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APPEAL AND ERROR

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CROSS-REFERENCES

[See 2 Cyc. 506, 507]

XIII. RECORD, AND PROCEEDINGS NOT IN RECORD.*

D. Contents, Making, and Settlement of Bill of Exceptions — 1. Origin of Bill. The power of a court to sign bills of exceptions and make the facts therein stated a part of the record is not derived from the common law,[1] but had its origin in the Statute of Westminster II (13 Edw. I, c. 31), whereby the judge signing the bill was required to come into the appellate court and there confess or deny his seal to the bill.[2]

2. Office or Purpose of Bill. The office or purpose of a bill of exceptions is to preserve in, and make a part of, the record such matters as transpired in the progress of a trial, which otherwise would not become a part thereof.[3] It must,

1. *Alabama.*— *Ex p.* Nelson, 62 Ala. 376.
Indiana.— Hopkins *v.* Greensburg, etc., Turnpike Co., 46 Ind. 187; Columbus, etc., Cent. R. Co. *v.* Griffin, 45 Ind. 369; Stewart *v.* Rankin, 39 Ind. 161.
Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447.
Nebraska.— Horbach *v.* Omaha, 49 Nebr. 851, 69 N. W. 121.
Virginia.— Virginia Development Co. *v.* Rich Patch Iron Co., 98 Va. 700, 37 S. E. 280; Winston *v.* Giles, 27 Gratt. (Va.) 530.
United States.— Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666.
England.— Bacon Abr. tit. Bill of Exceptions.

2. Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Conrow *v.* Schloss, 55 Pa. St. 28; Bacon Abr. tit. Bill of Exceptions.

3. Numerous authorities sustain the text, among which may be cited the following cases:
Alabama.— Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Efurd *v.* Loeb, 82 Ala. 429, 3 So. 3.
Arkansas.— Cowall *v.* Altchul, 40 Ark. 172; Hall *v.* Bonville, 36 Ark. 491.
California.— Matter of Robinson, 106 Cal. 493, 39 Pac. 862; *In re* Ling, (Cal. 1885) 7 Pac. 660.
Colorado.— Winter *v.* People, 10 Colo. App. 510, 51 Pac. 1006 [*affirmed* in 27 Colo. 136, 60 Pac. 344].

* For Analysis of XIII, A, B, and C, see 2 Cyc. 502-506.

however, be confined to some particular point or question to which exception was taken pending trial,[4] and can present matters of law only.[5] It cannot be used to bring up the whole case.[6]

3. Form of Bill — a. In General. Every bill must be complete, either by setting out the facts on which it is founded, or by referring to some other bill in the same cause which definitely states such facts.[7] A reference in a bill to evi-

Florida.— Vanhorne *v.* Henderson, 37 Fla. 354, 19 So. 659; Anderson *v.* Gainesville Presb. Church, 13 Fla. 592.

Georgia.— Lewis *v.* Clegg, 87 Ga. 449, 13 S. E. 693; Traynham *v.* Perry, 57 Ga. 529.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Tower *v.* Bradley, 66 Ill. 189.

Indiana.— Burk *v.* Andis, 98 Ind. 59; Horn *v.* Bray, 51 Ind. 555, 19 Am. Rep. 742.

Iowa.— Redman *v.* Williamson, 2 Iowa 488.

Kansas.— Lauer *v.* Livings, 24 Kan. 273; Kœhler *v.* Ball, 2 Kan. 154, 83 Am. Dec. 451.

Kentucky.—McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531; Allsup *v.* Hassett, 12 B. Mon. (Ky.) 128.

Maryland.— Davis *v.* Carroll, 71 Md. 568, 18 Atl. 965; Blake *v.* Pitcher, 46 Md. 453.

Michigan.—Johr *v.* People, 26 Mich. 427; Smith *v.* Barstow, 2 Dougl. (Mich.) 155.

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447; McKnight *v.* Dozier, 44 Miss. 606.

Missouri.— Mackey *v.* Hyatt, 42 Mo. App. 443.

Nebraska.— State *v.* Scott, 59 Nebr. 499, 81 N. W. 305.

New Jersey.— Belton *v.* Gibbon, 12 N. J. L. 76.

Tennessee.— Darden *v.* Williams, 100 Tenn. 414, 45 S. W. 669.

Virginia.— Brown *v.* Hall, 85 Va. 146, 7 S. E. 182.

Wisconsin.— Taylor *v.* Lucas, 43 Wis. 155.

United States.— Young *v.* Martin, 8 Wall. (U. S.) 354, 19 L. ed. 418.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 11.

Where causes of action are consolidated by the court's order on agreement of the parties, such agreement and order reciting that it was made on consent, need not be incorporated into a bill of exceptions, as such order is a part of the judgment-roll, and as such is part of the record. Spencer *v.* Forcht, (S. D. 1900) 84 N. W. 765.

4. Durant *v.* Palmer, 29 N. J. L. 544; Brown *v.* Clarke, 4 How. (U. S.) 4, 11 L. ed. 850.

As to necessity of exception see *supra*, V, B, 2 [2 Cyc. 714].

5. *Connecticut.*—Lyme *v.* East-Haddam, 14 Conn. 394.

Louisiana.— Shewell *v.* Stone, 12 Mart. (La.) 386.

Massachusetts.— Walker *v.* Penniman, 8 Gray (Mass.) 233; Barnacoat *v.* Six Quarter Casks of Gunpowder, 1 Metc. (Mass.) 225.

New York.— Kelly *v.* Kelly, 3 Barb. (N. Y.) 419; Lansing *v.* Wiswall, 5 Den. (N. Y.) 213; Whiteside *v.* Jackson, 1 Wend. (N. Y.) 418; Foot *v.* Wiswall, 14 Johns. (N. Y.) 304; Graham *v.* Cammann, 2 Cai. (N. Y.) 168.

Ohio.— Leonard *v.* Cincinnati, 26 Ohio St. 447; State *v.* Wood, 22 Ohio St. 537.

Pennsylvania.— Leach *v.* Ansbacher, 55 Pa. St. 85, 28 Leg. Int. (Pa.) 277.

Rhode Island.— Providence County Sav. Bank *v.* Phalen, 12 R. I. 495; Hubbard *v.* Pearce, 7 R. I. 579.

Vermont.— Emerson *v.* Young, 18 Vt. 603.

United States.— Lincoln *v.* Claflin, 6 Wall. (U. S.) 132, 19 L. ed. 106.

England.— Bacon Abr. tit. Bill of Exceptions.

See 21 Cent. Dig. tit. "Exceptions, Bill of," §§ 5, 6.

6. *Connecticut.*— Norwich, etc., R. Co. *v.* Kay, 22 Conn. 603; Shelton *v.* Hoadley, 15 Conn. 535; Sharp *v.* Curtiss, 15 Conn. 526; Lyme *v.* East-Haddam, 14 Conn. 394; Picket *v.* Allen, 10 Conn. 146; Watson *v.* Watson, 10 Conn. 75; Wadsworth *v.* Sanford, Kirby (Conn.) 456.

Mississippi.— Hackler *v.* Cabel, Walk. (Miss.) 91.

New York.— Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622; Van Gorden *v.* Jackson, 5 Johns. (N. Y.) 440.

United States.— McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

England.— Bacon Abr. tit. Bill of Exceptions.

See 21 Cent. Dig. tit. "Exceptions, Bill of," §§ 1, 34.

7. *District of Columbia.*— Cotharin *v.* Davis, 4 Mackey (D. C.) 146.

Mississippi.— Doe *v.* Gildart, 5 How. (Miss.) 606.

South Carolina.— Holtzclaw *v.* Green, 45 S. C. 494, 23 S. E. 515.

Vermont.— St. Johnsbury *v.* Waterford, 15 Vt. 692.

Virginia.— Perkins *v.* Hawkins, 9 Gratt. (Va.) 649; Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

West Virginia.— Corder *v.* Talbott, 14 W. Va. 277.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 24.

Form of bill of exceptions is set out in:

Alabama.—Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

Arkansas.— Real Estate Bank *v.* Rawdon, 5 Ark. 558.

District of Columbia.— Lloyd *v.* Washington Gaslight Co., 1 Mackey (D. C.) 331.

Florida.— Fla. Supreme Ct. Special Rules, No. 3 [35 Fla. 21, 18 So. xiii].

Illinois.— People *v.* Pearson, 3 Ill. 189, 33 Am. Dec. 445.

dence set out in a bill in another case does not incorporate such evidence in the bill.[8]

b. Caption. Regularly, a bill should have a caption or introductory part showing that it is a bill of exceptions.[9] It has been held, however, that a bill duly signed by the trial judge is sufficient though it has no formal caption.[10]

c. Separate Bills. It is not necessary that a separate bill of exceptions be made to each ruling or decision complained of. Where it appears that exceptions to the several rulings were taken at the proper time, they all may be embodied in one bill.[11]

d. Signature of Parties or Counsel. A bill must be signed by appellant or his counsel when so required by statute.[12]

Indiana.— Baber *v.* Rickart, 52 Ind. 594.

West Virginia.— Spragins *v.* West Virginia, etc., R. Co., 35 W. Va. 139, 13 S. E. 45; State *v.* Dotts, 31 W. Va. 819, 8 S. E. 391.

Reference to exhibits.—Where a bill, instead of stating distinctly the matters of law in the charge which are excepted to, refers to an exhibit annexed, containing the evidence, with minutes that certain parts of it were objected to, and another exhibit containing the charge in full, with the stenographer's notes of an ensuing conversation showing that counsel excepted to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested in the course of that conversation, the bill is insufficient in form, and will not be considered. Hanna *v.* Maas, 122 U. S. 24, 7 S. Ct. 1055, 30 L. ed. 1117. See also Dunn *v.* State, 23 Ohio St. 167.

Where two bills of exceptions, taken together, contain sufficient to present a question, the court will consider the same, though neither bill, standing alone, is sufficient. Kuhns *v.* Gates, 92 Ind. 66; Lewis *v.* Buskirk, 14 Ind. App. 439, 42 N. E. 1118.

8. Tecumseh Nat. Bank *v.* Best, 50 Nebr. 518, 70 N. W. 41.

9. Huston *v.* Cosby, 14 Ind. App. 602, 41 N. E. 953. See also Jenkins *v.* Wilson, 140 Ind. 544, 40 N. E. 39, wherein it was held that a transcript of the evidence which has no formal commencement as a bill of exceptions, and was not filed in the clerk's office, is insufficient to bring the evidence into the record, though it concluded as a bill of exceptions and was signed by the trial judge as such.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 22.

10. Dennis *v.* State, 103 Ind. 142, 2 N. E. 349: Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. 1022.

Entitlement.— If a bill is regularly certified by the clerk as appertaining to the cause it is no objection that it is not entitled of any court or cause. Gordon *v.* Parker, 2 Sm. & M. (Miss.) 485. So a bill settled and signed by the trial judge will be treated as such, although it is denominated a "statement." People *v.* Crane, 60 Cal. 279; U. S. *v.* Alexander, 2 Ida. 354, 17 Pac. 746; Schultz *v.* Keeler, 2 Ida. 305, 13 Pac. 481. And a paper incorporated in the record, certified to be a part thereof by the court below, and having all the requisites of a bill of exceptions, though entitled a "Case and Exceptions," is a sufficient bill. Herbert *v.* Butler, 97 U. S. 319, 24 L. ed. 958.

11. *District of Columbia.*— Stewart *v.* Elliott, 2 Mackey (D. C.) 307.

Georgia.— Martin *v.* Huson, 42 Ga. 83.

Indiana.— Doe *v.* Makepeace, 8 Blackf. (Ind.) 575.

Iowa.— Anderson *v.* Ames, 6 Iowa 486.

Maryland.— Essentially distinct propositions should be embodied in distinct bills of exceptions. Tall *v.* Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120; Ellicott *v.* Martin, 6 Md. 509, 61 Am. Dec. 327.

Mississippi.— Lindsey *v.* Henderson, 27 Miss. 502.

Missouri.— Dougherty *v.* Whitehead, 31 Mo. 255; Lane *v.* Kingsberry, 11 Mo. 402.

New Jersey.— Jersey Co. Associates *v.* Davison, 29 N. J. L. 415.

New York.— Brewer *v.* Isish, 12 How. Pr. (N. Y.) 481.

Virginia.— Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811; Brown *v.* Hall, 85 Va. 146, 7 S. E. 182.

West Virginia.—Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

England.— 2 Tidd Pr. 864.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 31.

As to proceedings before different judges see *infra*, XIII, D, 6, a, (IV).

Joinder of parties in same bill.—All parties to a suit, whether they are suing individually or in representative capacities in the trial court, must be joined in the bill of exceptions. Harrington *v.* Roberts, 7 Ga. 510. But, when the parties are different, several suits cannot be blended in one bill of exceptions. Mayberry *v.* Morse, 39 Me. 105. So, where two actions in favor of the same plaintiffs against different defendants were tried together by the same jury under an order for the rendition of separate verdicts in each case, defendants could not unite in one bill of exceptions. Western Assur. Co. *v.* Way, 98 Ga. 746, 27 S. E. 167.

12. Wellborn *v.* Atlanta Consol. St. R. Co., 92 Ga. 577, 17 S. E. 672; McAlister *v.* Eastman, 92 Ga. 448, 17 S. E. 675; Anderson *v.* Baker, 58 Ga. 604. But see Smith *v.* Frye, 14 Me. 457, wherein it was held that, regularly, exceptions should be signed by the party excepting or by his counsel; but if this is omitted, and the exceptions are allowed and

4. Contents of Bill — a. In General. A bill should only contain matter material to the question of law excepted to.[13]

b. Incorporating Evidence — (I) *In General.* The evidence adduced at the trial should either be incorporated into the bill of exceptions[14] or be particularly referred to, and by express terms made a part of it.[15] Evidence not contained in the bill, nor made a part thereof, will not be considered by the appellate court[16] even though appended to the bill.[17] A literal transcript, however, by question and answer, of all the testimony, taken from a stenographic report of the proceedings, need not be incorporated at length into the bill.[18]

(II) *Documents* — (A) *In General.* Under common-law practice, documents were required to be written out in full in a bill of exceptions,[19] and this rule is

signed by the judge, no advantage can be afterward taken of the omission.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 23.

As to signing by judge see *infra*, XIII, D, 6, e.

Exceptions in chancery must be signed by a solicitor of the court. Cross *v.* Cohen, 3 Gill (Md.) 257.

Place of signing.—An indorsement of the name of the attorney on the back of the bill is not a signing, within Ga. Code, § 4251. Brand *v.* Garrett, 62 Ga. 165.

13. *Alabama.*— Tyree *v.* Parham, 66 Ala. 424; Seawell *v.* Henry, 6 Ala. 226; Chamberlain *v.* Darrington, 4 Port. (Ala.) 515.

Georgia.— Alexander *v.* Williamson, 86 Ga. 13, 12 S. E. 182; Dunagan *v.* Dunagan, 38 Ga. 554.

Indiana.— Blemel *v.* Shattuck, 133 Ind. 498, 33 N. E. 277.

Massachusetts.— Ryder *v.* Jenkins, 163 Mass. 536, 40 N. E. 848.

Michigan.— Continental Ins. Co. *v.* Horton, 28 Mich. 173.

New York.— *Ex p.* Jones, 8 Cow. (N. Y.) 123.

United States.— Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; Prichard *v.* Budd, 76 Fed. 710, 42 U. S. App. 186, 22 C. C. A. 504.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 8.

As to the evidence that should be brought up see *supra*, XIII, C, 2, b, (II) [2 Cyc. 1085].

A bill of exceptions and a petition for a new trial cannot be combined in the same proceeding. Elliott *v.* Benedict, 13 R. I. 463.

14. Harrell *v.* Seal, 121 Ind. 193, 22 N. E. 983; Stratton *v.* Kennard, 74 Ind. 302; Stern *v.* Foltz, 152 Mo. 552, 54 S. W. 451; Olive St. Furniture Co. *v.* Mullaly, 62 Mo. App. 18; Thomas *v.* Wright, 9 Serg. & R. (Pa.) 87.

As to the evidence that should be incorporated into the bill see *supra*, XIII, C, 2, b, (II) [2 Cyc. 1085].

15. *Arkansas.*—Jacks *v.* Dyer, 31 Ark. 334.

Georgia.— Chism *v.* Varnedoe, 96 Ga. 777, 22 S. E. 334; Hightower *v.* Flanders, 69 Ga. 772; Hancock *v.* Perkins, 68 Ga. 830.

Illinois.— Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941.

Iowa.— Talbort *v.* Noble, (Iowa 1887) 34 N. W. 426; Burlington Gas Light Co. *v.* Green, 21 Iowa 335; Van Orman *v.* Spafford, 16 Iowa 186.

Missouri.— Gorwyn *v.* Anable, 48 Mo. App. 297.

United States.— Russell *v.* Ely, 2 Black (U. S.) 575, 17 L. ed. 258.

16. Jacks *v.* Dyer, 31 Ark. 334.

17. National Bank *v.* Kennedy, 17 Wall. (U. S.) 19, 21 L. ed. 554.

18. *California.*— Caldwell *v.* Parks, 50 Cal. 502.

District of Columbia.— Baltimore, etc., R. Co. *v.* Fitzgerald, 2 App. Cas. (D. C.) 501.

Georgia.— Carey *v.* Giles, 10 Ga. 1.

Illinois.— Harvey *v.* Van de Mark, 71 Ill. 117.

Indiana.— Grisell *v.* Noel Bros. Flour-Feed Co., 9 Ind. App. 251, 36 N. E. 452.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 17.

Cumulative testimony of several witnesses, when substantially the same, should not be stated at length in the bill of exceptions. Tyree *v.* Parham, 66 Ala. 424.

Reduction to narrative form.—Where all questions and answers were taken down by a shorthand reporter, and the testimony is voluminous, the judge settling the bill of exceptions may, in his discretion, require the testimony to be reduced to narrative form. Karasich *v.* Hasbrouck, 28 Wis. 569.

19. Chicago *v.* South Park Com'rs, 169 Ill. 387, 48 N. E. 680; Stratton *v.* Kennard, 74 Ind. 302; Irwin *v.* Smith, 72 Ind. 482; Mills *v.* Simmonds, 10 Ind. 464; Vincennes University *v.* Embree, 7 Blackf. (Ind.) 461; Spears *v.* Clark, 6 Blackf. (Ind.) 167; Huff *v.* Gilbert, 4 Blackf. (Ind.) 19; Pittsburg, etc., R. Co. *v.* Hart, 10 Ohio Cir. Ct. 411, 6 Ohio Cir. Dec. 731.

Omission to incorporate in a bill certain papers cannot be cured by a stipulation that the clerk shall attach them. Byrne *v.* Clark, 31 Ill. App. 651; Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 10.

Records and documents neither offered nor read in evidence should not be incorporated in a bill, though they refer to the same matter as that in controversy and were commented on in the argument at the trial. Matter of Moore, 78 Cal. 242, 20 Pac. 558.

Substance of documents.—A bill of exceptions setting forth in substance deeds and other documents affecting land, and describing them according to their legal effect, is

still adhered to in one state to the extent, at least, that the instrument must appear in the bill when considered by the appellate court.[20]

(B) *Skeleton Bill.* In many jurisdictions a more relaxed rule now prevails. In such jurisdictions it is sufficient to identify a document by a reference in the bill, marking the place where it should be incorporated by the words, "Clerk Here Insert," or otherwise ordering it to be made a part of the bill, and identifying it, if it is not actually copied into the bill.[21] But, to incorporate a document into a bill by this method — known as a skeleton bill — the document must be so described as to leave no doubt as to its identity or room for mistake on the part of the clerk.[22] The document, too, must be subsequently inserted as intended, or it will not be considered by the appellate court.[23]

(III) *Matters Not Formally Introduced in Evidence.* The rules of practice of the trial court, or events transpiring in the presence of the court, may be incorporated in the bill of exceptions, even though not formally introduced in evidence.[24]

(IV) *Stenographer's Report.* The stenographer's report of the evidence is not a part of the bill of exceptions unless referred to and incorporated therein.[25]

sufficient. Fox *v.* Hubbard, 79 Mo. 390. See also Fagg *v.* Donaldson, 77 Ga. 691, 2 S. E. 639; School Trustees *v.* Welchley, 19 Ill. 64.

Where a physical object is admitted in evidence that is too bulky and cumbersome to be incorporated into or transmitted in a bill of exceptions, a complete description of such object should be given. Colby *v.* Herron, 88 Ill. App. 299; Seaverns *v.* Lischinski, 82 Ill. App. 298. See also Pierce *v.* Edington, 38 Ark. 150.

20. Chicago *v.* South Park Com'rs, 169 Ill. 387, 48 N. E. 680.

21. *Alabama.*— Parsons *v.* Woodward, 73 Ala. 348; Tuskaloosa County *v.* Logan, 50 Ala. 503.

Arkansas.— Sprott *v.* New Orleans Ins. Assoc., 53 Ark. 215, 13 S. W. 799.

California.— Canfield *v.* Thompson, 49 Cal. 210.

Georgia.— Masland *v.* Kemp, 70 Ga. 786; Harman *v.* Stange, 62 Ga. 167.

Indiana.— State *v.* Peru, etc., R. Co., 44 Ind. 350; Stewart *v.* Rankin, 39 Ind. 161.

Iowa.— Wright *v.* Everett, 87 Iowa 697, 55 N. W. 4; Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275.

Kansas.— Atchison, etc., R. Co. *v.* Wagner, 19 Kan. 335.

Maryland.— Blair *v.* Blair, 39 Md. 556.

Missouri.— Jones *v.* Christian, 24 Mo. App. 540.

Ohio.— Pittsburg, etc., R. Co. *v.* Hart, 10 Ohio Cir. Ct. 411, 6 Ohio Cir. Dec. 731.

Oregon.— Roberts *v.* Parrish, 17 Oreg. 583, 22 Pac. 136; Oregonian R. Co. *v.* Wright, 10 Oreg. 162; Morrison *v.* Crawford, 7 Oreg. 472.

See 21 Cent. Dig. tit. "Exceptions, Bill of," §§ 15, 29, 30.

Attachment as exhibit.— Documents attached to a bill as exhibits, and which are indorsed by the trial judge, need not be embodied in the bill. Woolfolk *v.* Wright, 28 Ark. 1; Fielder *v.* Collier, 13 Ga. 495; Legnard *v.* Rhoades, 156 Ill. 431, 40 N. E. 964; Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194; Oregonian R. Co. *v.* Wright, 10 Oreg. 162.

22. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Kyle *v.* Gadsden Land, etc., Co., 96 Ala. 376, 11 So. 478; Moore *v.* Penn, 95 Ala. 200, 10 So. 343.

Arkansas.— Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Woolfolk *v.* Wright, 28 Ark. 1.

Indiana.— Boos *v.* Morgan, 146 Ind. 111, 43 N. E. 947; Seston *v.* Tether, 145 Ind. 251, 44 N. E. 304.

Iowa.— Wooster *v.* Chicago, etc., R. Co., 74 Iowa 593, 38 N. W. 425; Parks *v.* Council Bluffs Ins. Co., 70 Iowa 655, 28 N. W. 424.

Kansas.— Atchison, etc., R. Co. *v.* Wagner, 19 Kan. 335.

Kentucky.— Garrott *v.* Ratliff, 83 Ky. 384; Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477.

Minnesota.—Acker Post No. 21, G. A. R., *v.* Carver, 23 Minn. 567.

Mississippi.— Hollingsworth *v.* Willis, 64 Miss. 152, 8 So. 170.

Missouri.— Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

Wisconsin.— Sexton *v.* Willard, 27 Wis. 465.

23. Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Continental F. Ins. Co. *v.* Adams, 8 Ky. L. Rep. 269; Bamberger *v.* Kingston, 7 Ky. L. Rep. 360; Berry *v.* Hale, 1 How. (Miss.) 315.

24. State *v.* Scott, 59 Nebr. 499, 81 N. W. 305.

25. Huntington *v.* Griffith, (Ind. 1895) 41 N. E. 8; Big Creek Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52; Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 591, 36 N. E. 642; Morningstar *v.* Musser, 129 Ind. 470, 28 N. E. 1119; Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 632; Harvey *v.* State, 123 Ind. 260, 24 N. E. 239; Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214; Gleason *v.* Chicago, etc., R. Co., (Iowa 1889) 43 N. W. 517; Waller *v.* Waller, 76 Iowa 513, 41 N. W. 307; Hurlburt *v.* Fyock, 73 Iowa 477, 35 N. W. 482; Miller *v.* Chicago, etc., R. Co., 70 Iowa 302, 30 N. W.

c. Incorporating Instructions. Instructions, in order to become a part of the bill of exceptions, must be incorporated therein,[26] or be so marked and referred to that they may be identified.[27]

d. Incorporating Motions and Affidavits. Where it is attempted to make motions or affidavits a part of the record by bill of exceptions, they must be set out at length in such bill, or be referred to therein as properly appearing elsewhere in the record.[28]

e. Incorporating Verdict or Judgment. A bill of exceptions is not the proper place for either a verdict or judgment to be shown. The record proper, which preserves itself and needs no bill of exceptions, is the appropriate and only necessary place wherein they should appear.[29]

f. Showing as to Compliance With Statutory Requirements. Compliance with statutory requirements as to the time of settling, signing, and filing should be shown on the face of the bill.[30] If the bill was not filed during the term of

580; Hampton *v.* Moorhead, 62 Iowa 91, 17 N. W. 202; Echols *v.* Smith, (Ky. 1897) 42 S. W. 538; McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531; Louisville City R. Co. *v.* Wood, 2 Ky. L. Rep. 387. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 14.

In Mississippi, under the act of March 18, 1896 [Miss. Laws (1896), pp. 91–93], a copy of the stenographer's notes may be filed with the clerk, to be used on appeal instead of a bill of exceptions, when the correctness of such notes is agreed to. Under this statute it has been held that such agreement need not be indorsed on the notes themselves, but may be on a separate paper, and that the time within which it may be filed, not being fixed by the statute, is limited only by the time within which the appeal is required to be perfected, and not by the time fixed for presenting a bill of exceptions for settlement. Sanders *v.* State, 74 Miss. 531, 21 So. 299.

The stenographer's report of oral testimony is not a "written instrument" or "documentary evidence," within the meaning of a statute providing that it shall not be necessary to copy "a written instrument, or any documentary evidence," into a bill of exceptions. Patterson *v.* Churchman, 122 Ind. 379, 22 N. E. 662, 23 N. E. 1082; Flint *v.* Burnell, 116 Ind. 481, 19 N. E. 140; Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392.

Oath of stenographer.— It is no objection to a bill that the stenographer who took the evidence incorporated therein was not sworn. Williams *v.* Pendleton, etc., Turnpike Co., 76 Ind. 87.

Transcription by third person.— The fact that the evidence was written out by some one other than the shorthand reporter who acted on the trial is immaterial if such evidence is contained in a bill of exceptions which purports to contain all the evidence. Hill *v.* Hagaman, 84 Ind. 287.

26. Mumma *v.* McKee, 10 Iowa 107; Echols *v.* Smith, (Ky. 1897) 42 S. W. 538; Arnold *v.* Hicks, 5 Ky. L. Rep. 511; Cooper *v.* Cooper, 4 Ky. L. Rep. 900; Branham *v.* Berry, 4 Ky. L. Rep. 894; Forest *v.* Crenshaw, 4 Ky. L. Rep. 596; Tucker *v.* Salem Flouring Mills Co., 15 Oreg. 581, 16 Pac. 426. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 19.

Only instructions excepted to are properly inserted in a bill of exceptions. Alabama Fertilizer Co. *v.* Reynolds, 85 Ala. 19, 4 So. 639; Hamlin *v.* Treat, 87 Me. 310, 32 Atl. 909; Bradstreet *v.* Bradstreet, 64 Me. 204; Bulkeley *v.* Keteltas, 4 Sandf. (N. Y.) 450; U. S. *v.* Rindskopf, 105 U. S. 418, 26 L. ed. 1131; Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979; Stimpson *v.* Westchester R. Co., 3 How. (U. S.) 553, 11 L. ed. 722; Gregg *v.* Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932; Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262, 8 L. ed. 392.

27. Stirman *v.* Cravens, 29 Ark. 548; Blizzard *v.* Riley, 83 Ind. 300; Irwin *v.* Smith, 72 Ind. 482; Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214.

Reference to instructions in a bill, by citing the page of the transcript on which they appear, is an insufficient incorporation thereof. Jefferson City *v.* Opel, 67 Mo. 394; Collins *v.* Barding, 65 Mo. 496.

28. Shields *v.* McMahan, 101 Ind. 591.

A bill stating "that thereupon plaintiff filed his certain motion, with affidavits attached, to set aside said verdict," does not so refer to the affidavits as to make them part of the record. Moffit *v.* Rogers, 15 Iowa 453.

Affidavits copied at length in the bill as a part of the evidence heard by the judge in a proceeding at chambers are authenticated by a general certificate to the bill of exceptions, and need not otherwise be identified. Yoemans *v.* Yoemans, 77 Ga. 124, 3 S. E. 354.

Reference to transcript.— Motions and affidavits cannot be made a part of the bill by a reference to the part of the transcript where they may be found. Crumley *v.* Hickman, 92 Ind. 388; Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315; Kesler *v.* Myers, 41 Ind. 543; Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836; Story *v.* Ragsdale, 30 Mo. App. 196.

29. Curran *v.* Foley, 67 Ill. App. 543.

As to verdict as part of record see *supra*, XIII, B, 1, i [2 Cyc. 1068].

As to judgment as part of record see *supra*, XIII, B, 1, m, (II) [2 Cyc. 1072].

30. *Alabama.*— Stearn *v.* Lehman, (Ala. 1887) 2 So. 708.

Georgia.— Searcy *v.* Tillman, 75 Ga. 504; Jones *v.* Daniel, 66 Ga. 246; Cloudis *v.* Tennessee Bank, 6 Ga. 481.

court at which the judgment was rendered, it must appear that the time for filing was extended.[31]

g. Showing as to Grounds of Objection.[32] A bill of exceptions should specify the decision complained of, and point out the alleged error therein or ground of objection thereto.[33] The circumstances of the decision should be so stated

Illinois.— Burst *v.* Wayne, 13 Ill. 664; Buckmaster *v.* Beames, 9 Ill. 443.

Indiana.— Davis *v.* National Forge, etc., Co., 143 Ind. 142, 42 N. E. 473; Buchart *v.* Burger, 115 Ind. 123, 17 N. E. 125; Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936; Huston *v.* Roosa, 42 Ind. 386.

Kansas.— Litsey *v.* Moffett, 29 Kan. 507.

Missouri.— Lafollette *v.* Thompson, 83 Mo. 199; State *v.* Mason, 31 Mo. App. 211.

Oklahoma.— Kingfisher Bank *v.* Smith, 2 Okla. 6, 35 Pac. 955.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 71.

As to record showing settling, signing, and filing see *supra*, XIII, A, 6, b [2 Cyc. 1041].

31. Higgins *v.* Mahoney, 50 Cal. 444; Terre Haute, etc., R. Co. *v.* South Bend, (Ind. 1896) 42 N. E. 812; York *v.* Webster, 66 Ind. 50; Schoonover *v.* Reed, 65 Ind. 313; Freeman *v.* Moffitt, (Mo. 1895) 32 S. W. 300; Webster County *v.* Cunningham, 101 Mo. 642, 14 S. W. 625; Reliable Incubator, etc., Co. *v.* Stahl, 102 Fed. 590, 42 C. C. A. 522.

As to record showing extension of time see *supra*, XIII, A, 6, b, (II) [2 Cyc. 1042].

32. As to necessity of exception see *supra*, V, B, 2 [2 Cyc. 714].

As to necessity of objection see *supra*, V, B, 1 [2 Cyc. 677].

33. *Alabama.*—Milliken *v.* Maund, 110 Ala. 332, 20 So. 310.

California.— Errors of law occurring at the trial need not be specified in the bill of exceptions to entitle them to be considered on appeal. Barfield *v.* South Side Irrigation Co., 111 Cal. 118, 43 Pac. 406; Hagman *v.* Williams, 88 Cal. 146, 25 Pac. 1111; Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403.

Georgia.— Beckham *v.* Beckham, (Ga. 1901) 38 S. E. 817; Melson *v.* Thornton, (Ga. 1901) 38 S. E. 342; Wheeler *v.* Worley, 110 Ga. 513, 35 S. E. 639; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Idaho.— A bill of exceptions need not contain a specification of errors relied on unless the exception is to the verdict on the ground of insufficiency of evidence to sustain it. Warren *v.* Stoddart, (Ida. 1899) 59 Pac. 540.

Illinois.— Baker *v.* Newbury, 63 Ill. App. 405; Winona Paper Co. *v.* W. O. Taylor Co., 27 Ill. App. 558.

Indiana.— Cox *v.* Rash, 82 Ind. 519; Clay *v.* Clark, 76 Ind. 161; Blizzard *v.* Hays, 46 Ind. 166, 15 Am. Rep. 291; Robinson *v.* Murphy, 33 Ind. 482.

Kentucky.— Applegate *v.* McClung, 3 A. K. Marsh. (Ky.) 304.

Louisiana.— Richard *v.* Beauchamp, 21 La. Ann. 635; Pickens *v.* Preston, 20 La. Ann. 138; Porche *v.* Le Blanc, 12 La. Ann. 778.

Maine.— Comstock *v.* Smith, 23 Me. 202.

Massachusetts.— Hubbell *v.* Bissell, 2 Allen (Mass.) 196.

Missouri.— St. Louis Public Schools *v.* Risley, 40 Mo. 356; Miller *v.* Duff, 34 Mo. 167; Smith *v.* Phillips, 33 Mo. 43.

New Hampshire.— Mooney *v.* Boston, etc., R. Co., 65 N. H. 670, 19 Atl. 571.

New Jersey.— Packard *v.* Bergen Neck R. Co., 54 N. J. L. 229, 23 Atl. 722.

North Dakota.— Hostetter *v.* Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49.

Oregon.— O'Connor *v.* Van Hoy, 29 Oreg. 505, 45 Pac. 762; Janeway *v.* Holston, 19 Oreg. 97, 23 Pac. 850.

Pennsylvania.— Wall *v.* Building Assoc., 3 Leg. Gaz. (Pa.) 28.

South Dakota.— Randall *v.* Burk Tp., 4 S. D. 337, 57 N. W. 4.

Texas.— Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764; Franklin *v.* Tiernan, 62 Tex. 92; Johnson *v.* Crawl, 55 Tex. 571; Simonton *v.* Forrester, 35 Tex. 584; Anderson *v.* Anderson, 23 Tex. 639.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658; Barker *v.* Barker, 2 Gratt. (Va.) 343.

United States.— Springfield F. & M. Ins. Co. *v.* Sea, 21 Wall. (U. S.) 158, 22 L. ed. 511; Young *v.* Martin, 8 Wall. (U. S.) 354, 19 L. ed. 418; Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 42 U. S. App. 466, 25 C. C. A. 382; Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 13 U. S. App. 604, 9 C. C. A. 279; Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 7 U. S. App. 359, 2 C. C. A. 380.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 9.

Admission or exclusion of evidence.—A bill of exceptions to the admission or exclusion of certain evidence must show what the objection to such evidence was. Johnson *v.* Newman, 35 Tex. 166; Wright *v.* Thompson, 14 Tex. 558; Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310. See also Kimball *v.* Carter, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570; Johnson *v.* Jennings, 10 Gratt. (Va.) 1, 60 Am. Dec. 323.

Insufficiency of evidence.— Under a statute providing that, when the exception is to the verdict or decision on the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient, a statement in the bill of exceptions "that the evidence does not show" certain facts is equivalent to saying that it "is insufficient to justify" a finding of such facts. Matter of Fath, 132 Cal. 609, 64 Pac. 995. Where no point is made as to the insufficiency of the evidence to sustain the verdict the bill need not specify the particulars in which the evidence is insufficient. Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403; Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920.

that the error to which the exception is addressed will clearly appear to the appellate court.[34]

h. Showing as to Parties. A bill of exceptions should show on its face who are the parties thereto.[35]

i. Showing as to Taking of Exception. A bill of exceptions should show upon its face that the exception was taken at the time the alleged erroneous ruling or decision was made.[36] Accordingly, a bill of exceptions to the admission or exclusion of evidence will not be considered on appeal where it fails to state that there was an exception to the court's ruling at the time.[37]

5. Construction of Bill. As a bill of exceptions is deemed to be a pleading of appellant, it will be construed most strongly against him.[38] The appellate court will, for the purpose of sustaining the ruling of the primary court, give to the words used their natural import and meaning;[39] and if a bill is defective in

34. Milliken *v.* Maund, 110 Ala. 332, 20 So. 310; Dunham *v.* Forbes, 25 Tex. 23.

Each proposition excepted to should be distinctly stated, so that it can be understood by the court. Jersey Co. Associates *v.* Davison, 29 N. J. L. 415.

Materiality of excluded testimony.—A bill of exceptions to the exclusion of certain testimony should show the materiality of the excluded testimony. MacMahon *v.* Duffy, 36 Oreg. 150, 59 Pac. 184. See also Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Shephard *v.* Brenton, 20 Iowa 41.

35. Orr *v.* Webb, 112 Ga. 806, 38 S. E. 98; McCain *v.* Sutlive, 109 Ga. 547, 34 S. E. 1013.

The abbreviation "et al.," when used in a bill of exceptions, cannot be held to designate any person or persons. Orr *v.* Webb, 112 Ga. 806, 38 S. E. 98; Cameron *v.* Sheppard, 71 Ga. 781.

36. *Alabama.*— Foster *v.* Hightower, 40 Ala. 295.

Arkansas.— Henry *v.* Gibson, 26 Ark. 519.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Tarble *v.* People, 111 Ill. 120; Parsons *v.* Evans, 17 Ill. 238; Young *v.* Wells Glass Co., 87 Ill. App. 537 [*affirmed* in 187 Ill. 626, 58 N. E. 605].

Indiana.— Greensburgh, etc., Turnpike Co. *v.* Sidener, 40 Ind. 424.

Massachusetts.— Burke *v.* Savage, 13 Allen (Mass.) 408.

Missouri.— Case *v.* Fogg, 46 Mo. 44.

Pennsylvania.— Yeager *v.* Fuss, 9 Wkly. Notes Cas. (Pa.) 557.

Virginia.— Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321.

United States.— Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638; Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 42 U. S. App. 466, 25 C. C. A. 382.

A bill showing objection to the competency of the testimony offered, and that the objection was overruled, "to which defendant excepts," sufficiently shows that the ruling of the court was excepted to at the time it was made. Louisville, etc., R. Co. *v.* Ritter, 9 Ky. L. Rep. 22, 3 S. W. 591.

Showing as to party taking exception.—A bill should show by whom the objections noted were taken. Arcade Co. *v.* Allen, 51 Ill. App. 305; Shedd *v.* Dalzell, 30 Ill. App. 356.

37. Smith *v.* Dowling, 85 Mo. App. 514.

38. *Alabama.*— Milliken *v.* Maund, 110 Ala. 332, 20 So. 310; Massey *v.* Smith, 73 Ala. 173; Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177; Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194.

Colorado.— Webber *v.* Emmerson, 3 Colo. 248; Martin *v.* Force, 3 Colo. 199.

Illinois.— Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237; Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715; Fred Miller Brewing Co. *v.* Beckington, 54 Ill. App. 191; Monroe *v.* Snow, 33 Ill. App. 230.

Kentucky.— Jennings *v.* Davis, 5 Dana (Ky.) 127.

New York.— Price *v.* Powell, 3 N. Y. 322.

Vermont.— Cram *v.* Cram, 33 Vt. 15; Westford *v.* Essex, 31 Vt. 459.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 33.

Contradictory statements.—Where the bill of exceptions contains contradictory statements it will be construed against appellant. Redfern *v.* McNaul, 179 Ill. 203, 53 N. E. 569 [*affirming* 79 Ill. App. 232]. Where a bill of exceptions states that there was no evidence of indebtedness, and this was repugnant to other statements in the bill, the court will construe the expression to mean that there was no positive proof. Goodgame *v.* Clifton, 13 Ala. 583.

When there are interlineations in a bill and also in one of the affidavits of authentication, an addition to the interlined affidavit, subsequent in date to the original, to the effect that the interlineations were sworn to, without stating what interlineations, will be construed as referring to the interlineations in the affidavit, and not to those in the bill. Cowart *v.* Page, 59 Ga. 235.

39. Thompson *v.* Drake, 32 Ala. 99.

Reasonable construction.— A bill, though construed most strongly against the party excepting, must nevertheless receive a reasonable construction. Smith *v.* Garrett, 31 Ala. 492.

A statement in a bill that a certain fact appeared is equivalent to stating that there was no controversy in regard to such fact. Noyes *v.* Rockwood, 56 Vt. 647; Beach *v.* Packard, 10 Vt. 96, 33 Am. Dec. 185.

Where a bill admits of two constructions it will be construed to affirm, rather than to

any material part it cannot be supplied by any intendment of the court[40] or statements of counsel on the hearing.[41]

6. Settlement, Filing, and Service of Bill[42] — **a. Authority to Settle** — (I) *In General.* A bill of exceptions should be settled by the officer or person designated by the statute,[43] the officer usually designated being the judge before whom the proceedings excepted to were had.[44]

(II) *Delegation of Power to Settle.* The determination of what shall be incorporated in a bill of exceptions is in the nature of a judicial act, to be performed by the exercise of judicial power.[45] It is, therefore, held to be a power

reverse, the judgment. Milliken *v.* Maund, 110 Ala. 332, 20 So. 310; McReynolds *v.* Jones, 30 Ala. 101.

40. Dunlop *v.* Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329.

41. Allen *v.* Lawrence, 64 Me. 175.

42. As to necessity of record showing allowance of bill see *supra*, XIII, A, 6, a [2 Cyc. 1041]. See also Riverside Rubber Co. *v.* Midland Mfg. Co., 63 Ohio St. 66, 57 N. E. 958; Felch *v.* Hodgman, 62 Ohio St. 312, 56 N. E. 1018; Hill *v.* Bassett, 27 Ohio St. 597; Baldwin *v.* State, 6 Ohio 15; Hosmer *v.* Williams, Wright (Ohio) 355; Winters *v.* Null, 31 W. Va. 450, 7 S. E. 443; Quaker City Nat. Bank *v.* Showacre, 26 W. Va. 48. *Compare* Bullock *v.* Neal, 42 Ark. 278, wherein it was held that, when a bill of exceptions is properly signed and filed, it becomes a record *proprio vigore*, without any order of court making it so.

43. *Arkansas.*— McFarlane *v.* Johnson, 64 Ark. 597, 43 S. W. 971; Cowall *v.* Altchul, 40 Ark. 172.

Indiana.— Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427.

Maryland.— State *v.* Weiskittle, 61 Md. 48.

Michigan.— Hill *v.* Hill, 112 Mich. 633, 71 N. W. 144.

Mississippi.— Delta Bank *v.* Goff, (Miss. 1893) 12 So. 699.

Missouri.— Cranor *v.* School Dist. No. 2, 18 Mo. App. 397.

Vermont.— Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041; Small *v.* Haskins, 29 Vt. 187.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 37.

After a court is abolished a bill of exceptions in a cause tried therein must be signed by the judge of the court on which the jurisdiction thereof has been conferred. Reed *v.* Worland, 64 Ind. 216; McKeen *v.* Boord, 60 Ind. 280.

It is the duty of a referee to settle and sign the bill of exceptions in a case tried before him. Disbrow *v.* McNish, 52 Nebr. 309, 72 N. W. 216; Carlson *v.* Beckman, 35 Nebr. 392, 53 N. W. 203; Whalen *v.* Brennan, 34 Nebr. 129, 51 N. W. 759; Light *v.* Kennard, 10 Nebr. 330, 6 N. W. 372. See also Lee *v.* State, 88 Ind. 256. *Compare* Ballard *v.* McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327.

Nebraska Code Civ. Proc. § 311, provides that "in case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions, . . . it shall be the duty of the clerk to settle and sign the bill." Chicago, etc., R. Co. *v.* Hyatt, 48 Nebr. 161, 67 N. W. 8; Mattis *v.* Connolly, 45 Nebr. 628, 63 N. W. 918; Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830; Griggs *v.* Harmon, 45 Nebr. 21, 63 N. W. 125; Martin *v.* Fillmore County, 44 Nebr. 719, 62 N. W. 863; School Dist. No. 49 *v.* Cooper, 44 Nebr. 714, 62 N. W. 1084; Yenney *v.* Central City Bank, 44 Nebr. 402, 62 N. W. 872; Nelson *v.* Johnson, 44 Nebr. 7, 62 N. W. 244; Glass *v.* Zutavern, 43 Nebr. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Guthrie *v.* Brown, 42 Nebr. 652, 60 N. W. 939; Scott *v.* Spencer, 42 Nebr. 632, 60 N. W. 892; Reynolds *v.* Dietz, 39 Nebr. 180, 58 N. W. 89; Great Western Mfg. Co. *v.* Hunter, 14 Nebr. 452, 16 N. W. 474; Schaffroneck *v.* Martin, 9 Nebr. 38, 2 N. W. 343.

44. *Alabama.*— McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68; *Ex p.* Nelson, 62 Ala. 376.

Arkansas.— Watkins *v.* State, 37 Ark. 370.

California.— Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Colorado.— Empire Land, etc., Co. *v.* Engley, 14 Colo. 289, 23 Pac. 452.

Illinois.— Parker *v.* La Grange, 167 Ill. 623, 48 N. E. 1057; McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894.

Indiana.— Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427; Travellers' Ins. Co. *v.* Leeds, 38 Ind. 444.

Kentucky.— Louisville Southern R. Co. *v.* Lewis, 101 Ky. 296, 41 S. W. 3.

Maryland.— State *v.* Weiskittle, 61 Md. 48.

Michigan.— Hill *v.* Hill, 112 Mich. 633, 71 N. W. 144.

Mississippi.— Delta Bank *v.* Goff, (Miss. 1893) 12 So. 699.

Missouri.— Sahlein *v.* Gum, 43 Mo. App. 315.

Tennessee.— Darden *v.* Williams, 100 Tenn. 414, 45 S. W. 669.

Vermont.— Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041.

45. *Colorado.*—Winter *v.* People, 10 Colo. App. 510, 51 Pac. 1006 [*affirmed* in 27 Colo. 136, 60 Pac. 344].

Illinois.— Mallers *v.* Whittier Mach. Co., 170 Ill. 434, 48 N. E. 992 [*affirming* 70 Ill. App. 17]; People *v.* Anthony, 129 Ill. 218, 21 N. E. 780; Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Emerson *v.* Clark, 3 Ill. 489; Pointon *v.* St. Louis, etc., R. Co., 90 Ill. App. 623.

which cannot be delegated, by the person or officer vested by the statute with it, to another.[46]

(III) *Expiration of Trial Judge's Term of Office.* The authorities upon the question whether the retiring judge who presided at the trial, or his successor, should sign the bill of exceptions are in irreconcilable conflict. Many courts of high distinction hold that the ex-judge should sign the bill, or else it is so provided by statute.[47] Many others of equal distinction and respectability hold that the successor should perform that duty.[48]

(IV) *Proceedings Before Different Judges.* Where different judges

Indiana.— Seymour Woollen Factory Co. *v.* Brodhecker, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528; Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427.

Mississippi.— *Compare* Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447.

Tennessee.— Darden *v.* Williams, 100 Tenn. 414, 45 S. W. 669.

Virginia.— Virginia Development Co. *v.* Rich Patch Iron Co., 98 Va. 700, 37 S. E. 280.

46. *Arkansas.*— McFarlane *v.* Johnson, 64 Ark. 597, 43 S. W. 971.

Illinois.— Mallers *v.* Whittier Mach. Co., 170 Ill. 434, 48 N. E. 992 [*affirming* 70 Ill. App. 17]; Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941; Culliner *v.* Nash, 76 Ill. 515; Thompson *v.* Seipp, 44 Ill. App. 515; Byrne *v.* Clark, 31 Ill. App. 651; Hayward *v.* Catton, 1 Ill. App. 577.

Indiana.— Seymour Woollen Factory Co. *v.* Brodhecker, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528; Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427.

Nebraska.— In cases where the clerk of the trial court is authorized to settle bills of exceptions, the act may be performed by a deputy. Brownell *v.* Fuller, 54 Nebr. 586, 74 N. W. 1105.

Pennsylvania.—Com. *v.* Arnold, 161 Pa. St. 320, 34 Wkly. Notes Cas. (Pa.) 313, 29 Atl. 270.

Tennessee.— Darden *v.* Williams, 100 Tenn. 414, 45 S. W. 669.

As to stipulations for settlement see *infra*, XIII, D, 6, a (VI).

47. *Colorado.*—Water Supply, etc., Co. *v.* Tenney, 21 Colo. 284, 40 Pac. 442.

Connecticut.— See Hotchkiss *v.* Dalton, 46 Conn. 467.

Georgia.— A trial judge, after the expiration of his term of office, has no authority to certify a fast bill of exceptions. Grace *v.* Gordon, (Ga. 1901) 38 S. E. 404.

Illinois.— A trial judge, after the expiration of his term of office, cannot settle a bill of exceptions. People *v.* Altgeld, 43 Ill. App. 460.

Maryland.— The signing and sealing of a bill of exceptions by a judge after the expiration of his term of office and the qualification of his successor is a void act, and no agreement of counsel can give it validity. In such case the party is entitled to a new trial. State *v.* Weiskittle, 61 Md. 48.

Missouri.— The successor of a trial judge has no authority to sign a bill of exceptions. Consaul *v.* Lidell, 7 Mo. 250; Connelley *v.* Leslie, 28 Mo. App. 551; Cranor *v.* School Dist. No. 2, 18 Mo. App. 397. *Compare* Miller *v.* Anheuser, 4 Mo. App. 436.

Montana.— Montana Ore-Purchasing Co. *v.* Lindsay, (Mont. 1901) 63 Pac. 715.

Nebraska.— Hanscom *v.* Lantry, 48 Nebr. 665, 67 N. W. 762; Quick *v.* Sachsse, 31 Nebr. 312, 47 N. W. 935; State *v.* Barnes, 16 Nebr. 37, 19 N. W. 701.

New Mexico.— Wheeler *v.* Fick, 4 N. M. 36, 12 Pac. 625.

New York.— See Milvehal *v.* Milward, 2 Duer (N. Y.) 607.

Ohio.— Labold *v.* Wilson, 4 Ohio Cir. Ct. 345.

Oregon.— The successor of a trial judge cannot settle the bill of exceptions. Henrichsen *v.* Smith, 29 Oreg. 475, 42 Pac. 486, 44 Pac. 496.

Wisconsin.— Oliver *v.* Town, 24 Wis. 512; Hale *v.* Haselton, 21 Wis. 320; Davis *v.* Menasha, 20 Wis. 194; Fellows *v.* Tait, 14 Wis. 156.

England.— If a party, without his fault, loses the benefit of his bill of exceptions by reason of the death or sickness of the trial judge, the judgment will be set aside, and a new trial ordered. Benett *v.* Peninsular, etc., Steamboat Co., 16 C. B. 29, 81 E. C. L. 29; Newton *v.* Boodle, 3 C. B. 795, 54 E. C. L. 795.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 39.

48. *Arkansas.*— On the death of the presiding judge before signing a bill of exceptions, mandamus will not lie to compel the clerk to sign the name of said judge, as it is not his duty, under any circumstances, so to do. Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 339, 33 S. W. 208.

California.— See Leach *v.* Pierce, 93 Cal. 624, 29 Pac. 238.

Florida.— Hays *v.* McNealy, 16 Fla. 406. See also Bowden *v.* Wilson, 21 Fla. 165.

Illinois.— Hinsdale *v.* Shannon, 182 Ill. 312, 55 N. E. 327; People *v.* Higbee, 172 Ill. 251, 50 N. E. 110.

Indiana.— Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Finch *v.* Travellers Ins. Co., 87 Ind. 302; State *v.* Slick, 86 Ind. 501; Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427; Ketcham *v.* Hill, 42 Ind. 64; Smith *v.* Baugh, 32 Ind. 163; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

Kentucky.— See Richards *v.* Bennett, 4 Ky. L. Rep. 890.

Michigan.— Mich. Laws (1879), p. 5, expressly provide for a settlement of exceptions

preside during the progress of a trial, each should sign a bill of exceptions as to the proceedings before him.[49]

(v) *Special Judge.* A bill of exceptions in a cause tried before a special judge should be signed by such special judge.[50] So, a special judge who has given time to file a bill of exceptions has power to sign the bill at the time fixed, and to order it to be filed, though he no longer has any power for any other purpose.[51] The record, however, in case of a bill signed by a special judge, should show his authority to act.[52]

(vi) *Stipulation as to Settlement.* It has been held that a judge other than the trial judge,[53] or the clerk [54] may sign a bill of exceptions, if authorized to do so by stipulation of the parties.

b. Manner of Settlement — (i) *In General.* A bill of exceptions must be settled in the manner indicated by statute or rule of court, or it will not be

by the successor of the judge who tried the cause. Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837. Prior to such statute it was held that the death or resignation of a trial judge, without acting upon a bill of exceptions, entitled the party to a new trial. People *v.* Judge Super. Ct., 41 Mich. 726, 49 N. W. 925; Crittenden *v.* Schermerhorn, 35 Mich. 370; Tefft *v.* Windsor, 17 Mich. 425; Scribner *v.* Gay, 5 Mich. 511.

Pennsylvania.— Where the judge who presided at the trial of a cause died without having sealed the bill of exceptions taken at the trial, it may be sealed by the other members of the court, or by the succeeding presiding judge. McCandless *v.* McWha, 20 Pa. St. 183. *Compare* Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85.

Vermont.— See Phelps *v.* Conant, 30 Vt. 277.

Wyoming.— See Conway *v.* Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201. *Compare* Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

Counsel as successor.—Where the term of office of a judge before whom a cause was tried expires after the completion of the trial but before the signing of the bill of exceptions, and the counsel for one of the parties is elected the successor of such judge, the latter is incompetent to sign such bill. Waterman *v.* Morgan, 114 Ind. 237, 16 N. E. 590.

49. *Arkansas.*— Bullock *v.* Neal, 42 Ark. 278; Cowall *v.* Altchul, 40 Ark. 172.

California.—Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Illinois.— Where a motion for a new trial has been overruled by a judge other than the one who tried the case, the trial judge may sign the bill of exceptions. Chicago, etc., R. Co. *v.* Marseilles, 107 Ill. 313.

Indiana.—See Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

Iowa.— See Ferguson *v.* Davis County, 51 Iowa 220, 1 N. W. 505.

Massachusetts.— Exceptions to the rulings of two judges at different stages of the same case should be stated in distinct bills of exceptions allowed by each judge as to matters ruled on by him, and not in one bill allowed by both. Safford *v.* Knight, 117 Mass. 281.

Missouri.— See Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737.

Nebraska.— Schields *v.* Horbach, 40 Nebr. 103, 58 N. W. 720.

50. *Alabama.*— *Ex p.* Nelson, 62 Ala. 376.

Arkansas.— Cowall *v.* Altchul, 40 Ark. 172.

Colorado.— Empire Land, etc., Co. *v.* Engley, 14 Colo. 289, 23 Pac. 452.

Florida.— Bacon *v.* State, 22 Fla. 46.

Indiana.— Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Finch *v.* Travellers Ins. Co., 87 Ind. 302; Lee *v.* Hills, 66 Ind. 474; Lerch *v.* Emmett, 44 Ind. 331.

Kentucky.— McFarland *v.* Benton, 10 Ky. L. Rep. 873.

Missouri.— Cranor *v.* School Dist. No. 2, 18 Mo. App. 397.

Wyoming.— Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

51. Bacon *v.* State, 22 Fla. 46; Stewart *v.* Adam, etc., Co., (Ind. 1899) 55 N. E. 760; Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551; Lerch *v.* Emmett, 44 Ind. 331; Murray *v.* East End Imp. Co., (Ky. 1901) 60 S. W. 648; McFarland *v.* Benton, 10 Ky. L. Rep. 873.

52. Finch *v.* Travellers Ins. Co., 87 Ind. 302; Negley *v.* Wilson, 14 Ind. 215; Croy *v.* State, Wright (Ohio) 135.

53. Brethold *v.* Wilmette, 168 Ill. 162, 48 N. E. 38.

In Maryland it has been held that an agreement that a judge whose term of office has expired may sign and seal a bill of exceptions is of no effect, and a new trial should be granted. State *v.* Weiskittle, 61 Md. 48.

In Michigan it has been held that the parties cannot stipulate as to the judge who shall settle a bill of exceptions. Hill *v.* Hill, 112 Mich. 633, 71 N. W. 144; Crittenden *v.* Schermerhorn, 35 Mich. 370. See also Lynch *v.* Craney, 95 Mich. 199, 54 N. W. 879.

54. Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835.

Sufficiency of stipulation.— The clerk of court was authorized to settle a bill of exceptions by the following stipulation: "Returned this bill of exceptions . . . without amendments; and it is hereby stipulated . . . that the clerk of the district court shall allow, sign, and certify this bill of exceptions, and make the same a part of the record in this case, and be the bill of exceptions." Philadelphia F. Assoc. *v.* Ruby, 49 Nebr. 584, 589, 68 N. W. 939.

considered on appeal.[55] Merely filing the bill in the clerk's office below is not enough.[56]

(II) *Submission to Adverse Party.* A proposed bill of exceptions should be submitted to the adverse party for examination or amendment when so required by statute or rule of court.[57]

(III) *Proceedings to Establish Exceptions*—(A) *In General.* In some states statutes provide for the establishment of a bill of exceptions in the appellate court in case of the neglect or refusal of the trial court to settle the same.[58]

55. *California.*—More *v.* Del Valle, 28 Cal. 170.

Idaho.— Meinert *v.* Snow, 2 Ida. 851, 27 Pac. 677.

Indiana.— Stout *v.* Woods, 79 Ind. 108.

Kansas.— Kœhler *v.* Ball, 2 Kan. 154, 83 Am. Dec. 451.

Wisconsin.— Merwins *v.* O'Day, 9 Wis. 156.

Wyoming.— White *v.* Sisson, 1 Wyo. 395.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 36.

Sufficiency of settlement.—An approval by the trial judge, within the statutory time after the trial, on a separate piece of paper, of several distinct bills of exception, numbered consecutively and alluded to in the approval *seriatim*, is a sufficient approval and allowance of the designated bills of exception. Fitzpatrick *v.* State, 37 Tex. Crim. 20, 38 S. W. 806.

Waiver of objections.—A party who is present and participates in the settlement of a bill of exceptions waives all objections to its settlement not then made. Coquard *v.* Weinstein, 15 Mont. 554, 39 Pac. 849.

56. Merwins *v.* O'Day, 9 Wis. 156.

57. *Arizona.*—Snead *v.* Tietjen, (Ariz. 1890) 24 Pac. 324.

Illinois.— People *v.* Blades, 104 Ill. 591; Russell *v.* Thomas, 39 Ill. App. 158.

Iowa.— Christenson *v.* Central Iowa R. Co., 63 Iowa 703, 17 N. W. 33.

Louisiana.— State *v.* Judge Second Dist. Ct., 13 La. Ann. 484; State *v.* Judge Second Dist. Ct., 13 La. Ann. 199.

Nebraska.— Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992; Greenwood *v.* Craig, 27 Nebr. 669, 43 N. W. 427; Birdsall *v.* Carter, 16 Nebr. 422, 20 N. W. 287; Madsen *v.* Norfolk Mill Co., 15 Nebr. 644, 19 N. W. 636; Edwards *v.* Kearney, 13 Nebr. 502, 14 N. W. 536; Atkins *v.* Atkins, 13 Nebr. 271, 13 N. W. 285; Howard *v.* Lamaster, 13 Nebr. 221, 13 N. W. 211.

Ohio.— Pugh *v.* State, 51 Ohio St. 116, 36 N. E. 783; Sedam *v.* Meeksback, 6 Ohio Cir. Ct. 219.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 75.

Service on part of appellees.— On appeal from a final decree it is error to refuse to settle the bill of exceptions on the ground that it has not been served on all the parties to the action, as the rights of the parties not served, and the necessity of whose presence is not apparent from the record, may be protected if it appears on the hearing of the appeal that they will be affected by the proposed modification of the decree. Gutierrez *v.* Hebberd, 106 Cal. 167, 39 Pac. 529. See also Crane Bros. Mfg. Co. *v.* Keck, 35 Nebr. 683, 53 N. W. 606, wherein it was held that where there is no particular controversy between two or more defendants against whom plaintiff is seeking to enforce a claim, service of the bill on one of such defendants, or his attorney, is sufficient.

Sufficiency of submission.—A proposed bill of exceptions is not submitted to the adverse party, or his attorney of record, by leaving it at the office of the attorney in his absence. Lancaster County Bank *v.* Gillilan, 49 Nebr. 165, 68 N. W. 852. Such service would be sufficient under Clark's Code Civ. Proc. N. C. (1900), § 597 (4). Watkins *v.* Raleigh, etc., Air Line R. Co., 116 N. C. 961, 21 S. E. 409. So, the tender by appellant's counsel to appellee's counsel of a bill of exceptions, with a number of exhibits in no way attached thereto, is insufficient. State *v.* Evans, 12 Ohio Cir. Ct. 245.

58. *Alabama.*— Montgomery, etc., R. Co. *v.* Perryman, (Ala. 1890) 7 So. 383; Haden *v.* Brown, 22 Ala. 572; Woods *v.* Brown, 8 Ala. 742; Bartlett *v.* Lang, 2 Ala. 161.

California.— Hudson *v.* Hudson, 129 Cal. 141, 61 Pac. 773; Crow *v.* Minor, 85 Cal. 214, 24 Pac. 640; Curran *v.* Kennedy, (Cal. 1890) 24 Pac. 276; Sais *v.* Sais, 49 Cal. 263.

Maine.— Frank *v.* Mallett, 92 Me. 77, 42 Atl. 238.

Massachusetts.— O'Connell, Petitioner, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; Clemens Electrical Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; Kaiser *v.* Alexander, 144 Mass. 71, 12 N. E. 209; Spofford *v.* Loveland, 139 Mass. 6; Brown *v.* Hale, 127 Mass. 158; Bates *v.* Santom, 116 Mass. 120; Cullen *v.* Sears, 112 Mass. 299.

Montana.— Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 23 Mont. 122, 58 Pac. 40.

South Dakota.— Severson *v.* Milwaukee Mechanics' Mut. Ins. Co., 3 S. D. 412, 53 N. W. 860; Baird *v.* Gleckler, 3 S. D. 300, 52 N. W. 1097.

Utah.— Whipple *v.* Preece, 18 Utah 454, 56 Pac. 296.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 90.

Establishment of lost bill.—Where a bill of exceptions is lost in transmission to the appellate court after such court has acquired jurisdiction of the case, the application to establish a copy thereof from that on file in the clerk's office in the court below should be

As such a settlement is purely statutory, the requirements of the statute relating thereto must be strictly observed.[59]

(B) *Time of Taking Proceedings.* A proceeding to establish exceptions must be instituted within the time indicated by statute or rule of court.[60] In the absence of a statute or rule of court fixing the time, the proceedings must be instituted within a reasonable time after the exceptions are taken.[61]

(C) *Notice.* A proceeding to establish exceptions must be on notice to the adverse party.[62]

(D) *Petition.* A petition to the supreme court for the settlement of a bill of exceptions should set forth the exceptions taken, and the evidence in support thereof.[63]

made to the appellate court (Wade *v.* Graham, 59 Ga. 642), at the term to which the writ is returnable (McLendon *v.* Holland, 59 Ga. 242) and before the conclusion of the call of the docket for the circuit from which the case came up (McDaniel *v.* Brakefield, 66 Ga. 249). But before a bill of exceptions becomes an office paper of the supreme court so as to be established in that court as a lost paper, it must affirmatively appear that it was certified by the judge and filed in the office of the clerk of the court below, and that the clerk certified it as the true, original bill of exceptions. Till this is done it is not ready for transmission. High *v.* Candler, 103 Ga. 86, 28 S. E. 377.

59. *Alabama.*— Blake *v.* Harlan, 75 Ala. 205; Stein *v.* McArdle, 25 Ala. 561.

California.— Matter of Gates, 90 Cal. 257, 27 Pac. 195; Vance *v.* Superior Ct., 87 Cal. 390, 25 Pac. 500; Hyde *v.* Boyle, 86 Cal. 352, 24 Pac. 1059; Hyde *v.* Thornton, 83 Cal. 83, 23 Pac. 126; Landers *v.* Landers, 82 Cal. 480, 23 Pac. 126.

Maine.— In a cause heard by the presiding judge without the aid of a jury, where no right of "exceptions in matters of law" was reserved to either party so as to permit exceptions to lie to his rulings, the truth of the exceptions cannot be established before the supreme court. Frank *v.* Mallett, 92 Me. 77, 42 Atl. 238.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Harden *v.* Wade, 121 Mass. 160; Sawyer *v.* Yale Iron Works, 116 Mass. 424; Bottum *v.* Fogle, 105 Mass. 42; Joannes *v.* Underwood, 6 Allen (Mass.) 241.

Montana.— Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 23 Mont. 122, 58 Pac. 40.

Before referee.— Under Mont. Code Civ. Proc. § 1157, and Mont. Supreme Ct. Rules, No. 4, subd. 14, allowing a bill of exceptions to be proved before a referee, by leave of the supreme court, when the trial judge refuses to settle it, a bill proved before a referee will be disregarded when his report fails to show that the judge's refusal to settle it because of delay in serving it was not justified. Harding *v.* McLaughlin, 23 Mont. 334, 58 Pac. 865.

Refusal proper.— The supreme court will not settle a bill of exceptions which was properly refused by the trial court. Gallardo *v.* Atlantic, etc., Tel. Co., 49 Cal. 510.

60. Perkins *v.* Harper, 2 Stew. (Ala.) 477; Brown *v.* Gilman, 115 Mass. 56.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 91.

61. Priest *v.* Groton, 103 Mass. 530; Whitford *v.* Knowlton, 6 Allen (Mass.) 557.

After adjournment.— In Massachusetts it has been held that it is too late, after the adjournment of the court without day, to apply to a judge of the supreme court for the allowance of exceptions. Phillips *v.* Soule, 6 Allen (Mass.) 150.

After perfection of appeal.— In California it has been held that it is too late after the court below has acted upon a new trial statement, duly settled, and an appeal has been perfected, to petition to prove an exception in the supreme court. Frankel *v.* Deidesheimer, 83 Cal. 44, 23 Pac. 136.

62. Perkins *v.* Harper, 2 Stew. (Ala.) 477; Phillips *v.* Hoyle, 4 Gray (Mass.) 568.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 91.

In California notice should be given to the trial judge of an application to the supreme court for the settlement of a bill which he has refused to settle. Matter of Hawes, 68 Cal. 413, 9 Pac. 456.

Form of notice that bill of exceptions will be settled where the judge fails to sign the same is set out in Judge *v.* State, 58 Ala. 402.

63. Landers *v.* Landers, 82 Cal. 480, 23 Pac. 126; Matter of Biddel, 75 Cal. 229, 19 Pac. 181; Matter of Hawes, 68 Cal. 413, 9 Pac. 456; Ryder *v.* Jenkins, 163 Mass. 536, 40 N. E. 848; Crow *v.* Stowe, 113 Mass. 153; Whitford *v.* Knowlton, 6 Allen (Mass.) 557.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 92.

Necessity of petition.— In Massachusetts it has been held that an application to establish the truth of exceptions could not be made to the supreme court where there had been a failure to file and serve a petition, although a copy of the exceptions sought to be proved, as well as an affidavit of their truth, were duly filed and served. Marble *v.* Keyes, 4 Gray (Mass.) 570 note; Phillips *v.* Hoyle, 4 Gray (Mass.) 568.

Verification.— In Massachusetts, by rule of court, a petition to establish exceptions must be verified by affidavit. Lyons *v.* Cambridge, 131 Mass. 571. Under this rule it has been held that an affidavit merely to the truth of the exceptions, and not alleging the truth of

(iv) *Settlement by Bystanders.* By statute, in other states, a bill of exceptions may be signed by bystanders if the trial judge neglects or refuses to allow and sign it;[64] but to entitle a bill to be so settled the conditions pointed out by the statute must be shown to exist, and the requirements of the statute must be observed.[65] In the absence of such a permissive statute, a bill cannot be allowed by bystanders.[66]

c. **Notice of Settlement.** A settlement of a bill of exceptions after adjournment of the term should be on notice to the adverse party.[67]

the allegations of the petition (Tufts *v.* Newton, 117 Mass. 68), or an affidavit on information and belief only (Hadley *v.* Watson, 143 Mass. 27, 9 N. E. 806), is insufficient. But, after the filing of the report of a commissioner to whom a petition to prove exceptions has been referred, it is too late to object that the petition is not verified in accordance with the rule. Kaiser *v.* Alexander, 144 Mass. 71, 12 N. E. 209.

64. *Arkansas.*—Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

Colorado.—Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 17 Colo. 9, 28 Pac. 472; Meyer *v.* Binkleman, 5 Colo. 133; Widner *v.* Buttles, 3 Colo. 1.

Florida.— Williams *v.* Pitt, 38 Fla. 162, 20 So. 936.

Iowa.— St. John *v.* Wallace, 25 Iowa 21; Craig *v.* Andrews, 7 Iowa 17; Edgar *v.* Caldwell, Morr. (Iowa) 434; Clark *v.* Parvin, Morr. (Iowa) 371.

Kentucky.— Arnold *v.* Leathers, 2 Dana (Ky.) 287; Kennedy *v.* Covington, 4 J. J. Marsh. (Ky.) 538; Wickliffe *v.* Payne, 1 Bibb (Ky.) 413; Wright *v.* Nichols, 1 Bibb (Ky.) 298; Hayden *v.* Ortkeiss, 7 Ky. L. Rep. 399.

Missouri.— Hoyt *v.* Williams, 41 Mo. 270; Greene County *v.* Wilhite, 35 Mo. App. 39; State *v.* Thayer, 15 Mo. App. 391.

Texas.— Heidenheimer *v.* Thomas, 63 Tex. 287; Firebaugh *v.* Ward, 51 Tex. 409.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 89.

65. *Arkansas.*— Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

Colorado.—Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 17 Colo. 9, 28 Pac. 472; Thornily *v.* Pierce, 10 Colo. 250, 15 Pac. 335; Meyer *v.* Binkleman, 5 Colo. 133.

Florida.— Williams *v.* Pitt, 38 Fla. 162, 20 So. 936.

Georgia.— Kelsoe *v.* Taylor, 62 Ga. 160.

Iowa.— St. John *v.* Wallace, 25 Iowa 21; Edgar *v.* Caldwell, Morr. (Iowa) 434; Clark *v.* Parvin, Morr. (Iowa) 371.

Kentucky.— Wickliffe *v.* Payne, 1 Bibb (Ky.) 413; Schneider *v.* Hesse, 9 Ky. L. Rep. 814; Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 659; Cockrill *v.* Com., 3 Ky. L. Rep. 473; Dells *v.* Brown, 2 Ky. L. Rep. 214.

Missouri.— Downing *v.* Shacklett, 49 Mo. 86.

Texas.— Heidenheimer *v.* Thomas, 63 Tex. 287; Houston *v.* Jones, 4 Tex. 170.

Competency of attorneys.— Under a statute providing that a bill of exceptions may, under certain circumstances, be authenticated by the affidavits of two or more attorneys of the court or other persons who were present at the time of the trial and when such exceptions were taken, neither the attorney for the party excepting, nor such party's business agent, is competent to make such affidavits. Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 17 Colo. 9, 28 Pac. 472; Simon *v.* Weigel, 10 Iowa 505.

Competency of jurors.—Jurors trying a case are bystanders. Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 659.

66. Murphy *v.* Lucas, 2 Ohio 255.

67. *California.*— Matter of Scott, 128 Cal. 578, 61 Pac. 98; Gallardo *v.* Atlantic, etc., Tel. Co., 49 Cal. 510.

Illinois.— People *v.* Blades, 104 Ill. 591; Russell *v.* Thomas, 39 Ill. App. 158.

Iowa.— The official stenographer's report of the evidence, certified by the judge, constitutes a bill of exceptions, and no notice is required to the parties before certifying the same. Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261.

Kansas.— See McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373.

Massachusetts.— Baron *v.* Fitzpatrick, 167 Mass. 417, 45 N. E. 915; Blair *v.* Laflin, 127 Mass. 518; Fletcher *v.* Sibley, 124 Mass. 220; Conway *v.* Callahan, 121 Mass. 165.

Michigan.— See Scribner *v.* Gay, 5 Mich. 511.

Montana.— McKay *v.* Montana Union R. Co., 13 Mont. 15, 31 Pac. 999.

Nebraska.—Where no amendments are proposed to a bill of exceptions, no notice of the presentation of the bill to the judge for allowance is required to be served on the adverse party. Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 987.

New Hampshire.— State *v.* Lord, 5 N. H. 335.

Pennsylvania.— Leach *v.* Ansbacher, 55 Pa. St. 85, 28 Leg. Int. (Pa.) 277.

Washington.— State *v.* Howard, 15 Wash. 425, 46 Pac. 650.

Wisconsin.— Vroman *v.* Dewey, 22 Wis. 360; Demier *v.* Durand, 15 Wis. 580; Tollensen *v.* Gunderson, 1 Wis. 110.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 77.

An objection to a notice of settlement is waived by appearance at the settlement, and consenting to a postponement of it. O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; Horton *v.* Jack, 115 Cal. 29, 46 Pac. 920. See also Hicks *v.* Masten, 101 Cal. 651, 36 Pac. 130; Keefer *v.* Keefer, 2 How. Pr. (N. Y.) 67; Estabrook *v.* Messersmith, 18 Wis. 545.

d. Time of Settlement [68]— (I) *In General.* Originally, exceptions were required to be taken at the time the alleged erroneous ruling or decision was made, and the bill must have been presented, settled, signed, and sealed before verdict, or before the jury were discharged. But, to meet the convenience of bench and bar, the practice obtained of allowing the bill to be reduced to form after judgment, the bill in such cases being signed *nunc pro tunc*.[69] In modern times, statutes or rules of court provide, as a rule, a time for settling a bill of exceptions. Under such statutes or rules of court the bill must be settled within the time so prescribed, or it will not be considered.[70] In the absence of a regulation, by statute or rule of court, as to the time when a bill is to be presented, it must be presented within a reasonable time.[71]

(II) *After Expiration of Time For Appeal.* In the absence of mandatory limitation of the time by statute, the court has power to settle a bill of exceptions after expiration of the time allowed for appeal, if the appeal has been taken within such time.[72]

68. As to record showing time of settlement see *supra*, XIII, A, 6, b [2 Cyc. 1041].

69. *Georgia.*— Low *v.* Goldsmith, R. M. Charlt. (Ga.) 288.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

Missouri.— Consaul *v.* Lidell, 7 Mo. 250.

New York.— Law *v.* Merrills, 6 Wend. (N. Y.) 268.

Pennsylvania.—Com. *v.* Arnold, 161 Pa. St. 320, 34 Wkly. Notes Cas. (Pa.) 313, 29 Atl. 270.

Wyoming.— Schlessinger *v.* Cook, 8 Wyo. 484, 58 Pac. 757; Conway *v.* Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201; McBride *v.* Union Pac. R. Co., 3 Wyo. 183, 18 Pac. 635.

United States.— *Ex p.* Bradstreet, 4 Pet. (U. S.) 102, 7 L. ed. 796; Walton *v.* U. S., 9 Wheat. (U. S.) 651, 6 L. ed. 182.

England.— Wright *v.* Sharp, Salk. 288.

70. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Alabama Midland R. Co. *v.* Brown, (Ala. 1901) 29 So. 548.

Arizona.—Newmark *v.* Marks, (Ariz. 1890) 28 Pac. 960.

Arkansas.— Carroll *v.* Saunders, 38 Ark. 216.

California.— Berry *v.* San Francisco, etc., R. Co., 47 Cal. 643.

Colorado.— Fick *v.* Crook, 27 Colo. 429, 62 Pac. 196, 832.

District of Columbia.— Brown *v.* Bradley, 6 App. Cas. (D. C.) 207.

Florida.— Webster *v.* Barnett, 17 Fla. 272.

Georgia.— Carter *v.* Johnson, 112 Ga. 494, 37 S. E. 736.

Idaho.— Lydon *v.* Piper, (Ida. 1897) 51 Pac. 101.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

Indiana.— Citizens State Bank *v.* Julian, 153 Ind. 655, 54 N. E. 390.

Iowa.— Kiburz *v.* Jacobs, 104 Iowa 580, 73 N. W. 1069.

Kansas.— Cook *v.* Larson, 47 Kan. 70, 27 Pac. 113.

Kentucky.— McFarland *v.* Burton, 89 Ky. 294, 12 S. W. 336.

Maryland.—Wheeler *v.* Briscoe, 44 Md. 308.

Massachusetts.—Elwell *v.* Dizer, 1 Allen (Mass.) 484.

Mississippi.—Gray *v.* Thomas, 12 Sm. & M. (Miss.) 111.

Missouri.— State *v.* Withrow, 135 Mo. 376, 36 S. W. 896, 1038.

Montana.— Randall *v.* Greenhood, 3 Mont. 506.

Nebraska.— State *v.* Ramsey, 60 Nebr. 191, 82 N. W. 625.

New Jersey.— Agnew *v.* Campbell, 17 N. J. L. 291.

New Mexico.—Evans *v.* Baggs, 4 N. M. 147, 13 Pac. 207.

Ohio.— Enck *v.* Gerding, 63 Ohio St. 175, 57 N. E. 1083. For the purpose of fixing the time for the allowance and signing of a bill the record is conclusive as to the date of the judgment. State *v.* Judges, 53 Ohio St. 430, 41 N. E. 689.

Oklahoma.— Rice *v.* West, (Okla. 1893) 33 Pac. 706.

Oregon.— Mogan *v.* Thompson, 13 Oreg. 230, 9 Pac. 564.

Pennsylvania.— Grim *v.* Paul, 16 Pa. Co. Ct. 670.

South Carolina.— Rogers *v.* Nash, 12 S. C. 559.

South Dakota.— McGillycuddy *v.* Morris, 7 S. D. 592, 65 N. W. 14.

Tennessee.— Mallon *v.* Tucker Mfg. Co., 7 Lea (Tenn.) 62.

Texas.— Siebert *v.* Lott, (Tex. Civ. App. 1899) 49 S. W. 783.

Utah.— Willard City *v.* Woodland, 7 Utah 192, 26 Pac. 284.

Vermont.— Howard *v.* Burlington, 35 Vt. 491.

West Virginia.—Jordan *v.* Jordan, (W. Va. 1900) 37 S. E. 556.

Wisconsin.— Vroman *v.* Dewey, 22 Wis. 323.

Wyoming.— Schlessinger *v.* Cook, 8 Wyo. 484, 58 Pac. 757.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 44.

71. Meese *v.* Levis, 13 Pa. St. 384.

72. Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409 [*disapproving* Evans *v.* St. Paul F. & M. Ins. Co., 54 Wis. 522, 11 N. W. 594].

(III) *After Perfection of Appeal or Writ of Error.* That a bill was not settled until after an appeal was taken or writ of error sued out is of itself no objection to it.[73]

(IV) *At Trial Term or Time Then Granted* — (A) *In General.* Generally, it may be said that a bill of exceptions should be settled during the term of court at which the trial was had and judgment rendered,[74] unless, by consent or agreement of the respective parties,[75] special order of court,[76] or under the provisions of a statute,[77] the time is extended. After the expiration of the trial term, the trial court is without authority, in the absence of a permissive statute or the express agreement or consent of the parties,[78] to either sign and allow the

73. *Alabama.*— Louisville, etc., R. Co. *v.* Murphree, (Ala. 1901) 29 So. 592.

California.—Colbert *v.* Rankin, 72 Cal. 197, 13 Pac. 491; Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463.

Indiana.— Grisell *v.* Noel Bros. Flour Feed Co., 9 Ind. App. 251, 36 N. E. 452.

Iowa.— Tiffany *v.* Henderson, 57 Iowa 490, 10 N. W. 884; Bennett *v.* Davis, Morr. (Iowa) 364.

Missouri.—Shaw *v.* Shaw, 14 Mo. App. 580.

Nevada.— James *v.* Lepert, (Nev. 1884) 2 Pac. 753.

North Dakota.— Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046.

Pennsylvania.— Meese *v.* Levis, 13 Pa. St. 384.

United States.— Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Shreve *v.* Cheesman, 69 Fed. 785, 32 U. S. App. 676, 16 C. C. A. 413.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 45.

74. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Loosse *v.* Vogel, 80 Ala. 308.

Arizona.— Salt River Canal Co. *v.* Hickey, (Ariz. 1894) 36 Pac. 171.

Arkansas.— Carroll *v.* Saunders, 38 Ark. 216.

Colorado.—Kansas Pac. R. Co. *v.* Twombly, 2 Colo. 559.

Florida.— Webster *v.* Barnett, 17 Fla. 272.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

Indiana.— Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20.

Iowa.— White *v.* Guarantee Abstract Co., 96 Iowa 343, 65 N. W. 305.

Kansas.— South Haven *v.* Christian, 49 Kan. 229, 31 Pac. 154.

Kentucky.— McIlvoy *v.* Russell, 8 Ky. L. Rep. 523.

Maryland.— Livers *v.* Ardinger, 90 Md. 36, 44 Atl. 1042.

Massachusetts.— Barstow *v.* Marsh, 4 Gray (Mass.) 165.

Michigan.— Cleveland *v.* Stein, 14 Mich. 334.

Mississippi.—Gray *v.* Thomas, 12 Sm. & M. (Miss.) 111.

Missouri.— Davis *v.* Bond, 84 Mo. App. 504.

Nevada.— Burns *v.* Rodefer, 15 Nev. 59.

Ohio.— Hicks *v.* Person, 19 Ohio 426.

Oregon.— Holcomb *v.* Teal, 4 Oreg. 352.

Tennessee.—McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34.

Texas.— Schaub *v.* Dallas Brewing Co., 80 Tex. 634, 16 S. W. 429.

Utah.— Willard City *v.* Woodland, 7 Utah 192, 26 Pac. 284.

Virginia.— Virginia Development Co. *v.* Rich Patch Iron Co., 98 Va. 700, 37 S. E. 280.

West Virginia.— Wickes *v.* Baltimore, etc., R. Co., 14 W. Va. 157.

Wyoming.—Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

United States.— Morse *v.* Anderson, 150 U. S. 156, 14 S. Ct. 43, 37 L. ed. 1037.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 47.

Justices of the peace.— Since a justice of the peace has no term of court, a bill of exceptions must be prepared and certified on the day that a judgment is rendered; and, where the record on appeal shows that it was signed on a day subsequent to the entry of judgment, no review of the matter contained therein can be had. Richmond *v.* Henderson, (W. Va. 1900) 37 S. E. 653.

75. *Iowa.*— State *v.* Chamberlin, 74 Iowa 266, 37 N. W. 326.

Massachusetts.— Nye *v.* Old Colony R. Co., 124 Mass. 241, holding, however, that the agreement must be in writing.

Michigan.— Atlas Min. Co. *v.* Johnston, 22 Mich. 78.

Missouri.— West *v.* Fowler, 55 Mo. 300.

Tennessee.— *Compare* Ballard *v.* Nashville, etc., R. Co., 94 Tenn. 205, 28 S. W. 1088.

Virginia.— Page *v.* Clopton, 30 Gratt. (Va.) 415.

United States.—Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

76. *California.*— Leach *v.* Pierce, 93 Cal. 627, 29 Pac. 239.

Colorado.—Kansas Pac. R. Co. *v.* Twombly, 2 Colo. 559.

Illinois.—Buckmaster *v.* Beames, 9 Ill. 443.

Indiana.— Henry *v.* Dennis, 93 Ind. 452, 47 Am. Rep. 378.

Missouri.— Swank *v.* Swank, 85 Mo. 198.

Virginia.— *Compare* Page *v.* Clopton, 30 Gratt. (Va.) 415.

United States.—Ward *v.* Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. ed. 1195.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 55.

77. Wetty *v.* Campbell, 37 W. Va. 797, 17 S. E. 312.

78. *Colorado.*— Rhoades *v.* Drummond, 3 Colo. 374.

bill, or to extend the time for its allowance and signing.[79] It has been held, however, that a bill may be allowed and filed at the term at which judgment is entered, though such time is subsequent to the trial term.[80]

(B) *Inclusion of Matters at Previous Term.* Exceptions can bring in question only the proceedings had in a cause at the term at which the exceptions are presented, and cannot reach proceedings had at a previous or subsequent term.[81]

(C) *Retention of Control Over Judgment to Subsequent Term.* If, by reason of a motion for a new trial or rehearing, or to set aside the judgment entered at the term, the power of the court over the judgment is retained, a bill of exceptions may be settled or time given for preparing it, when the motion is overruled, whether at the same or at a later term.[82]

Idaho.— Sebree *v.* Smith, 2 Ida. 329, 16 Pac. 915.

Iowa.—Hershey *v.* Nyenhuis, 103 Iowa 195, 72 N. W. 510.

Maryland.— Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

Michigan.—People *v.* Kalamazoo Cir. Judge, 39 Mich. 123.

Missouri.— Spencer *v.* St. Louis, etc., R. Co., 79 Mo. 500.

New Jersey.— Agnew *v.* Campbell, 17 N. J. L. 291.

United States.— Davis *v.* Patrick, 122 U. S. 138, 7 S. Ct. 1102, 30 L. ed. 1090.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 63.

A statute permitting a bill of exceptions to be certified after expiration of the time prescribed "if the judge is absent from home, or by other casualty fails to certify" the same within the time specified, does not apply to a delay in signing caused by pressure of official work. Walker *v.* Equitable Mortg. Co., 100 Ga. 84, 26 S. E. 75; Gibson *v.* Thornton, 99 Ga. 647, 26 S. E. 78.

79. *Arizona.*— Salt River Canal Co. *v.* Hickey, (Ariz. 1894) 36 Pac. 171.

Illinois.—O'Brien *v.* Lynch, 90 Ill. App. 26; Underwood *v.* Masterson, 67 Ill. App. 315.

Missouri.— Danforth *v.* Lindell R. Co., 123 Mo. 196, 27 S. W. 715; Dorman *v.* Coon, 119 Mo. 68, 24 S. W. 731.

Nebraska.—The fact that the party excepting has been diligent, and that the delay has been caused by the court reporter in preparing the transcript, does not authorize the submission of a bill of exceptions after the expiration of the eighty days from the adjournment of the term which may be allowed for its submission. Horbach *v.* Omaha, 49 Nebr. 851, 69 N. W. 121 [*overruling* Richards *v.* State, 22 Nebr. 145, 34 N. W. 346].

Ohio.— Riverside Rubber Co. *v.* Midland Mfg. Co., 63 Ohio St. 66, 57 N. E. 958; Long *v.* Newhouse, 57 Ohio St. 348, 49 N. E. 79; Neuman *v.* Becker, 54 Ohio St. 323, 46 N. E. 706.

South Dakota.— McGillycuddy *v.* Morris, 7 S. D. 592, 65 N. W. 14.

United States.— U. S. *v.* Jones, 149 U. S. 262, 13 S. Ct. 840, 37 L. ed. 726; Muller *v.* Ehlers, 91 U. S. 249, 23 L. ed. 319.

80. *Colorado.*— Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

Massachusetts.— Priest *v.* Groton, 103 Mass. 530.

Michigan.— Rayl *v.* Brevoort, 91 Mich. 4, 51 N. W. 693.

Nebraska.— State *v.* Hopewell, 35 Nebr. 822, 53 N. W. 990; Wineland *v.* Cochran, 8 Nebr. 528, 1 N. W. 576.

Vermont.— Thetford *v.* Hubbard, 22 Vt. 440.

Virginia.— See Winston *v.* Giles, 27 Gratt. (Va.) 530.

United States.— Preble *v.* Bates, 40 Fed. 745.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 53.

81. *Colorado.*— If the bill be perfected within the time fixed by the court, it is immaterial that proceedings had in the cause at different terms are embodied therein. Packard *v.* Spellings, 3 Colo. 109.

Indiana.—Smith *v.* Lotton, 5 Ind. App. 177, 31 N. E. 816.

Maine.— Lothrop *v.* Page, 26 Me. 119.

Missouri.— Jones *v.* Evans, 80 Mo. 565; Carpenter *v.* McDavitt, 53 Mo. App. 393.

Ohio.—Errors of law occurring at the trial term cannot be reviewed on a bill taken at the general term. Cook Carriage Co. *v.* Johnson, 23 Cinc. L. Bul. 374.

Texas.—Marshall *v.* Spillane, 7 Tex. Civ. App. 532, 27 S. W. 162.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 50.

82. *Alabama.*— Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Colorado.—Stocking *v.* Morey, 14 Colo. 317, 23 Pac. 343; Gomer *v.* Chaffe, 5 Colo. 383.

Florida.— Greeley *v.* Percival, 21 Fla. 428.

Illinois.— People *v.* Gary, 105 Ill. 264.

Indiana.— Banner Cigar Co. *v.* Kamm, etc., Brewing Co., 145 Ind. 266, 44 N. E. 455; Jones *v.* Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

Iowa.— See Dedric *v.* Hopson, 62 Iowa 562, 17 N. W. 772; Courtney *v.* Carr, 11 Iowa 295.

Kansas.— *Compare* South Haven *v.* Christian, 49 Kan. 229, 31 Pac. 154.

Kentucky.— Covington *v.* Jack, 5 Ky. L. Rep. 315.

Michigan.— Adrian Furniture Mfg. Co. *v.* Lane, 92 Mich. 295, 52 N. W. 615.

Mississippi.—Holman *v.* Murdock, 34 Miss. 275.

Missouri.— Young *v.* Downey, 150 Mo. 317, 51 S. W. 751; Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Henze *v.* St. Louis,

(v) *In Vacation.* The trial judge has no right to receive and approve a bill of exceptions in vacation,[83] unless by consent or agreement of the parties,[84] by order of court entered in term-time,[85] or under the provisions of a statute permitting such reception and approval.[86]

(vi) *Computation of Time.* A statutory regulation that the time within which an act is to be done shall be computed by excluding the first day and including the last has been held to apply to the filing of a bill of exceptions.[87]

etc., R. Co., 71 Mo. 636; Riddlesbarger *v.* McDaniel, 38 Mo. 138.

Nebraska.— *Compare* State *v.* Ambrose, 47 Nebr. 235, 66 N. W. 306; Dodge *v.* Runels, 20 Nebr. 33, 28 N. W. 849; Donovan *v.* Sherwin, 16 Nebr. 129, 20 N. W. 26.

Ohio.— *Compare* Cincinnati St. R. Co. *v.* Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340; Finley *v.* Whitley, 46 Ohio St. 524, 22 N. E. 640; Estabrook *v.* Gebhart, 32 Ohio St. 415; Dayton *v.* Hinsey, 32 Ohio St. 258; Morgan *v.* Boyd, 13 Ohio St. 271; Coleman *v.* Edwards, 5 Ohio St. 51.

Tennessee.— *Compare* McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34.

Texas.— Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 452; International Bldg., etc., Assoc. *v.* Hardy, (Tex. Civ. App. 1894) 26 S. W. 523.

Virginia.— Hudgins *v.* Simon, 94 Va. 659, 27 S. E. 606.

United States.— Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597; Merchants' Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19; Woods *v.* Lindvall, 48 Fed. 73, 4 U. S. App. 45, 1 C. C. A. 34.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 51.

Motion to set aside involuntary nonsuit.— When a party takes an involuntary nonsuit, and moves to set same aside, such motion, though not acted upon nor continued by order of court to next term, is yet pending, is in effect a motion for a new trial, and suspends the judgment until acted upon, after which a bill of exceptions may be allowed and signed. McElroy *v.* Ford, 81 Mo. App. 500.

83. *Alabama.*— Powers *v.* Wright, Minor (Ala.) 66.

Colorado.— Jordan *v.* Finley, 4 Colo. 189.

Illinois.— Evans *v.* Fisher, 10 Ill. 453.

Indiana.— Thompson *v.* Hathaway, 12 Ind. 479.

Iowa.— Claggett *v.* Gray, 1 Iowa 19.

Kentucky.— Allard *v.* Smith, 2 Metc. (Ky.) 297; Freeman *v.* Brenham, 17 B. Mon. (Ky.) 603; Biggs *v.* McIlvain, 3 A. K. Marsh. (Ky.) 360; Beattyville, etc., R. Co. *v.* Plummer, 21 Ky. L. Rep. 685, 52 S. W. 948; Craft *v.* Allen, 21 Ky. L. Rep. 243, 51 S. W. 169; Com. *v.* Lewis, 19 Ky. L. Rep. 170, 39 S. W. 438.

Nebraska.— Mewis *v.* Johnson Harvester Co., 5 Nebr. 217.

Virginia.— Virginia Development Co. *v.* Rich Patch Iron Co., 98 Va. 700, 37 S. E. 280.

Wyoming.— *Compare* McBride *v.* Union Pac. R. Co., 3 Wyo. 183, 18 Pac. 635.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 52.

Waiver of objection.— Where defendant joins in error, he thereby waives the objection that the bill of exceptions was filed in vacation without an order of court. Murphy *v.* Cunningham, 1 Colo. 467.

84. *Colorado.*— Jordan *v.* Finley, 4 Colo. 189.

Illinois.— Evans *v.* Fisher, 10 Ill. 453.

Iowa.— Claggett *v.* Gray, 1 Iowa 19.

Kentucky.— Kelsoe *v.* Ellis, 10 B. Mon. (Ky.) 36; Meagher *v.* Bowling, 21 Ky. L. Rep. 1149, 54 S. W. 170.

Mississippi.— Williams *v.* Ramsey, 52 Miss. 851; Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447.

Missouri.— Baker *v.* Loring, 65 Mo. 527; Mentzing *v.* Pacific R. Co., 64 Mo. 25.

Form of agreement that bill be signed in vacation is set out in Stephens *v.* State, 47 Ala. 696.

85. *Alabama.*— Stabler *v.* Bryant, (Ala. 1900) 28 So. 659; Carter *v.* Long, 124 Ala. 330, 27 So. 465; Morningstar *v.* Stratton, 121 Ala. 437, 25 So. 573.

Illinois.— Satonstall *v.* Canal Com'rs, 13 Ill. 705; Evans *v.* Fisher, 10 Ill. 453.

Indiana.— Terre Haute, etc., R. Co. *v.* South Bend, (Ind. 1896) 42 N. E. 812; Engleman *v.* Arnold, 118 Ind. 81, 20 N. E. 505.

Kentucky.— *Compare* Louisville, etc., R. Co. *v.* Barbour, 9 Ky. L. Rep. 934.

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447.

86. Rankin County Sav.-Bank *v.* Johnson, 56 Miss. 125; Welty *v.* Campbell, 37 W. Va. 797, 17 S. E. 312.

In Florida it has been held that a judge of another circuit has authority to settle and sign a bill of exceptions in vacation, if within the time limited by the order, where the judge who tried the case becomes unable, from sickness, to settle and sign it. Bowden *v.* Wilson, 21 Fla. 165.

87. Keeler *v.* Heims, 126 Ind. 382, 26 N. E. 61; Rodenwald *v.* Edwards, 77 Ind. 221; Lewis *v.* Wintrode, 76 Ind. 13; Miller *v.* Muir, 63 Ind. 496; Huff *v.* Krause, 63 Ind. 396; Schoonover *v.* Irwin, 58 Ind. 287; Baker *v.* Arctic Ditchers, 54 Ind. 310; State *v.* Thorn, 28 Ind. 306; McCoid *v.* Rafferty, 84 Iowa 532, 51 N. W. 24; Sheldon Bank *v.* Royce, 84 Iowa 288, 50 N. W. 986; Cavanaugh *v.* Cochran, 11 Ky. L. Rep. 855. See also Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443.

See, generally, Time; and 21 Cent. Dig. tit. "Exceptions, Bill of," § 70.

Legal holiday.— In Massachusetts it has been held that, where a judge has extended the time for the filing and presentment of exceptions to a particular day, which turns out to be a legal holiday, and they are not presented until the next day, objections by the adverse party to their allowance will result

In computing this time, Sundays must be included,[88] in the absence of a statute to the contrary.[89] It has, however, been held that, where no statute or rule of court intervenes, if the last day allowed by an order for the settling of a bill of exceptions falls on Sunday, the bill may be settled on the following Monday.[90]

(VII) *EXTENSION OF TIME*[91] — (A) *In General.* Statutes or rules of court in most, if not all, of the states authorize an extension of time beyond the trial term for filing bills of exceptions.[92] To entitle a bill to be so filed, however, there must be a substantial compliance with such statutes or rules of court.[93] The bill must be filed within the extended time, or it will not be considered.[94]

in their dismissal. Cooney *v.* Burt, 123 Mass. 579.

Leap-year.— In computing the number of days given within which a bill of exceptions may be filed, the twenty-eighth and twenty-ninth days of February are to be counted as one day. Porter *v.* Holloway, 43 Ind. 35.

Till next term.—Where an exception was taken to a ruling of the court, and time was given "till next term" to file a bill of exceptions, a bill filed on the sixth day of the next term is too late. De Haven *v.* De Haven, 46 Ind. 296.

When time is given until a day named to file a bill of exceptions, a bill filed on the day named is not within the time fixed for the filing. Hartman *v.* Ringgenberg, 119 Ind. 72, 21 N. E. 464; Corbin *v.* Ketcham, 87 Ind. 138; Eshelman *v.* Snyder, 82 Ind. 498; Hall's Safe, etc., Co. *v.* Rigby, 79 Ind. 150; Erb *v.* Moak, 78 Ind. 569.

88. Wilkinson *v.* Castellow, 14 Ga. 122; American Tobacco Co. *v.* Strickling, 88 Md. 500, 41 Atl. 1083.

89. Cowley *v.* McLaughlin, 141 Mass. 181, 4 N. E. 821, wherein it was held that, by Mass. Pub. Stat. c. 153, § 8, Sunday is excluded from the three days allowed for the filing of a bill of exceptions.

90. Bacon *v.* State, 22 Fla. 46; Harris *v.* Atlanta, 62 Ga. 290; Evans *v.* Chicago, etc., R. Co., 76 Mo. App. 468; Cash *v.* Penix, 11 Mo. App. 597.

91. As to record showing extension of time see *supra*, XIII, A. 6, b, (II) [2 Cyc. 1042].

92. See the statutes and rules of court of the several states, and the following cases:

California.— Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139, 772.

Colorado.— Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

District of Columbia.— Jones *v.* Pennsylvania R. Co., 7 Mackey (D. C.) 426.

Kentucky.— Cavanaugh *v.* Cochran, 11 Ky. L. Rep. 855.

Maryland.—Edelhoff *v.* Horner-Miller Straw Goods Mfg. Co., 86 Md. 595, 39 Atl. 314.

Michigan.— White *v.* Campbell, 25 Mich. 463.

Missouri.— Rine *v.* Chicago, etc., R. Co., 88 Mo. 392.

Nebraska.— Greenwood *v.* Cobbey, 24 Nebr. 648, 39 N. W. 833.

Ohio.— Pugh *v.* State, 51 Ohio St. 116, 36 N. E. 783.

United States.— Talbot *v.* Press Pub. Co., 80 Fed. 567.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 57.

Death of party pending extended time.— Where defendant obtained time to file his bill, and in the meantime plaintiff died, and defendant then tendered his bill in time, though before revivor, it was properly allowed to be filed. Hayden *v.* Ortkeiss, 7 Ky. L. Rep. 399.

Extension by special judge.— A special judge, being invested with all the powers of a regular judge, has authority to sign the bill of exceptions in a case tried before him, and exclusive authority to make an order for the extension of time to file the bill of exceptions in vacation. Rawlins *v.* Timons, 80 Mo. App. 84.

A general order of the court, continuing "all matters in court not disposed of until the next term," does not extend the time for signing and settling a bill of exceptions. Burns *v.* Rodefer, 15 Nev. 59.

An order extending the time for the preparation and filing of the transcript of the record beyond the term does not operate to extend the time for signing and filing a bill of exceptions. Reliable Incubator, etc., Co. *v.* Stahl, 102 Fed. 590, 42 C. C. A. 522.

93. Edelhoff *v.* Horner-Miller Straw Goods Mfg. Co., 86 Md. 595, 39 Atl. 314; Singer *v.* Livingston Cir. Judge, 117 Mich. 318, 75 N. W. 609; Wright *v.* Redd, 106 Tenn. 719, 63 S. W. 1120; Jones *v.* Moore, 106 Tenn. 188, 61 S. W. 81; Muse *v.* State, 106 Tenn. 181, 61 S. W. 80.

In Tennessee it has been held, under Tenn. Acts (1899), c. 275, giving chancellors and circuit judges authority to grant thirty days after the adjournment of court within which a bill of exceptions may be signed and filed, that an order that defendants should be allowed thirty days in which to perfect their appeal does not authorize the filing of a bill of exceptions within such thirty days, and after the expiration of the term. Lewis *v.* Partee, (Tenn. Ch. 1901) 62 S. W. 328.

Entry of order nunc pro tunc.—Where the court extends the time for filing a bill of exceptions, but the clerk fails to enter the order, the court may, later in the term, have the order entered *nunc pro tunc*, though the time originally given for filing the bill has expired. Becker *v.* Schutte, 85 Mo. App. 57.

94. *Arkansas.*— Adler *v.* Conway County, 42 Ark. 488.

Indiana.— Miller *v.* Muir, 63 Ind. 496; Farnsworth *v.* Coquillard, 22 Ind. 453.

Iowa.— Rosenbaum *v.* Partch, 85 Iowa 409,

(B) *In Vacation.* In the absence of a statute permitting it,[95] a trial judge has no authority, in vacation, to extend the time fixed for filing a bill of exceptions.[96]

(C) *Length of Extension.* The time fixed by the court for the settling and filing of a bill of exceptions must be a definite time.[97] If the statute limits the time of extension, an order cannot be granted giving longer time.[98]

(D) *Notice.* In the absence of a statute requiring it,[99] notice need not be given to the adverse party of an application to the trial court for an extension of time within which to prepare and serve a bill of exceptions.[1]

(E) *When Time Begins to Run.* Where an order is made in term-time, extending the time for settling a bill of exceptions, the time under such order will not be deemed to run until an adjournment of the term,[2] unless there is something in the order or record evidencing a contrary intent.[3]

(F) *Second Extension.* Where the court extends the time for filing a bill of exceptions, it has no power, after the expiration of such time, in the absence of a statute permitting it or the consent of the parties,[4] to again extend the time for settling and signing the bill.[5] A second extension, in order to be valid, must

52 N. W. 181; McCoid *v.* Rafferty, 84 Iowa 532, 51 N. W. 24; St. John *v.* Wallace, 25 Iowa 21.

Kentucky.— Wade *v.* Moore, 3 Ky. L. Rep. 392.

Missouri.— Fulkerson *v.* Murdock, 123 Mo. 292, 27 S. W. 555.

95. Rosson *v.* State, 92 Ala. 76, 9 So. 357; Bass Furnace Co. *v.* Glasscock, 86 Ala. 244, 6 So. 430.

96. *Colorado.*— Winter *v.* People, 27 Colo. 136, 60 Pac. 344 [*affirming* 10 Colo. App. 510, 51 Pac. 1006]; Bell *v.* Murray, 13 Colo. App. 217, 57 Pac. 488; Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

Florida.— Myrick *v.* Merritt, 21 Fla. 799.

Illinois.— Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

Indiana.— Everhart *v.* Hollingsworth, 19 Ind. 138.

Wyoming.— Schlessinger *v.* Cook, 8 Wyo. 484, 58 Pac. 757.

United States.— Missouri, etc., R. Co. *v.* Russell, 60 Fed. 501, 19 U. S. App. 641, 9 C. C. A. 108.

97. Lansing *v.* Coats, 18 Ind. 166; Smith *v.* Blakeman, 8 Bush (Ky.) 476, wherein it was held that an extension of time to file a bill of exceptions which does not specify a day certain, but simply allows further time, is void.

98. Carroll *v.* Pryor, 38 Ark. 283; Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957; Bailey *v.* Villier, 6 Bush (Ky.) 27; Shrader *v.* Wilhite, 11 Ky. L. Rep. 954; Cavanaugh *v.* Cochran, 11 Ky. L. Rep. 855.

99. Taylor *v.* Derry, 4 Colo. App. 109, 35 Pac. 60. See also Purcell *v.* Boston, etc., Steamship Line, 151 Mass. 158, 23 N. E. 834.

1. Jones *v.* Pennsylvania R. Co., 7 Mackey (D. C.) 426; Hunter *v.* Union L. Ins. Co., 58 Nebr. 198, 78 N. W. 516; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 987; McDonald *v.* McAllister, 32 Nebr. 514, 49 N. W. 377; Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 59.

2. Morningstar *v.* Stratton, 121 Ala. 437, 25 So. 573. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 69.

3. Lewis *v.* Meginniss, 25 Fla. 589, 6 So. 169; Marks *v.* Boone, 24 Fla. 177, 4 So. 532.

4. Hawes *v.* People, 129 Ill. 123, 21 N. E. 777; Marseilles *v.* Howland, 34 Ill. App. 350 [*affirmed* in 136 Ill. 81, 26 N. E. 495].

5. *Alabama.*— Kimball *v.* Penney, 117 Ala. 245, 22 So. 899; Rosson *v.* State, 92 Ala. 76, 9 So. 357; Bass Furnace Co. *v.* Glasscock, 86 Ala. 244, 6 So. 430.

Arkansas.— Davies *v.* Nichols, 52 Ark. 554, 13 S. W. 129.

California.— Cameron *v.* Arcata, etc., R. Co., 129 Cal. 279, 61 Pac. 955; Matter of Clary, 112 Cal. 292, 44 Pac. 569.

Colorado.— Beulah Marble Co. *v.* Dixon, 12 Colo. App. 525, 56 Pac. 814.

District of Columbia.— See U. S. *v.* Hood, 19 D. C. 372.

Illinois.— Illinois Conference, etc. *v.* Plagge, 76 Ill. App. 468; Dickey *v.* Bruce, 21 Ill. App. 445. See also U. S. Life Ins. Co. *v.* Shattuck, 159 Ill. 610, 43 N. E. 389.

Indiana.— Trentman *v.* Swartzell, 85 Ind. 443; Kirby *v.* Bowland, 69 Ind. 290; Whitworth *v.* Sour, 57 Ind. 107; Sherman *v.* Crothers, 25 Ind. 417; Noble *v.* Thompson, 24 Ind. 346.

Iowa.— White *v.* Guarantee Abstract Co., 96 Iowa 343, 65 N. W. 305.

Kentucky.— Louisville, etc., R. Co. *v.* Turner, 81 Ky. 489; Combs *v.* Combs, 19 Ky. L. Rep. 439, 41 S. W. 7; Turner *v.* Johnson, 18 Ky. L. Rep. 202, 35 S. W. 923.

Missouri.— State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State *v.* Apperson, 115 Mo. 470, 22 S. W. 375; Maddox *v.* Wabash R. Co., 73 Mo. App. 510; Kansas City *v.* Allen, 28 Mo. App. 132.

Nebraska.— *Compare* McDonald *v.* McAllister, 32 Nebr. 514, 49 N. W. 377; Greenwood *v.* Cobbey, 24 Nebr. 648, 39 N. W. 833.

Wisconsin.— Evans *v.* St. Paul F. & M. Ins. Co., 54 Wis. 522, 11 N. W. 594.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 60.

In vacation.— In Missouri it has been held that, where the period beyond the trial term granted by the court in which to file a bill of exceptions has expired, neither the court nor judge in vacation can extend it. Powell *v.*

be made before the expiration of the time allowed for settlement by the first extension.[6]

(G) *Mandamus to Compel Extension.* An appellate court cannot, by mandamus, compel the trial court to enter an order extending the time in which to prepare a bill of exceptions.[7]

(VIII) *Settlement of Part of Bill.* Where a part only of a general bill of exceptions is presented within the time prescribed for preparation, no part of the bill can be considered.[8]

(IX) *Waiver of Objections.* A defendant in error does not waive his objection that the bill of exceptions was not signed and filed within the time allowed by the court by merely indorsing thereon that he found the same to be correct.[9]

e. Signing[10] — (I) *Necessity.* A bill of exceptions must be signed by the trial judge.[11] In the absence of such signature it has been held that the bill will

Sherwood, (Mo. 1901) 63 S. W. 485; Doherty *v.* Robb, 154 Mo. 365, 55 S. W. 455; State *v.* Chain, 128 Mo. 361, 31 S. W. 20; Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728; Warder Bushnell, etc., Co. *v.* Forman, 83 Mo. App. 70; Mitchell *v.* Williams, 79 Mo. App. 389.

6. Gottlieb *v.* Fred W. Wolf Co., 75 Md. 126, 23 Atl. 198.

Death of party pending extended time.— Where plaintiff obtains an extension of time within which to file a bill of exceptions, and dies before the bill is filed, the trial court has no authority to grant a further extension of time before plaintiff's heirs are brought in and before defendants are served. Walmsley *v.* Dougherty, (Mo. 1901) 63 S. W. 693.

7. State *v.* Second Judicial Dist. Ct., 24 Mont. 566, 63 Pac. 389.

8. McFadden *v.* Owens, 150 Ind. 213, 49 N. E. 1058.

9. Bell *v.* Murray, 13 Colo. App. 217, 57 Pac. 488; Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660. See also Bennett *v.* Marion, 101 Iowa 112, 70 N. W. 105, wherein it was held that the letters "O. K.," followed by the names of appellee's attorneys, on a bill of exceptions filed after term, will not be considered as an approval of the filing at such time if it does not appear when the notation was made and there is nothing to show whether it meant an approval of the filing at such time or merely of the contents of the bill. But see Drake *v.* Dodsworth, 4 Kan. 159, wherein it was held that an indorsement on a bill of exceptions by the attorneys for appellee, after the expiration of the time for filing thereof, of the words, "We consent to within bill of exceptions," constitutes a waiver of appellant's failure to file the same within the time allowed.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 72.

Stipulation of parties.—Where the bill is served on the adverse party after the time therefor had expired, a written stipulation by the parties that the trial judge shall allow the bill is a waiver of the objection that it was not presented within the statutory time. Thompson *v.* Missouri Pac. R. Co., 50 Nebr. 329, 69 N. W. 1119.

10. As to record showing signing of bill see *supra*, XIII, A, 6, b [2 Cyc. 1041].

11. *Alabama.*— Rolater *v.* Rolater, 52 Ala. 111.

Arkansas.— Turner *v.* Collier, 37 Ark. 528; McMinn *v.* Shultz, 34 Ark. 627.

California.— Gee *v.* Terrio, 55 Cal. 381; Harley *v.* Young, 4 Cal. 284.

Colorado.— Laffey *v.* Chapman, 9 Colo. 304, 12 Pac. 152.

Georgia.— Ward *v.* State, 87 Ga. 160, 13 S. E. 711; Brown *v.* Happ, 39 Ga. 61.

Idaho.— Meinert *v.* Snow, 2 Ida. 851, 27 Pac. 677.

Illinois.— Alley *v.* McCabe, 147 Ill. 410, 35 N. E. 615; Chicago, etc., R. Co. *v.* De Marko, 51 Ill. App. 581; Cline *v.* Toledo, etc., R. Co., 41 Ill. App. 516.

Indiana.— Keiser *v.* Lines, 79 Ind. 445; Fromm *v.* Lawrence, 16 Ind. 384; Moore *v.* Combs, 24 Ind. App. 22, 56 N. E. 35.

Kansas.— Kœhler *v.* Ball, 2 Kan. 154, 83 Am. Dec. 451; Waysman *v.* Updegraff, McCahon (Kan.) 88.

Kentucky.— Louisville Bridge Co. *v.* Neafus, (Ky. 1901) 62 S. W. 2; Wisconsin Chair Co. *v.* Columbia Finance, etc., Co., (Ky. 1900) 60 S. W. 19.

Maryland.— Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711; Albert *v.* State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; Hopkins *v.* Kent, 17 Md. 113.

Mississippi.— Dreyfus *v.* Cage, 62 Miss. 605; Graves *v.* Monet, 7 Sm. & M. (Miss.) 45.

Missouri.— Cooper *v.* Maloney, (Mo. 1901) 63 S. W. 372; Roberts *v.* Jones, 148 Mo. 368, 49 S. W. 985.

Montana.— Kleinschmidt *v.* McAndrews, 4 Mont. 8, 223, 2 Pac. 286, 5 Pac. 281.

Nebraska.— Jewett *v.* Osborne, 33 Nebr. 24, 49 N. W. 774; Quick *v.* Sachsse, 31 Nebr. 312, 47 N. W. 935.

New Jersey.— Lutes *v.* Alpaugh, 23 N. J. L. 165.

New York.—Radcliff *v.* Rhan, 5 Den. (N. Y.) 234.

Ohio.— Shilito *v.* Thacker, 43 Ohio St. 63 1 N. E. 438; Rankin *v.* Sanderson, 35 Ohio St. 482. See also Wagner *v.* Ziegler, 44 Ohio St. 59, 4 N. E. 705.

Oregon.— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

Pennsylvania.— Com. *v.* Arnold, 161 Pa.

not be considered on appeal, though counsel stipulate its correctness.[12] It has also been held that even a statement in the record that defendant filed a bill signed by the trial judge is not sufficient to cure a defect arising from the absence of the judge's signature to the bill.[13]

(II) *Place of Signing.* As the act of signing a bill of exceptions is the act of the judge and not of the court,[14] it is not essential that the bill shall be signed in open court.[15]

(III) *Time of Signing.* Where a bill of exceptions is presented to the trial judge within the time prescribed, the rights of appellant or plaintiff in error will not be prejudiced by the judge's delay in signing it. In such case the maxim *actus curiæ neminem gravabit* applies.[16]

St. 320, 34 Wkly. Notes Cas. (Pa.) 313, 29 Atl. 270 [*distinguishing* Chase *v.* Vandegrift, 88 Pa. St. 217].

Tennessee.— State *v.* Hawkins, 91 Tenn. 140, 18 S. W. 114.

Texas.— Missouri, etc., R. Co. *v.* Cock, (Tex. Civ. App. 1899) 51 S. W. 354; Western Union Tel. Co. *v.* Trice, (Tex. Civ. App. 1898) 48 S. W. 770.

Vermont.— See Small *v.* Haskins, 29 Vt. 187.

West Virginia.— Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194.

Wisconsin.— Leonard *v.* Warriner, 20 Wis. 41.

Wyoming.— White *v.* Sisson, 1 Wyo. 395.

United States.— Malony *v.* Adsit, 175 U. S. 281, 20 S. Ct. 115, 44 L. ed. 163; Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 95.

Curing defect.—Where the first exception was not signed, but the second, which was signed, referred to the first as stating all the necessary facts, the defect is thereby cured. Hopkins *v.* Kent, 17 Md. 113.

12. *Alabama.*— Southern Express Co. *v.* Black, 54 Ala. 177; Kerley *v.* Vann, 52 Ala. 7.

California.— Gee *v.* Terrio, 55 Cal. 381. *Compare* Sarver *v.* Garcia, 49 Cal. 218.

Colorado.— Denver *v.* Capelli, 3 Colo. 235.

Florida.— Robinson *v.* Matthews, 16 Fla. 319.

Illinois.— Illinois Cent. R. Co. *v.* Gilchrist, 9 Ill. App. 135.

Indiana.— Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427.

Kansas.— Hodgden *v.* Ellsworth County, 10 Kan. 637.

Michigan.— Wessels *v.* Beeman, 66 Mich. 343, 33 N. W. 516.

Nebraska.— Credit Foncier of America *v.* Rogers, 8 Nebr. 34.

Wisconsin.— Leonard *v.* Warriner, 20 Wis. 41.

United States.— Malony *v.* Adsit, 175 U. S. 281, 20 S. Ct. 115, 44 L. ed. 163.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 77½.

13. Cooper *v.* Maloney, (Mo. 1901) 63 S. W. 372; State *v.* Hawkins, 91 Tenn. 140, 18 S. W. 114.

The certificate of the judge below that the transcript contained a certain bill of exceptions does not cure the defect of presenting such bill unsigned by such judge. Alford *v.* Eubank, 44 Ala. 276.

14. *Ex p.* Nelson, 62 Ala. 376.

15. Chicago *v.* South Park Com'rs, 169 Ill. 387, 48 N. E. 680; Oliver *v.* Town, 24 Wis. 512. But see Corley *v.* Evans, 4 Bush (Ky.) 409, wherein it was held that a bill of exceptions, prepared and signed extrajudicially, out of court, is unauthorized and void.

Presentation outside of county.—A bill of exceptions, on appeal from a justice of the peace, which was presented to the justice outside of his county, but signed by him within his county, is not objectionable, since the signature which makes the bill effective was given within his jurisdiction. Deibolt *v.* Bradley, (Kan. App. 1900) 62 Pac. 431.

16. *Colorado.*— Swem *v.* Green, 9 Colo. 358, 12 Pac. 202; Denver *v.* Capelli, 3 Colo. 236.

Florida.— Glasser *v.* Hackett, 37 Fla. 358, 20 So. 532; Livingston *v.* Cooper, 22 Fla. 292; Mayo *v.* Hynote, 16 Fla. 673.

Georgia.— See Loud *v.* Pritchett, 104 Ga. 648, 30 S. E. 870.

Illinois.—Olds *v.* North Chicago St. R. Co., 165 Ill. 472, 46 N. E. 446 [*affirming* 64 Ill. App. 595]; West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118 [*affirming* 55 Ill. App. 218]; Weber *v.* German Ins. Co., 80 Ill. App. 390; Yunker *v.* Marshall, 65 Ill. App. 667.

Indiana.— Vincennes Water Supply Co. *v.* White, 124 Ind. 376, 24 N. E. 747; Terre Haute, etc., R. Co. *v.* Bissell, 108 Ind. 113, 9 N. E. 144; Ohio, etc., R. Co. *v.* Cosby, 107 Ind. 32, 7 N. E. 373; Robinson *v.* Anderson, 106 Ind. 152, 6 N. E. 12; Brower *v.* Ream, 15 Ind. App. 51, 42 N. E. 824.

Kentucky.—Toner *v.* South Covington, etc., St. R. Co., (Ky. 1900) 58 S. W. 439; Chenault *v.* Quisenberry, 19 Ky. L. Rep. 1632, 43 S. W. 717; Fuqua *v.* Moseley, 12 Ky. L. Rep. 989; Ray *v.* Grove, 6 Ky. L. Rep. 736.

Maine.— Field *v.* Gellerson, 80 Me. 270, 14 Atl. 70.

Maryland.— Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698.

Massachusetts.— Browne *v.* Hale, 127 Mass. 158.

Michigan.— People *v.* Judge of Super. Ct., 41 Mich. 726, 49 N. W. 925; People *v.* Vanburen Cir. Judge, 41 Mich. 725, 49 N. W. 921.

Mississippi.—McGee *v.* Beall, 63 Miss. 455.

(iv) *Matters Following Signature.* Whatever precedes the certificate of the judge to the bill will be regarded as a part of such bill, and may be verified by the certificate alone; but whatever follows such certificate must be distinctly identified.[17]

f. Seal. In some jurisdictions a bill of exceptions must be under the seal of the trial judge;[18] in others no seal is necessary.[19]

g. Filing[20]—(i) *Necessity.* A bill of exceptions, to be available on appeal, must be filed.[21]

Missouri.— Wells *v.* Estes, 154 Mo. 291, 55 S. W. 255.

Nebraska.— Parker *v.* Kuhn, 19 Nebr. 394, 27 N. W. 399.

South Dakota.— Pollock *v.* Aikens, 4 S. D. 374, 57 N. W. 1.

Tennessee.— *Compare* Jones *v.* Burch, 3 Lea (Tenn.) 747.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 66.

Presumption as to time of signing.—Where a bill of exceptions was signed and sealed by the judge who presided at the trial, and was filed within the time limited by the court, but it did not appear when it was signed, it will be presumed that it was signed before being filed. Kean *v.* West Chicago St. R. Co., 75 Ill. App. 38. See *infra*, XVII, E, 1, d.

17. Watson *v.* McCarty, 72 Ga. 216; Hancock *v.* Perkins, 68 Ga. 830; Bridges *v.* Banks, 62 Ga. 653; Colquitt *v.* Solomon, 61 Ga. 492; Harris *v.* Brain, 33 Ill. App. 510; State *v.* Lanham, 6 Mo. App. 577. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 27.

Papers attached after the judge has signed the bill will not be considered. Hursen *v.* Lehman, 35 Ill. App. 489; France *v.* Omaha First Nat. Bank, 3 Wyo. 187, 18 Pac. 748.

18. *Alabama.*— Godden *v.* Le Grand, 28 Ala. 158; Floyd *v.* Fountain, 17 Ala. 700.

Colorado.— Reed *v.* Cates, 11 Colo. 527, 19 Pac. 464; Gates *v.* People, 11 Colo. 292, 17 Pac. 783; Laffey *v.* Chapman, 9 Colo. 304, 12 Pac. 152; Marshall Silver Min. Co. *v.* Kirtley, 8 Colo. 108, 5 Pac. 649; De la Mar *v.* Hurd, 4 Colo. 442; Denver *v.* Capelli, 3 Colo. 235.

Illinois.— Miller *v.* Jenkins, 44 Ill. 443; Higgins *v.* Hide, etc., Nat. Bank, 88 Ill. App. 33; Cudney *v.* Martindale, 86 Ill. App. 672; Farmers Trust Co. *v.* Kimball, 84 Ill. App. 613; French *v.* Hotchkiss, 60 Ill. App. 580; Sterling *v.* Grove, 56 Ill. App. 370; Chicago, etc., R. Co. *v.* De Marko, 51 Ill. App. 581; Cline *v.* Toledo, etc., R. Co., 41 Ill. App. 516; Chicago, etc., R. Co. *v.* Johnson, 34 Ill. App. 351; Widows, etc., Beneficiary, etc., Assoc. *v.* Powers, 30 Ill. App. 82; Chicago, etc., R. Co. *v.* Benham, 25 Ill. App. 248; Thompson *v.* Duff, 17 Ill. App. 304; Bunker Hill *v.* Johnson, 12 Ill. App. 255; Gale *v.* Rector, 10 Ill. App. 262; Illinois Cent. R. Co. *v.* Gilchrist, 9 Ill. App. 135.

Indiana.— See Springer *v.* Peterson, 1 Blackf. (Ind.) 188.

Maryland.— Lancaster *v.* Herbert, 74 Md. 334, 22 Atl. 139; Albert *v.* State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; Ellicott *v.* Martin, 6 Md. 509, 61 Am. Dec. 327; Davis *v.* Wilson, 2 Harr. & J. (Md.) 345. See also Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711.

Mississippi.— Forniquet *v.* Tegarden, 24 Miss. 96.

New York.—Radcliff *v.* Rhan, 5 Den. (N. Y.) 234.

Ohio.— Rankin *v.* Sanderson, 35 Ohio St. 482. See also Darling *v.* Gill, Wright (Ohio) 73.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 95.

A scroll around the word "seal," opposite the signature of the judge who signs the bill of exceptions, is a sufficient seal. Kenan *v.* Starke, 6 Ala. 773. See also Morgenson *v.* Middlesex Min., etc., Co., 11 Colo. 176, 17 Pac. 513.

Time of sealing.—Where a bill of exceptions was tendered to the trial judge, who signed it and affixed the date of tender within the time limited, the fact that it was not sealed by the judge until after filing is immaterial. Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

19. *Florida.*— Robinson *v.* L'Engle, 13 Fla. 482.

Kansas.— In cases tried before a justice of the peace a bill of exceptions need not have a seal. Stager *v.* Harrington, 27 Kan. 414.

Kentucky.—A bill of exceptions, when made part of the record, requires no seal. Washington *v.* McGee, 3 Dana (Ky.) 445.

Missouri.— Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152; Williams *v.* Kitchen, 43 Mo. App. 338.

Pennsylvania.— See Chase *v.* Vandergrift, 88 Pa. St. 217.

United States.— Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743; Herbert *v.* Butler, 97 U. S. 319, 24 L. ed. 958; Generes *v.* Campbell, 11 Wall. (U. S.) 193, 20 L. ed. 110.

20. As to record showing filing of bill see *supra*, XIII, A, 6, b [2 Cyc. 1041].

21. *Colorado.*— Pettit *v.* People, 24 Colo. 517, 52 Pac. 676.

Georgia.— Russell *v.* March, 6 Ga. 491.

Indiana.— Louisville, etc., R. Co. *v.* Schmidt, 147 Ind. 638, 46 N. E. 344; Miller *v.* Evansville, etc., R. Co., 143 Ind. 570, 41 N. E. 801, 42 N. E. 806; De Hart *v.* Johnson County, 143 Ind. 363, 41 N. E. 825; Pillsbury, etc., R. Co. *v.* O'Brien, 142 Ind. 218, 41 N. E. 528; Nordyke *v.* McCreery, 21 Ind. App. 708, 52 N. E. 89; McCormick Harvesting Mach. Co. *v.* Smith, 21 Ind. App. 617, 52 N. E. 1000.

Indian Territory.— Kelly *v.* Johnson, 1 Indian Terr. 184, 39 S. W. 352.

Kentucky.— Kentucky Lodge No. 39, etc.

(II) *Place of Filing.* A bill of exceptions should be filed in the court in which the proceedings excepted to were had.[22]

(III) *Time of Filing.*[23] A bill of exceptions must be filed within the time prescribed by statute or rule of court.[24]

h. Service — (I) *Necessity.* A bill of exceptions must be served on the adverse party when so required to be done by statute.[25]

(II) *Persons to Be Served.* All substantial defendants in error must be served with the bill.[26]

v. White, 5 Ky. L. Rep. 766; Linden *v.* Haddix, 4 Ky. L. Rep. 633; Padget *v.* Mays, 2 Ky. L. Rep. 213.

Missouri.— State *v.* Leslie, 83 Mo. 60; Johnson *v.* Hodges, 65 Mo. 589; Williams *v.* Williams, 26 Mo. App. 408.

Ohio.— Schott *v.* Hunt, 6 Ohio Dec. (Reprint) 1087.

Texas.— Baker *v.* Milde, (Tex. Civ. App. 1895) 33 S. W. 152.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 97.

Iowa Code (1873), § 200, providing that no pleading shall be considered as filed until a memorandum is made on the appearance docket, does not apply to a bill of exceptions. Royer *v.* Foster, 62 Iowa 321, 17 N. W. 516.

Sufficiency of filing.— Causing a bill of exceptions to be actually placed in the hands of the clerk of a trial court within the time prescribed by law for filing the same in his office is all that is required of a plaintiff in error or his counsel. McDaniel *v.* Columbus Fertilizer Co., 109 Ga. 284, 34 S. E. 598; Preble *v.* Bates, 40 Fed. 745. The filing of a bill of exceptions in open court is equivalent to a filing in the clerk's office. Wabash Paper Co. *v.* Webb, 146 Ind. 303, 45 N. E. 474. The fact that a bill of exceptions was filed by the judge of the district court on his own motion, and not on the motion of either of the parties to the action, does not affect its conclusiveness as a part of the record. Shepherd *v.* Brenton, 15 Iowa 84.

Omission of file-mark.—Where a bill of exceptions was delivered to the clerk for the purpose of being filed within the prescribed time, the omission of the filing-mark is not proof that it was not filed. Young *v.* Gaut, (Ark. 1901) 61 S. W. 372; Eldred *v.* Malloy, 2 Colo. 20; Foster *v.* Hinsen, 75 Iowa 291, 39 N. W. 505. See also Anderson *v.* Leverich, 70 Iowa 741, 30 N. W. 39.

22. Jackson *v.* Stoner, 17 Kan. 605. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 99.

Change of venue.—A bill of exceptions to the ruling of a court in one county, where a cause was taken by a change of venue, cannot legally be filed in the same cause in the county from which the venue had been changed, after the cause has been remanded to that county, though the same judge holds both courts. McMahan *v.* Spinning, 51 Ind. 187.

23. As to record showing time of filing of bill see *supra*, XIII, A, 6, b [2 Cyc. 1041].

24. *Arkansas.*— Texarkana, etc., R. Co. *v.* Scull, 66 Ark. 312, 50 S. W. 693; Stinson *v.* Shafer, 58 Ark. 110, 23 S. W. 651; Watson *v.* Watson, 53 Ark. 415, 14 S. W. 622.

Indiana.— La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Brouse *v.* Price, 20 Ind. 216. *Compare* Albaugh *v.* James, 29 Ind. 398.

Iowa.—Cobb *v.* Chase, 54 Iowa 196, 6 N. W. 264. *Compare* Jones *v.* Hockman, 12 Iowa 101.

Massachusetts.— Tufts *v.* Newton, 119 Mass. 476.

Missouri.— Fulkerson *v.* Houts, 55 Mo. 301.

Ohio.— *Compare* Potter *v.* Myers, 31 Ohio St. 103; Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502.

Vermont.— Mead *v.* Moretown, 72 Vt. 323, 47 Atl. 1072.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 66.

Filing before signing.—A bill of exceptions filed before it was signed by the judge, and not again refiled, cannot be considered. Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. 336; Gifford *v.* Hess, 15 Ind. App. 450, 43 N. E. 906.

A nunc pro tunc order, filing a bill of exceptions as of the date it was indorsed "Filed," is valid where there is evidence showing that an order filing the bill, though not entered, was made at the time the bill was filed. Washington L. Ins. Co. *v.* Menefee, 21 Ky. L. Rep. 916, 53 S. W. 260.

25. Ward *v.* State, 87 Ga. 160, 13 S. E. 711; Craig *v.* Webb, 70 Ga. 188; Walker *v.* Johnson, 64 Ga. 363; McLendon *v.* McLendon, 61 Ga. 110; Worshaw *v.* Newton, 60 Ga. 595; Bliss *v.* Stevens, 13 Ga. 401. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 100.

Amendment of bill.—Where a bill of exceptions is changed by the judge after service is acknowledged on it, it must be served anew. Wynn *v.* Benning, 42 Ga. 656.

Sufficiency of service.— It is not necessary that service be made by plaintiff himself. Walter *v.* Kierstead, 74 Ga. 18. Leaving a copy at the residence of defendant in error is sufficient. Montgomery *v.* Walker, 41 Ga. 681. Mailing a copy addressed to the attorneys of defendant is not enough, though such attorney admits receiving it. Clark *v.* Lyon, 48 Ga. 125.

Waiver of service.—Where there has been no service of the bill of exceptions as required by law, the written waiver of such service will not operate to give the appellate court jurisdiction of the same. Moss *v.* Burch, 99 Ga. 94, 24 S. E. 865; Thomas *v.* Reppard, 74 Ga. 410; Darby *v.* Wesleyan Female College, 72 Ga. 212; Johnson *v.* Atlanta, 70 Ga. 728; Cowart *v.* Page, 59 Ga. 235; Phillips *v.* McNeice, 50 Ga. 358; Meador *v.* Dent, 48 Ga. 126.

26. Anderson *v.* Faw, 79 Ga. 558, 4 S. E. 920; Traynham *v.* Brown, 74 Ga. 410; Simp-

(III) *TIME OF SERVICE.* The bill must be served within the time indicated by the statute, or the delay will be fatal.[27]

(IV) *ACKNOWLEDGMENT OF SERVICE.* There must be an acknowledgment of service indorsed on the bill if the statute so requires.[28] Such an acknowledgment, it has been held, only relates to and binds the person actually named or sufficiently designated therein as a defendant in error when the acknowledgment is entered.[29]

i. Mandamus to Compel Settlement — (I) *STATEMENT OF RULE.* The power of an appellate court, in aid of its appellate jurisdiction, to compel a trial judge to sign a bill of exceptions is well established.[30]

son *v.* Mathis, 74 Ga. 115; Jowers *v.* Baker, 65 Ga. 611; Maynard *v.* Hunnewell, 65 Ga. 281; Jordan *v.* Kelly, 63 Ga. 437; Hudson *v.* Board of Education, 62 Ga. 165; Curey *v.* Hitch, 57 Ga. 197. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 103.

A bill of exceptions, taken by a part of defendants to the overruling of a demurrer to a bill in equity, need not be served on the other defendants. Mechanics', etc., Bank *v.* Harrison, 68 Ga. 463.

Service on attorney only.—Where there was no evidence that defendant in error was a non-resident, and the return shows a bill of exceptions served on his attorney only, a writ of error will be dismissed. Southwestern Georgia Bank *v.* Tillman, 94 Ga. 731, 20 S. E. 4.

27. Greer *v.* Holdridge, 86 Ga. 791, 13 S. E. 108; Wing *v.* Harris, 75 Ga. 236; Head *v.* Bridges, 72 Ga. 30; Jones *v.* Daniel, 66 Ga. 246; Beckham *v.* Hulsey, 60 Ga. 594; Bradley *v.* Sadler, 57 Ga. 191; Platen *v.* Johnson, 54 Ga. 455; Watson *v.* Johnson, 40 Ga. 544. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 102.

Laches of counsel in perfecting service of a bill confers no right upon the client to have a second bill. Williams *v.* Clarke, 70 Ga. 405.

Service before signing.— Service of a bill of exceptions before it has been certified by the judge is invalid. Whitley Grocery Co. *v.* Walker, 111 Ga. 846, 36 S. E. 426; Southern R. Co. *v.* Brannon, 102 Ga. 578, 27 S. E. 663; Riley *v.* Echols, 99 Ga. 321, 25 S. E. 649; Bush *v.* Keaton, 65 Ga. 296; Nichols *v.* Fraser, 54 Ga. 696; Tison *v.* Forrester, 50 Ga. 87.

28. Crow *v.* State, 111 Ga. 645, 36 S. E. 858 (holding that service cannot be shown in the supreme court by parol statements of counsel or by the production of detached writings purporting to evidence service); Goodwin *v.* Kennedy, 99 Ga. 123, 24 S. E. 975; Westfield *v.* Toccoa City, 80 Ga. 735, 6 S. E. 471; Wostenholmes *v.* State, 71 Ga. 669; Akerman *v.* Neel, 70 Ga. 728; Arnett *v.* Gurley, 59 Ga. 666; Burney *v.* Collins, 50 Ga. 90; Clark *v.* Lyon, 48 Ga. 125; Coleman *v.* Ransom, 45 Ga. 316. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 104.

Acknowledgment without date.—A writ of error will be dismissed where the acknowledgment of service on the bill of exceptions is without date and signed by attorneys who appear neither in such acknowledgment nor elsewhere on the record to represent defendant. Weatherly *v.* Mimms, 63 Ga. 161.

After the time allowed for filing a bill of exceptions has expired it is too late to file an affidavit of service, or indorse it on the bill of exceptions. Plummer *v.* Moore, 63 Ga. 626.

29. Orr *v.* Webb, 112 Ga. 806, 38 S. E. 98; Mutual Bldg., etc., Co. *v.* Dickinson, 112 Ga. 469, 37 S. E. 713; McCain *v.* Sutlive, 109 Ga. 547, 34 S. E. 1013; Papworth *v.* Ryman, 108 Ga. 780, 33 S. E. 665; White *v.* Bleckley, 105 Ga. 173, 31 S. E. 147; Inman *v.* Estes, 104 Ga. 645, 30 S. E. 800; Anderson *v.* Faw, 79 Ga. 558, 4 S. E. 920; Brantley *v.* Brookins, 74 Ga. 843; Allen *v.* Cravens, 68 Ga. 554; Smith *v.* Eckles, 65 Ga. 326.

Acknowledgment by person other than defendant.— In order for an acknowledgment of service entered on a bill of exceptions, and signed by one other than defendant in error, to evidence legal service thereof it must affirmatively appear that the person signing such acknowledgment was the attorney for defendant in error. Redman *v.* Hitchins, (Ga. 1901) 38 S. E. 819.

30. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Etheridge *v.* Hall, 7 Port. (Ala.) 47.

Arkansas.— Garibaldi *v.* Carroll, 33 Ark. 568.

California.— Gamache *v.* Budd, 129 Cal. 554, 62 Pac. 105; Houghton *v.* Superior Ct., 128 Cal. 352, 60 Pac. 972.

Delaware.— A superior court has no jurisdiction, by mandamus, to compel the orphans' court to sign the bill of exceptions. Crawford *v.* Short, 1 Harr. (Del.) 355.

Georgia.— Sears *v.* Candler, 112 Ga. 381, 37 S. E. 442; Brinson *v.* Callaway, 112 Ga. 162, 37 S. E. 177.

Illinois.— People *v.* Anthony, 129 Ill. 218, 21 N. E. 780; People *v.* Jameson, 40 Ill. 93, 89 Am. Dec. 337.

Indiana.— Jelley *v.* Roberts, 50 Ind. 1; Bogue *v.* Murphy, 25 Ind. App. 102, 57 N. E. 726.

Kansas.— Swartz *v.* Nash, 45 Kan. 341, 25 Pac. 873; Green *v.* Bulkley, 23 Kan. 130.

Louisiana.— Broussart *v.* Trahan, 3 Mart. (La.) 714.

Maryland.— Marsh *v.* Hand, 35 Md. 123; Briscoe *v.* Ward, 1 Harr. & J. (Md.) 165.

Mississippi.— *Ex p.* Robson, Walk. (Miss.) 412.

Missouri.— State *v.* Field, 37 Mo. App. 83.

(II) *Limitations of Rule.* An appellate court, however, will not require a judge to sign a bill of exceptions which he asserts contains untruthful,[31] irrelevant, or unnecessary matter,[32] unless upon the clearest and most convincing showing, made to appear properly before the court below and incorporated in the record sent to the appellate court.[33] And mandamus will not lie to compel settlement of a bill of exceptions when it is apparent the bill would be useless if signed.[34] It has also been held that one who has ceased to be judge cannot be compelled to settle a bill.[35]

Montana.— Montana Ore-Purchasing Co. *v.* Lindsay, (Mont. 1901) 63 Pac. 715.

Nebraska.— State *v.* Weaver, 11 Nebr. 163, 8 N. W. 385.

New Jersey.— Wilson *v.* Moore, 19 N. J. L. 186; Budd *v.* Crea, 6 N. J. L. 370.

New York.— Tweed *v.* Davis, 1 Hun (N. Y.) 252, 47 How. Pr. (N. Y.) 162; Sikes *v.* Ransom, 6 Johns. (N. Y.) 279.

Ohio.— State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1; State *v.* Todd, 4 Ohio 351.

Oregon.— Che Gong *v.* Stearns, 16 Oreg. 219, 17 Pac. 871; Ah Lep *v.* Gong Choy, 13 Oreg. 205, 9 Pac. 483.

Pennsylvania.— The supreme court has no power to issue a mandamus to the district court for the city and county of Philadelphia to compel it to sign a bill of exceptions. Drexel *v.* Man, 6 Watts & S. (Pa.) 386, 40 Am. Dec. 573.

Tennessee.— State *v.* Cooper, (Tenn. 1901) 64 S. W. 50; State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070.

Virginia.— Collins *v.* Christian, 92 Va. 731, 24 S. E. 472; Page *v.* Clopton, 30 Gratt. (Va.) 415.

West Virginia.— Potet *v.* Cabell County, 30 W. Va. 58, 3 S. E. 97; Henry *v.* Davis, 13 W. Va. 230.

Wisconsin.— State *v.* Noggle, 13 Wis. 380.

United States.— *Ex p.* Bradstreet, 4 Pet. (U. S.) 102, 7 L. ed. 796; Scaife *v.* Western North Carolina Land Co., 87 Fed. 308, 59 U. S. App. 28, 30 C. C. A. 661.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 82.

Payment of fees.— Cal. Code Civ. Proc. § 274, which provides that the reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed as costs against the party against whom judgment is rendered, does not authorize the trial judge to refuse to settle the bill of exceptions until appellant has paid to the reporter certain fees ordered during the trial, and a writ of mandate will issue to compel the judge to settle such bill. James *v.* McCann, 93 Cal. 513, 29 Pac. 49.

31. *Alabama.*— Etheridge *v.* Hall, 7 Port. (Ala.) 47.

Illinois.— People *v.* Anthony, 129 Ill. 218, 21 N. E. 780; People *v.* Jameson, 40 Ill. 93, 89 Am. Dec. 337; People *v.* Pearson, 3 Ill. 189, 33 Am. Dec. 445.

Indian Territory.— Kearney *v.* Liverpool, etc., Ins. Co., 1 Indian Terr. 328, 37 S. W. 143.

Iowa.— The supreme court will not, by mandamus, compel the trial judge to settle and allow a bill of exceptions presented to him, since, if the judge refuses to settle and allow the bill of exceptions presented on the ground that the same is untrue, the appellant has a legal remedy by presenting a bill signed by bystanders. Jamison *v.* Reid, 2 Greene (Iowa) 394.

Kansas.— Shepard *v.* Peyton, 12 Kan. 616.

Missouri.— State *v.* Wickham, 65 Mo. 634; State *v.* Thayer, 15 Mo. App. 391.

New Jersey.— Benedict *v.* Howell, 39 N. J. L. 221.

New York.— Tweed *v.* Davis, 1 Hun (N. Y.) 252, 4 Thomps. & C. (N. Y.) 1, 47 How. Pr. (N. Y.) 162; People *v.* West Chester Judges, 2 Johns. Cas. (N. Y.) 118.

Ohio.— State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1; Creager *v.* Meeker, 22 Ohio St. 207; State *v.* Todd, 4 Ohio 351.

Tennessee.— Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786.

Virginia.— Collins *v.* Christian, 92 Va. 731, 24 S. E. 472.

Wisconsin.— State *v.* Noggle, 13 Wis. 380.

United States.— *Ex p.* Bradstreet, 4 Pet. (U. S.) 102, 7 L. ed. 796.

Signing substitute bill.—Although it is irregular and an abuse of discretion to discard a proper bill of exceptions tendered for settlement, and to adopt as a substitute one submitted by the adverse party, yet the case is not one calling for the extraordinary writ of mandamus, where the bill as settled is not so far defective as to fail fairly to present substantially all the questions sought to be raised. People *v.* Wayne Cir. Judge, 32 Mich. 259.

32. Pacific Land Assoc. *v.* Hunt, 105 Cal. 202, 38 Pac. 635; Little *v.* Sparks, 112 Ga. 220, 37 S. E. 364; Montana Ore-Purchasing Co *v.* Lindsay, (Mont. 1901) 63 Pac. 715.

33. State *v.* Cooper, (Tenn. 1901) 64 S. W. 50.

34. *Georgia.*— Dotterer *v.* Harden, 88 Ga. 145, 13 S. E. 971; Pitts *v.* Hall, 60 Ga. 389.

Illinois.— People *v.* Smith, 51 Ill. 177.

Indiana.— State *v.* Cox, 155 Ind. 593, 58 N. E. 849; Borchus *v.* Sayler, 90 Ind. 439.

Michigan.— People *v.* Judge Cir. Ct., 30 Mich. 266.

Missouri.— Walker *v.* Stoddard Cir. Judge, 31 Mo. 123.

35. *California.*— Leach *v.* Aitken, 91 Cal. 484, 28 Pac. 777.

Illinois.— People *v.* Pearson, 4 Ill. 270; People *v.* Altgeld, 43 Ill. App. 460.

Michigan.—De Haas *v.* Newaygo Cir. Judge, 46 Mich. 12, 8 N. W. 587.

Montana.— *Contra,* Montana Ore-Purchas-

(III) *TIME OF APPLICATION.* An applicant for a writ of mandamus to compel the trial judge to settle a bill of exceptions must show diligence on his own part.[36]

(IV) *PLEADING* — (A) *The Writ.* The writ must show facts sufficient to entitle the relator to the relief which he claims.[37]

(B) *Return or Answer.* The return or answer to a mandamus to compel the settlement of a bill of exceptions must respond to all the allegations in the writ, or it will be bad on demurrer.[38]

ing Co. *v.* Lindsay, (Mont. 1901) 63 Pac. 715.

Washington.— *Compare* State *v.* Allyn, 7 Wash. 285, 34 Pac. 914.

Successor of trial judge.—A circuit judge cannot be compelled to settle and sign a bill of exceptions in a case tried before his predecessor. Fellows *v.* Tait, 14 Wis. 156. See also Visher *v.* Smith, 92 Cal. 60, 28 Pac. 94; State *v.* Slick, 86 Ind. 501.

36. Vason *v.* Gardner, 70 Ga. 517; State *v.* Dyer, 99 Ind. 426; Eggleston *v.* Kent Cir. Judge, 50 Mich. 147, 15 N. W. 55. See also Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85, wherein it was held that, when a judge has vacated his office, certiorari is the proper process to obtain of him a return of a bill of exceptions; but, in case of the laches of plaintiff in error, the court may impose terms on granting the writ, or decline to grant it at all.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 81.

Expiration of time for appeal.— Mandamus to compel settlement and allowance of a bill of exceptions which petitioner was entitled to have settled and allowed will be denied where the time for appealing has expired and no appeal has been taken. Flagg *v.* Puterbaugh, 98 Cal. 134, 32 Pac. 863. See also Board of Police *v.* Ray, 12 Sm. & M. (Miss.) 342.

37. People *v.* Baker, 35 Barb. (N. Y.) 105; Morgan *v.* Fleming, 24 W. Va. 186. See also Montana Ore-Purchasing Co. *v.* Lindsay, (Mont. 1901) 63 Pac. 715. And see Creager *v.* Meeker, 22 Ohio St. 207, wherein it was held that an application for a mandamus to compel a judge to sign a bill of exceptions should be accompanied by the bill that was tendered to him for his allowance.

See, generally, MANDAMUS; and 21 Cent. Dig. tit. "Exceptions, Bill of," § 84.

In California it has been held that a petition for a mandate to settle a bill of exceptions must show that the bill was presented to the judge on the required notice to the district attorney, and when it was presented to the judge or delivered to the clerk. Anschlag *v.* Superior Ct., 76 Cal. 513, 18 Pac. 676.

Amendment.— The writ may be amended before return and demurrer thereto. People *v.* Baker, 35 Barb. (N. Y.) 105.

Leave of court.—In Illinois it has been held that a petition for mandamus, and summons issued to compel the judge of the superior court to sign a bill of exceptions, without leave of court first obtained, will be quashed. Hawkins *v.* Harding, 35 Ill. App. 25.

Necessity of petition.—A petition must be filed, setting forth the grounds of the application, before the supreme court will award a mandamus to compel a judge to sign a bill of exceptions, a mere affidavit by one of the attorneys in the case, accompanied by the bill of exceptions which the judge refused to sign, being insufficient. People *v.* Loomis, 94 Ill. 587. See also Ruppertsberger *v.* Clark, 53 Md. 402, wherein it was held that a compulsory writ, requiring the judge to sign the bill of exceptions, must be specifically prayed in a proper proceeding for that purpose as against the judge, and cannot be granted upon a bill against the other parties to the cause and under the prayer for general relief.

Form of petition for mandamus to compel settlement of bill of exceptions is set out in People *v.* Pearson, 3 Ill. 189, 33 Am. Dec. 445; State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1; Haines *v.* Com., 99 Pa. St. 411; Poteet *v.* Cabell County, 30 W. Va. 58, 3 S. E. 97.

38. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235; People *v.* Baker, 35 Barb. (N. Y.) 105; State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1. See also Conrow *v.* Schloss, 55 Pa. St. 28, wherein it was held that where the return to a writ of mandamus, compelling the judge of a lower court to confess and seal, or deny, exceptions, is argumentative and uncertain the court will allow exceptions to the return to be filed.

See, generally, MANDAMUS; and 21 Cent. Dig. tit. "Exceptions, Bill of," § 85.

Conclusiveness of return.— The return by a court to a mandamus *nisi* to show cause why it should not be compelled to sign a bill of exceptions, that the bill did not state the facts truly, is conclusive.

Illinois.— People *v.* Anthony, 129 Ill. 218, 21 N. E. 780.

Indiana.— Jelley *v.* Roberts, 50 Ind. 1.

Kansas.— Shepard *v.* Peyton, 12 Kan. 616.

New Jersey.— Benedict *v.* Howell, 39 N. J. L. 221.

Ohio.— State *v.* Todd, 4 Ohio 351.

West Virginia.— Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742; Poteet *v.* Cabell County, 30 W. Va. 58, 3 S. E. 97; Douglass *v.* Loomis, 5 W. Va. 542.

Wisconsin.— State *v.* Small, 47 Wis. 436, 2 N. W. 544.

United States.— *Ex p.* Bradstreet, 4 Pet. (U. S.) 102, 7 L. ed. 796.

Oath.—A judge need not make oath to his return of the reasons why he refused to sign a bill of exceptions. *Ex p.* Bradstreet, 4 Pet. (U. S.) 102, 7 L. ed. 796.

Form of return is set out in Haines *v.* Com.,

j. Right of Appeal From Refusal to Settle. The refusal of the trial court to settle a bill of exceptions cannot be assigned as error.[39]

7. Amendment or Correction of Bill — a. Power to Amend or Correct. The court has power, on an application seasonably made, to amend or correct a bill of exceptions.[40]

b. Time of Amendment. A bill of exceptions, when signed by the trial judge, becomes a part of the record and cannot be altered or added to by the judge after the adjournment of the term,[41] except in cases where, by inadvert-

99 Pa. St. 411; Poteet *v.* Cabell County, 30 W. Va. 58, 3 S. E. 97.

39. *Alabama.*— Turner *v.* White, 97 Ala. 545, 12 So. 601.

Arkansas.— Garibaldi *v.* Carroll, 33 Ark. 568.

California.— *Contra*, Stonesifer *v.* Kilburn, 94 Cal. 33, 29 Pac. 332 [*overruling* Ketchum *v.* Crippen, 31 Cal. 365].

Illinois.— Hulett *v.* Ames, 74 Ill. 253.

Kansas.— Green *v.* Bulkley, 23 Kan. 130.

New Jersey.— Wilson *v.* Moore, 19 N. J. L. 186; Budd *v.* Crea, 6 N. J. L. 370.

Maryland.— Carey *v.* Merryman, 46 Md. 89; Marsh *v.* Hand, 35 Md. 123.

Minnesota.— Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270.

Missouri.— Darrah *v.* Steamboat Lightfoot, 17 Mo. 276.

Tennessee.— Mallon *v.* Tucker Mfg. Co., 7 Lea (Tenn.) 62; Miller *v.* Koger, 9 Humphr. (Tenn.) 230.

Wisconsin.— Messenger *v.* Broom, 1 Pinn. (Wis.) 630.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 86.

Certiorari will not be granted, on the ground that movant's failure to settle exceptions was due to a waiver of the requirements of the code as to settlement, when the affidavits of parties as to such waiver are conflicting. Scroggs *v.* Alexander, 88 N. C. 64.

40. *Arkansas.*— Churchill *v.* Hill, 59 Ark. 54, 26 S. W. 378; Martin *v.* St. Louis, etc., R. Co., 53 Ark. 250, 13 S. W. 765.

California.— Matter of Lamb, 95 Cal. 397, 30 Pac. 568. See also Hyde *v.* Boyle, 89 Cal. 590, 26 Pac. 1092.

Colorado.— Catlin Land, etc., Co. *v.* Burke, 22 Colo. 419, 45 Pac. 387.

Georgia.— Parks *v.* Johnson, 79 Ga. 567, 5 S. E. 243; Dupon *v.* McLaren, 63 Ga. 470; Healey *v.* Scofield, 60 Ga. 450; Higgs *v.* Huson, 8 Ga. 317.

Illinois.— North Chillicothe *v.* Burr, 178 Ill. 218, 52 N. E. 853; Chicago, etc., R. Co. *v.* Walsh, 150 Ill. 607, 37 N. E. 1001; Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941; Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49; People *v.* Anthony, 129 Ill. 218, 21 N. E. 780; Newman *v.* Ravenscroft, 67 Ill. 496.

Indiana.— Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214; Longworth *v.* Higham, 89 Ind. 352; Hannah *v.* Dorrell, 73 Ind. 465; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154.

Kentucky.—Givens *v.* Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646.

Maine.— Shepard *v.* Hull, 42 Me. 577.

Massachusetts.— The rule of practice which allows the amendment of a bill of exceptions, by leave of court, to cure a mistake or omission in drawing it up, does not entitle an excepting party to file, by way of amendment, a substantially new bill after the statutory period has elapsed. Arvilla *v.* Spaulding, 121 Mass. 505.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 26 S. W. 20; West *v.* Burney, 71 Mo. App. 271.

Nebraska.— McWaid *v.* Blair State Bank, 58 Nebr. 618, 79 N. W. 620; Brennan-Love Co. *v.* McIntosh, 56 Nebr. 149, 76 N. W. 461.

New York.— Catlin *v.* Cole, 10 Abb. Pr. (N. Y.) 387; Lynes *v.* Noble, 1 How. Pr. (N. Y.) 226.

Ohio.— Ash *v.* Marlow, 20 Ohio 119; Hazlewood *v.* Parker, 2 Disn. (Ohio) 429.

Tennessee.— Davis *v.* Jones, 3 Head (Tenn.) 602.

Vermont.— Hall *v.* Simpson, 63 Vt. 601, 22 Atl. 664.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 106.

Counsel cannot, by agreement, add to a bill of exceptions either testimony or statements of facts which are not embraced in the bill and authenticated over the signature of the judge. Blair *v.* Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; Wessels *v.* Beeman, 66 Mich. 343, 33 N. W. 510. See also Kennedy *v.* Kennedy, 16 Lea (Tenn.) 736.

Expiration of trial judge's term of office.— The authorities are conflicting as to the proper judge to allow an amendment where the term of office of the judge who tried the case has expired. Some hold that the ex-judge may allow the amendment. Frazier *v.* Laughlin, 6 Ill. 185; Halstead *v.* Brown, 17 Ind. 202. Others hold that the successor may do so. Horton *v.* Smith, 46 Ill. App. 241; Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 26 S. W. 20. See also Phelps *v.* Conant, 30 Vt. 277; Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191; and *supra*, XIII, D, 6, a, (III).

41. *Alabama.*— Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897; Posey *v.* Beale, 69 Ala. 32; Dudley *v.* Chilton County, 66 Ala. 593; Chapman *v.* Holding, 54 Ala. 61; Kitchen *v.* Moye, 17 Ala. 394; Branch Bank *v.* Kinsey, 5 Ala. 9.

California.— The presentation and settlement of a bill of exceptions or statement of the case is a proceeding, within the purview of Cal. Code Civ. Proc. § 473, which provides that amendments of proceedings must be ap-

ence, omission, or mistake, it does not conform to the facts[42] and there is something in the record to amend by.[43]

c. Application — (I) *Requisites and Sufficiency.* A motion to correct a bill of exceptions is sufficient if it specifies with reasonable certainty the relief sought and the grounds upon which the motion is founded.[44]

(II) *Notice.* A bill of exceptions executed and filed during the term may, without notice to the adverse party, be amended during such term to make it conform to the facts;[45] but after the expiration of the term amendments can only be made on notice.[46]

d. Identificatien of Amendment. Where a judge, in amending a bill of exceptions, obliterates or strikes out any part of it, he should call attention to the fact, so that it may be known that it was authorized.[47]

e. Mandamus to Compel Amendment. Mandamus has been held to lie to

plied for within six months. Sprigg *v.* Barber, 118 Cal. 591, 50 Pac. 682.

Colorado.— See Nelson *v.* Jenkins, 9 Colo. App. 420, 48 Pac. 826.

Georgia.— Snell *v.* Smith, 78 Ga. 355; Scott *v.* Central R. Co., 77 Ga. 450; Perry *v.* Central R. Co., 74 Ga. 411; State *v.* Powers, 14 Ga. 388.

Illinois.— Hall *v.* Mills, 5 Ill. App. 495.

Indiana.— Seig *v.* Long, 72 Ind. 18.

Kentucky.— Adkinson *v.* Stevens, 7 J. J. Marsh. (Ky.) 237.

Massachusetts.— A bill cannot be amended by the judge who signed it after it is entered in the supreme court. McCarren *v.* McNulty, 7 Gray (Mass.) 139.

Mississippi.— Dreyfus *v.* Cage, 62 Miss. 605; Bridges *v.* Kuykendall, 58 Miss. 827.

Ohio.— Busby *v.* Finn, 1 Ohio St. 409; State *v.* Flinn, 1 Ohio Dec. (Reprint) 551.

Tennessee.—Steele *v.* Davis, 5 Heisk. (Tenn.) 75; Davis *v.* Jones, 3 Head (Tenn.) 602.

Texas.— Conrad *v.* Walsh, 1 Tex. App. Civ. Cas. § 231.

United States.— Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 12 S. Ct. 450, 36 L. ed. 162; Gayler *v.* Wilder, 10 How. (U. S.) 509, 13 L. ed. 517; Honey *v.* Chicago, etc., R. Co., 82 Fed. 773, 49 U. S. App. 625, 27 C. C. A. 262; Sutherland *v.* Round, 57 Fed. 467, 16 U. S. App. 30, 6 C. C. A. 428.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 110.

42. *Colorado.*—Beckwith *v.* Talbot, 2 Colo. 604.

Illinois.— Chicago, etc., R. Co. *v.* Walsh, 150 Ill. 607, 37 N. E. 1001; Bank of Commerce *v.* Franklin, 90 Ill. App. 91; Dearborn Foundry Co. *v.* Rielly, 79 Ill. App. 281; Szatkowski *v.* Catholic Order of Foresters, 78 Ill. App. 484; Pollard *v.* Rutter, 35 Ill. App. 370; Fame Ins. Co. *v.* Mann, 4 Ill. App. 485.

Indiana.— Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214; Morgan *v.* Hays, 91 Ind. 132.

Missouri.— Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728.

Ohio.— Tanner *v.* Brown, 5 Ohio Dec. (Reprint) 112.

43. North Chillicothe *v.* Burr, 178 Ill. 218, 52 N. E. 853; Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49; Chicago, etc., R. Co. *v.* Walsh, 51 Ill. App. 584; Wallahan *v.* People, 40 Ill. 103; Roblin *v.* Yaggy, 35 Ill. App. 537; Morgan *v.* Hays, 91 Ind. 132.

Oral proof.— The trial court should not allow, on oral proof alone, a *nunc pro tunc* correction of the bill of exceptions. Driver *v.* Driver, 153 Ind. 88, 54 N. E. 389; Hamilton *v.* Burch, 28 Ind. 233; Ross *v.* Kansas City, etc., R. Co., 141 Mo. 390, 38 S. W. 926, 42 S. W. 957; Smith *v.* Kingfisher Bank, 2 Okla. 358, 37 Pac. 828; Kingfisher Bank *v.* Smith, 2 Okla. 6, 35 Pac. 955.

Presumption as to amendment.—Where a bill of exceptions was amended by the court by inserting matters *in pais* after the term, and after the lapse of time allowed for presenting and filing it, it will be presumed that the court was in possession of sufficient memoranda or notes to give definite information as to what the actual proceedings were. Pollard *v.* Rutter, 35 Ill. App. 370. See also Myers *v.* Phillips, 68 Ill. 269.

44. Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

To test the sufficiency of an application for the correction of a bill of exceptions, the opposite party, after full appearance, may file a motion to dismiss such application. Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

45. Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75. *Compare* Shepard *v.* Hull, 42 Me. 577.

46. Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941; Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75; Wallahan *v.* People, 40 Ill. 103; Myers *v.* Antrim, 14 Ill. App. 437; Terra Haute, etc., R. Co. *v.* Bond, 13 Ill. App. 328; Fame Ins. Co. *v.* Mann, 4 Ill. App. 485; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 107.

Summons as notice.—Where an application to correct a bill of exceptions is made, a notice served on the opposite party is sufficient to bring him into court, and, if a summons is issued and served, it will be treated as a mere notice. Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

47. Clayton *v.* May, 68 Ga. 27.

Incorporation of amendments into bill.— Amendments allowed by the trial court to the proposed bill of exceptions should be incorporated in the bill as finally settled and signed. King *v.* Farmington, 90 Wis. 62, 62 N. W. 928; Killops *v.* Stephens, 74 Wis. 39,

compel the court to amend a bill of exceptions according to the truth of the case.[48]

f. Appeal. Proceedings to amend bills of exceptions are not actions separate and distinct from the original action, but are merely auxiliary thereto, and should, where an appeal in the main action is pending, be brought up on appeal as a part of that action, and not as an original case.[49]

8. Quashing or Striking Out Bill — a. Grounds. A motion to quash or strike out a bill of exceptions, to be effective, must be based on some objection to the bill itself, either in the manner of its preparation and signing, or in other like respects.[50]

b. Application — (I) *Manner of Application.* An application to quash or to strike out a bill of exceptions may be made by motion.[51]

(II) *Time of Application.* A motion to quash or strike out a bill of exceptions must be seasonably made, or it will not be considered.[52]

41 N. W. 970. See also Conger *v.* Chamberlain, 11 Wis. 187.

48. True *v.* Plumley, 36 Me. 466; People *v.* Judge Cir. Ct., 24 Mich. 513; Delavan *v.* Boardman, 5 Wend. (N. Y.) 132; Sikes *v.* Ransom, 6 Johns. (N. Y.) 279. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 111.

As to mandamus to compel settlement see *supra*, XIII, D, 6, i.

Waiver of right.—Where plaintiff in error has delayed making his application until after the lapse of one term from the filing of the bill of exceptions, and has in the meantime filed assignments of error to the bill as settled, he waives the right to compel an amendment of a bill of exceptions. People *v.* Manistee Cir. Judge, 31 Mich. 72.

49. Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214; Hamilton *v.* Burch, 28 Ind. 233.

50. Phœnix Ins. Co. *v.* Readinger, 28 Nebr. 587, 44 N. W. 864. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 112.

Neglect of clerk.— Exceptions to instructions of the trial court will not be set aside because of the neglect, through inadvertence, of the clerk to indorse them as "Instructions, and Exceptions Thereto," as required by statute, both parties having knowledge of them. State *v.* Wentworth, 56 Wis. 531, 14 N. W. 634.

Taking improperly from files.— The fact that the bill of exceptions was improperly taken from the files of the trial court by counsel after it was signed is no reason why the appellate court should strike it from the files. Sedam *v.* Meeksback, 6 Ohio Cir. Ct. 219.

Where bills of exceptions have been fraudulently obtained, or sealed irregularly, improvidently, or in clear violation of a plain rule of law, the court to which the writ of error has been returned will quash them. Wilson *v.* Moore, 19 N. J. L. 186. See also Mills *v.* Vail, 4 Allen (New Brunsw.) 629.

51. *Alabama.*— Ryan *v.* Kilpatrick, 66 Ala. 332; Hollingsworth *v.* Chapman, 50 Ala. 23.

Illinois.— McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894.

Missouri.— Farrar *v.* Finney, 21 Mo. 569.

Nebraska.— Nyce *v.* Shaffer, 20 Nebr. 507, 30 N. W. 943; Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368; Howard *v.* Lamaster, 13 Nebr. 221, 13 N. W. 211.

New York.— Dean *v.* Gridley, 10 Wend. (N. Y.) 254.

Ohio.— Sedam *v.* Meeksback, 6 Ohio Cir. Ct. 219.

Texas.— St. Louis Southwestern R. Co. *v.* Campbell, (Tex. Civ. App. 1896) 34 S. W. 186.

Wisconsin.— Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1; Oliver *v.* Town, 28 Wis. 328; Tollensen *v.* Gunderson, 1 Wis. 110.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 113½.

An objection to a bill of exceptions, on the ground that it was not properly made a part of the record in the court below, should be presented in the appellate court by motion to strike it from the record. Jones *v.* Hockman, 12 Iowa 101. But see Castleman *v.* Griffin, 13 Wis. 535, wherein it was held that an objection that the bill of exceptions was not filed within the time required by rule of court cannot be made in the appellate court, the remedy being by a motion to strike from the files, made in the court below.

Sufficiency of motion.—A motion to quash a bill of exceptions, being a technical objection, must itself be free from fault, and where the grounds assigned are "because the same was not made and signed as required by law," the motion should be overruled unless there is a total want of some material requirement, such as the signature of the judge. Walker *v.* Morse, 33 Nebr. 650, 50 N. W. 1055.

52. Crane Bros. Mfg. Co. *v.* Keck, 35 Nebr. 683, 53 N. W. 606, wherein it was held that a motion to quash the bill of exceptions, not filed until after briefs on the merits have been made and served, will not be considered; Fitzpatrick *v.* Cottingham, 14 Wis. 219, wherein it was held that a motion to strike a bill settled in October, 1859, because of delay in settling, not made until June, 1861, comes too late.

See 21 Cent. Dig. tit. "Exceptions, Bill of," § 113.

After joinder in error.— The right to move to strike out a bill of exceptions is not lost by joining in error. Farrar *v.* Finney, 21 Mo. 569.

c. Effect of Striking Out Bill. Where a bill of exceptions has been stricken from the files, and the errors assigned are all based on matters contained therein, the appeal will be dismissed or the judgment below will be affirmed.[53] The bill itself in such case cannot be considered by the appellate court for any purpose.[54]

9. Effect of Motion For New Trial on Bill. The authorities are in conflict as to the effect of a motion for a new trial on exceptions previously taken. Some hold that such a motion is a waiver of the exceptions unless they are incorporated in the motion.[55] Others take the contrary view.[56]

E. Contents, Making, and Settlement of Case or Statement of Facts — 1. By Whom to Be Made. Only the parties to an appeal or writ of error can make a case or statement of facts,[57] and this duty, as a rule, devolves upon the appellant or plaintiff in error.[58] So, unless it is otherwise provided for by

53. Markland *v.* Albes, 81 Ala. 433, 2 So. 123; Mutzenburg *v.* McGowan, 10 Colo. App. 486, 51 Pac. 523; Jackson *v.* Bateman, 180 Ill. 359, 54 N. E. 304; Chicago Tire, etc., Co. *v.* Grunow, 88 Ill. App. 360; McGraw *v.* Chicago, etc., R. Co., 59 Nebr. 397, 81 N. W. 306; Walker *v.* Allen, 58 Nebr. 537, 78 N. W. 1070; Johnson *v.* Klein, 58 Nebr. 243, 78 N. W. 514. But see Parker *v.* La Grange, 167 Ill. 623, 48 N. E. 1057, in which it was held that where the bill of exceptions was stricken out, but appellant had assigned errors not depending entirely upon such bill, a motion to affirm the judgment would be denied.

See 3 Cent. Dig. tit. "Appeal and Error," § 2955; 21 Cent. Dig. tit. "Exceptions, Bill of," § 115.

Effect of failure to make bill see *supra*, XIII, C, 7 [2 Cyc. 1093].

54. City Nat. Bank *v.* Thomas, 46 Nebr. 861, 65 N. W. 895; Jones *v.* Wolfe, 42 Nebr. 272, 60 N. W. 563.

Effect on special bill.—When an exception has been taken upon the trial to the refusal of the judge to give instructions, and the instructions have been written out and indorsed by him as refused, and the exception noted, and it is signed and filed, it constitutes a special bill of exceptions; and, though incorporated into the general bill of exceptions, it is not affected by the subsequent striking from the record of the general bill for failure to settle it in time. Myrick *v.* Merritt, 22 Fla. 335.

55. Ferguson *v.* Ehrenberg, 39 Ark. 420; Knox *v.* Hellums, 38 Ark. 413; Gibbs *v.* Dickson, 33 Ark. 107; Blunt *v.* Williams, 27 Ark. 374; Graham *v.* Roark, 23 Ark. 19; Ford *v.* Clark, 12 Ark. 99; Berry *v.* Singer, 10 Ark. 483; Sawyers *v.* Lathrap, 9 Ark. 67. See 21 Cent. Dig. tit. "Exceptions, Bill of," § 35.

Express waiver.—After verdict for plaintiff, defendant secured an extension of time to file a motion for a new trial, stating that he did not intend to proceed under his exceptions. The time was further extended, and the motion was filed and argued. A new trial was refused, and defendant, at the next term, and eight months after the trial, moved for signature of his bill of exceptions, and petitioned for a writ of error founded thereon. It was held that the motion should be overruled and the writ refused, the exceptions having been waived and the bill being presented for signature neither within the term nor within a reasonable time. Marine City Stave Co. *v.* Herreshoff Mfg. Co., 32 Fed. 822.

56. Sorrelle *v.* Craig, 9 Ala. 534; West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300 (holding, however, that the court trying the cause ought not to grant a new trial for the causes embraced by a bill of exceptions unless the party submitting a motion distinctly waives the exception); Reed *v.* Miller, 1 Bibb (Ky.) 142.

Where a party files both a bill and a motion for a new trial, and, at the judge's suggestion, a hearing is had on the motion after the filing of the exceptions, he may hold, though the motion for a new trial is refused, that the excepting party has not waived the exceptions by participating in the argument upon the motion. Anthony *v.* Travis, 148 Mass. 53, 19 N. E. 8.

57. Sojourner *v.* Charpontier, 10 La. 210; Bryan *v.* Moring, 99 N. C. 16, 5 S. E. 739.

58. *Kansas.*— Weeks *v.* Medler, 18 Kan. 425.

Michigan.— Wright *v.* Dudley, 8 Mich. 74.

Missouri.— Paxson *v.* St. Louis Drayage Co., 55 Mo. App. 566.

New Jersey.— Curtis *v.* Hall, 4 N. J. L. 418; Overseers of Poor *v.* Overseers of Poor, 4 N. J. L. 215.

New York.— Staacke *v.* Preble, 43 Hun (N. Y.) 441; Feeter *v.* Heath, 11 Wend. (N. Y.) 477.

North Carolina.— Smith *v.* Fite, 98 N. C. 517, 4 S. E. 203; Williams *v.* Council, 65 N. C. 10.

Pennsylvania.— Munderbach *v.* Lutz, 14 Serg. & R. (Pa.) 125; Bassler *v.* Niesly, 1 Serg. & R. (Pa.) 431, 472; Downing *v.* Baldwin, 1 Serg. & R. (Pa.) 298.

Texas.—Gardner *v.* Broussard, 39 Tex. 372; Owen *v.* Cibolo Creek Mill, etc., Co., (Tex. Civ. App. 1897) 43 S. W. 297.

See 3 Cent. Dig. tit. "Appeal and Error," § 2480.

In Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435, 477, it was held that "the making and serving of a case are the acts of the plaintiff in error; the suggestion of amendments the act of the defendant in error; and the settling and signing of the case the duty of the judge."

Duty of judge.— Under Mass. Stat. (1893), c. 61, § 7, the appellant is entitled to a report

statute,[59] it is generally the duty of the party appealing to furnish a statement of the evidence;[60] and, where the parties disagree as to a statement of the evidence, or of the facts proved, it must be made by the court.[61] When, however, any party desires a fuller case or statement, it becomes the duty of such party to cause the facts or evidence deemed material by him to be inserted.[62]

2. Scope and Sufficiency — a. In General. A case made or statement of facts on appeal should contain within itself all matters necessary for a review by the appellate court, and should affirmatively show that it is complete.[63]

to the appellate court of the material facts found by the trial judge as a matter of right when appellant's request is made within the four days. Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833.

Effect of admission of error by defendant.— Where defendant in error has pleaded limitations in bar of plaintiff's writ of error, and the issue joined on that plea has been found in favor of plaintiff, though defendant impliedly admits that there is error in the record, nevertheless it is the duty of plaintiff to make up the error book. Hymann *v.* Cook, 2 Den. (N. Y.) 201.

Effect of failure to make.— The appellate court will not examine voluminous evidence where appellant makes no statement of it, and lends no assistance thereto. Paxson *v.* St. Louis Drayage Co., 55 Mo. App. 566; Mitchell *v.* Tedder, 107 N. C. 358, 12 S. E. 193.

Verdict subject to opinion on points reserved.— In Eagle *v.* Alner, 1 Johns. Cas. (N. Y.) 332, it was held that when a verdict is taken subject to the opinion of the court on points reserved, plaintiff must make up the case and have it settled, and cannot move for judgment because no case is made.

The proper course in chancery cases, where the evidence of witnesses is taken in open court, is for the party desiring the testimony to be certified to make a case, setting such testimony forth, present it to the circuit judge, and procure his order fixing the time and place when and where it shall be settled, and forward notice to the opposite party in order that the latter may attend and propose amendments, or, instead thereof, take other equivalent proceedings. The practice should be simulated as near as may be to that of making cases for review at law. Wright *v.* Dudley, 8 Mich. 74.

59. In Louisiana, under La. Code Prac. art. 601, either party might require the clerk to take down the testimony in writing, which should serve as a statement of facts if the parties should not agree to one. Under this article, together with articles 586, 602, 603, it has been held that where all the parol evidence offered on the trial has been taken in writing by the clerk, and all the written evidence noted by him, the judge cannot be required to make a statement. Hennen *v.* Hennen, 10 La. 560.

In South Carolina, under the thirteenth clause of the act of 1839 "concerning the office and duties of ordinary," it was the duty of the ordinary to furnish an appellant with a copy of the evidence taken by him in a proceeding had before him. Clark *v.* West, 1 Strobh. Eq. (S. C.) 185.

60. Pellerin *v.* Levois, 8 La. Ann. 436; Tompkins *v.* Benjamin, 16 La. 197; Turner *v.* Foard, 83 N. C. 683; Sampson *v.* Atlantic, etc., R. Co., 70 N. C. 404; Munderbach *v.* Lutz, 14 Serg. & R. (Pa.) 125 (holding that, under the Pennsylvania act of Feb. 24, 1806, where, on the request of a party, a judge reduces his opinion to writing, he is not obliged to furnish a copy of his notes of evidence, to be transcribed and annexed to the record); Bassler *v.* Niesly, 1 Serg. & R. (Pa.) 431.

In Louisiana, under La. Code Prac. art. 1042, the judge of a probate court cannot be called upon to make a statement of the evidence in causes tried before him. It is the duty of the party intending to appeal to have the evidence taken down in writing. Tompkins *v.* Benjamin, 16 La. 197.

61. Theus *v.* Kemp, 49 La. Ann. 1650, 22 So. 962; Le Blanc *v.* Broussard, 16 La. 137. See 3 Cent. Dig. tit. "Appeal and Error," § 2481.

62. Where party making up case omits any of the evidence it is the duty of the other party, if the latter deems the evidence material to sustain the findings, to cause it to be inserted by amendments. Perkins *v.* Hill, 56 N. Y. 87.

Where a referee settled a case on appeal without certifying that it contained all the evidence, and appellants, at the time, made no demand for such certificate, but afterward desired to have such certificate, and moved for a resettlement, an order permitting respondents to add any testimony that might be necessary to enable the referee to certify that the case contained all the evidence was held error, since it was appellants' duty to furnish such omissions, as they, and not respondents, desired the certificate. Martin *v.* Adams, 73 Hun (N. Y.) 122, 25 N. Y. Suppl. 1020, 57 N. Y. St. 133.

63. *California.*— Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555.

Connecticut.—Darrow *v.* Langdon, 20 Conn. 288.

Kansas.— Ervin *v.* Morris, 26 Kan. 664; Parker *v.* Remington Sewing-Mach. Co., 24 Kan. 31; Horner *v.* Barney, 9 Kan. App. 882, 57 Pac. 1048.

Missouri.— Coleman *v.* Farrar, (Mo. 1890) 14 S. W. 825; Ford *v.* Cameron, 19 Mo. App. 467.

New Jersey.— McLaughlin *v.* Davis, 64 N. J. L. 360, 45 Atl. 967; Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176.

New York.— Ehrman *v.* Rothschild, 23 Hun (N. Y.) 273.

South Carolina.— Springs *v.* South Bound

b. Matters Included — (1) *In General* — (A) *Rule Stated.* It should show the judgment or final order appealed from, and should set forth the proceedings had in the lower court, and the questions of law and fact raised upon which appellant or plaintiff in error relies, with only so much of the evidence, if any, as is requisite to show the pertinency and materiality of such questions.[64] Mat-

R. Co., 46 S. C. 104, 24 S. E. 166; *In re* Perry, 42 S. C. 183, 20 S. E. 84.

Texas.— Werlan *v.* Schollett, 63 Tex. 227; Barnhart *v.* Clark, 59 Tex. 552; Galveston, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1894) 26 S. W. 782.

United States.— Davenport *v.* Paris, 136 U. S. 580, 10 S. Ct. 1064, 34 L. ed. 548; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 10 S. Ct. 57, 33 L. ed. 309.

See 3 Cent. Dig. tit. "Appeal and Error," § 2458 *et seq.*

64. *California.*— Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555; Kimball *v.* Semple, 31 Cal. 657.

Georgia.— Papot *v.* Gibson, 7 Ga. 529.

Kansas.— School Dist. No. 54 *v.* Goff, 47 Kan. 101, 27 Pac. 817; Mullaney *v.* Humes, 47 Kan. 99, 27 Pac. 817; Continental Ins. Co. *v.* Pratt, 8 Kan. App. 424, 55 Pac. 671. And see Noble *v.* Frack, 5 Kan. App. 786, 48 Pac. 1004.

Michigan.— Sallee *v.* Ireland, 9 Mich. 154.

Minnesota.— State *v.* Otis, 71 Minn. 511, 74 N. W. 283.

Missouri.— Coleman *v.* Farrar, (Mo. 1890) 14 S. W. 825.

New Jersey.— Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176.

New York.— New York Rubber Co. *v.* Rothery, (N. Y. 1890) 23 N. E. 529, 29 N. Y. St. 37; Bissel *v.* Hamlin, 20 N. Y. 519 (holding that a case should contain the pleadings, a complete and condensed summary of all the facts deemed material, and a statement of the questions to be reviewed); Smith *v.* Grant, 15 N. Y. 590; Davie *v.* Van Wie, 1 Thomps. & C. (N. Y.) 530; Wierichs *v.* Innis, 32 Misc. (N. Y.) 462, 66 N. Y. Suppl. 553; Spies *v.* Michelson, 15 Misc. (N. Y.) 414, 25 N. Y. Civ. Proc. 188, 36 N. Y. Suppl. 619, 71 N. Y. St. 785; Zucker *v.* Blumenthal, 58 N. Y. Suppl. 318 (holding that N. Y. Code Civ. Proc. § 997, is not satisfied by a proposed case which contains nothing more than a statement that the judgment-roll, order denying motion for a new trial, notice of appeal, and exhibits are to be inserted, to which is added an unsigned order permitting the printing of the stenographer's minutes *in hæc verba*); Leffler *v.* Field, 42 How. Pr. (N. Y.) 420; Walsworth *v.* Wood, 7 Wend. (N. Y.) 483.

North Carolina.— Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 415, 26 S. E. 27; State *v.* Brown, 70 N. C. 27.

North Dakota.—Douglas *v.* Glazier, 9 N. D. 615, 84 N. W. 552.

Oklahoma.—Gardenhire *v.* Burdick, 7 Okla. 212, 54 Pac. 483.

South Carolina.— Thomson *v.* Brown, 56 S. C. 304, 33 S. E. 454; Kaminer *v.* Hope, 18 S. C. 561.

Texas.— Werlan *v.* Schollett, 63 Tex. 227; Galveston, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1894) 26 S. W. 782.

Washington.— Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886, holding that a statement of facts, under Wash. Laws (1883), p. 59, § 3, should include everything material that transpires in the cause and not otherwise a part of the record.

See 3 Cent. Dig. tit. "Appeal and Error," § 2483.

Affidavits used on the hearing of a motion should be made a part of the case-made or statement of facts on appeal from the decision on such motion (Gallaudet *v.* Steinmetz, 45 N. Y. Super. Ct. 239; Clay *v.* Selah Valley Irrigation Co., 14 Wash. 543, 45 Pac. 141); but where a statute requires that affidavits so used shall be indorsed by the judge or clerk "at the time as having been read or referred to on the hearing," affidavits not so indorsed will be stricken from the statement on appeal (Albion Consol. Min. Co. *v.* Richmond Min. Co., 19 Nev. 225, 8 Pac. 480. See also Dean *v.* Pritchard, 9 Nev. 232).

Exceptions to findings after filing of judgment-roll.— In Pettit *v.* Pettit, 20 Wkly. Dig. (N. Y.) 154, it was held that the clerk to whom written exceptions to findings and refusals to find of the court, in an equity case are presented, after the filing of the judgment-roll within the time specified therefor by N. Y. Code Civ. Proc. § 994, should file the same and affix them to the judgment-roll as a part of his return on appeal, and that it is not necessary that such written exceptions should be made part of the case to be passed upon on settlement by the trial judge.

Findings of fact, conclusions of law, and exceptions.—A case-made must contain the findings of fact, the conclusions of law thereon, and the exceptions of the party who appeals. Tuxbury *v.* French, 39 Mich. 190; Essex County Bank *v.* Russell, 29 N. Y. 673; Westcott *v.* Thompson, 16 N. Y. 613; Otis *v.* Spencer, 16 N. Y. 610, 6 Abb. Pr. (N. Y.) 127, 15 How. Pr. (N. Y.) 425; Matter of Peck, 21 N. Y. Civ. Proc. 85, 14 N. Y. Suppl. 899, 39 N. Y. St. 234; *In re* Falls, 10 N. Y. Suppl. 41; Hunt *v.* Bloomer, 12 How. Pr. (N. Y.) 567; Deming *v.* Post, 1 Code Rep. (N. Y.) 121; McNeill *v.* Chadbourn, 79 N. C. 149.

Immaterial portions of papers used before the court on the hearing need not be printed in the case-made on appeal. City Real Estate Co. *v.* Gaylor, 31 Misc. (N. Y.) 105, 64 N. Y. Suppl. 1066.

Must affirmatively show that judgment or final order was rendered by the trial court, and a mere statement to that effect in the certificate of the judge is not sufficient. Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

ter that cannot be the subject of review by the appellate court need not be inserted.[65]

(B) *Incorporating Evidence* — (1) In General. So much of the evidence introduced or the facts proved in the trial court should be incorporated in a case-made or statement of facts on appeal as may be necessary and requisite to fully present the exceptions taken,[66] and, where the evidence is itself used, it should be

Objections and exceptions made by the prevailing party should not be incorporated into a case upon appeal unless their insertion can be justified by the existence of a special reason therefor. Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Dabney *v.* Stevens, 32 N. Y. Super. Ct. 415, 10 Abb. Pr. N. S. (N. Y.) 39, 40 How. Pr. (N. Y.) 341; *In re* Post, 18 N. Y. Suppl. 812; Clarke *v.* House, 16 N. Y. Suppl. 777.

Orders denying motions.— On appeals from orders denying motions the case-made or statement of facts should not only show that the motion was duly made, but should contain the order denying the motion. Ervin *v.* Morris, 26 Kan. 664; Parker *v.* Remington Sewing-Mach. Co., 24 Kan. 31; Ehrman *v.* Rothschild, 23 Hun (N. Y.) 273; Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

Specification of facts for review.— N. D. Rev. Codes, § 5630, as amended by Sess. Laws (1897), c. 5, requires appellant to incorporate with the statement of the case, where he desires to review only one or more particular facts, specifications pointing out such particular fact or facts, and when he desires a retrial of the whole case in the supreme court that fact must also be specified in the statement of the case. Farmers, etc., Nat. Bank *v.* Davis, 8 N. D. 83, 76 N. W. 998.

Transcript of record.—A case-made need not contain a certified transcript of the record. Atchison, etc., R. Co. *v.* Snedeger, 5 Kan. App. 700, 49 Pac. 103.

Unauthorized omissions.—Appellant is not authorized to assume that any portion of a statement, on an appeal from an order denying a motion for a new trial, is immaterial, and omit it, except by stipulation with the other party. Kimball *v.* Semple, 31 Cal. 657.

Power of judge to insert matter.—In Walsworth *v.* Wood, 7 Wend. (N. Y.) 483, it was held that a circuit judge might insert in a case such facts as he might deem necessary to render his charge intelligible. He might state his charge as he deemed correct, and, if no charge had been delivered, but opinions had been expressed by him in the hearing of the jury in the progress of the trial, he might, with propriety, state such opinions in the settlement of the case. See also, to like effect, McManus *v.* Western Assur. Co., 40 N. Y. App. Div. 86, 57 N. Y. Suppl. 559.

65. Leffler *v.* Field, 42 How. Pr. (N. Y.) 420.

Questions withdrawn, answers excluded without objection, exceptions by appellee's counsel, and testimony not necessary to raise the questions on the exceptions should be excluded from the case on appeal. Hoffman *v.* Ætna F. Ins. Co., 19 Abb. Pr. (N. Y.) 325.

66. *Georgia.*— Papot *v.* Gibson, 7 Ga. 529.

Massachusetts.— Powers *v.* Provident Sav. Inst., 122 Mass. 443.

New York.— Hubbard *v.* Chapman, 28 N. Y. App. Div. 577, 51 N. Y. Suppl. 207; Firth *v.* Rehfeldt, 47 N. Y. Suppl. 474; Mills *v.* Thursby, 12 How. Pr. (N. Y.) 417.

North Carolina.— Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Green *v.* Collins, 28 N. C. 139.

Oklahoma.— McFadyen *v.* Masters, 8 Okla. 174, 56 Pac. 1059.

Texas.— Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Caswell *v.* Hopson, (Tex. Civ. App. 1897) 43 S. W. 547.

Washington.— Nickus *v.* Lewis County, (Wash. 1900) 62 Pac. 763; Case *v.* Ham, 9 Wash. 54, 36 Pac. 1050; Phillips *v.* Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476. See also Parker *v.* Esch, 5 Wash. 296, 31 Pac. 754.

Wisconsin.— Austin *v.* Bacon, 28 Wis. 416, which held that a printed case of seventeen hundred folios, which might have been condensed into one-tenth of the space, was an imposition on the time and patience of the court, and would not be considered by it.

United States.—Raimond *v.* Terrebonne Parish, 132 U. S. 192, 10 S. Ct. 57, 33 L. ed. 309; Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638.

See 3 Cent. Dig. tit. "Appeal and Error," § 2490; and *supra*, XIII, C, 1, b, (II) [2 Cyc. 1079].

Effect of irrelevant matter in statement by judge.—When the judge himself makes the statement of fact, a needless encumbrance of the record with interrogatories and answers of the witnesses is no ground for dismissal of the appeal. Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 415, 26 S. E. 27; Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; McManus *v.* Wallis, 52 Tex. 534.

Where a case is tried by the court without a jury, and the objection of appellant is upon the legal principle involved, and not with regard to the illegal admission or rejection of evidence, the statement of the case need contain only the facts found by the judge, and not the testimony on which such facts are based. Benedict *v.* Howell, 39 N. J. L. 221; Douglas *v.* Douglas, 11 Hun (N. Y.) 406. See also Lynch *v.* Crain, 2 La. Ann. 905, in which it was held that where the parties consent that the testimony taken on the trial shall be reduced to writing by the judge in a certain manner, to serve as a statement in case of appeal, and the mode adopted is as well calculated to secure a fair and accurate statement of the evidence as if the testimony had been

incorporated in a condensed and narrative form.[67] It is not necessary to recite at length evidence elsewhere embodied in the record, but a reference thereto is sufficient.[68]

(2) Stenographer's Report. The minutes of a stenographer taken at a trial are not official records, and can only be made part of the record in the cause by being incorporated in a case or bill of exceptions signed and settled by the judge.[69] The use of such notes is not a matter of absolute right, but rests in the discretion of the judge who settles the case or statement,[70] and, where used, the notes should be condensed and the evidence recited in a narrative form.[71]

(3) Statement That All Evidence Is Included. It is not necessary that the case-made should show that it contains all the evidence,[72] and, where a party desires that the case-made shall show that it contains all the evidence introduced

taken down by the clerk, neither party can object to it upon appeal.

67. *California.*— Battersby *v.* Abbott, 9 Cal. 565.

Colorado.— Rice *v.* Ross, 9 Colo. App. 552, 49 Pac. 368.

Kansas.— School Dist. No. 54 *v.* Goff, 47 Kan. 101, 27 Pac. 817; Mullaney *v.* Humes, 47 Kan. 99, 27 Pac. 817.

Michigan.— Hammond *v.* Rathbone, 113 Mich. 499, 71 N. W. 858, 75 N. W. 928.

Montana.—Barger *v.* Halford, 10 Mont. 57, 24 Pac. 699; Newell *v.* Meyendorff, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738, 8 L. R. A. 440.

New York.— Smith *v.* Newell, 32 Hun (N. Y.) 501; McNish *v.* Bowers, 30 Hun (N. Y.) 214; Smith *v.* New York Cent., etc., R. Co., 30 Hun (N. Y.) 144; Gibson *v.* Metropolitan St. R. Co., 31 Misc. (N. Y.) 391, 7 N. Y. Annot. Cas. 455, 64 N. Y. Suppl. 396; Winter *v.* Crosstown St. R. Co., 8 Misc. (N. Y.) 362, 28 N. Y. Suppl. 695, 59 N. Y. St. 598.

South Carolina.— *In re* Perry, 42 S. C. 183, 20 S. E. 84.

Texas.— See Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1898) 45 S. W. 214.

Wisconsin.—Karasich *v.* Hasbrouck, 28 Wis. 569: Austin *v.* Bacon, 28 Wis. 416.

See 3 Cent. Dig. tit. "Appeal and Error," § 2490.

68. Darst *v.* Rush, 14 Cal. 81; Rehberg *v.* Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; Wood *v.* Southern R. Co., 118 N. C. 1056, 24 S. E. 704; Karasich *v.* Hasbrouck, 28 Wis. 569, in which last case it was held that, where the testimony is conflicting on any question of fact in a jury case, it is sufficient to say in the printed abstract that the testimony tends to prove or disprove the facts, and to make a reference therein to the folios in the bill of exceptions where the testimony can be found. But see *In re* Perry, 42 S. C. 183, 20 S. E. 84.

Reference to petition.—Where a statement of facts recites that a witness testified in accordance with the allegation in the petition, and the petition is given, the statement is sufficient. Nicholls *v.* Bienvenue, 47 La. Ann. 355, 16 So. 811.

Statement that evidence is to be inserted.—A case made out and served on appellee is sufficient to authorize the clerk to copy, as a part of the case on appeal, the judge's notes of the evidence (which Clark's Code Civ. Proc. N. C. (1900), § 412, subsec. 2, requires the judge to file in cases of appeal), though the case so served contains the words: "Here the clerk will copy the evidence" instead of directing him to copy "the judge's notes of the evidence," such notes being the only record thereof. Wood *v.* Southern R. Co., 118 N. C. 1056, 24 S. E. 704. Similarly, the fact that a case served upon a party on appeal does not, owing to the other engagements of the stenographer, contain the testimony, but only a statement showing that the testimony was to be inserted, is not ground for dismissal of the appeal, although it might be ground for a motion to recommit for further settlement. Wallace *v.* Columbia, etc., R. Co., 36 S. C. 599, 15 S. E. 452.

69. Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98; Kaeppler *v.* Pollock, 8 N. D. 59, 76 N. W. 987; Harris *v.* Philadelphia Traction Co., 180 Pa. St. 184, 40 Wkly. Notes Cas. (Pa.) 3, 36 Atl. 727; Woodward *v.* Heist, 180 Pa. St. 161, 36 Atl. 645, 1131; Rothschild *v.* McLaughlin, 7 Del. Co. (Pa.) 550.

70. Bohnet *v.* Lithauer, 7 Hun (N. Y.) 238.

71. Barger *v.* Halford, 10 Mont. 57, 24 Pac. 699; Coakley *v.* Mahar, 36 Hun (N. Y.) 157; Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 415, 26 S. E. 27; Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1. See also Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556, wherein appellant failed, in making up the statement of the case, to comply with Tex. Dist. and County Ct. Rules, Nos. 72–78 [20 S. W. xvi], requiring a condensed statement of the facts proved, the statement being, instead, a transcript of the stenographer's report in a condensed and narrative form, and it was held that this would not necessitate a dismissal of the appeal.

Compulsory incorporation.— In State *v.* Superior Ct., 13 Wash. 514, 43 Pac. 636, it was held that a party applying for a settlement of a statement of facts in the superior court could not be compelled by the judge to embody therein a transcript of the stenographer's notes taken on the trial.

72. Burlington, etc., R. Co. *v.* Grimes, 38 Kan. 241, 16 Pac. 472. *Compare* Barnhart *v.* Clark, 59 Tex. 552.

and offered on the trial, a statement to that effect should be inserted in the case itself, and not in the certificate of the judge who settles the case.[73]

(c) *Incorporating Matters of Record, Exhibits, and Other Documents.* Matters of record, exhibits, and other documents material and necessary to a proper determination of the controversy should be inserted in the case or statement on appeal, or made a part thereof, by intelligible and definite reference.[74]

73. Crosby *v.* Wilson, 53 Kan. 565, 36 Pac. 985; Eddy *v.* Weaver, 37 Kan. 540, 15 Pac. 492.

What a sufficient compliance.—Where the case-made recites that, although it "does not contain all of the evidence in minute detail, yet it contains the substantial parts of the evidence," the record will be interpreted to contain in substance all of the evidence offered upon the trial. Cavender *v.* Roberson, 33 Kan. 626, 7 Pac. 152.

When party entitled to statement.— In Magnus *v.* Trischet, 2 Abo. Pr. N. S. (N. Y.) 175, it was held that a party is not entitled, upon the settlement of a case, to have inserted in it a statement that it contains all the evidence which was given upon the trial, unless the object is to move for a new trial upon the ground of a misdirection which was not the subject of an exception.

74. *California.*— Sprigg *v.* Barber, (Cal. 1898) 54 Pac. 899; Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131. *Compare* People *v.* Bartlett, 40 Cal. 142.

Idaho.—Stickney *v.* Hanrahan, (Ida. 1900) 63 Pac. 189; Moore *v.* Taylor, 1 Ida. 583.

Kansas.— Smith *v.* Moore, 21 Kan. 161; Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159; Missouri, etc., Transp. Co. *v.* Palmer, 19 Kan. 471. See also Crosby *v.* Wilson, 53 Kan. 565, 36 Pac. 985; Mullaney *v.* Humes, 47 Kan. 99, 27 Pac. 817.

Minnesota.— Blake *v.* Lee, 38 Minn. 478, 38 N. W. 487; Acker Post No. 21, G. A. R., *v.* Carver, 23 Minn. 567.

New York.—Carman *v.* Pultz, 21 N. Y. 547; Jones *v.* Nichols, 42 N. Y. App. Div. 515, 59 N. Y. Suppl. 564.

North Carolina.— Drake *v.* Connelly, 107 N. C. 463. 12 S. E. 251; Waugh *v.* Andrews, 24 N. C. 75.

Pennsylvania.— Krumhhaar *v.* Stetler, 10 Pa. Co. Ct. 12.

Washington.— Armstrong *v.* Van de Vanter, 21 Wash. 682, 59 Pac. 510; Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 18 Wash. 667, 52 Pac. 246; Healy *v.* Seward, 5 Wash. 319, 31 Pac. 874.

But *compare* Hawkins *v.* Lee, 22 Tex. 544.

See 3 Cent. Dig. tit. "Appeal and Error," § 2495 *et seq.*

In South Carolina it is required that the statement of the case contain within itself all that is necessary to be considered on appeal, and it has been held that this requirement is not fulfilled by an agreement that certain books be submitted to the justices of the supreme court for their inspection and examination. Bowen *v.* Stribling, 47 S. C. 61, 24 S. E. 986. See also Moore *v.* Perry, 42 S. C. 369, 20 S. E. 200; *In re* Perry, 42 S. C. 183, 20 S. E. 84.

Abridgment of documents and exhibits.— In Albion Consol. Min. Co. *v.* Richmond Min. Co., 19 Nev. 225, 8 Pac. 480, it was held that, where deeds and other documentary evidence are introduced to show title, and not objected to at the time as insufficient, such deeds and documentary evidence need not be copied in full in the statement of case on appeal, but the substance of the document is sufficient. See also Smith *v.* Newell, 32 Hun (N. Y.) 501 (in which it was held that N. Y. Supreme Ct. Gen. Rules, No. 34, directing that, on appeal, the exhibits shall not be printed at length, should be observed); Hawkins *v.* Lee, 22 Tex. 544.

Formal parts of pleadings.— In Cooper *v.* Cooper, 9 N. J. Eq. 566, it was held that the formal part of a bill in chancery may be omitted on appeal, and the pleadings generally abridged.

Immaterial exhibits.— Copies of exhibits, which are not material for a proper determination of the controversy, need not be included in a settled case on appeal. Matter of Lyons, 42 Minn. 19, 43 N. W. 568.

Maps, drawings, etc., used to illustrate the evidence of the witnesses, but not put in evidence, need not be copied into the statement of the case on appeal. Albion Consol. Min. Co. *v.* Richmond Min. Co., 19 Nev. 225, 8 Pac. 480.

Record of other proceedings.— The record in one proceeding cannot be made a part of the case-made in another appeal by mere reference thereto, but must be actually incorporated therein. Hartwell *v.* Concordia First Nat. Bank, (Kan. 1896) 44 Pac. 1053; Clark *v.* Blake, (Kan. 1896) 44 Pac. 682; Parkhurst *v.* Clyde First Nat. Bank, 55 Kan. 100, 39 Pac. 1027. See also Johnson *v.* Sabine, etc., R. Co., 69 Tex. 641, 7 S. W. 379, in which the statement of facts contained an agreement that the evidence used in another case tried in the same court, and before the supreme court at a former term, "is the same as was offered on the trial of this case, so far as it goes; and that the evidence found in the statement of facts in that case may be used in this, without copying in the transcript in this case." It was held that, under Tex. Rev. Stat. arts. 1411, 1413, 1414, providing that the transcript shall, except in certain cases, contain a full and correct copy of all the proceedings had in the case, the evidence referred to could not be considered for any purpose.

Waiver of incorporation by respondent.—In Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131, it was held that where an exhibit has been omitted from the statement, and no objection made, and the attorneys for respondent indorse on the statement: "The forego-

(D) *Showing Disagreement of Parties.* Where a judge is required to make a statement of fact in case of a disagreement of the parties, the fact of such disagreement need not be set out in his statement, but will be presumed.[75]

(E) *Request For Settlement and Allowance.* A party may, where such request is necessary to the validity of the statement, insert in the proposed statement of a case a request for its settlement and allowance.[76]

(F) *Form and Arrangement.* Both as to form and arrangement, a case-made or statement on appeal should comply with the requirements laid down by statute or by rule of court. As a general rule, all matters should be inserted in their order of occurrence, and prior to the certificate and signature of the judge.[77]

(II) *Case Settled by Referee.* Where an action has been tried by a referee nothing should be contained in the case on appeal except such evidence, findings, and exceptions as are expressly allowed by him.[78]

3. Making, Filing, and Serving Proposed Case or Statement — a. Necessity of. The record of a cause brought up for the purpose of review by a case-made or statement of facts must show that the case or statement was made, filed, and served in the prescribed time, and that the opposite party was present at, or was notified, or waived notice of, the time and place of settling the case or statement, or waived his right to make amendments thereto.[79] It has accordingly been held

ing statement agreed to by us," and the same is thereupon signed by the judge, the objection that certain exhibits have been omitted is thereby waived.

75. Bachemain *v.* His Creditors, 2 La. 346; McMicken *v.* Riley, 7 Mart. N. S. (La.) 393; Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. (La.) 324. And see McManus *v.* Wallis, 52 Tex. 534, in which it was said, however, that the judge's certificate should regularly show the fact of disagreement.

76. Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458, holding, also, that this may be done though the time for filing such statement has expired.

77. *Kansas.*— Winfield *v.* Peeden, 8 Kan. App. 671, 57 Pac. 131.

Louisiana.— Ship *v.* Cuny, 9 Mart. (La.) 91.

Nevada.— Irwin *v.* Samson, 10 Nev. 282; Corbett *v.* Job, 5 Nev. 201.

New York.— Hurlbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428; Zimmer *v.* Metropolitan St. R. Co., 28 N. Y. App. Div. 504, 51 N. Y. Suppl. 247; Matter of Campbell, 88 Hun (N. Y.) 374, 34 N. Y. Suppl. 831, 68 N. Y. St. 769.

South Carolina.—Nott *v.* Thomson, 35 S. C. 589, 14 S. E. 23.

See Darrow *v.* Langdon, 20 Conn. 288; Archer *v.* Long, 35 S. C. 585, 14 S. E. 24. See also 3 Cent. Dig. tit. "Appeal and Error," § 2500; and also *infra*, XIII, E, 7, g.

The case on appeal should point out by date every proceeding which the supreme court is asked to review. Crane *v.* Lipscomb, 24 S. C. 430; Fooshe *v.* Merriwether, 20 S. C. 337.

Nothing which follows the signature of the judge who settles the case is part of the case on appeal. Kelley *v.* Stevens, 57 Kan. 506, 46 Pac. 943; Winfield *v.* Peeden, 8 Kan. App. 671, 57 Pac. 131.

Insertion of title.— In preparing a case on appeal the title of the action should be written or printed but once, and such matters as verifications should be merely noted, unless the appeal involves some point concerning them. Sickles *v.* Kling, 32 Misc. (N. Y.) 165, 7 N. Y. Annot. Cas. 492, 65 N. Y. Suppl. 513.

Inadvertent misplacement of matter.— In Hurlbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428, it was held that, although a referee's report should be inserted in a case immediately after the testimony, and preceding the exceptions thereto, yet an inadvertent misplacement of it might be disregarded.

Immaterial non-conformity.— In Archer *v.* Long, 35 S. C. 585, 14 S. E. 24, it was held, under S. C. Supreme Ct. Rules, No. 5, which, after enumerating the particulars that shall be set forth in the case, provides that if the case is voluminous an index shall be added, that the absence of such index was no ground for a dismissal of the appeal, more especially as it was subsequently added by appellants.

78. Hassler *v.* Turnbull, 10 N. Y. Civ. Proc. 240 (holding that a referee should make the case conform to and contain only the evidence produced on the trial); Leffler *v.* Field, 33 How. Pr. (N. Y.) 385; Foushee *v.* Beckwith, 119 N. C. 178, 25 S. E. 866.

79. *Kansas.*— Hughes *v.* Miller, 56 Kan. 183, 42 Pac. 696; Burlington, etc., R. Co. *v.* Gillen, 38 Kan. 673, 17 Pac. 334; Douglass *v.* Stewart, (Kan. App. 1899) 56 Pac. 1127; Sheridan *v.* Snyder, 4 Kan. App. 214, 45 Pac. 1007.

Minnesota.— Phoenix *v.* Gardner, 13 Minn. 294.

Nevada.— Baum *v.* Meyer, 16 Nev. 91.

New York.— Clark *v.* Jewett, 1 How. Pr. (N. Y.) 224.

North Carolina.— Hicks *v.* Westbrook, 121 N. C. 131, 28 S. E. 188; Forte *v.* Boone, 114 N. C. 176, 19 S. E. 632; Howell *v.* Jones, 109 N. C. 102, 13 S. E. 889.

South Carolina.— Marjenhoff *v.* Marjenhoff, 40 S. C. 545, 18 S. E. 942.

See 3 Cent. Dig. tit. "Appeal and Error," § 2507.

Co-parties.—In Kansas, where, in an action by plaintiff against several defendants, judg-

that, unless the defect is waived[80] by appellee or defendant in error, service, otherwise than at the time, in the manner, and by the officer authorized by statute, is invalid.[81]

b. Time For — (1) *In General.* The provisions of law as to the time of making and filing the case-made or statement of facts, and for service thereof upon the adverse party, are mandatory, and should be strictly observed.[82] In some states the statutory period of limitations begins to run from the time of the decision; in others, from the entry of the decree or judgment; and, again, in others, from the time of notice of the judgment or from the adjournment of the term at which it is rendered.[83] The time is computed by excluding the first day and including the last, whether such time is fixed by statute or order of court.[84]

ment is rendered for plaintiff, and one defendant brings error, it is necessary to serve the case-made upon his co-defendants, and the difficulty of service on account of their residence abroad will not change the rule. Lapham *v.* Bailey, (Kan. 1900) 60 Pac. 743. See also Rose *v.* Baker, 99 N. C. 323, 5 S. E. 919, in which it was held that, where one appeals from so much of a judgment as is in favor of his co-defendant, he must serve his statement of the case on such co-defendant.

Effect of subsequent settlement.—The failure of appellant to legally and seasonably serve his case on appeal on appellee cannot be cured by the judge's subsequent settlement of the case. Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187; McNeill *v.* Raleigh, etc., Air Line R. Co., 117 N. C. 642, 23 S. E. 268; Forte *v.* Boone, 114 N. C. 176, 19 S. E. 632.

80. Waiver.—A motion to dismiss an appeal, on the ground that the case was not properly served, will not be sustained where no objections were made to the service at the time, and exceptions to the case were subsequently filed. Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611, 26 S. E. 253.

81. Smith *v.* Smith, 119 N. C. 311, 25 S. E. 877; Roberts *v.* Partridge, 118 N. C. 355, 24 S. E. 15 (holding that service by counsel is a nullity unless accepted by appellee); McNeill *v.* Raleigh, etc., Air Line R. Co., 117 N. C. 642, 23 S. E. 268 (holding that service by a proper officer is insufficient if after prescribed time); Archer *v.* Long, 35 S. C. 585, 14 S. E. 24; Barkley *v.* Barton, 15 Wash. 33, 45 Pac. 654. See 3 Cent. Dig. tit. "Appeal and Error," § 2508.

Service in separate parts of a proposed case will not affect the validity of the service. Archer *v.* Long, 35 S. C. 585, 14 S. E. 24.

Stipulation as to time of service.—A stipulation that appellants are to serve the case on respondent by a certain time does not waive service in a legal manner. Smith *v.* Smith, 119 N. C. 311, 25 S. E. 877. *Compare* Willis *v.* Atlantic, etc., R. Co., 119 N. C. 718, 25 S. E. 790.

82. *California.*— Buffendeau *v.* Edmondson, 24 Cal. 94; Hastings *v.* Halleck, 10 Cal. 31.

Nevada.— Lambert *v.* Moore, 1 Nev. 344.

North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.

Washington.— Erickson *v.* Erickson, 11 Wash. 76, 39 Pac. 241; Shelton Bank *v.* Willey, 7 Wash. 535, 35 Pac. 411. See also Tatum *v.* Boyd, 11 Wash. 712, 39 Pac. 639.

United States.— Cohn *v.* Daley, 174 U. S. 539, 19 S. Ct. 802, 43 L. ed. 1077.

In Pennsylvania the certificate required of counsel, stating the grounds of appeal, must be made during the sitting of the lower court when the appeal rests on facts not apparent on the record. Cramond *v.* Gibson, 3 Yeates (Pa.) 122.

Service before filing.—Where a statute provides that a party desiring to have a statement of facts certified must file it in the action, and serve a copy on the adverse party, the service cannot precede the filing. Barkley *v.* Barton, 15 Wash. 33, 45 Pac. 654; Erickson *v.* Erickson, 11 Wash. 76, 39 Pac. 241.

83. *California.*— Ryan *v.* Dougherty, 30 Cal. 218.

Kansas.— Kearny County *v.* Rush, (Kan. 1897) 50 Pac. 874; Union Park Land Co. *v.* Muret, 57 Kan. 192, 45 Pac. 589.

Louisiana.— Theus *v.* Kemp, 49 La. Ann. 1650, 22 So. 962.

Michigan.— People *v.* Wilson, 12 Mich. 25.

Minnesota.— Van Brunt, etc., Mfg. Co. *v.* Kinney, 51 Minn. 337, 53 N. W. 643; Irvine *v.* Myers, 6 Minn. 558.

New York.— French *v.* Powers, 80 N. Y. 146, 58 How. Pr. (N. Y.) 389; Kohn *v.* Manhattan R. Co., 8 Misc. (N. Y.) 415, 28 N. Y. Suppl. 665, 59 N. Y. St. 601; Schwartz *v.* Weber, 18 Abb. N. Cas. (N. Y.) 60. And see Mason *v.* Corbin, 29 N. Y. App. Div. 602, 51 N. Y. Suppl. 178.

North Carolina.— From the adjournment of the term. Delafield *v.* Lewis Mercer Constr. Co., 115 N. C. 21, 20 S. E. 167; McGee *v.* Fox, 107 N. C. 766, 12 S. E. 369.

South Carolina.—Godbold *v.* Vance, 14 S. C. 458. And see Parsons *v.* Gibbes, (S. C. 1901) 37 S. E. 753.

Washington.—Barkley *v.* Barton, 15 Wash. 33, 45 Pac. 654; Baker *v.* Washington Iron Works Co., 11 Wash. 335, 39 Pac. 642.

See 3 Cent. Dig. tit. "Appeal and Error," § 2502.

84. Consolidated Kansas City Smelting, etc., Co. *v.* Peterson, 8 Kan. App. 316, 55 Pac. 673 (in which it was held that where the time to serve a case-made was extended "until" a certain date, service on such date was in due time); Scruton *v.* Hall, 6 Kan. App. 714, 50 Pac. 964. See also Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260, 51 Pac. 376.

(II) *Extension of Time*—(A) *In General.* The time within which a case or statement on appeal must be made, filed, and served in some jurisdictions may be extended by the court below, within its discretion, upon sufficient cause being shown, and such extension may itself be enlarged, but in others it can only be extended by consent of the parties;[85] when the time has elapsed the court is without power to grant an extension for that purpose, or to settle and sign a case or statement which may thereafter be presented,[86] and, *a fortiori*, where an extension of time previously granted has expired, no further extension can be allowed.[87]

85. *California.*— Mahoney *v.* Caperton, 15 Cal. 313.

Idaho.— Snyder *v.* Viola Min., etc., Co., 2 Ida. 771, 26 Pac. 127.

Kansas.— Chicago, etc., R. Co. *v.* Guild, 61 Kan. 213, 59 Pac. 283; Hulme *v.* Diffenbacher, 53 Kan. 181, 36 Pac. 60; Hildinger *v.* Tootle, 9 Kan. App. 582, 58 Pac. 226. See also Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247; Limerick *v.* Haun, 44 Kan. 696, 25 Pac. 1069; Ætna L. Ins. Co. *v.* Koons, 26 Kan. 215.

Michigan.— Tilden *v.* Wayne Cir. Judge, 44 Mich. 515, 7 N. W. 84.

Minnesota.— Volmer *v.* Stagerman, 25 Minn. 234.

New York.— Coe *v.* Coe, 37 Barb. (N. Y.) 232; 14 Abb. Pr. (N. Y.) 86; Hatch *v.* Fogerty, 7 Rob. (N. Y.) 488; Finelite *v.* Finelite, 16 N. Y. Suppl. 287, 41 N. Y. St. 158; Adams *v.* Sage, 13 How. Pr. (N. Y.) 18; Livingston *v.* Miller, 1 Code Rep. (N. Y.) 117; Thompson *v.* Blanchard, 1 Code Rep. (N. Y.) 105; Hoffman *v.* Loomis, 18 Wend. (N. Y.) 513. But see Jackson *v.* Hornbeck, 2 Johns. Cas. (N. Y.) 115.

North Carolina.— But see Pipkin *v.* McArtan, 122 N. C. 194, 29 S. E. 334; Hemphill *v.* Morrison, 112 N. C. 756, 17 S. E. 535, to the effect that, the time for service of case on appeal being fixed by statute, it cannot be extended by the trial judge or otherwise except by consent.

Washington.— McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

See 3 Cent. Dig. tit. "Appeal and Error," § 2503.

A discretionary power.— The granting or refusing of a motion for leave to propose and settle a case after the time limited by the statute is within the discretion of the trial court, and nothing but a clear abuse of such discretion will justify the interference of the higher court. State *v.* Powers, 69 Minn. 429, 72 N. W. 705. *Contra*, State *v.* Price, 110 N. C. 599, 15 S. E. 116.

Effect of termination of office.—After a judge *pro tempore* has ceased to sit as a court he cannot extend the time for making and serving a case-made. Atchison, etc., R. Co. *v.* Leeman, 5 Kan. App. 804, 48 Pac. 932.

By successor in office.— In Hulme *v.* Diffenbacher, 53 Kan. 181, 36 Pac. 60, it was held, under section 549 of the code, authorizing the court or judge to extend the time for making or serving a case on appeal, that that duty might be performed by the successor in office of the judge who tried the case.

A motion for a new trial does not extend the time for filing a statement on appeal. Mahoney *v.* Caperton, 15 Cal. 313. But see Manley *v.* Park, (Kan. 1899) 58 Pac. 961; Union Park Land Co. *v.* Muret, 57 Kan. 192, 45 Pac. 589.

The extension of the time to appeal does not of itself extend the time to file and serve exceptions or a case with exceptions. Salls *v.* Butler, 27 How. Pr. (N. Y.) 133.

The extension of time to make implies an extension of time to serve. Chicago, etc., R. Co. *v.* Guild, 61 Kan. 213, 59 Pac. 283.

An order, made without the state by a trial judge, extending the time within which a case for the supreme court could be served, settled and signed, is a nullity. Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247; Blanchard *v.* U. S., 6 Okla. 587, 52 Pac. 736.

Stipulation of parties.— An extension of the time within which a case or statement should be made cannot, in the absence of an order of the court, be made by stipulation between the parties. Limerick *v.* Haun, 44 Kan. 696, 25 Pac. 1069; Ætna L. Ins. Co. *v.* Koons, 26 Kan. 215. See also Horner *v.* Christy, 4 Okla. 553, 46 Pac. 561, where it was held that such a stipulation must be approved by the court. *Contra*, Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534.

86. *California.*— Leech *v.* West, 2 Cal. 95.

Indiana.— Drake *v.* Everson, 155 Ind. 47, 57 N. E. 533.

Kansas.— Ferree *v.* Walker, 54 Kan. 49, 36 Pac. 738; Ætna L. Ins. Co. *v.* Koons, 26 Kan. 215; Ingersoll *v.* Yates, 21 Kan. 90.

New York.— Cluff's Estate, 11 N. Y. Civ. Proc. 338; Doty *v.* Brown, 3 How. Pr. (N. Y.) 375; De Lamater *v.* Havens, 5 Dem. Surr. (N. Y.) 53; Tilby *v.* Tilby, 3 Dem. Surr. (N. Y.) 258.

North Carolina.— Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187.

Oregon.— Seeley *v.* Sabastian, 3 Oreg. 563.

South Carolina.— Stribling *v.* Johns, 16 S. C. 112.

Compare Volmer *v.* Stagerman, 25 Minn. 234, in which it was held that where, after the expiration of the time limited for the making of a case, no judgment having been entered, leave to make a case is granted by the court, such leave operates as an extension authorized by Minn. Gen. Stat. (1878), c. 66, § 125. And see Matter of Williams, 6 Misc. (N. Y.) 512, 27 N. Y. Suppl. 433, 57 N. Y. St. 711, in which it was held that the surrogate's court has authority, under N. Y. Supreme Ct. Rules, No. 32, to permit a party at any time after an appeal is taken to serve a case, if the application is seasonably made thereafter, and good reasons shown.

87. Security Invest. Co. *v.* Love, 43 Kan. 157, 23 Pac. 161; Brown *v.* Crabtree, (Kan.

The court below cannot, however, extend the time in which to make and serve a case or statement on appeal beyond the time limited by statute in which an appeal or writ of error may be prosecuted.[88]

(B) *Notice of Application.* No notice of an application for an extension of time in which to make and serve a case or statement need be served on the opposite party.[89]

c. Failure to Make, File, or Serve in Time — (I) *In General.* Where an appellant or plaintiff in error fails to make, file, or serve his case or statement of facts within the time allowed by statute or by order of the court, such case or statement cannot be considered by the appellate court.[90]

(II) *Excuse and Relief.* Such failure will be excused and relief granted, however, where it is caused by the act of the adverse party or of the court, and there has been no default or negligence on the part of appellant or plaintiff in error.[91]

1897) 47 Pac. 525; Garden City *v.* Merchants', etc., Nat. Bank, 8 Kan. App. 785, 60 Pac. 823; Hawkins *v.* Dutchess, etc., Steamboat Co., 7 Cow. (N. Y.) 467; Noyes *v.* Tootle, 8 Okla. 505, 58 Pac. 652; Blanchard *v.* U. S., 6 Okla. 587, 52 Pac. 736; Polson *v.* Purcell, 4 Okla. 93, 46 Pac. 578; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729; Abel *v.* Blair, 3 Okla. 399, 41 Pac. 342.

88. Manch Chunk First Nat. Bank *v.* Valley State Bank, (Kan. 1899) 59 Pac. 335; Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611, 26 S. E. 253.

89. Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938. But see McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56, where it was held that, if notice can reasonably be given, an extension should not be granted upon an *ex parte* application.

90. *Arizona.*— Sandford *v.* Moeller, 1 Ariz. 362, 25 Pac. 534.

California.— Buckley *v.* Althorf, 86 Cal. 643, 25 Pac. 134; Kavanagh *v.* Maus, 28 Cal. 261.

Kansas.— Rogers *v.* Trader's Nat. Bank, (Kan. 1898) 55 Pac. 463; Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247; Kauter *v.* Entz, 8 Kan. App. 788, 61 Pac. 818.

Minnesota.— Van Brunt, etc., Mfg. Co. *v.* Kinney, 51 Minn. 337, 53 N. W. 643.

New York.— Hegeman *v.* Cantrell, 50 How. Pr. (N. Y.) 188; Hunt *v.* Bloomer, 12 How. Pr. (N. Y.) 567; Brown *v.* Heacock, 9 How. Pr. (N. Y.) 345. See also Ingersoll *v.* Smith, 62 How. Pr. (N. Y.) 474.

North Carolina.—Twitty *v.* Logan, 85 N. C. 592.

Texas.— Pickard *v.* Willis, (Tex. Civ. App. 1900) 57 S. W. 891; Peoples *v.* Terry, (Tex. Civ. App. 1898) 43 S. W. 846.

Washington.— Baker *v.* Washington Iron Works Co., 11 Wash. 335, 39 Pac. 642; Loos *v.* Rondema, 10 Wash. 164, 38 Pac. 1012.

United States.— Cohn *v.* Daley, 174 U. S. 539, 19 S. Ct. 802, 43 L. ed. 1077.

See 3 Cent. Dig. tit. "Appeal and Error," § 2504.

A jurisdictional question.— An objection that a statement of facts is not filed within the statutory time goes to the jurisdiction of the appellate court, and may be first made in that court. Loos *v.* Rondema, 10 Wash. 164, 38 Pac. 1012.

Appeal not dismissed.— Ordinarily, an appeal will not be dismissed on motion on the ground that a case has not been served in time, since appellant has a right to rely upon any errors apparent upon the face of the record proper. Kavanagh *v.* Maus, 28 Cal. 261; Harper *v.* Minor, 27 Cal. 107; Macomber *v.* Chamberlain, 8 Cal. 322; Leech *v.* West, 2 Cal. 95; Brown *v.* Heacock, 9 How. Pr. (N. Y.) 345; Hicks *v.* Westbrook, 121 N. C. 131, 28 S. E. 188; Rosenthal *v.* Roberson, 114 N. C. 594, 19 S. E. 667. But see *supra*, XIII, C, 7 [2 Cyc. 1093].

Effect of subsequent settlement.— The failure to serve the case on appeal within the time limited by law cannot be cured by a subsequent settlement of the case by the judge. Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187; McNeill *v.* Raleigh, etc., Air Line R. Co., 117 N. C. 642, 23 S. E. 268; Forte *v.* Boone, 114 N. C. 176, 19 S. E. 632. *Compare* Volmer *v.* Stagerman, 25 Minn. 234.

91. *New York.*—Jackson *v.* Platt, 2 Johns. Cas. (N. Y.) 71.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 113, 19 S. E. 105.

Texas.— Willis *v.* Smith, 17 Tex. Civ. App. 543, 43 S. W. 325; Hodges *v.* Peacock, 2 Tex. App. Civ. Cas. § 824.

Washington.— McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

Wisconsin.— Stevens *v.* Campbell, 13 Wis. 375.

To whom application for relief made.—An application for relief from default in serving a case on appeal should be made to the court from whose judgment the appeal is taken. Odell *v.* McGrath, 16 N. Y. App. Div. 103, 45 N. Y. Suppl. 119.

Mistake.— In Wade *v.* Wade, 1 How. Pr. (N. Y.) 7, plaintiff's attorney secured an order after trial for time to prepare and serve a case, and for a stay, but, by mistake, failed to serve the order until eight days afterward. Defendant had, in the meantime, entered the judgment and given notice of costs, and it was held that plaintiff would have twenty days to make and serve a case, judgment standing as security.

(III) *Waiver of Objections.* An objection based upon the failure of appellant or plaintiff in error to make, file, or serve his case or statement of facts within the required time may be either expressly or impliedly waived.[92]

d. Evidence of Service. The record should contain evidence of due and timely service of the case or statement of facts upon appellee or defendant in error.[93]

4. Proposed Amendments or Counter-Case or Statement — a. In General. If the case-made or statement of facts, as presented for settlement to the court below by appellant or plaintiff in error, does not state all the evidence or facts, and the exceptions of both parties on the points presented, it is the right of the other party to have such evidence or facts and exceptions inserted before the case or statement is settled.[94]

Subsequent settlement and allowance.— In Volmer *v.* Stagerman, 25 Minn. 234, it is said that failure to make timely service of a case is cured by a subsequent settlement and allowance by the court, this, under Minn. Gen. Stat. c. 66, § 105, being equivalent to an allowance of service after time, or to an enlargement of the time of service. *Contra,* Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187.

Effect of commencing appeal.—Where a party takes steps to appeal from a judgment he cannot claim that, because of respondent's failure to serve notice of the entry of the judgment, the time of appeal does not commence to run, within the provisions of Wash. Laws (1893), p. 116, § 13, to the effect that a statement on appeal must be filed within thirty days after the time begins to run within which an appeal may be taken. McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

Want of due diligence on part of appellant will debar him from relief. Whiting *v.* Kimball, 6 Bosw. (N. Y.) 690; Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324.

An announcement by the judge that court will not adjourn until a day fixed (meaning that the court cannot adjourn before that time, if the business is not then finished), will not excuse a failure to file a statement of facts, where the court adjourns before the time announced. Akes *v.* Sanford, (Tex. Civ. App. 1896) 39 S. W. 952.

92. Waiver by agreement.— Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534; Twitty *v.* Logan, 85 N. C. 592.

Waiver by admission of "due service."— State *v.* Baxter, 38 Minn. 137, 36 N. W. 108. But the mere acceptance of service, after the time limited by statute, will not waive the objection, and it is competent for counsel, in so accepting service, to add the date to the indorsement. Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187.

Waiver by participation in making up case. Abbott *v.* Nash, 35 Minn. 451, 29 N. W. 65; Byrd *v.* Bazemore, 122 N. C. 115, 28 S. E. 965; Roberts *v.* Partridge, 118 N. C. 355, 24 S. E. 15.

Failure of appellee to object.— In Bryan *v.* Maume, 28 Cal. 238, it was held that an appellee, by not returning the copy of the statement served on him, or by not making any objection, did not waive objection or consent to an order of the court giving appellant more than fifty days in which to file a statement.

93. Hunter *v.* Cross, 52 Kan. 283, 34 Pac. 781; Turner *v.* Bailey, 12 Wash. 634, 42 Pac. 115.

94. *Kansas.*— Mauch Chunk First Nat. Bank *v.* Valley State Bank, (Kan. 1899) 59 Pac. 335; Missouri, etc., R. Co. *v.* Roach, 18 Kan. 592.

Minnesota.— Phoenix *v.* Gardner, 13 Minn. 294.

New York.— Renwick *v.* New York El. R. Co., 59 N. Y. Super. Ct. 96, 13 N. Y. Suppl. 600, 36 N. Y. St. 682; Davey *v.* Lohrmann, 1 Misc. (N. Y.) 317, 20 N. Y. Suppl. 675, 48 N. Y. St. 716. See also Thompson *v.* Blanchard, 3 How. Pr. (N. Y.) 399.

North Carolina.—Walker *v.* Scott, 104 N. C. 481, 10 S. E. 523, holding that N. C. Acts (1889), c. 161, extending the time in which a case on appeal could be served, even though restoring the rights appellant had lost by his delay, would not be considered to cut off the rights of appellee, who, relying on appellant's case not having been served in time, had served no counter-case, and that appellee might file his exceptions to appellant's case *nunc pro tunc.*

South Carolina.— See Sanders *v.* Sanders, 28 S. C. 609, 9 S. E. 465.

Washington.— Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140, holding that the ten days allowed by Wash. Laws (1893), pp. 114, 115, § 9, for filing amendments to a proposed statement of facts, cannot be extended by the court.

See 3 Cent. Dig. tit. "Appeal and Error," § 2511.

Failure to show allowance of time for amendments.—A case-made will not be considered where the record fails to show that, as required by statute, defendant in error was given three days in which to suggest amendments, or that he waived his right to suggest them. Missouri, etc., R. Co. *v.* Roach, 18 Kan. 592; Weeks *v.* Medler, 18 Kan. 425. *Contra,* State *v.* Crook, 91 N. C. 536, holding that upon the case signed by the judge there arises the presumption of regularity, which must be rebutted.

Extension of time for making case.— In Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435, it was held that, under the statute allowing three days after the time fixed for making and serving a case for the suggestion

b. Manner of Making Amendments. It is the duty of the appellee who proposes alterations in the case or statement served to do so either by writing his proposed amendments on the case itself or on a separate paper, with a designation of the page and line of the original case proposed to be altered, and a specification of each alteration proposed; and, if on a separate paper, he should mark distinctly on the original case or statement each place and page to which amendments are proposed.[95]

c. Effect of Failure to Serve Objections or Counter-Case. Where the case or statement on appeal is served in time, and no exceptions are taken thereto, nor any counter-case served in the required time, it will be settled as the case or statement on appeal.[96]

d. Waiver of Defects in Exceptions. Defects in exceptions to a proposed case or statement on appeal, or in the service thereof, may be either expressly or impliedly waived.[97]

5 Time For Settlement — a. In General. A case-made or statement of facts on appeal should be settled as soon after judgment or decree as possible,[98] and

of amendments, an extension of time for making and serving a case does not take away the three days for such suggestion. Such latter time commences to run, not from the date of the actual service of the case-made, but from the expiration of the period of extension.

95. Tyng *v.* Marsh, 51 How. Pr. (N. Y.) 465 (holding that it is not necessary, generally, to insert *in extenso* or any considerable portion of the stenographer's notes of the trial in the proposed amendments to the case, but that, where they are in possession of one of the parties, they may be referred to by the folio or page); Stuart *v.* Binsse, 3 Bosw. (N. Y.) 657 (holding that the settled practice in New York requires that the lines of the proposed case be numbered, and that the amendments should be proposed in detail); Milward *v.* Hallett, 1 Cai. (N. Y.) 344.

Amendment by substitution.—When a case is made by one party, and intended to be amended by the other, the right to amend will not authorize a new case to be made by way of a substitution for the first. Stuart *v.* Binsse, 3 Bosw. (N. Y.) 657, 4 Bosw. (N. Y.) 616; Eagle *v.* Alner, 1 Johns. Cas. (N. Y.) 332. *Compare* State *v.* King, 119 N. C. 910, 26 S. E. 261; Harris *v.* Carrington, 115 N. C. 187, 20 S. E. 452; Horne *v.* Smith, 105 N. C. 322, 11 S. E. 373, 18 Am. St. Rep. 903 (in which it was held that where appellee makes his objections to appellant's statement to the case on appeal by asking that a statement prepared by him be substituted, it is a sufficient compliance with Clark's Code Civ. Proc. N. C. (1900), § 550, which provides that appellee shall return the copy of appellant's case served on him "with his approval or specific amendments indorsed or attached"); State *v.* Gooch, 94 N. C. 982.

96. Stickney *v.* Hanrahan, (Ida. 1900) 63 Pac. 189; Bailey *v.* Papina, 20 Nev. 177, 19 Pac. 33; Herbin *v.* Wagoner, 118 N. C. 656, 24 S. E. 490; Watkins *v.* Raleigh, etc., Air Line R. Co., 116 N. C. 961, 21 S. E. 409; State *v.* Arthur, 7 Wash. 358, 35 Pac. 120. See 3 Cent. Dig. tit. "Appeal and Error," § 2514.

Default in service without laches.— In Arrington *v.* Arrington, 114 N. C. 115, 19 S. E. 145, appellee mailed his counter-case, with fees, to the sheriff of the county in which appellant resided, and the sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post-office until too late, and it was held that there were no laches on appellee's part.

Failure of a case-made to state that no exceptions were made is not ground for dismissal where the case shows that it was served within the time granted by the court, and the certificate of the judge shows that the case was duly presented for settlement, both parties being present, and that no objection was made to the settlement. St. Louis, etc., R. Co. *v.* Sullivan, (Kan. App. 1897) 48 Pac. 945.

Failure to return statement with exceptions.—Where the exceptions to appellant's case on appeal are served within the required time, appellant cannot complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled. Stevens *v.* Smathers, 123 N. C. 497, 31 S. E. 721; McDaniel *v.* Scurlock, 115 N. C. 295, 20 S. E. 451.

Where the counter-case was erroneously served by mistake on an attorney who did not appear for appellant, the cause was remanded, with leave to proceed in the proper manner. Russell *v.* Koonce, 102 N. C. 485, 9 S. E. 403.

97. Express waiver.— Where appellant's counsel telegraphs, after the time appellee is required to serve his counter-case, that he will, on his return home, accept service, he is not estopped to claim that the counter-case was not served in time; otherwise if before the expiration of the time prescribed for service. Watkins *v.* Raleigh, etc., Air Line R. Co., 116 N. C. 961, 21 S. E. 409.

Implied waiver.— By presenting exceptions to a proposed case on appeal to the judge for settlement, without objection, appellant waives defects therein. Byrd *v.* Bazemore, 122 N. C. 115, 28 S. E. 965; Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611, 26 S. E. 253.

98. Hutchinson *v.* Bours, 13 Cal. 50.

In Louisiana the statement must be made

before the appeal is granted or the writ of error sued out;[99] and, where the statute fixes a specific time within which a case or statement on appeal shall be settled, a settlement after the expiration of such period is invalid.[1]

b. Extension of Time. In some jurisdictions, where a case or statement of facts on an appeal has not been settled in due time, an extension of time will be granted, upon good cause shown, in which to settle it,[2] and, although an order

before the judgment is signed (Burke *v.* Erwin, 5 La. 320; Mitchel *v.* Jewel, 10 Mart. O. S. (La.) 645); but, where the parties agree thereto, the statement may be made after the judgment is signed (Jones *v.* Neville, 9 Rob. (La.) 478; Meeker *v.* Galpin, 4 Rob. (La.) 259).

See 3 Cent. Dig. tit. "Appeal and Error," § 2516.

If settled and certified before the rendition of judgment a statement of facts will, in an equity case, be stricken from the record as insufficient, as there must be an affirmative showing that all the necessary facts are before the court. Bartlett *v.* Reichenecker, 6 Wash. 168, 32 Pac. 1062. See also Waldo *v.* Waldo, 32 Hun (N. Y.) 251; *In re* Prout, 18 N. Y. Civ. Proc. 270, 11 N. Y. Suppl. 160; Tilby *v.* Tilby, 3 Dem. Surr. (N. Y.) 258; Hartwell *v.* McMaster, 4 Redf. Surr. (N. Y.) 389.

Settlement in vacation.— A case-made may be settled and signed after the trial term, and in vacation, on the order of the trial court or judge. Shumaker *v.* O'Brien, 19 Kan. 476. See also Allen *v.* Ward, Dall. (Tex.) 371.

Waiver of question of jurisdiction.—Where a party appeared before the judge the day after the date fixed in the notice to settle a statement of facts, and objected to settlement only because the notice had not been given in time, he thereby waived the jurisdiction of the court to settle the statement on that date. McGlauflin *v.* Merriam, 7 Wash. 111, 34 Pac. 561.

99. Logan *v.* Winder, 20 La. Ann. 253; State *v.* Judge, 13 La. Ann. 485; Avendano *v.* Gay, 8 Wall. (U. S.) 376, 19 L. ed. 422; Generes *v.* Bonnemer, 7 Wall. (U. S.) 564, 19 L. ed. 227. *Compare* British Bark Latona *v.* McAllep, 3 Wash. Terr. 332, 19 Pac. 131 [*overruling* Meeker *v.* Gardella, 2 Wash. Terr. 355, 7 Pac. 889], where it was held that Wash. Laws (1883), p. 59, § 3, relating to the manner of settling and certifying a statement of facts on appeal, is permissive, and does not affect the jurisdiction of the supreme court, and that such statement may be certified by the lower court after the appeal is perfected. See 3 Cent. Dig. tit. "Appeal and Error," § 2517.

After dismissal of suspensive appeal.— If a statement be made before a devolutive appeal, taken any time within the year, it will be in time, though a previous suspensive appeal has been dismissed for insufficiency of the security. Jones *v.* Neville, 9 Rob. (La.) 478; Meeker *v.* Galpin, 4 Rob. (La.) 259.

After expiration of time to appeal.—A case or statement on appeal cannot be settled after the expiration of the time in which an appeal or writ of error may be prosecuted (Lee *v.* Tillotson, 4 Hill (N. Y.) 27); but where the time fixed by the court within which amendments to the case-made may be served extends beyond the time allowed by law in which appellate proceedings can be taken, the judge, at chambers, has authority so to modify the order as to enable the case to be settled in time to be filed in the appellate court (Files *v.* Baldwin, 9 Kan. App. 425, 58 Pac. 1039).

Before notice of appeal.—A statement of fact may be settled in advance of giving notice of appeal. Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758.

Before return to supreme court.— In Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87, it was held that a case may be made and settled at any time before the return is sent to the supreme court, notwithstanding that an appeal has in fact been taken.

1. *Minnesota.*— State *v.* Searle, 81 Minn. 467, 84 N. W. 324.

Nevada.— Whitmore *v.* Shiverick, 3 Nev. 288.

New York.— Little Falls M. E. Church *v.* Tryon, 2 How. Pr. (N. Y.) 132.

North Dakota.— McDonald *v.* Beatty, 9 N. D. 293, 83 N. W. 224.

Texas.— Swift *v.* Trotti, 52 Tex. 498; Withee *v.* May, 8 Tex. 160; Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984. *Compare* Allen *v.* Ward, Dall. (Tex.) 371.

Washington.— See McGlauflin *v.* Merriam, 7 Wash. 111, 34 Pac. 561; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

United States.— Coughlan *v.* District of Columbia, 106 U. S. 37, 1 S. Ct. 7, 27 L. ed. 74; Flanders *v.* Tweed, 9 Wall. (U. S.) 425, 19 L. ed. 678.

See 3 Cent. Dig. tit. "Appeal and Error," § 2518.

Computation of time.—In Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260, 51 Pac. 376, it was held that the statute providing that, in computing time, the first day shall be excluded and the last included applies in computing the time to be fixed of a notice of an intended application to the court to settle the statement of facts on appeal.

2. Lake Shore, etc., R. Co. *v.* Chambers, 89 Mich. 5, 50 N. W. 741; Gram *v.* Wasey, 45 Mich. 223, 7 N. W. 84, 762; Loveland *v.* Cooley, 59 Minn. 259, 61 N. W. 138; Cook *v.* Finch, 19 Minn. 407. But see Phelps-Bigelow Windmill Co. *v.* Deming, 6 Kan. App. 502, 50 Pac. 944.

Extension granted by appellate court.— In Bass *v.* Barton, 12 La. 437, it was held that, at any time before or at the argument of the cause, appellant may obtain further time and a mandamus to the judge below to complete the record.

fixing the time when a case-made or statement of facts shall be settled and signed should be observed, it is, nevertheless, within the power of the court or judge, thereafter and upon reasonable notice, to settle and sign the case or statement.[3]

e. Failure to Settle in Time. The effect, generally, of a failure on the part of appellant or plaintiff in error to have a case or statement on appeal settled in time is to prevent a review by the appellate court of any matters to a consideration of which a case or statement is necessary;[4] but where the failure to settle is caused by no fault of appellant,[5] or where he is misled by the adverse party,[6] or where the failure is caused through a *bona fide* mistake,[7] it may be excused, and relief granted.

6. Notice of Proceedings For Settlement — a. In General. Due notice of the time and place of the settlement of a case or statement of facts must, ordinarily, be served upon the adverse party,[8] though, in some jurisdictions, the failure of

3. Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481; Benham *v.* Smith, 53 Kan. 495, 36 Pac. 997; Lake Shore, etc., R. Co. *v.* Chambers, 89 Mich. 5, 50 N. W. 741; Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46, 31 Pac. 411. *Compare* Waterfield *v.* Hutchinson Nat. Bank, 6 Kan. App. 743, 50 Pac. 971. But see Day County *v.* Hubble, 8 Okla. 209, 57 Pac. 163; Sigman *v.* Poole, 5 Okla. 677, 49 Pac. 944; Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236. See 3 Cent. Dig. tit. "Appeal and Error," § 2520.

In North Carolina the court cannot extend the time prescribed by statute, but parties may waive it. Pipkin *v.* McArtan, 122 N. C. 194, 29 S. E. 334.

4. *Kansas.*— Missouri Pac. R. Co. *v.* Preston, (Kan. 1901) 63 Pac. 444; Symns Grocer Co. *v.* Wulfsohm, (Kan. 1899) 56 Pac. 473; Ferree *v.* Walker, 54 Kan. 49, 36 Pac. 738; Atchison, etc., R. Co. *v.* Dougan, 39 Kan. 181, 17 Pac. 811; Schweitzer *v.* Wichita, (Kan. App. 1898) 54 Pac. 321; Rhoades *v.* Rhoades, 6 Kan. App. 739, 50 Pac. 972; Waterfield *v.* Hutchinson Nat. Bank, 6 Kan. App. 743, 50 Pac. 971.

Michigan.— Lake Shore, etc., R. Co. *v.* Chambers, 89 Mich. 5, 50 N. W. 741.

New York.— Robinson *v.* Hudson River R. Co., 1 Hilt. (N. Y.) 144, 3 Abb. Pr. (N. Y.) 115.

North Carolina.— Heath *v.* Lancaster, 116 N. C. 69, 20 S. E. 962.

Texas.— Ennis Mercantile Co. *v.* Wathen, 93 Tex. 622, 57 S. W. 946; Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236. See 3 Cent. Dig. tit. "Appeal and Error," § 2521.

Stipulation waiving lapse of time.—When the jurisdiction of the judge to settle and sign a case has been lost by lapse of time, it cannot be restored by agreement of parties, nor by any action he may take with their consent. Home Electric Light, etc., Co. *v.* Globe Tissue-Paper Co., 146 Ind. 673, 45 N. E. 1108; Phelps-Bigelow Windmill Co. *v.* Deming, 6 Kan. App. 502, 50 Pac. 944. *Compare* Snyder *v.* Moon, 5 Kan. App. 447, 49 Pac. 327.

5. Meixell *v.* Kirkpatrick, 25 Kan. 13; Walton *v.* Prigmore, (Tex. Civ. App. 1899) 51 S. W. 352.

6. Willis *v.* Atlantic, etc., R. Co., 119 N. C. 718, 25 S. E. 790; Mott *v.* Ramsay, 91 N. C. 249. See also Atchison, etc., R. Co. *v.* Dougan, 39 Kan. 181, 17 Pac. 811; Weber *v.* Marquette Cir. Judge, (Mich. 1891) 85 N. W. 247.

7. Arrington *v.* Arrington, 114 N. C. 115, 19 S. E. 145.

8. Christie *v.* Carter, 56 Kan. 166, 42 Pac. 708; Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, 39 Pac. 727; Jones *v.* Menefee, 28 Kan. 436 (holding that district courts have power to provide for notice by rule); Weeks *v.* Medler, 18 Kan. 425 [*followed* in Missouri, etc., R. Co. *v.* Greenwood, 1 Kan. App. 330, 41 Pac. 225]; Nebraska L., etc., Co. *v.* Jones, (Kan. App. 1898) 55 Pac. 1097; Kincaid Bank *v.* Bronson, (Kan. App. 1898) 54 Pac. 504; Sheridan *v.* Snyder, 4 Kan. App. 214, 45 Pac. 1007; Kroenert *v.* Gustason, 19 Wash. 373, 53 Pac. 340; Aberdeen First Nat. Bank *v.* Andrews, 11 Wash. 409, 39 Pac. 672. See 3 Cent. Dig. tit. "Appeal and Error," §§ 2523, 2524.

Notice to all defendants in error.— Where plaintiff sued several defendants for specific performance of a contract executed by them, and, on judgment for defendants, failed to give a part of them notice of the presenting and settling of a case-made, and did not serve the case-made on all the defendants, the petition in error was dismissed. Shepard *v.* Doty, (Kan. App. 1900) 61 Pac. 870. Where defendants have different interests and are represented by different counsel each set must be served with notice. Shober *v.* Wheeler, 119 N. C. 471, 26 S. E. 26.

Premature notice.—Where due notice of the time and place for settling a case-made has been given, the adverse party cannot ignore it although the time fixed may be earlier than the case could properly be settled. Gross *v.* Funk, 20 Kan. 655; Nelson *v.* Becker, 14 Kan. 509.

Presumption of regularity.— In Battersby *v.* Abbott, 9 Cal. 665, it was held that it is no objection to the statement that it did not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. But *compare* Ward *v.* Tucker, 7 Wash. 399, 35 Pac. 126, 1086. See also Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029 (where it was held that a

appellee or defendant in error to propose amendments or a counter-case to the case or statement of facts served upon him, will obviate the necessity of a notice of settlement.[9]

b. Time of Notice. Where a time is fixed by law within which the notice of settlement shall be served, such limitation must be observed.[10]

c. Service of Notice. Notice of the time and place of settlement should be served in the mode prescribed by statute for the service of notices generally.[11]

d. Sufficiency of Notice. A notice of settlement should clearly show the object of the notice, and specify the time and place of application with certainty.[12]

e. Failure to Give Notice. A case or statement of facts on appeal cannot be considered by the appellate court where no notice of settlement has been given to the opposite party, or where such notice has not been given in the required time.[13]

finding, made and entered in the case-made by the judge while settling and signing such case, showing that notice has been given of the application for settlement, is sufficient, *prima facie*, to prove the fact that such notice was given); Attica State Bank *v.* Benson, 8 Kan. App. 566, 54 Pac. 1037.

Expiration of term of judge.—Where the person who presided at a trial has ceased to be a judge, the notice to settle the statement of facts should be that it will be settled before the court wherein the action is pending, and when the case is brought on for hearing it will be continued until a judge qualified to act is present. Watt *v.* O'Brien, 6 Wash. 415, 33 Pac. 969.

In North Carolina, by statute [Clark's Code Civ. Proc. N. C. (1900), § 550], the trial judge, upon disagreement of counsel, settles the case although he has gone out of office. Ritter *v.* Grimm, 114 N. C. 373, 19 S. E. 239.

9. Kavanagh *v.* Maus, 28 Cal. 261; Edwards *v.* Tracy, 2 Mont. 22; Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940; Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935; Erickson *v.* Erickson, 11 Wash. 76, 39 Pac. 241; Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268.

In North Carolina it has been held that when appellant's counsel, on receipt of appellee's case, sends the papers to the judge to settle without any "request" as required by Clark's Code Civ. Proc. N. C. (1900), § 550, to fix a time and place for settling the case, the judge is not required to give him notice. Walker *v.* Scott, 106 N. C. 56, 11 S. E. 364. See also State *v.* Debnam, 98 N. C. 712, 3 S. E. 742.

10. Cadwell *v.* North Yakima First Nat. Bank, 3 Wash. 188, 28 Pac. 365; Kenyon *v.* Knipe, 3 Wash. Terr. 243, 13 Pac. 759, holding that the court has no power to extend the time fixed by statute. See also Ledyard *v.* West St., etc., Electric R. Co., 5 Wash. 64, 31 Pac. 417.

Notice before judgment.—A statement of facts settled, with the knowledge of all parties, after the rendition of judgment, will not be stricken from the record because the notice for application for settlement was given before the rendition of judgment. Phillips *v.* Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476.

Before notice of appeal — Under Wash. Laws (1883), p. 59, § 3, requiring notice of a settlement of a statement of facts to be given within thirty days after rendition of judgment, and section 5, providing that notice of appeal may be given within six months after the rendition of judgment, it has been held that notice of settlement of facts may precede notice of appeal. King County *v.* Hill, 1 Wash. 63, 23 Pac. 926.

Time computed from filing of judgment.—Under a statute requiring that notice of a settlement of a statement of facts shall be made within thirty days after rendition of judgment, it has been held that a notice to settle given twenty-one days after judgment has been filed was in time, though not given until thirty-three days after the date of the judgment and the filing of the findings of fact. McGlauflin *v.* Merriam, 7 Wash. 111, 34 Pac. 561.

11. McCurdy *v.* Bowman, 27 Mich. 214 (in which service upon the party himself, instead of upon his solicitor, he being a solicitor of the court and having taken part in the trial of the cause, was held sufficient); Bowen *v.* Cain, 7 Wash. 469, 35 Pac. 369 (in which notice mailed to an adverse party residing in the same town was held insufficient, there being no statutory provision for serving notices by mail where both parties live in the same town).

See, generally, NOTICES.

Denial of motion to compel acceptance.—The denial of a motion to require an attorney to accept service of a case and exceptions is proper where he has never refused to receive them when properly served, and has merely neglected to reply to a letter asking him to accept service. Farley *v.* Stowell, 57 N. Y. App. Div. 218, 68 N. Y. Suppl. 119.

12. Merchants Nat. Bank *v.* Ault, 14 Wash. 701, 44 Pac. 129; American Asphalt Co. *v.* Gribble, 8 Wash. 255, 35 Pac. 1098. See 3 Cent. Dig. tit. "Appeal and Error," § 2527.

A notice fixing Sunday as the day for settling a statement of facts on appeal is void, and subsequent orders of the judge extending the time for settling the case, based on such notice, are without authority. Cadwell *v.* North Yakima First Nat. Bank, 3 Wash. 188, 28 Pac. 365.

13. Christie *v.* Carter, 56 Kan. 166, 42 Pac. 708; Chicago, etc., Bridge Co. *v.* Fowler,

f. Waiver of Notice. The appellee or defendant in error may, either expressly or by implication, waive notice of settlement or defects therein.[14]

7. Settlement and Signing — a. Necessity of. In some jurisdictions a case-made or statement of facts on appeal must be settled or approved by the court, while in others this is necessary only when counsel do not agree upon a case.[15]

b. By Whom Made — (I) *In General.* A case or statement of facts on appeal should be settled and signed by the judge who tried the cause.[16]

55 Kan. 17, 39 Pac. 727; Tatum *v.* Boyd, 11 Wash. 712, 39 Pac. 639; Aberdeen First Nat. Bank *v.* Andrews, 11 Wash. 409, 39 Pac. 672.

14. Phillips *v.* Love, 57 Kan. 828, 48 Pac. 142; McDonald *v.* Swisher, 57 Kan. 205, 45 Pac. 593; Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436; Symns Grocer Co. *v.* Burnham, 5 Okla. 222, 47 Pac. 1059; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660; Boyer *v.* Boyer, 4 Wash. 80, 29 Pac. 981.

Waiver by appearance.— An objection that appellant's proposed statement of facts was filed and settled without notice to respondents is not well taken where the record discloses that such statement was filed in due time, and that respondents appeared and objected to its certification, as such appearance obviates the necessity for such notice. Hansen *v.* Nilson, 17 Wash. 606, 50 Pac. 511. See also Attica State Bank *v.* Benson, 8 Kan. App. 566, 54 Pac. 1037.

15. *Arizona.*— Tombstone *v.* Reilly, (Ariz. 1893) 33 Pac. 823.

California.— Wetherbee *v.* Carroll, 33 Cal. 549; Redman *v.* Gulnac, 5 Cal. 148. *Compare* Warden *v.* Mendocino County, 32 Cal. 655, in which case, however, no objection was made upon that ground.

Idaho.— Pence *v.* Lemp, (Ida. 1895) 43 Pac. 75.

Kansas.— Merchants Nat. Bank *v.* Becannon, 51 Kan. 716, 33 Pac. 595; St. Louis, etc., R. Co. *v.* Corser, 31 Kan. 705, 3 Pac. 569; Phillips *v.* Love, 4 Kan. App. 443, 46 Pac. 55.

Louisiana.— Castaing *v.* Stone, 4 La. Ann. 18; Landry *v.* Jefferson College, 7 Rob. (La.) 179.

Michigan.— Gard *v.* Stevens, 12 Mich. 9.

Montana.— Gallagher *v.* Cornelius, 23 Mont. 27, 57 Pac. 447; Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

New Jersey.— Loftus *v.* Passaic County, 43 N. J. L. 357.

New York.— See Thompson *v.* Blanchard, 3 How. Pr. (N. Y.) 399; Jackson *v.* Miller, 6 Cow. (N. Y.) 38.

North Carolina.— State *v.* Gooch, 94 N. C. 982; Simonton *v.* Simonton, 80 N. C. 7; Kirkman *v.* Dixon, 66 N. C. 406.

Rhode Island.— Denison *v.* Foster, 18 R. I. 735, 31 Atl. 894.

South Carolina.— Archer *v.* Long, 35 S. C. 585, 14 S. E. 24; Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

Texas.— Hudson *v.* Morriss, 55 Tex. 595; Keef *v.* State, 44 Tex. 582; Texas, etc., R. Co. *v.* Cole, (Tex. 1886) 1 S. W. 631, 632; Graves *v.* George, (Tex. Civ. App. 1899) 54 S. W. 262; Owen *v.* Cibolo Creek Mill, etc., Co., (Tex. Civ. App. 1897) 43 S. W. 297; Meyer *v.* Mattes, 15 Tex. Civ. App. 11, 37 S. W. 963; Western Union Tel. Co. *v.* Walker, (Tex. Civ. App. 1894) 26 S. W. 858.

Washington.— Zenkner *v.* Northern Pac. R. Co., 3 Wash. Terr. 60, 14 Pac. 596.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2530, 2531.

Settlement by lapse of time.— A case which becomes settled by lapse of time after the amendments are served, or by arrangements between the parties, must be drawn up, copied, and served at or before the notice of argument in the same manner as where it is settled by a judge. Jackson *v.* Harrington, 4 Cow. (N. Y.) 537.

Counsel have a right to be heard in settling a case before a judge. Root *v.* King, 6 Cow. (N. Y.) 569.

In New York, on an appeal to the court of appeals from an intermediate court, a case must be prepared and settled by or under the direction of such court, and annexed to the judgment-roll. The case upon which the judgment was rendered should not be transmitted to the court of appeals. N. Y. Code Civ. Proc. § 1539; People *v.* Featherly, (N. Y. 1892) 30 N. E. 48; Cowenhoven *v.* Ball, 118 N. Y. 231, 23 N. E. 470, 28 N. Y. St. 870; Jaycox *v.* Cameron, 49 N. Y. 645; Essex County Bank *v.* Russell, 29 N. Y. 673; Purchase *v.* Matteson, 25 N. Y. 211; Mills *v.* Thursby, 11 How. Pr. (N. Y.) 134. See also King *v.* Townshend, 65 Hun (N. Y.) 567, 20 N. Y. Suppl. 602, 48 N. Y. St. 592.

Review of referee's decision.— In Johnson *v.* Whitlock, 13 N. Y. 344, it was held that, in the absence of any agreement between the parties and of any different settlement by the supreme court, the review of a referee's decision by the court of appeals must be on the same case on which the review was had at general term.

Where stipulated against.— A stipulation by the parties, or their counsel, that the case or statement of facts is correct, and that it may be filed and considered without the approval of the trial judge, will not dispense with such approval. Hodgden *v.* Ellsworth County, 10 Kan. 637; Abrahams *v.* Sheehan, 27 Minn. 401, 7 N. W. 822; Watson *v.* Duncan, 29 Misc. (N. Y.) 447, 60 N. Y. Suppl. 755; Johnson *v.* Blount, 48 Tex. 38.

16. Thurber *v.* Ryan, 12 Kan. 453 (even when the county of trial is transferred to another judicial district); Hunt *v.* Bloomer, 12 How. Pr. (N. Y.) 567; Western Union

(II) *On Appeal From Referees.* Where a referee has heard and decided the case, and an appeal is taken from the judgment, the case or statement on appeal should be settled by the referee, and not by the judge of the court.[17]

(III) *Effect of Termination of Office*—(A) *Settlement by Trial Judge.* In some jurisdictions, upon the expiration or other termination of a judge's term of office, a case or statement of facts on appeal must, nevertheless, be settled and signed by him.[18]

(B) *Settlement by Successor.* In other jurisdictions, the power to settle and sign the case or statement must be exercised by the successor in office of the trial judge.[19]

(C) *Grant of New Trial.* In North Carolina, if a judge dies before preparing a case on appeal, a new trial will be awarded unless the parties agree upon a statement of the case.[20]

Tel. Co. *v.* Walker, (Tex. Civ. App. 1894) 26 S. W. 858; State *v.* McDonald, 21 Wash. 201, 57 Pac. 336; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144.

After removal from district.— In Washington, under section 2137 of the code, providing that the judge of one district may sit in any other when requested by the judge of the latter, it has been held that the judge before whom a trial has been had can make a settlement of the statement of facts for appeal after removing from the district where he tried the case. King County *v.* Hill, 1 Wash. 63, 23 Pac. 926.

17. Matter of Niles, 47 Hun (N. Y.) 348; Doane *v.* Clinton, 2 Utah 417. See also Abbott *v.* Thomas, 6 N. Y. Suppl. 178, 25 N. Y. St. 157.

From two or more referees.— Where, on appeal from the determination of three referees, a case was settled by two of the referees in the absence of a third, and without notice to him, such proceeding was held irregular, and the case sent back for resettlement. Fielden *v.* Lahens, 14 Abb. Pr. (N. Y.) 48.

Where referee is interested — In Leonard *v.* Mulry, 93 N. Y. 392, it was held that where plaintiff had given the referee in the cause a lien on the judgment for his fees, both plaintiff and the referee knowing that defendant had appealed, the referee was disqualified from settling the case.

18. Harris *v.* Morange, 1 N. Y. City Ct. 221; Ritter *v.* Grimm, 114 N. C. 373, 19 S. E. 239; Barnes *v.* Lynch, 9 Okla. 11, 156, 59 Pac. 995; Michigan Mfg. Co. *v.* Saunders, 7 Wash. 302, 34 Pac. 1102; State *v.* Allyn, 7 Wash. 285, 34 Pac. 914. *Contra*, Prewitt *v.* Woods, 1 Tex. 521.

See 3 Cent. Dig. tit. "Appeal and Error," § 2533.

In Kansas, if the term of the trial judge expires before the time fixed for making and serving a case, he should settle the same as if his term had not expired; and, if his term expires after the time fixed for making and serving a case, yet if the time for settling a case had been fixed before the expiration of his term, which time did not expire until after the expiration of his term, he should also settle the case. Stoddard Mfg. Co. *v.* Columbia Mfg. Co., 8 Kan. App. 690, 57 Pac. 136 [*modifying* Farmers' Alliance Ins. Co. *v.* Nichols, 6 Kan. App. 923, 50 Pac. 940; Waterfield *v.* Hutchinson Nat. Bank, 6 Kan. App. 743, 50 Pac. 971]. See also Kansas, etc., R. Co. *v.* Wright, 53 Kan. 272, 36 Pac. 331; St. Louis, etc., R. Co. *v.* Corser, 31 Kan. 705, 3 Pac. 569; Gruble *v.* Wood, 27 Kan. 535; Ingersoll *v.* Yates, 21 Kan. 90; Garvin *v.* Jennerson, 20 Kan. 371; Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435; National Mortg., etc., Co. *v.* St. John Marsh Co., 8 Kan. App. 554, 54 Pac. 788; Gertz *v.* Beck, 7 Kan. App. 654, 53 Pac. 884.

19. Hays *v.* McNealy, 16 Fla. 406; Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117; Edwards *v.* Tracy, 2 Mont. 22; Chalk *v.* Patterson, 4 S. C. 98.

Motions for new trial before successor.— Where the successor of a judge who tried an action hears and denies the motion for a new trial made upon the record and minutes of the court, the subsequent statement on appeal from the order denying the motion should be settled by the judge who made the order, and not by his predecessor who tried the action. Cummings *v.* Conlan, 66 Cal. 403, 5 Pac. 796, 903.

Death of judge.—A case-made, being purely the creation of statute, cannot be settled or signed except as provided for therein; and where the statute does not provide for the signing and settlement of a case-made on the decease of the judge who tried the cause, it cannot be settled and signed by the latter's successor. Parrault *v.* Marsant, 9 Kan. App. 419, 58 Pac. 1027; Taylor *v.* Simmons, 116 N. C. 70, 20 S. E. 961; Heath *v.* Lancaster, 116 N. C. 69, 20 S. E. 962. *Compare* Hasard *v.* Conklin, 1 N. Y. City Ct. 220, where it was held that upon the death of the justice who tried a cause before settling the case and amendments on appeal, the settlement may be made by any other judge of the court.

20. Shelton *v.* Shelton, 89 N. C. 185; Mason *v.* Osgood, 72 N. C. 120. See also Drake *v.* Connelly, 107 N. C. 463, 12 S. E. 251 (wherein appellant moved for a new trial on account of the death of the judge before settlement, which application was refused upon appellee making a motion to withdraw his case, and leave the appellant's statement to stand as the case on appeal); Jones *v.* Holmes, 83 N. C. 108.

If there was laches on part of appellant

c. Place of Settlement. A case or statement on appeal is not jurisdictional, and it seems that it may be settled without the jurisdiction of the judge who tried the case.[21]

d. Adjournment of Settlement. The settlement of a statement of facts may be adjourned to another time or place specified in the order of the court, or in a stipulation between the parties.[22]

e. Mode of Determining Contents. While a case or statement of facts on appeal should properly be settled upon the minutes and recollection of the trial judge,[23] yet, if necessary, means may be taken to ascertain the truth by the examination of witnesses or other appropriate modes, before making up the appeal papers.[24]

f. Adopting and Incorporating Amendments or Counter-Case — (I) *Adopting and Incorporating Amendments.* Where there are amendments to a proposed case or statement of facts on appeal, the draft prepared and the amendments allowed should be incorporated into one document. In their separate form they do not constitute such a statement as will be noticed on appeal.[25]

(II) *Adoption of Counter-Case.* Where appellee returns a counter-case as a statement of his exceptions to appellant's case, and such counter-case is adopted by the court, it constitutes the case on appeal.[26]

(III) *Disallowed Amendments.* Where the court below disallows proposed amendments to a case or statement of facts, the controversy with regard to their

and during the delay judge dies, the judgment will be affirmed in the absence of errors on the face of the record. Heath *v.* Lancaster, 116 N. C. 69, 20 S. E. 962.

21. Owens *v.* Phelps, 92 N. C. 231; Whitesides *v.* Williams, 66 N. C. 141. And see Marsh *v.* Wade, 3 Wash. Terr. 477, 17 Pac. 886, wherein, by reason of appellee's appearance without the district in which the action was pending, the court refused to determine the question as to the validity of the objection if it had been taken in time.

22. Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96.

23. Visher *v.* Webster, 13 Cal. 58; Hale *v.* Park Ditch Co., 2 Mont. 498; Whitesides *v.* Williams, 66 N. C. 141; Chalk *v.* Patterson, 4 S. C. 98.

24. Pearson *v.* Grice, 8 Fla. 214; Chalk *v.* Patterson, 4 S. C. 98. See also Kamermann *v.* Eisner, etc., Co., 25 Misc. (N. Y.) 405, 55 N. Y. Suppl. 438. *Contra*, Hale *v.* Park Ditch Co., 2 Mont. 498.

25. Baldwin *v.* Ferre, 23 Cal. 461; Skillman *v.* Riley, 10 Cal. 300; Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600; Hinton *v.* Greenleaf, 115 N. C. 5, 20 S. E. 162; Mitchell *v.* Tedder, 107 N. C. 358, 12 S. E. 193. *Compare* Weems *v.* McDavitt, 49 Kan. 260, 30 Pac. 481, in which it was held that amendments to a case-made may be attached to and made a part thereof as exhibits, and, when so certified to by the trial judge, become a part of the record.

See 3 Cent. Dig. tit. "Appeal and Error," § 2538.

Duty of court in absence of appellee's attorney.— It is the duty of the trial judge to consider and allow, disallow, or modify amendments to the case proposed by appellant's attorney, and prepared and served by respondent's attorney, whether the latter appears at the time and place of submitting the case and amendments for settlement or not. Chalk *v.* Patterson, 4 S. C. 98.

Amendments striking out exceptions.— In Canzi *v.* Conner, 4 Abb. N. Cas. (N. Y.) 148, it was held that on a settlement of a case on appeal, an amendment striking out an exception which did not appear upon the judge's minutes or stenographer's notes was properly allowed, though appellant's counsel made affidavit that it was taken at the trial.

Notice of adoption.—It is not necessary for appellant or plaintiff in error to give notice of the adoption of amendments, the absence of notice being equivalent to an admission that they are to be allowed, and the subsequent settlement of the statement, by adoption of the amendments by the judge, is a substantial compliance with statutory requirements. Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481.

26. Harris *v.* Carrington, 115 N. C. 187, 20 S. E. 452.

Laches of appellant.—Where, after appellee has duly objected to appellant's case on appeal, there has been an unexplained delay of seven months by appellant in applying to the trial judge for a settlement of the case, and the judge is unable to distinctly remember what took place at the trial, the supreme court will take appellee's case as the case on appeal, Clark's Code Civ. Proc. N. C. (1900), § 550, providing that, where appellee has duly filed objections to appellant's case, appellant shall "immediately" request the trial judge to fix a time for settling the case. Simmons *v.* Andrews, 106 N. C. 201, 10 S. E. 1052. See also Stevens *v.* Smathers, 123 N. C. 497, 31 S. E. 721. Similarly, where appellant failed to apply to the court to settle the case, appellant's statement, as amended by appellee's exceptions, may be taken as the case on appeal. McDaniel *v.* Scurlock, 115 N. C. 295, 20 S. E. 451.

subject-matter is ended, and they should not be added to the case or statement on appeal.[27]

g. Formality Required. Statements of proceedings and copies of evidence intended to be incorporated in a case-made or statement of facts on appeal should precede the order of the judge settling the case, so as to make it manifest that they have been considered and allowed by him as parts of the record for review;[28] but mere informalities that can in no wise adversely affect the rights of the parties will not invalidate the case or statement.[29]

h. Signature of Judge. A case or statement of facts on appeal must be signed by the judge who settles it.[30]

i. Amendment, Correction, or Setting Aside Settlement — (I) *At Time of Settlement.* The trial judge, in settling a case-made or statement of facts on appeal, has the power, of his own motion or at the suggestion of either party, and before signing such case-made or statement of facts, to make such alterations in it, and such erasures and additions, as may be necessary to make it conform to the truth.[31]

(II) *After Settlement* — (A) *By Court.* In some jurisdictions the power of the court to amend, correct, or set aside the settlement of a case or statement of facts after signing is denied,[32] while in others it is allowed.[33]

27. The reason being that the appellate court cannot consider the reason actuating a judge in his allowance or disallowance of such amendment. Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600; Arkush *v.* Hanan, 60 Hun (N. Y.) 518, 15 N. Y. Suppl. 219, 39 N. Y. St. 424; Howe *v.* Kenyon, 4 Wash. 677, 30 Pac. 1058.

28. Hutchinson First Nat. Bank *v.* Kansas Grain Co., 60 Kan. 30, 55 Pac. 277. See also *supra*, XIII, E, 2, b, (I), (F).

29. Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499; Nott *v.* Thomson, 35 S. C. 589, 14 S. E. 23; Lacey *v.* Ashe, 21 Tex. 394.

Presumption of regularity.—"Where a case for the supreme court is made and served upon the defendant within proper time, and is settled and signed by the judge of the district court, and properly attached and filed by the clerk, it will be presumed, in the absence of anything to the contrary, that the case was settled in accordance with the requirements of the law." Douglass *v.* Parker, 32 Kan. 593, 5 Pac. 178. See also Fearns *v.* Atchison, etc., R. Co., 33 Kan. 275, 6 Pac. 237; Atchison, etc., R. Co. *v.* Ditmars, (Kan. App. 1895) 42 Pac. 933.

30. *Arizona.*— Tombstone *v.* Reilly, (Ariz. 1893) 33 Pac. 823.

Kansas.— Allen *v.* Krueger, 25 Kan. 74; Couse *v.* Phelps, 11 Kan. 455; Hodgden *v.* Ellsworth County, 10 Kan. 637.

Michigan.— Gard *v.* Stevens, 12 Mich. 9.

New York.— McNish *v.* Bowers, 30 Hun (N. Y.) 214.

Texas.— Johnson *v.* Blount, 48 Tex. 38; Henry *v.* Shain, 1 Tex. App. Civ. Cas. § 1074.

31. *California.*—Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458.

Kansas.— Sloan *v.* Beebe, 24 Kan. 343; Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105; Mutual Ben. L. Ins. Co. *v.* Sackett, 5 Kan. App. 660, 48 Pac. 994.

New York.— Root *v.* King, 6 Cow. (N. Y.) 569.

North Carolina.— State *v.* Gooch, 94 N. C. 982.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

Texas.— King *v.* Russell, 40 Tex. 124.

Striking out evidence.— In settling a case, the trial judge cannot strike out testimony set forth in the case drawn up by the party making the same, and not proposed to be stricken out by the adverse party in the amendments served by him. Denison *v.* Seymour, 5 Wend. (N. Y.) 103. See also Healey *v.* Terry, 7 N. Y. Suppl. 321, 26 N. Y. St. 929 (in which it was held that it was error for the trial judge to arbitrarily strike from appellant's exhibit any words which form a part of it); Becker *v.* Third Ave. R. Co., 46 N. Y. Suppl. 503. But *compare* Watson *v.* Duncan, 29 Misc. (N. Y.) 447, 60 N. Y. Suppl. 755, where it was held that it is the duty of the trial judge to refuse to settle a case which contains evidence not material to the question to be raised.

Insertion of irrelevant matters.— In Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96, it was held that where the statement contains all matters material to the appeal, the subsequent addition and settlement of matters irrelevant thereto does not afford grounds for striking out the statement.

32. Graham *v.* Shaw, 38 Kan. 734, 17 Pac. 332; Lewis *v.* Linscott, 37 Kan. 379, 15 Pac. 158; Snavely *v.* Abbott Buggy Co., 36 Kan. 106, 12 Pac. 522; Atchison, etc., R. Co. *v.* Anderson, 5 Kan. App. 707, 49 Pac. 108; Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140. *Compare* Wilson *v.* Janes, 29 Kan. 233, in which it was held that where an alteration of the case-made is required by justice, and was manifestly intended by both parties, the making thereof by the trial judge after the case has, strictly, passed out of his jurisdiction, is not necessarily fatal to the appeal. The court, however, distinctly denied the general power of a judge to amend a case-made after settlement.

33. *California.*— Warner *v.* F. Thomas Parisian Dyeing, etc., Works, 105 Cal. 409, 38 Pac. 960, 103 Cal. 242, 37 Pac. 153, 42 Am.

(B) *By Parties.* No change can be made in a case or statement of facts by any of the parties after it has been settled and signed by the judge who tried the case.[34]

8. RESETTLEMENT — a. In General. Where there are defects or omissions in the case or statement on appeal as settled, in some jurisdictions, a motion lies to the court or judge by whom it was settled for correction and resettlement[35] notwithstanding the case is pending in the appellate court.[36]

b. Time For Resettlement. A motion for a resettlement of a case or statement on appeal is too late if made after argument and decision in the appellate court.[37]

c. Appeal From Order Denying. Orders granting or refusing motions for a resettlement are appealable, but such appeals are not regarded with favor, and the decision of the trial judge is conclusive upon the appellate tribunal, except in cases where it is apparent that there has been a denial of a substantial right.[38]

St. Rep. 108, 37 Pac. 213; Flynn *v.* Cottle, 47 Cal. 526.

New Jersey.— Journey *v.* Hunt, 1 N. J. L. 274.

New York.— McKean *v.* Adams, 27 N. Y. Suppl. 421, 57 N. Y. St. 651.

South Carolina.—Correll *v.* Georgia Constr., etc., Co., 35 S. C. 593, 14 S. E. 65.

Washington.—See State *v.* Arthur, 7 Wash. 358, 35 Pac. 120.

Additional exceptions.—In Correll *v.* Georgia Constr., etc., Co., 35 S. C. 593, 14 S. E. 65, it was held that appellant may file additional exceptions where they become necessary by reason of a change allowed in the case-settled.

Correction of certificate.— Under Wash. Laws (1893), c. 60, §§ 9, 11, it has been held that while the judge may correct or supplement his certificate according to the facts at any time before an appeal is made, he can correct it only in accordance with the facts as shown by the statement at the time of settlement, and he cannot correct the statement and then make his certificate conform to the facts of the new statement. State *v.* Arthur, 7 Wash. 358, 35 Pac. 120.

34. Newlin *v.* Rogers, 6 Kan. App. 910, 51 Pac. 315; McCready *v.* Lindenborn, 24 Misc. (N. Y.) 606, 54 N. Y. Suppl. 46; Newman *v.* Dodson, 61 Tex. 91. *Compare* Boggess *v.* Harris, 90 Tex. 476, 39 S. W. 565, in which it was held that an unauthorized interlineation by appellant's attorney, without the knowledge of appellant, would not defeat appellant's right to have the case reviewed on the real record made below.

Alteration after service.— In Atchison, etc., R. Co. *v.* Ditmars, (Kan. App. 1895) 42 Pac. 933, it was held that where a case-made is served on, and acknowledged by, the opposite party, a statement of something which occurred subsequent to said service cannot be made a part of the legal case-made, since such statement has not been served upon the opposite party.

35. Salina Bldg., etc., Assoc. *v.* Beebe, 24 Kan. 363; McBride *v.* Rea, 33 Mich. 347; New York Rubber Co. *v.* Rothery, 112 N. Y. 592, 20 N. E. 546, 21 N. Y. St. 841; Cooley *v.* New York, etc., Bridge, 36 N. Y. App. Div. 520, 55 N. Y. Suppl. 832; Gleason *v.* Smith, 34 Hun (N. Y.) 547; Hallgarten *v.* Eckert, 3 Thomps. & C. (N. Y.) 102; Carr *v.* Butler, 32 Misc. (N. Y.) 657, 67 N. Y. Suppl. 491; Mason *v.* Tietig, 22 Misc. (N. Y.) 557, 49 N. Y. Suppl. 1000; James *v.* Work, 22 N. Y. Suppl. 123, 51 N. Y. St. 323; Cheever *v.* Brown, 7 N. Y. Suppl. 918, 17 N. Y. Civ. Proc. 51; Toner *v.* New York, 1 Abb. N. Cas. (N. Y.) 302.

By referee.— Where a case on appeal has been settled by the referee before the trial was had, the court cannot resettle the case, but may send it back to the referee for that purpose, with proper instructions. Jaeger *v.* Koenig, 28 Misc. (N. Y.) 436, 59 N. Y. Suppl. 182; Cheever *v.* Brown, 7 N. Y. Suppl. 918, 17 N. Y. Civ. Proc. 51. And see the opinion of Bartlett, J., in Abbott *v.* Thomas [*quoted* in Cheever *v.* Brown, 7 N. Y. Suppl. 918, 17 N. Y. Civ. Proc. 51].

Remandment for settlement.— In Jackson *v.* Miller, 6 Cow. (N. Y.) 38, it was held that, unless there was a very plain mistake, a case would not be remanded for settlement as to the evidence where it has been settled by the lower court according to the practice of the court.

36. It is not necessary to apply first to the appellate court to have the cause remitted to the court below before making an application for resettlement. Witbeck *v.* Waine, 8 How. Pr. (N. Y.) 433. See also Luyster *v.* Sniffin, 3 How. Pr. (N. Y.) 250; Rew *v.* Barker, 2 Cow. (N. Y.) 408, 14 Am. Dec. 515. But see Adams *v.* Bush, 2 Abb. Pr. N. S. (N. Y.) 118.

Contra.— The application must be for a certiorari in the appellate court, based upon written statement of the trial judge that he will probably make the correction if given opportunity to do so. Allen *v.* McLendon, 113 N. C. 319, 18 S. E. 205; Broadwell *v.* Ray, 111 N. C. 457, 16 S. E. 408; Boyer *v.* Teague, 106 N. C. 571, 11 S. E. 330.

37. Fish *v.* Wood, 2 Abb. Pr. (N. Y.) 419; Kettle *v.* Turl, 35 N. Y. Suppl. 1101, 70 N. Y. St. 698. But see Hix *v.* Edison Electric Light Co., 42 N. Y. Suppl. 769.

38. New York Rubber Co. *v.* Rothery, 112 N. Y. 592, 20 N. E. 546, 21 N. Y. St. 841; Gleason *v.* Smith, 34 Hun (N. Y.) 547 [*distinguishing* Tweed *v.* Davis, 1 Hun (N. Y.) 252]; Marckwald *v.* Oceanic Steam Nav. Co., 8 Hun (N. Y.) 547; Hallgarten *v.* Eckert,

9. Proceedings to Compel Settlement. Mandamus is the appropriate remedy to compel a judge to settle and sign a case or statement of facts on appeal, where he wrongfully and wilfully refuses and neglects to do so.[39] But a judge will not be compelled by mandamus or other proceedings to settle a case or statement on appeal where the applicant has been guilty of laches;[40] nor will an appellant, who is apprised of the trial judge's refusal to prepare a case or statement of facts, and who fails to apply for a mandamus to compel the judge to do so, be entitled to a reversal for the failure of the judge to discharge his statutory duty.[41]

10. Filing After Settlement — a. In General. After settlement, a case or statement on appeal must be filed in the lower court,[42] and a requirement, whether by statute or by rule of court, that it shall be filed within a certain time after settlement, must be complied with.[43]

b. Failure to File. A case or statement of facts on appeal which is not filed within the required time after settlement cannot be considered by the appellate court.[44]

3 Thomps. & C. (N. Y.) 102; Klein *v.* Second Ave. R. Co., 53 N. Y. Super. Ct. 531; Foster *v.* Standard Nat. Bank, 21 Misc. (N. Y.) 8, 46 N. Y. Suppl. 839; James *v.* Work, 22 N. Y. Suppl. 123, 51 N. Y. St. 323; Young *v.* Young, 18 N. Y. Suppl. 116, 44 N. Y. St. 652; Kingsland *v.* New York, 15 N. Y. Suppl. 420, 37 N. Y. St. 943.

39. People *v.* New York, 20 Wend. (N. Y.) 663; Kaeppler *v.* Pollock, 8 N. D. 59, 76 N. W. 987; Osborne *v.* Prather, 83 Tex. 208, 18 S. W. 613; Yeiser *v.* Burdett, 10 Tex. Civ. App. 155, 29 S. W. 912; Morgan *v.* Fleming, 24 W. Va. 186. See also Frost *v.* Frost, 45 Tex. 324. *Compare* Hodges *v.* Lassiter, 94 N. C. 294, in which a writ of certiorari was asked to compel a judge to settle a case and certify the same to the supreme court. It did not appear that the neglect of the judge below was due to a wilful violation of his duty, and the court refused to grant the writ, but granted a writ of certiorari directed to the clerk below, commanding him to certify the case settled upon appeal when, and as soon as, the judge should file the same, and to certify a copy of its opinion to the judge whose duty it was to settle the case. It is to be noted, however, that the supreme court refused to say that certiorari was the proper remedy applicable to compel a judge to settle a case where he wilfully refuses to do so, saying that they did not deem it necessary to settle the point under the circumstances. See also Peebles *v.* Braswell, 107 N. C. 68, 12 S. E. 44, in which case also a certiorari was applied for, but refused because there was no affidavit negativing laches on the part of appellant.

See, generally, Mandamus.

Contents of petition.— In Morgan *v.* Fleming, 24 W. Va. 186, it was held that the facts or evidence which it was alleged the court below erroneously refused to certify should be set forth in the petition for mandamus, or otherwise brought before the appellate court.

Showing as to jurisdiction.— A rule taken against the judge of a lower court, to compel him to show cause why he should not furnish a statement of facts to be used in a suit on appeal, will be dismissed unless it is shown that the suit is within the appellate jurisdiction of the court. This will not be inferred from the fact that the judge below had granted an appeal. State *v.* Judge, 13 La. Ann. 485.

After time limited by statute.— The granting or refusing of a motion for leave to propose and settle a case after the time limited by the statute is within the discretion of the trial court, and nothing but a clear abuse of such discretion will justify the interference of the appellate court. State *v.* Powers, 69 Minn. 429, 72 N. W. 705.

Motion to resettle in city court of New York. A motion to compel a referee, before whom a case was tried, to resettle the case on appeal should be made at the general, and not the special, term of the city court. Jaeger *v.* Koenig, 28 Misc. (N. Y.) 436, 59 N. Y. Suppl. 182.

40. Peebles *v.* Braswell, 107 N. C. 68, 12 S. E. 44; Cross *v.* Cross, 90 N. C. 15.

41. Guerguin *v.* McGown, (Tex. Civ. App. 1899) 53 S. W. 585.

42. Mix *v.* San Diego, etc., R. Co., 86 Cal. 235, 24 Pac. 1027; Woodhull *v.* New York, 69 Hun (N. Y.) 210, 23 N. Y. Suppl. 553, 53 N. Y. St. 418; Parker *v.* Link, 26 How. Pr. (N. Y.) 375; Van Bergen *v.* Ackles, 21 How. Pr. (N. Y.) 314; Clark's Code Civ. Proc. N. C. (1900), § 550.

43. Ryan *v.* Dougherty, 30 Cal. 218; Parker *v.* Link, 26 How. Pr. (N. Y.) 375; Chisolm *v.* Providence Washington Ins. Co., 35 S. C. 599, 14 S. E. 349, 480. See also *supra*, XIII, E, 3.

Extension of time.—The time may, by order entered of record, be extended by the judge for a period not exceeding ten days after adjournment of the term. Such extension may be made by the court either of its own motion or upon an application in writing by counsel. Ball *v.* Collins, 66 Tex. 467, 17 S. W. 371; International, etc., R. Co. *v.* Scott, 58 Tex. 187; White *v.* Holley, (Tex. Civ. App. 1892) 20 S. W. 859.

44. *Arkansas.*— Gray *v.* Nations, 1 Ark. 557.

Iowa.— Markley *v.* Owen, 102 Iowa 492, 71 N. W. 431.

Nevada.— Hagerman *v.* Tong Lee, 12 Nev. 331.

11. PRINTING. Non-compliance with a rule of court requiring that cases and statements of facts on appeal should be printed will subject appellant to a dismissal of his appeal.[45]

12. AGREED CASE OR STATEMENT. In some jurisdictions it is held that an appeal may be prosecuted upon a case or statement of facts agreed upon,[46] and

New York.— Rothschild *v.* Rio Grand Western R. Co., 9 N. Y. App. Div. 406, 41 N. Y. Suppl. 293, 75 N. Y. St. 703.

South Carolina.— Mensing *v.* Jervey, 38 S. C. 557, 17 S. E. 29; Simonds *v.* Marco, 38 S. C. 554, 16 S. E. 830.

Texas.— Attoway *v.* Goldsmith, (Tex. 1891) 18 S. W. 604; Galveston *v.* Dazet, (Tex. 1891) 16 S. W. 20.

See 3 Cent. Dig. tit. "Appeal and Error," § 2558; and *supra*, XIII, E, 3, c.

Evidence as to time of filing.—Where the indorsements of the clerk of the trial court show that the statement of facts was filed within the time required, but that it was not received by him until after the expiration of such time, the reviewing court will consider an affidavit of appellant's attorney, and a certificate by the clerk attached thereto as an exhibit filed in the case, for the purpose of determining whether such statement of facts was filed in time. Hilburn *v.* Preston, (Tex. Civ. App. 1895) 32 S. W. 702.

Excuse for failure.— In Simonds *v.* Marco, 38 S. C. 554, 16 S. E. 830, it was held that failure to file a case for appeal within ten days after settlement was not excused, under S. C. Code Civ. Proc. § 349, allowing relief on the ground of mistake or inadvertence, or misapprehension on the part of counsel.

In Texas it is provided by statute [1 Sayles' Civ. Stat. Tex. art. 1379*a*], that when a statement of facts is filed after time, and the party filing it shows that he used due diligence and that the delay resulted from causes beyond his control, the court shall allow said statement as part of the record. Under this statute it was held that an affidavit that the statement was presented before adjournment to the judge, who agreed to approve and file it, but failed to do so, showed no sufficient diligence on the part of appellant. Worlev *v.* McIntire, (Tex. Civ. App. 1893) 23 S. W. 996.

Statement prepared by judge.— 1 Sayles' Civ. Stat. Tex. art. 1379*a*, does not apply where the statement of facts is prepared by the judge after failure of the parties to agree on such statement, and the judge, through no fault of appellant, fails to file it within proper time. Hilburn *v.* Preston, (Tex. Civ. App. 1895) 32 S. W. 702.

45. Hunt *v.* Richmond, etc., R. Co., 107 N. C. 447, 12 S. E. 378; Horton *v.* Green, 104 N. C. 400, 10 S. E. 470; Witt *v.* Long, 93 N. C. 388; Rencher *v.* Anderson, 93 N. C. 105; Bowker Fertilizer Co. *v.* Woodward, 41 S. C. 547, 19 S. E. 498. See also Roberts *v.* Lewald, 108 N. C. 405, 12 S. E. 1028; Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

A mere colorable compliance with a rule requiring the printing of a case on appeal will be treated as none at all, and the appeal will be dismissed. Witt *v.* Long, 93 N. C. 388.

Time of printing.— While it is better and more convenient to have the record printed as soon as the case is docketed in the appellate court, yet it is a compliance with the rule if the record is printed when the case is called in its order for argument. Witt *v.* Long, 93 N. C. 388.

46. *Arizona.*— Smith *v.* Blackmore, (Ariz. 1892) 29 Pac. 15.

California.— Hutchinson *v.* Bours, 13 Cal. 50.

District of Columbia.— Pabst *v.* Baltimore, etc., R. Co., 2 MacArthur (D. C.) 42.

Florida.— See, *contra*, Pine *v.* Anderson, 22 Fla. 330.

Georgia.— Ogletree *v.* Sharp, 72 Ga. 899.

Idaho.— Moore *v.* Taylor, 1 Ida. 583.

Indiana.— Citizens' Ins. Co. *v.* Harris, 108 Ind. 392, 9 N. E. 299.

Iowa.— Williams *v.* Wells, 62 Iowa 740, 16 N. W. 513.

Louisiana.— Dubreuil *v.* Dubreuil, 5 Mart. (La.) 81.

Massachusetts.— Merrill *v.* Suffolk Mut. F. Ins. Co., (Mass. 1897) 46 N. E. 123.

Missouri.— Kansas City *v.* Hill, 80 Mo. 523; Ford *v.* Cameron, 19 Mo. App. 467.

Texas.— Whitaker *v.* Gee, 61 Tex. 217; Johnson *v.* Blount, 48 Tex. 38; Price *v.* Cole, 35 Tex. 461; Missouri, etc., R. Co. *v.* Fisher, (Tex. Civ. App. 1898) 47 S. W. 284.

United States.— Stimpson *v.* Baltimore, etc., R. Co., 10 How. (U. S.) 329, 13 L. ed. 441; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968.

See 3 Cent. Dig. tit. "Appeal and Error," § 2560 *et seq.*

Must contain all facts.— An agreed statement of facts, in order to enable the case to be heard thereon, must cover all the facts, and not leave some of them still controverted. Ford *v.* Cameron, 19 Mo. App. 467.

An agreed statement presenting essentially different facts from those presented to the court below, will not be considered by the appellate court. Crawford *v.* Kelly, 10 Bosw. (N. Y.) 697.

Necessary parties.— In Missouri, it is not necessary that all parties to an action should agree upon and join in the agreed case provided by Mo. Supreme Ct. Rules, No. 20, so as to place the appeal properly before that court, but only those actually appealing. Kansas City *v.* Hill, 80 Mo. 523.

Amendments.— An agreed case is not to be amended without a clear showing of mistake or fault. Hutchinson *v.* Bours, 13 Cal. 50.

Matters included.—An agreed case, under the Texas statute, should contain a brief statement of the case and of the facts proven, with or without copies of any of the proceedings,

signed by the parties[47] and approved by the judge before whom the proceedings were had.[48]

13. CERTIFICATES OF EVIDENCE — a. In General. Certificates of evidence, like cases made and statements of facts, are of statutory origin, and like them, must be procured and incorporated in the record in compliance with the requirements of the statutes creating them.[49]

b. Contents. A certificate of evidence should contain all the evidence introduced at the trial below.[50]

c. Time of Making and Filing. A certificate of evidence must be made and filed within the time specified by statute, or it will not be considered by the appellate court.[51]

as, in the opinion of the parties, may enable the appellate court to determine whether there has been any error. Whitaker *v.* Gee, 61 Tex. 217; Fisher *v.* Leisweitz, 1 Tex. Unrep. Cas. 330. And see Price *v.* Cole, 35 Tex. 461.

Incorporating evidence.—An agreed case or statement of facts should contain a brief statement of the facts proved as agreed upon, and not the evidence establishing such facts. Pabst *v.* Baltimore, etc., R. Co., 2 MacArthur (D. C.) 42; Whitaker *v.* Gee, 61 Tex. 217. See also Feist *v.* Boothe, (Tex. Civ. App. 1893) 27 S. W. 33. *Compare* Citizens' Ins. Co. *v.* Harris, 108 Ind. 392, 9 N. E. 299.

Where an agreed case is insufficient for the determination of the rights of the parties, the agreed facts will be discharged to enable them to show the necessary additional facts. Merrill *v.* Suffolk Mut. F. Ins. Co., (Mass. 1897) 46 N. E. 123.

47. Signing by parties.—An agreed statement must be signed by all the parties or their legal representatives. Dubreuil *v.* Dubreuil, 5 Mart. (La.) 81.

48. Approval by trial judge.— An agreed case or statement of facts on appeal must be approved by the trial judge. Smith *v.* Blackmore, (Ariz. 1892) 29 Pac. 15; Ogletree *v.* Sharp, 72 Ga. 899; Johnson *v.* Blount, 48 Tex. 38; Pace *v.* Price, (Tex. Civ. App. 1898) 45 S. W. 203. But in North Carolina it is not necessary for the judge to settle or sign unless counsel disagree. State *v.* Chaffin, 125 N. C. 660, 34 S. E. 516.

49. People *v.* Williams, 91 Ill. 87; White *v.* Morrison, 11 Ill. 361; Perkins Electric Lamp Co. *v.* Hood, 44 Ill. App. 449; Conway *v.* Chinn, 4 Mart. N. S. (La.) 491; Gephart *v.* Strong, 20 Md. 522; Cecil *v.* Harrington, 18 Md. 510; Devils Lake First Nat. Bank *v.* Merchants' Nat. Bank, 5 N. D. 161, 64 N. W. 941.

See also *infra*, XIII, G, 4.

In chancery causes, the sole office or function of a certificate of evidence is to truly set forth the evidence offered, rejected, received, and considered on the hearing, and any attempt to make it subserve the purpose of preserving a motion and order thereon for the appellate court is inoperative. Colehour *v.* Roby, 88 Ill. App. 478.

It is the duty of the court, in a chancery case in which oral evidence is admitted, to see that such evidence is, in some mode, incorporated into the record, and, where the judge cannot remember such evidence, he has the right to send for and reëxamine the witnesses to determine the facts to be incorporated in his certificate. People *v.* Williams, 91 Ill. 87. *Compare* Saratoga European Hotel, etc., Co. *v.* Mossler, 76 Ill. App. 688, in which it was held that a certificate of evidence, made solely upon the recollection of the judge as to what occurred at a prior term, will not be considered by a reviewing court, if objected to in apt time by either party.

It is the duty of the prevailing party to preserve what other evidence there may be in some appropriate manner, and his failure to do so estops him from complaining that the certificate of evidence does not contain all the evidence heard in the cause. John V. Farwell Co. *v.* Patterson, 76 Ill. App. 601.

In Pennsylvania, under the act of Feb. 24, 1806, the judge who delivers the opinion of the court is required, on request of either party, to reduce his opinion, and the reasons therefor, to writing, but cannot be compelled to write out the evidence or send up his notes. Bassler *v.* Niesly, 1 Serg. & R. (Pa.) 431; Downing *v.* Baldwin, 1 Serg. & R. (Pa.) 298.

50. Peacock *v.* Carnes, 110 Ill. 99.

51. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 62 Ill. App. 477; Turner *v.* Rutledge, 13 Ill. App. 454 (must be filed at time of filing decree unless time is extended); Jamison *v.* Weaver, (Iowa 1891) 50 N. W. 34; Hartnett *v.* Sioux City, 66 Iowa 253, 23 N. W. 654 (should be made within the time allowed for an appeal); McMicken *v.* Riley, 7 Mart. N. S. (La.) 393; Girod *v.* Perroneau, 11 Mart. (La.) 224 (at any time within judge's discretion, even after judgment signed). See 3 Cent. Dig. tit. "Appeal and Error," § 2568.

Enlargement of extended time.— Leave to file a certificate of evidence having been granted at the term at which the final decree was rendered, and the time therefor having been extended to a subsequent term, such time may, at such subsequent term, be extended, without notice, to a later day in the term. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 166 Ill. 154, 46 N. E. 756 [*reversing* 62 Ill. App. 477].

Order filing nunc pro tunc.— In Callies *v.* Callies, 91 Ill. App. 305, complainant prepared and presented to the chancellor a certificate of the evidence at the term of court at which the decree had been rendered, and

d. By Whom Made. A certificate of evidence should, as a rule, be made by the judge before whom the case was tried.[52]

e. Proceedings to Compel Certification. Where the judge below refuses to make a certificate of evidence mandamus lies to compel him.[53]

14. Supplemental Case, Statement, or Certificate. A case-made, statement of facts, or certificate of evidence imports absolute verity, and an appellate court will not consider assignments of error founded upon a supplemental case, statement, or certificate.[54]

15. Parties Bound by Case or Statement. Only those parties to a suit or action who are duly served with notice, or who, either personally or by their attorneys, participate in the settlement and signing of a case or statement of facts on appeal, will be bound by such case or statement.[55]

the chancellor made a note on it that it was so presented. The certificate was not filed, however, until a subsequent term, and it was held that the chancellor might properly enter an order that the same be filed *nunc pro tunc* as of the day it had been presented to him.

Certification prevented by judge's absence.—Where an order, granting an appeal in a chancery suit, gives thirty days to the party to prepare a certificate of the evidence and present it to the judge for signature, if, before the expiration of such time, the judge leaves the state without signing the same the party will have the right to have the same signed after the return of the judge, and after the expiration of the time originally fixed, when he is not chargeable with laches, and the appellate court will grant a writ of mandamus to compel the judge to sign a proper certificate. People *v.* Williams, 91 Ill. 87.

Estoppel.— One who stipulates that a certificate of evidence shall be incorporated in the transcript in lieu of a copy for the purpose of appeal, after the time allowed the other party for filing the certificate has expired, is estopped from objecting that it was not filed within the time allowed by the court therefor. Lederbrand *v.* Pickrell, 167 Ill. 624, 49 N. E. 192.

52. Teague *v.* Fortsch, 98 Iowa 92, 66 N. W. 1056; Burnett *v.* Loughridge, 87 Iowa 324, 54 N. W. 238; Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188. See 3 Cent. Dig. tit. "Appeal and Error," § 2569.

Evidence taken by referee.— On appeal from the overruling of exceptions to a referee's report, the evidence must be certified by the judge as required by statute, and should not be certified by the referee. Young *v.* Scoville, (Iowa 1895) 63 N. W. 607; Porter *v.* Everett, 66 Iowa 278, 23 N. W. 667; Mulkey *v.* McGrew, 2 Wash. Terr. 259, 5 Pac. 842.

After expiration of term of office.— Under Iowa Code (1873), § 2742, requiring evidence on appeal in equitable actions to be certified by the judge, such certificate, if made by the judge after the expiration of his term of office, is not sufficient. Teague *v.* Fortsch, 98 Iowa 92, 66 N. W. 1056; Burnett *v.* Loughridge, 87 Iowa 324, 54 N. W. 238. See 3 Cent. Dig. tit. "Appeal and Error," § 2569.

Where a change of judges is made after the partial trial of a case, and on the second hearing the notes of the reporter, taken on the first hearing, are used as correctly presenting the evidence, the certificate of the incoming judge is alone of any value as to what constituted the evidence on which he tried the case. Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188.

Certificate by clerk.— Where the record contains all the documents and evidence on which a cause has been heard and determined below, a certificate to this effect, made either by the clerk or judge, will suffice. Reeves *v.* Adams, 5 La. 288. See also Erwin *v.* Orillion, 6 La. 205.

53. People *v.* Williams, 91 Ill. 87; People *v.* Horton, 46 Ill. App. 434; Dillard *v.* Dunlop, 83 Va. 755, 3 S. E. 383; Powell *v.* Tarry, 77 Va. 250 [*overruling* Grayson *v.* Com., 6 Gratt. (Va.) 712]. See also Vaughan *v.* Green, 1 Leigh (Va.) 287.

See, generally, Mandamus.

Conflicting evidence.— Where evidence is conflicting the court may refuse to certify facts proved, but must certify the evidence if required. Powell *v.* Tarry, 77 Va. 250.

Reviewable error.— In Powell *v.* Tarry, 77 Va. 250, it was held that, while mandamus will lie to compel a judge to certify the evidence when he shall refuse to do so, his refusal is error, of which any party injured may complain to the appellate court, and for which an appellate court will reverse the judgment of the court below.

Mere lapse of memory is no reason for a trial judge to absolutely refuse to certify the evidence in a case preparatory to an appeal. Dillard *v.* Dunlop, 83 Va. 755, 3 S. E. 383.

54. Salina Bldg., etc., Assoc. *v.* Beebe, 24 Kan. 363; Rodman *v.* Harvey, 102 N. C. 1, 8 S. E. 888. *Compare* Leavy *v.* Roberts, 8 Abb. Pr. (N. Y.) 310, which holds that the preparation and use of a case on motion for a new trial on the ground of newly-discovered evidence does not preclude the party from submitting a new and different case on appeal from a judgment on the merits entered after denial of such motion.

Supplementary proceedings must be preserved by a new case-made or bill of exceptions, and cannot be incorporated into a case already settled. Taylor *v.* Mason, 28 Kan. 381.

55. Shober *v.* Wheeler, 119 N. C. 471, 26 S. E. 26; McMillan *v.* Hendricks, (Tex. Civ. App. 1898) 46 S. W. 859; Willis *v.* Smith,

F. Functions, Contents, and Making of Abstracts[56] of Record — 1. Office and Functions. An abstract of the record is designed to take the place of the record, and to save the appellate court the labor of searching through the latter to ascertain what it contains.[57]

2. Making and Preparing — a. Necessity of. In some jurisdictions an abstract or abridgment of the record is, by statute or rule of court, made a requisite to the hearing of the cause on appeal.[58]

17 Tex. Civ. App. 543, 43 S. W. 325; Brown *v.* Masterson, (Tex. Civ. App. 1897) 38 S. W. 1027.

Signature of attorney for several.— A statement of facts on appeal, signed by an attorney for several of the parties to the cause, but signed only as attorney for one, is binding on all. McMillan *v.* Hendricks, (Tex. Civ. App. 1898) 46 S. W. 859.

An intervener, who did not agree to a statement of facts as signed by the judge and is not guilty of any negligence in not preparing one, will not be bound thereby, and as to him the statement will, on motion, be stricken out. Willis *v.* Smith, 17 Tex. Civ. App. 543, 43 S. W. 325.

56. For definition of abstract see Abstract. For transcripts of record see *infra*, XIII, G.

57. *Alabama.*— O'Neal *v.* Simonton, 109 Ala. 369, 19 So. 8.

Florida.— Allen *v.* Lewis, 38 Fla. 115, 20 So. 821.

Illinois.— Johnson *v.* Bantock, 38 Ill. 111; Shackleford *v.* Bailey, 35 Ill. 387; March-Davis Cycle Mfg. Co. *v.* Strobridge Lithographing Co., 79 Ill. App. 683; Martin *v.* McMurray, 74 Ill. App. 44; Newman *v.* Jacobson, 67 Ill. App. 639; Kellogg *v.* McClellan, 62 Ill. App. 636.

Iowa.— Austin *v.* Bremer County, 44 Iowa 155.

Missouri.— Craig *v.* Scudder, 98 Mo. 664, 12 S. W. 341; Jayne *v.* Wine, 98 Mo. 404, 11 S. W. 969; Flannery *v.* Kansas City, etc., R. Co., 97 Mo. 192, 10 S. W. 894; Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Midland Elevator Co. *v.* Cleary, 56 Mo. App. 268; Matter of Redding, 31 Mo. App. 425.

Nebraska.— North Platte Water-Works Co. *v.* North Platte, 50 Nebr. 853, 70 N. W. 393; Alexander *v.* Irwin, 20 Nebr. 204, 29 N. W. 385; Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587.

North Dakota.— Thuet *v.* Strong, 7 N. D. 565, 75 N. W. 922.

South Dakota.— Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837; Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272; Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356; Noyes *v.* Lane, 2 S. D. 55, 48 N. W. 322.

Wisconsin.— Hay *v.* Lewis, 39 Wis. 364, wherein it is said that the sole office of a printed case is to present correctly the material parts of the record in a form convenient for the use of the court.

See 3 Cent. Dig. tit. "Appeal and Error," § 2573.

The supreme court, in the determination of questions before it, looks only to the abstract of appellant and the further or additional abstract of respondent (in case one has been filed), unless there is a conflict between the original abstract and the further or additional abstract which requires an examination of the records to settle.

Alabama.— O'Neal *v.* Simonton, 109 Ala. 369, 19 So. 8.

Florida.— Allen *v.* Lewis, 38 Fla. 115, 20 So. 821.

Missouri.— Herrmann *v.* Daily, 74 Mo. App. 505.

Nebraska.— Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587.

South Dakota.— Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837; Harrison *v.* Chicago, etc., R. Co., 6 S. D. 100, 60 N. W. 405; Noyes *v.* Lane, 2 S. D. 55, 48 N. W. 322.

58. *Alabama.*— Hobbie *v.* Andrews, 111 Ala. 176, 19 So. 974; O'Neal *v.* Simonton, 109 Ala. 369, 19 So. 8.

Arkansas.— May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064.

California.— Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 10 Cal. 187.

Colorado.— Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Hurd *v.* McClellan, 13 Colo. 7, 21 Pac. 903; South Boulder Ditch, etc., Co. *v.* Community Ditch, etc., Co., 8 Colo. 429, 8 Pac. 919.

Illinois.— People *v.* Cook County, 180 Ill. 160, 54 N. E. 164; Chamberlin *v.* Cary, 169 Ill. 34, 48 N. E. 173; Amundson Printing Co. *v.* Empire Paper Co., 83 Ill. App. 440; Chicago *v.* Fitzgerald, 75 Ill. App. 174.

Indiana.— Williams *v.* Nottingham, 27 Ind. 461; Cox *v.* Behm, 26 Ind. 307.

Iowa.— Cressey *v.* Lochner, 109 Iowa 454, 80 N. W. 531; State *v.* O'Day, 68 Iowa 213, 26 N. W. 81.

Missouri.— Butler County *v.* Graddy, 152 Mo. 441, 54 S. W. 219; Walser *v.* Wear, 128 Mo. 652, 31 S. W. 37; Hanauer *v.* Bradley, etc., Co., 64 Mo. App. 661.

Nebraska.— Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924; Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587.

North Dakota.— Thuet *v.* Strong, 7 N. D. 565, 75 N. W. 922.

South Dakota.— Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837; Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

Wisconsin.— A "printed case" corresponding to an abstract is required. Walker *v.* Newton, 53 Wis. 336, 10 N. W. 436; Hay *v.* Lewis, 39 Wis. 364. See also Heeron *v.* Beckwith, 1 Wis. 17.

Wyoming.— Spencer *v.* McMaster, 3 Wyo. 105, 3 Pac. 798; Halleck *v.* Bresnahen, (Wyo. 1883) 2 Pac. 537.

b. Who Must Make. The duty of making proper abstracts of record devolves upon plaintiff in error or appellant.[59]

3. Scope and Sufficiency — a. Formal Requisites[60] — (i) *Entitling.* A paper relied upon as an abstract will not be disregarded merely because it is not entitled as an abstract, and contains no averment that it is an abstract.[61]

(ii) *Index.* It is usually required that the abstract shall be indexed, and a failure to comply with such requirement has been held ground for dismissal.[62]

b. Matters Included — (i) *In General.* With regard to the matters properly included in an abstract of record it may be stated, as a general rule, that such

See 3 Cent. Dig. tit. "Appeal and Error," § 2574.

An abstract not required by rule or statute will be stricken out. Tacoma *v.* Tacoma Light, etc., Co., 16 Wash. 288, 47 Pac. 738.

An appeal, perfected before the passage of a statute providing for an abstract, is not affected by such statute. Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

Recitals in a bill of exceptions will not supply the record proper required by Mo. Supreme Ct. Rules, No. 13 [16 S. W. vi] in an abstract. Walser *v.* Wear, 128 Mo. 652, 31 S. W. 37.

For "statement of the case" as substitute for abstract see Crosby *v.* Clary, 43 Mo. App. 222.

Unauthorized abstract of evidence disregarded.— A paper in the transcript on appeal which is certified as containing "an abstract of the evidence given on the hearing" is not authorized by law, and will not be noticed by the appellate court. Matter of Tanner, 70 Cal. 22, 11 Pac. 326.

Requirements as to abstracts should not be waived or dispensed with either by the court or the parties. Spain *v.* Thomas, 49 Ill. App. 249; Thuet *v.* Strong, 7 N. D. 565, 75 N. W. 922; Spencer *v.* McMaster, 3 Wyo. 105, 3 Pac. 798.

59. Allen *v.* Lewis, 38 Fla. 115, 20 So. 821.

Where there are several defendants and all appeal, and one of them furnishes a complete abstract, it has been held that the other appellants are not required to furnish an abstract also. Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059.

60. Showing name of presiding trial judge. —In Iowa it is provided by the supreme court rules that the abstract shall show the name of the judge who presided at the trial. Pitkin *v.* Peet, 96 Iowa 748, 64 N. W. 793. It is sufficient if the name of the trial judge appear in any part of the abstract. Pitkin *v.* Peet, 96 Iowa 748, 64 N. W. 793. Where such name does not appear, the decision will be withheld until an amended or additional abstract is filed which complies with the rule. Kissinger *v.* Council Bluffs, 72 Iowa 471, 34 N. W. 215. See, however, Wilson *v.* Russell, 73 Iowa 395, 35 N. W. 492, in which it was held that the fact that an appellant's abstract incorrectly designates the judge making the certificate of the evidence can have no effect in the determination of the appeal.

Statement that abstract is complete.— According to some decisions an abstract cannot be considered which does not state that it is full and complete, its correctness being denied by the appellee. Avery Planter Co. *v.* Martz, 96 Iowa 747, 65 N. W. 989. See also State *v.* Hogan, 81 Iowa 747, 45 N. W. 903, in which it was held that where the abstract on appeal contains the certificate of the judge, or statement in the bill of exceptions that all the evidence, proceedings, and rulings in the case are therein set out or referred to in the bill of exceptions, but it is not alleged or shown that it contains an abstract of all the record, the case cannot be reviewed by the supreme court. But, when the abstract purports to contain a copy of a paper which is a part of the record, it is not necessary for the abstract to state that what it sets out is the whole of the paper. Baird *v.* Chicago, etc., R. Co., 61 Iowa 359, 13 N. W. 731, 16 N. W. 207.

For forms of abstracts of record see N. D. Supreme Ct. Rules, (1897), No. 133 [74 N. W. viii]; Oreg. Supreme Ct. Rules, (1894), No. 9 [37 Pac. v].

61. Noble *v.* Des Moines, etc., R. Co., 61 Iowa 637, 17 N. W. 26.

Enumeration of titles of other cases.—An appeal will not be dismissed because of the enumeration, in appellant's abstract, of the titles of numerous other cases intended to be submitted with the case of which a record is presented, where there is no showing of prejudice to appellee, and the titles are so separated as to avoid confusion. Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327; Searles *v.* Haag, 85 Iowa 754, 52 N. W. 328.

62. Staude *v.* Schumacher, 187 Ill. 187, 58 N. E. 318; State *v.* Abegglen, (Iowa 1896) 69 N. W. 256. Murrell *v.* McGuigan, 148 Mo. 334, 49 S. W. 984; Ramsdell *v.* Duxberry, (S. D. 1901) 85 N. W. 221.

Excuse for failure to index.— Where appellant has shown a sufficient excuse for his failure to annex an index to the original abstract, and, before the hearing, served and filed abstracts properly indexed, the motion to strike out the abstract will be denied. Ramsdell *v.* Duxberry, (S. D. 1901) 85 N. W. 221.

Marginal references to record.— In Illinois it is provided by a rule of court that the abstract of the record shall refer, by numerals on the margin, to appropriate pages of the record. Easterday *v.* Cutting, 77 Ill. App. 601; Illinois Cent. R. Co. *v.* Creighton, 53 Ill. App. 45 (holding that the absence of marginal references renders an abstract imperfect, but constitutes no ground for an affirmance); Lake *v.* Lower, 30 Ill. App. 500.

abstract should be literally an abstract, or abridgment, of the record, containing only so much thereof as is necessary to a full understanding of the questions presented for review.[63] It should be as brief as possible so long as all material matters are presented,[64] and an abstract which does not comply with this rule to a sufficient extent to obviate the necessity of a resort to the record is insufficient.[65] What-

63. *Colorado.*— Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864; Johnson *v.* Spohr, 12 Colo. App. 317, 56 Pac. 63 (holding that, where data on which rulings were made are not preserved in the abstract on appeal, they will be presumed to have been correct); Wicland *v.* Potter, 6 Colo. App. 451, 46 Pac. 370.

Florida.— Williams *v.* Pitt, 38 Fla. 162, 20 So. 936 (holding that a mere list of the papers filed in the case, in chronological order, with a slight history of the proceedings and allusions to contents of the papers filed, and reference to the transcript of the record, is insufficient); Allen *v.* Lewis, 38 Fla. 115, 20 So. 821 (holding that counsel must not state conclusions of the legal effect of the transcript, but facts must be given, so that the opposite party may admit them or question their correctness or fullness of statement); Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649.

Illinois.— People *v.* Cook County, 180 Ill. 160, 54 N. E. 164; Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78; Bochner *v.* Automatic Time Stamp Co., 80 Ill. App. 27; Ellinger *v.* Caspary, 76 Ill. App. 523, holding that, where there is nothing in the abstract to show whether or not a case was properly placed upon the short-cause calendar, the appellate court will not search the record for information on the question.

Indiana.— Williams *v.* Nottingham, 27 Ind. 461; Cunningham *v.* Thomas, 25 Ind. 171.

Iowa.— Howard *v.* Pratt, 110 Iowa 533, 81 N. W. 722; Cressey *v.* Lochner, 109 Iowa 454, 80 N. W. 531; Seekell *v.* Norman, 76 Iowa 234, 40 N. W. 726; State *v.* O'Day, 68 Iowa 213, 26 N. W. 81.

Missouri.— Sanders *v.* Chartrand, 158 Mo. 352, 59 S. W. 95; Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059 (holding that the certificate of the clerk and the various matters of record are not required to be set out in full in the abstract when the bill of exceptions is proved and filed, and that an abstract that states what the record shows is conclusive, unless respondent files a counter-abstract); Snoddy *v.* Jasper County, 146 Mo. 112, 47 S. W. 906; Sedgwick County *v.* Newton County, 144 Mo. 301, 46 S. W. 163; Ramsey *v.* Shannon, 140 Mo. 281, 41 S. W. 732; Ormiston *v.* Trumbo, 77 Mo. App. 310; Hanauer *v.* Bradley, etc., Co., 64 Mo. App. 661.

Nebraska.— Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924; Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587.

North Dakota.— Erickson *v.* Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46; Farmers', etc., Nat. Bank *v.* Davis, 8 N. D. 83, 76 N. W. 998.

South Dakota.— Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837.

Utah.— Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

Wisconsin.— Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487, holding that, under the rule requiring the printed case to contain a "brief abstract" of the return of the clerk, when the full phonographic report of the trial is printed the supreme court will not hear it read by counsel, and will not read it in the consultation room.

See 3 Cent. Dig. tit. "Appeal and Error," § 2575 *et seq.*

A good "abstract of the record" is an abbreviated but clear statement of every material thing in the pleadings, proof, instructions, affidavits, and entries in the order-book having a necessary and material bearing on the question presented, and embraced in the error assigned and relied on. Chapin *v.* Clapp, 29 Ind. 611.

Mere index has been repeatedly held to be insufficient as an abstract. Traeger *v.* Mutual Bldg., etc., Assoc., 189 Ill. 314, 59 N. E. 544; Buckley *v.* Eaton, 60 Ill. 252; Gilbert *v.* Sprague, 88 Ill. App. 508; Harrison *v.* Boetter, 88 Ill. App. 549; Amundson Printing Co. *v.* Empire Paper Co., 83 Ill. App. 440; Dorn *v.* Ross, 77 Ill. App. 223 [*affirmed* in 177 Ill. 225, 52 N. E. 321]; Martin *v.* McMurray, 74 Ill. App. 44; Chamberlin *v.* Cary, 67 Ill. App. 542; Ferguson *v.* Chas. F. Adams Mfg. Co., 66 Ill. App. 154; Cox *v.* Behm, 26 Ind. 307; Cunningham *v.* Thomas, 25 Ind. 171; Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587.

Prolix abstract stricken from files.— "The rules of this court require that the abstract show only so much of the record as is necessary to determine the questions presented by the appeal. An objectionable abstract may be stricken from the files, and appellant is allowed sixty days in which to file an abstract in conformity with the rules." Seekell *v.* Norman, 76 Iowa 234, 40 N. W. 726.

64. Howard *v.* Pratt, 110 Iowa 533, 81 N. W. 722. See also Allen *v.* Lewis, 38 Fla. 115, 20 So. 821.

A printed abstract of the record, filed in lieu of a transcript, under Mo. Rev. Stat. (1889), § 2253, must contain a statement of every matter sought to be reviewed on appeal and of all facts giving the appellate court jurisdiction of the cause, with the exception of the record entry of the judgment and the allowance of the appeal, which must be shown by the certificate of the clerk of the trial court. Wesby *v.* Bowers, 58 Mo. App. 419. See also Mo. Rev. Stat. (1889), § 2257; Doyle *v.* Turpin, 57 Mo. App. 84.

Necessity of setting out material parts in hæc verba.— Under Kansas City Ct. App. Rules, No. 15, the abstract must not be a mere statement of what the record is, but must set out *in hæc verba* the material parts. Matter of Redding, 31 Mo. App. 425.

65. Martin *v.* McMurray, 74 Ill. App. 44.

ever is relied upon as error should be shown,[66] and an appellant's abstract will, as against him, be deemed sufficiently full and accurate to present all the errors on which he relies.[67] The abstract should not, however, contain matters wholly immaterial and unnecessary in aiding the reviewing court to determine the appeal.[68]

(II) *Incorporating Evidence*—(A) *In General.* Matters of evidence on which counsel rely should be abstracted,[69] as the appellate court is under no obli-

66. *Colorado.*— Niles *v.* Kennan, 27 Colo. 502, 62 Pac. 360; Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479 (holding that, the court of appeals of Colorado making it obligatory upon an appellant or plaintiff in error to furnish the court with a printed abstract which shall present the parts of the record to which reference is made in the assignment of errors, omitted parts must be regarded as waived); Grant *v.* Leach, 8 Colo. App. 261, 45 Pac. 510.

Florida.— Allen *v.* Lewis, 38 Fla. 115, 20 So. 821.

Illinois.— Traeger *v.* Mutual Bldg., etc., Assoc., 189 Ill. 314, 59 N. E. 544; Staude *v.* Schumacher, 187 Ill. 187, 58 N. E. 318; Gibler *v.* Mattoon, 167 Ill. 18, 47 N. E. 319; Horn *v.* Yates, 90 Ill. App. 588; Harrison *v.* Boetter, 88 Ill. App. 549.

Indiana.— Chapin *v.* Clapp, 29 Ind. 611.

Iowa.—Egleston *v.* Brassfield, 38 Iowa 698.

Missouri.— Snoddy *v.* Jasper County, 146 Mo. 112, 47 S. W. 906; Johnson *v.* Carrington, 120 Mo. 315, 25 S. W. 200; Goodson *v.* Wabash, etc., R. Co., 23 Mo. App. 76; Coy *v.* Robinson, 20 Mo. App. 462.

Nebraska.— Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924.

Oregon.— Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519, holding that the fact that appellant's abstract does not contain a formal statement of errors does not render it fatally defective where it sufficiently appears from the abstract that the alleged error upon which appellant relies is the sustaining of appellee's motion for such decree.

South Dakota.— Neilson *v.* Holstein, 13 S. D. 459, 83 N. W. 581.

Questions presented by argument of counsel will not be considered on appeal if the abstract does not contain the proceedings of the trial court on which the argument is based. Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864.

67. Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78; Harrison *v.* Boetter, 88 Ill. App. 549; Wabash R. Co. *v.* Smith, 58 Ill. App. 419.

68. *Illinois.*— Johnson *v.* Bantock, 38 Ill. App. 111.

Iowa.— Phillips *v.* Crips, 108 Iowa 605, 79 N. W. 373; Rogers *v.* Winch, 65 Iowa 168, 21 N. W. 503; Tootle *v.* Taylor, 64 Iowa 629, 21 N. W. 115; Loan *v.* Hiney, (Iowa 1879) 1 N. W. 587.

Missouri.— Ricketts *v.* Hart, 73 Mo. App. 647, construing Mo. Rev. Stat. (1889), § 2253.

South Dakota.— Minnesota Thresher Mfg. Co. *v.* Schaack, 10 S. D. 511, 74 N. W. 445; Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

Wisconsin.— Walker *v.* Gulliford, 36 Wis. 325; Austin *v.* Bacon, 28 Wis. 416, holding that the "printed case" should contain only an abstract of the testimony, and should omit all irrelevant and impertinent matter.

"Preserve everything material to the question to be decided, and omit everything else," is the important suggestion contained in S. D. Supreme Ct. Rules, No. 12. Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

69. *Colorado.*— Old *v.* Keener, 22 Colo. 6, 43 Pac. 127; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Illinois.— Sohns *v.* Murphy, 168 Ill. 346, 48 N. E. 52; Maxwell *v.* Durkin, 86 Ill. App. 257; Western Electric Co. *v.* Parish, 83 Ill. App. 210; Rousseau *v.* Poitras, 62 Ill. App. 103.

Indiana.— Chapin *v.* Clapp, 29 Ind. 611.

Iowa.— State *v.* Warner, 98 Iowa 337, 67 N. W. 250; Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889; Holwig *v.* Rowler, 50 Iowa 96; Lucas *v.* Jones, 44 Iowa 298.

Minnesota.— In making up the record it is proper practice to abstract documentary evidence, but such abstract must contain all of the essential contents of the originals. Waldorf *v.* Kipp, 81 Minn. 379, 84 N. W. 122.

Missouri.— Jayne *v.* Wine, 98 Mo. 404, 11 S. W. 969; State *v.* Reynolds, 82 Mo. App. 152; Herrmann *v.* Daily, 74 Mo. App. 505; Ogleby *v.* Kansas City Dental Surgery College, 71 Mo. App. 339.

South Dakota.— Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580.

Wisconsin.— Walker *v.* Newton, 53 Wis. 336, 10 N. W. 436; Karasich *v.* Hasbrouck, 28 Wis. 569.

An abstract, consisting mostly of counsel's conclusions as to the substance and effect of the testimony of the several witnesses, interspersed with arguments as to its weight, and confidential side-remarks, does not call for the review of any questions of fact. Folger *v.* Bishop, 48 Ill. App. 526.

In narrative form.— Ill. App. Ct. Rules, No. 20, require the appellant to furnish a complete abstract of the record, in which shall appear the evidence in narrative form. Ferguson *v.* Chas. F. Adams Mfg. Co., 66 Ill. App. 154.

Mere reference to record insufficient.— So held in Florez *v.* Brown, 37 Ill. App. 270, construing Ill. App. Ct. Rules, No. 21.

When the abstract fails to show what evidence was admitted and what excluded the court will not determine whether or not appellant was prejudiced by admission or exclusion of evidence. Lucas *v.* Jones, 44 Iowa 298.

gation to resort to the record to ascertain what material evidence was introduced on the trial, but may rely on the abstract furnished by appellant.[70] The abstract should, as a rule, abbreviate and condense the evidence, and the whole of the testimony of witnesses should not be set forth by question and answer.[71]

(B) *Statement That All Evidence Is Included.* In Iowa, if the case is to be tried *de novo*, appellant's abstract should show that it is an abstract of all the evidence.[72] Such a statement will be sufficient if the opposite party and the

Where an instrument is objected to, so much of it as may be necessary to present the point must be inserted in the abstract on appeal. Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580. See also Western Electric Co. *v.* Parish, 83 Ill. App. 210. But see Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637, to the effect that a note sued on by plaintiff, and excluded for alleged alterations, may be inspected on appeal, and it is not enough that it is a part of the bill of exceptions, but plaintiff should, in his abstract, print a facsimile, or allege that there was no alteration apparent on its face; and, if not denied by additional abstract, this contention would be conceded, or, if denied, the original could be examined.

Where error is assigned upon the overruling of a motion for a continuance by the court below, and the affidavit upon which the motion was based does not appear in the abstract, the court will not consider it. Coleman *v.* Wiley, 56 Ill. App. 466. In some states, no appeal lies for granting or refusing a continuance. Piedmont Wagon Co. *v.* Bostic, 118 N. C. 758, 24 S. E. 525.

In equity cases in Missouri the appellate court must have the entire evidence, and the case is tried on the abstract, and not on the transcript. Brand *v.* Cannon, 118 Mo. 595, 24 S. W. 434; Garrett *v.* Kansas City Coal Min. Co., 111 Mo. 279, 20 S. W. 25; Wilds *v.* German Ins. Co., 65 Mo. App. 78; Trimble *v.* Wollman, 62 Mo. App. 541. But see New Haven Water Co. *v.* Wallingford, 72 Conn. 293, 44 Atl. 235, wherein it is said that, in equity, only the portions of evidence bearing upon the points intended to be raised on appeal should be certified to the appellate court, when the evidence is voluminous and much of it has no bearing on such questions, and all having such bearing can be easily separated from the rest.

In Iowa it is held that, in an equitable action, a recital in an abstract that the judge certified the evidence, stating the date of such certificate, is sufficient, without setting out the certificate itself. Yant *v.* Harvey, 55 Iowa 421, 7 N. W. 675. In actions at law in cases involving less than one hundred dollars it is necessary that the question certified shall be set out in the abstract, and it must appear by the abstract that the trial judge certified that it was desirable to have the question involved determined by the supreme court. Milliken *v.* Daugherty, 59 Iowa 294, 13 N. W. 293.

70. Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580; Sohns *v.* Murphy, 168 Ill. 346, 48 N. E. 52; Kanouse *v.* Martin, 3 Sandf. (N. Y.) 593, 3 Code Rep. (N. Y.) 124; Walker *v.* Newton, 53 Wis. 336, 10 N. W. 436.

71. Skiles *v.* Caruthers, 88 Ill. 458; Chicago, etc., R. Co. *v.* Rockford, etc., R. Co., 72 Ill. 34; Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604; Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

Statement of what evidence tended to prove. — Where the court is not required to determine the sufficiency of the evidence to sustain the judgment, the abstract need only state what the evidence tended to prove. Shumway *v.* Burlington, 108 Iowa 424, 79 N. W. 123.

72. Wallick *v.* Pierce, 102 Iowa 746, 71 N. W. 429; Maher *v.* Shenhall, 96 Iowa 634, 65 N. W. 978; Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632; Thatcher *v.* Stickney, 88 Iowa 454, 55 N. W. 488; Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418. See 3 Cent. Dig. tit. "Appeal and Error, § 2596.

"Counsel for appellant should at least state that they have furnished an abstract of all the evidence. If this is not properly controverted, it will be accepted as true. If it is thus controverted, then appellant should furnish an abstract of the certificate of the clerk or judge, showing what evidence was used in the trial below, and if the abstract furnished covers it all, it will be accepted unless an amended or controverting abstract is furnished by the other party." Britton *v.* Central R. Co., 39 Iowa 390.

Unnecessary on appeal from decree entered in accordance with procedendo.— The supreme court will take notice of its decision, and the record of a case in which, on rehearing, it has entered a procedendo, so that an abstract on appeal from a decree entered in accordance with the procedendo need not set out the evidence in the case. Pitkin *v.* Peet, 96 Iowa 748, 64 N. W. 793.

Abstracts held sufficient without such statement.— An appeal will not be dismissed because the abstract does not purport to contain all the evidence in the case, when there are questions which may be determined without all the evidence being before the court. Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810. Nor will an abstract be stricken out because it does not contain all the evidence, where it contains everything essential to enable the court to pass on the errors urged. McDermott *v.* Abney, 106 Iowa 749, 77 N. W. 505. So where the trial court directed a verdict for defendant at the close of the evidence, a motion to strike plaintiff's abstract from the files, because it did not contain all the testimony of defendant's witnesses, could not be granted, since the evidence of plaintiff only was necessary to pass on the validity of the verdict.

court are fairly apprised that appellant claims that he has presented an abstract of all the evidence.[73] That this statement may not be strictly true is not material.[74]

(III) *Recitals as to Error in Giving or Refusing Instructions.* The instructions in regard to the giving or refusing of which error is assigned, should appear in the abstract,[75] and the record will not be referred to to supply the omission.[76]

(IV) *Recitals as to Exceptions Taken and Bill of Exceptions Filed.* The abstract should show the exceptions taken to the proceedings of the court below,[77] and if it does not show that any exceptions were taken the supreme court will not look into the record to see if any were taken.[78] So, it may be stated that, as a general rule, an abstract of record should show that the bill of

Scott *v.* St. Louis, etc., R. Co., (Iowa 1900) 83 N. W. 818.

73. Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

Use of "testimony" for "evidence."— If it can be fairly inferred, however informal the language, that appellant claims that he has presented all the evidence in his abstract, though the word "testimony" be used instead, it will be assumed that he has done so, unless appellee sets out additional evidence. Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

Where appellant's abstract states that it is "a complete and correct abstract of the pleadings, evidence, and records in the cause," this is a sufficient claim that it contains all the evidence, and it will be so considered in the absence of an abstract by appellee showing additional evidence. Guinn *v.* Phoenix Ins. Co., 80 Iowa 346, 45 N. W. 880.

Statement in appellant's amended abstract.—An objection that appellant does not state in his original abstract that it contains all the evidence is without merit where such statement is made in an amended abstract, and is not denied. Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418.

The certificate of the judge, reporter, or clerk, to the effect that all the evidence is preserved by the record, if printed with the abstract, will not, alone, show that the abstract contains all the evidence. Mitchell *v.* Cahalan, 64 Iowa 172, 19 N. W. 902. See also Thatcher *v.* Stickney, 88 Iowa 454, 55 N. W. 488; State *v.* Hogan, 81 Iowa 747, 45 N. W. 903; Bailey *v.* Green, 80 Iowa 616, 45 N. W. 396; Peoria Steam Marble Works *v.* Limesenmeyer, 80 Iowa 253, 45 N. W. 766.

74. Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

A claim by appellant that all the "material evidence" is abstracted is futile, for the materiality of the evidence is a question for the court. McCoy *v.* American Emigrant Co., 76 Iowa 720, 39 N. W. 703.

75. May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064; Kelly *v.* Doyle, 12 Colo. App. 38, 54 Pac. 394; Otto *v.* Hill, 11 Colo. App. 431, 53 Pac. 614; Gibler *v.* Mattoon, 167 Ill. 18, 47 N. E. 319; City Electric R. Co. *v.* Jones, 161 Ill. 47, 43 N. E. 613; Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344; Horn *v.* Yates, 90 Ill. App. 588; Schroeder *v.* Clarke, 77 Ill. App. 564; Chicago *v.* Fitzgerald, 75 Ill. App. 174; Downey *v.* Hopkins, 43 Ill. App. 542 (holding that reference to the pages of the record is insufficient); Smith *v.* Johnson, 107 Mo. 494, 18 S. W. 21; Long *v.* Long, 96 Mo. 180, 8 S. W. 766; Ogelbay *v.* Kansas City Dental Surgery College, 71 Mo. App. 339. See also Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479.

The printing in the abstract of the motion for a new trial in which is inserted instructions given or refused by the court will not authorize a review of such instructions by the appellate court. Recitals in such motion will not be taken as true unless authenticated by the bill of exceptions signed by the judge. State *v.* Reynolds, 82 Mo. App. 152.

Where a bond referred to in the instructions is not set out in the abstract, the court cannot pass upon an objection to the instrument. Andryczka *v.* Towarzystwo, 86 Ill. App. 229.

76. Messamore *v.* Bittle, 59 Ill. App. 549; Parry *v.* Arnold, 33 Ill. App. 622; Smith *v.* Johnson, 107 Mo. 494, 18 S. W. 21; Long *v.* Long, 96 Mo. 180, 8 S. W. 766.

Necessity for showing objections to instructions.— An abstract on appeal should show that the instructions were objected to on the trial, and error in giving instructions will not be reviewed when such fact does not appear. Thompson *v.* De Weese Dye Ditch, etc., Co., 25 Colo. 243, 53 Pac. 507; Kelly *v.* Doyle, 12 Colo. App. 38, 54 Pac. 394.

77. Gibler *v.* Mattoon, 167 Ill. 18, 47 N. E. 319; Congress Constr. Co. *v.* Interior Bldg. Co., 86 Ill. App. 199; McKechney *v.* Mullane, 79 Ill. App. 135; Guenther *v.* Chicago Chronicle Co., 79 Ill. App. 105; American Surety Co. *v.* U. S., 77 Ill. App. 106; Hohstadt *v.* Daggs, 49 Mo. App. 157; Peterson *v.* Siglinger, 3 S. D. 255, 52 N. W. 1062.

78. McKechney *v.* Mullane, 79 Ill. App. 135; Aylsworth *v.* Moore, 58 Ill. App. 569.

Sufficient reservation of exceptions to rulings.— Where an abstract sets out the assignments of error, the ruling and objections thereto, and concludes: "Proper exceptions were reserved to each and all the foregoing assignments of error," there is a sufficient reservation of exceptions to the rulings, though the proper practice is to set out in the abstract the rulings, with objections and exceptions reserved, just as they appear in the bill of exceptions. Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827.

exceptions was signed and filed, properly and in due time;[79] but, according to some decisions, unless it appears affirmatively by appellant's abstract that no bill of exceptions was taken, the abstract will not be stricken from the files simply for want of a statement that it was taken,[80] and, in the absence of controversy, it will be presumed that such bill of exceptions was filed regularly and in due time.[81]

(v) *Recitals as to Judgment or Order Appealed From.* An abstract should show the rendition of a judgment or decree below,[82] and in whose favor rendered.[83]

(vi) *Recitals as to Motion For New Trial.* In some jurisdictions it is essential that an appellant's abstract should set forth his motion for a new trial, and should show that the same was filed within due time and that it was acted upon by the court.[84] Where, however, a party is given the right of appeal from the judgment on the judgment-roll, he may, if he deems proper, take it without bringing up in the abstract of the record the proceedings on the motion for new trial.[85]

(vii) *Setting Out Pleadings.* So much of the pleadings in a case as are necessary to a complete understanding of the question presented for decision should be set out in the abstract.[86]

79. Gates *v.* Brooks, 59 Iowa 510, 6 N. W. 595, 13 N. W. 640; Butler County *v.* Graddy, 152 Mo. 441, 54 S. W. 219; Hoffman *v.* St. Louis Trust Co., 151 Mo. 520, 52 S. W. 345; Western Storage, etc., Co. *v.* Glasner, 150 Mo. 426, 52 S. W. 237; Ricketts *v.* Hart, 150 Mo. 64, 51 S. W. 825; Hostetter *v.* Emerson, 64 Mo. App. 672; Mason *v.* Pennington, 53 Mo. App. 118; Hohstadt *v.* Daggs, 49 Mo. App. 157. See also Mason *v.* Pennington, 53 Mo. App. 118.

Record entries need not be set out. A narrative of the several steps taken is sufficient. Ricketts *v.* Hart, 150 Mo. 64, 51 S. W. 825.

Where the appeal is taken on the short method, the printed abstract need only state that the bill of exceptions was duly signed and filed in compliance with the order of the trial court, after reciting what the order was. Keet, etc., Dry Goods Co. *v.* Brown, 73 Mo. App. 245.

80. Thompson *v.* Silvers, 59 Iowa 670, 13 N. W. 854; Jones Lumber, etc., Co. *v.* Faris, 5 S. D. 348, 58 N. W. 813.

81. Wilson *v.* Mt. Ayr Presb. Church, 60 Iowa 112, 14 N. W. 136. See also *infra*, XVII, E, 1, d.

82. Pittman *v.* Pittman, 56 Iowa 769, 2 N. W. 536. See also Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479.

An abstract which merely refers to the judgment as "judgment on finding" is a mere index, and does not furnish material on which to base grounds for the reversal of the judgment. Gilbert *v.* Sprague, 88 Ill. App. 508.

The single word "judgment," appearing in the index filed as an abstract of the record, is not sufficient to indicate that there was a judgment rendered in the cause. Amundson Printing Co. *v.* Empire Paper Co., 83 Ill. App. 440.

83. Pittman *v.* Pittman, 56 Iowa 769, 2 N. W. 536. See also Schmitt *v.* Devine, 63 Ill. App. 289.

From what action of the trial court the appeal is taken (Neilson *v.* Holstein, 13 S. D. 459, 83 N. W. 581), and whether from an order, or a judgment or decree (Erickson *v.* Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46), should be shown by the abstract.

Inclusion of opinion of lower court.— It has been held that it is not improper to include in the abstract or additional abstract the written opinion of the lower court, and that such opinion will not be stricken on motion. Richardson *v.* Carlton, 109 Iowa 515, 80 N. W. 532; Gregg *v.* Spencer, 96 Iowa 501, 65 N. W. 411; Mellerup *v.* Travelers' Ins. Co., 95 Iowa 317, 63 N. W. 665; McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753; Williams *v.* Tschantz, 88 Iowa 126, 55 N. W. 202.

84. Jackson *v.* Ferguson, 76 Mo. App. 270; Hanauer *v.* Bradley, etc., Co., 64 Mo. App. 661. See also Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64.

A statement excusing length of motion does not call for a denial. Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64.

Under Mo. Rev. Stat. (1889), § 2253, providing that an appellant may, in lieu of a transcript, file a copy of the judgment and an order granting the appeal, accompanied by an abstract of the record, the abstract need not affirmatively show that the motion for a new trial was embodied in the bill of exceptions. Doyle *v.* Turpin, 57 Mo. App. 84.

85. Ramsdell *v.* Duxberry, (S. D. 1901) 85 N. W. 221.

86. Birmingham *v.* Coleman, 111 Ala. 407, 20 So. 383; Chamberlin *v.* Cary, 169 Ill. 34, 48 N. E. 173; Goelz *v.* Joerg, 64 Ill. 114; Sedgwick County *v.* Newton County, 144 Mo. 301, 46 S. W. 163, holding that, where the court is not informed as to what the allegations in the petition or the allegations or denials in the answer are, the appeal will be dismissed. See also Evans *v.* Gould, 82 Ill. App. 151; Chapin *v.* Clapp, 29 Ind. 611; Shaw *v.* Bryan, 39 Mo. App. 523.

Practice where complaint contains many similar causes of action.— An abstract on appeal, in an action to foreclose miners' liens

(VIII) *SHOWING THAT APPEAL WAS PROPERLY TAKEN.* An abstract should show that an appeal was, in fact, taken,[87] or was attempted to be taken,[88] and that notice of appeal was served.[89]

4. COUNTER-ABSTRACT — a. Office and Functions — (I) *IN GENERAL.* An additional or counter-abstract is proper for the purpose of setting out other or additional matter not found in the appellant's abstract, and necessary to a full understanding of the questions presented to the court for decision.[90] So, also, where respondent desires to correct appellant's abstract by striking out matters that are not contained in the original record, an additional abstract is proper.[91]

(II) *AS CURING DEFECTS AND WAIVING OBJECTIONS.* Filing an additional abstract, setting out in full certain facts of record and certain evidence alleged

filed to secure the payment of some thirty miners' claims, each being a duplicate of the others save as to names and amounts, stating two causes of action, submitted under a stipulation of the parties, was sufficient where it contained facts which enabled the court to decide the contested questions, and stated that all the other cases were precisely similar except the names of the parties and the amounts. Little Valeria Gold Min., etc., Co. *v.* Ingersoll, 14 Colo. App. 240, 59 Pac. 970.

When entire complaint to be set out.— On appeal from order sustaining demurrer to a complaint because not sufficient to constitute a cause of action, the entire complaint should be set out in the abstract. Ward *v.* Harr, (Ark. 1899) 50 S. W. 452. See also Chapin *v.* Clapp, 29 Ind. 611.

Where a case goes to the supreme court on a certificate of questions of law, appellant need not abstract the pleadings. Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038 [*citing* Noble *v.* Chase, 60 Iowa 261, 14 N. W. 299].

87. Plummer *v.* Peoples' Nat. Bank, 73 Iowa 752, 33 N. W. 150; Pittman *v.* Pittman, 56 Iowa 769, 2 N. W. 536; Erickson *v.* Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46; De Smet First Nat. Bank *v.* Northwestern Elevator Co., 2 S. D. 356, 50 N. W. 356; Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356.

88. Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356.

89. Tool *v.* Wightman, 78 Iowa 756, 42 N. W. 305; Hayden *v.* Goeppinger, 78 Iowa 753, 41 N. W. 607; Sheldon Independent Dist. *v.* Apperle, 76 Iowa 238, 40 N. W. 823; Fitzgerald *v.* Kelso, 71 Iowa 731, 29 N. W. 943; Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356.

Service of notice of appeal is essential to give the court jurisdiction of the appeal, and the fact that such service has been made, like any other fact essential to jurisdiction, should be stated in the abstract. Phillips *v.* Follet, 69 Iowa 39, 28 N. W. 425 [*following* Green *v.* Rouen, 59 Iowa 83, 12 N. W. 765; Pittman *v.* Pittman, 56 Iowa 769, 2 N. W. 536.

Sufficient statement in abstract.—The statement in appellant's abstract: "The plaintiffs appealed from the judgment," in the absence of any showing to the contrary, is sufficient to warrant the assumption that notice of the appeal was duly filed and everything done which is necessary in order to take an appeal. Day *v.* Hawkeye Ins. Co., 72 Iowa 597, 34 N. W. 435.

90. Daniels *v.* Knight Carpet Co., 15 Colo. 56, 24 Pac. 572; Hurd *v.* McClellan, 13 Colo. 7, 21 Pac. 903; Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; McArthur *v.* Linderman, 62 Iowa 307, 17 N. W. 531; Ormiston *v.* Trumbo, 77 Mo. App. 310; Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837; Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908; Harrison *v.* Chicago, etc., R. Co., 6 S. D. 100, 60 N. W. 405; Ayers, etc., Co. *v.* Sundback, 5 S. D. 362, 58 N. W. 929; Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272.

See 3 Cent. Dig. tit. "Appeal and Error," § 2586 *et seq.*

Additional abstract will be stricken out when it fails to set out omitted portions of record. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511. But where part of an appellee's amended abstract is essential to a correct understanding of a case, the abstract will not be stricken out. Commercial State Bank *v.* Hayes, (Iowa 1900) 82 N. W. 454. See also Markey *v.* Markey, 108 Iowa 373, 79 N. W. 258; Noble *v.* White, 103 Iowa 352, 72 N. W. 556. Appellee's amended abstract, containing papers used as evidence on the trial, will not be stricken out, in the appellate court, where appellant's abstract sufficiently refers to such papers and shows that they were used as evidence. McDonald *v.* Farrell, 60 Iowa 335, 14 N. W. 318.

If no bill of exceptions has been filed, the appellee, to take advantage of the fact, should set it up in an additional abstract. Thompson *v.* Silvers, 59 Iowa 670, 13 N. W. 854.

Review of cross-errors.— Under the rules of the Indiana supreme court it has been held that appellee, in order to have cross-errors considered which were not sufficiently presented in appellant's abstract, must furnish an abstract of that part of the record himself. Hall *v.* King, 29 Ind. 205. See also Evans *v.* Gould, 82 Ill. App. 151.

Where it is claimed that the undertaking on appeal is insufficient in form it is the proper practice to bring the same to the attention of the supreme court by an additional abstract. Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908.

91. Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908.

not to be found with sufficient fullness in the original abstract, has been regarded as an admission on the part of respondent that the original abstract, together with the additional abstract, completely present the case.[92]

b. Who Must Make and File. An appellee who regards the abstract of record made by appellant as incorrect or insufficient should make and file an additional or counter-abstract.[93]

92. Evans *v.* Gould, 82 Ill. App. 151; Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810; Kelly-Goodfellow Shoe Co. *v.* Vail, 84 Mo. App. 94. See also Burkhart *v.* Ball, 59 Iowa 629, 10 N. W. 260, 13 N. W. 666.

Effect of setting out judgment.— An objection on an appeal that no final judgment was rendered cannot be sustained, though an appellant's abstract does not show an entry of a final judgment, where respondent sets out such judgment in his additional abstract. Kelly-Goodfellow Shoe Co. *v.* Vail, 84 Mo. App. 94.

Where, however, appellee in his abstract alleges that appellant's abstract does not contain all the evidence, and, after presenting additional evidence, states that both abstracts fail to present all the evidence, and appellant's abstract does not claim to present all the evidence, the supreme court must consider that all the evidence is not before it. Shattuck *v.* Burlington Ins. Co., 78 Iowa 377, 43 N. W. 228. See also Cook *v.* Thurman, 88 Iowa 730, 55 N. W. 516; Barber *v.* Scott, (Iowa 1893) 55 N. W. 502; Hall *v.* Harris, 61 Iowa 500, 13 N. W. 665, 16 N. W. 535.

Estoppel to urge that all evidence is not before the court.— When an appellee files an additional or counter-abstract setting out certain evidence which he alleges to be omitted from the abstract of appellant, without any claim or statement that, together, the two abstracts do not present all the evidence, he cannot be heard to urge that all the evidence is not before the appellate court. Des Moines Nat. Bank *v.* Harding, 86 Iowa 153, 53 N. W. 99; *In re* Bagger, 78 Iowa 171, 42 N. W. 639; Richardson *v.* Blinkiron, 76 Iowa 255, 41 N. W. 10; Conners *v.* Burlington, etc., R. Co., 74 Iowa 383, 37 N. W. 966. See 3 Cent. Dig. tit. "Appeal and Error," § 2590. Where respondent files an additional abstract to supply omissions in the abstract of appellant, neither party can deny that the abstracts, taken together, contain all the evidence, even though the bill of exceptions in which it was certified has been stricken from the record. Roberts *v.* Leon Loan, etc., Co., 63 Iowa 76, 18 N. W. 702.

Waiver of objection that bill of exceptions was not seasonably filed.— Where an additional abstract is filed by appellee, setting out additional evidence which he claims appellant omitted from his abstract, a motion by appellee to strike the bill of exceptions from the files because it was filed too late in the trial court will be overruled. Richardson *v.* Blinkiron, 76 Iowa 255, 41 N. W. 10.

When the certificate of evidence is defective appellee may, for his own protection, supply the evidence by an additional abstract, and still insist that the judge's certificate is defective. Alexander *v.* McGrew, 57 Iowa 287, 8 N. W. 347, 10 N. W. 666.

93. *Alabama.*— Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507.

Colorado.— Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Illinois.— Hand *v.* Waddell, 167 Ill. 402, 47 N. E. 772; Ogden *v.* Ogden, 79 Ill. App. 488; Lauman *v.* Clark, 73 Ill. App. 659.

Iowa.— Noble *v.* White, 103 Iowa 352, 72 N. W. 556; Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770.

Missouri.— Bradley *v.* Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Ormiston *v.* Trumbo, 77 Mo. App. 310.

South Dakota.— Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837; Harrison *v.* Chicago, etc., R. Co., 6 S. D. 100, 60 N. W. 405; Ayers, etc., Co. *v.* Sundback, 5 S. D. 362, 58 N. W. 929.

See 3 Cent. Dig. tit. "Appeal and Error," § 2586 *et seq.*

A general denial by appellee that appellant's abstract contains all the evidence does not conform to Iowa Supreme Ct. Rules, No. 22, and will be disregarded. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

Certificate of clerk as substitute for additional abstract.— Though appellant's abstract is not denied by an additional abstract, yet where appellee files a certificate of the clerk that no translation of the shorthand notes has been filed in his office, that answers for an additional abstract and is to be regarded as an amended abstract showing the true condition of the record in that respect. Harrison *v.* Snair, 76 Iowa 558, 41 N. W. 315.

Defects to be specifically pointed out.— By Iowa Supreme Ct. Rules, No. 22, "every denial shall point out as specifically as the case will permit the defects alleged to exist in the abstract." Morrison *v.* Pepperman, (Iowa 1900) 84 N. W. 522.

Mere grumbling about opponent's abstract presents no question. "A party cannot impose upon the court the labor of reading the record by finding fault with the abstract filed, and grumbling about it does not present any question for the action of the court." Hand *v.* Waddell, 167 Ill. 402, 47 N. E. 772 [*quoted in* Lauman *v.* Clark, 73 Ill. App. 659].

Motion to have the costs of additional abstract taxed against appellant may be made by appellee. Ogden *v.* Ogden, 79 Ill. App. 488. See also Wilson *v.* Dresser, 152 Ill. 387, 38 N. E. 888.

e. Effect of Failure to File. Where no additional abstract is filed denying the correctness or sufficiency of appellant's abstract, the latter must be taken as correct.[94] A denial of its correctness, made in the argument on appeal, is insufficient and will be disregarded.[95]

d. Filing Unnecessarily. Where an additional abstract filed by a respondent is clearly unnecessary and uncalled for, it may be stricken from the files on motion.[96]

e. Time of Filing and Serving. The time within which a respondent's additional abstract should be filed and served is usually fixed by rules of court.[97] Notwithstanding the fact that the time is thus fixed, it would seem to be the usual rule that an additional abstract, though not filed or served within the time fixed by the rule, will not be stricken out where it does not appear that the submission of the cause has been delayed or prejudice caused by such failure to comply with the rule.[98]

94. *Arkansas.*— Ruble *v.* Helm, 57 Ark. 304, 21 S. W. 470; Tucker *v.* Byers, 57 Ark. 215, 21 S. W. 227; Ruble *v.* Cottrell, 57 Ark. 190, 21 S. W. 33; Hendricks *v.* Smith, (Ark. 1889) 12 S. W. 781.

Colorado.— Daniels *v.* Knight Carpet Co., 15 Colo. 56, 24 Pac. 572; Hurd *v.* McClellan, 13 Colo. 7, 21 Pac. 903. See also Niles *v.* Kennan, 27 Colo. 502, 62 Pac. 360.

Illinois.— Wilson *v.* Dresser, 152 Ill. 387, 38 N. E. 888; Yazel *v.* Palmer, 88 Ill. 597; Phelps *v.* Funkhouser, 40 Ill. 27.

Iowa.— McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810.

Missouri.— Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059; Flannery *v.* Kansas City, etc., R. Co., 97 Mo. 192, 10 S. W. 894; Midland Elevator Co. *v.* Cleary, 56 Mo. App. 268; State *v.* Wagers, 47 Mo. App. 431.

South Dakota.— Searles *v.* Christensen, 5 S. D. 650, 60 N. W. 29; Jones Lumber, etc., Co. *v.* Faris, 5 S. D. 348, 58 N. W. 813; Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272; Randall *v.* Burk Tp., 4 S. D. 337, 57 N. W. 4.

See 3 Cent. Dig. tit. "Appeal and Error," § 2586 *et seq.*

"The court takes such an abstract, so admitted by both parties to be correct, as the undisputed facts, and only examines the original record when there is a disagreement between the appellant's and respondent's abstract." Noyes *v.* Lane, 2 S. D. 55, 48 N. W. 322.

Though the original abstract fails to reproduce the evidence clearly, if counsel for appellee fails to file a further abstract the court will not resort to the transcript, but will confine itself to the abstract. Niles *v.* Kennan, 27 Colo. 502, 62 Pac. 360.

Where original abstract states that a bill of exceptions was filed, and no counter-abstract was filed, the appeal may be heard, even though the bill of exceptions set forth appears not to have been signed by the judge. Flannery *v.* Kansas City, etc., R. Co., 23 Mo. App. 120.

Where uncontradicted abstract shows prejudicial error.— Under S. D. Supreme Ct. Rules, No. 17, the judgment will be reversed if the appellant's abstract is acquiesced in by respondent. Noyes *v.* Lane, 2 S. D. 55, 48 N. W. 322.

95. Matter of Myers, 111 Iowa 584, 82 N. W. 961; McGillivary *v.* Case, 107 Iowa 17, 77 N. W. 483; McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Kunz *v.* Young, 97 Iowa 597, 66 N. W. 879.

96. Commercial State Bank *v.* Hayes, (Iowa 1900) 82 N. W. 454; Boggs *v.* Douglass, 89 Iowa 150, 56 N. W. 412; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64; Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14; Balkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

The cost of printing so much of appellee's amended abstract as was unnecessary will be taxed to appellee. Commercial State Bank *v.* Hayes, (Iowa 1900) 82 N. W. 454.

Where evidence set out not made of record. — An abstract on appeal purporting to set out evidence submitted to the trial court will, on motion, be stricken from the files where it appears that such evidence was not made of record. Cass County Bank *v.* Conrad, 81 Iowa 482, 46 N. W. 1055.

97. Briggs *v.* Coffin, 91 Iowa 329, 59 N. W. 259; Lathrop *v.* Doty, 82 Iowa 272, 47 N. W. 1089; Thomas *v.* McDaneld, 77 Iowa 126, 41 N. W. 592; Cruver *v.* Chicago, etc., R. Co., 62 Iowa 460, 17 N. W. 661; Green *v.* Ronen, 62 Iowa 89, 17 N. W. 180; Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

98. Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969; Ft. Madison *v.* Moore, 109 Iowa 476, 80 N. W. 527; Galer *v.* Galer, 108 Iowa 496, 79 N. W. 257; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236. See 3 Cent. Dig. tit. "Appeal and Error," § 2586 *et seq.*

Iowa Supreme Ct. Rules, § 19, require the additional abstract to be served within ten days after the service of the abstract, but an additional abstract, when served after the expiration of the ten days, will not be struck out when the final submission of the cause is not delayed by permitting it to remain on file. Briggs *v.* Coffin, 91 Iowa 329, 59 N. W. 259.

f. Denial of Additional Abstract — (I) *Necessity of* — (A) *In General.* An additional abstract which is not denied by the opposite party will, as a general rule, be deemed to be admitted and to correctly present the contents of the record.[99]

(B) *When Additional Abstract Is Not Justified by Record.* The point that parts of an additional abstract are unwarranted by the record should be made, not by motion, but by a printed denial in the nature of a reply, which may, if necessary, contain a further abstract of the record in explanation of the denial.[1]

(II) *Procedure Upon Denial.* Where an additional or counter-abstract is properly denied by appellant, the court will resort to the transcript to determine the questions raised as to the contents of the record.[2]

The appellate court will disregard a second additional abstract, served by respondent without leave, after the expiration of the fifteen days specified in S. D. Supreme Ct. Rules, No. 15, and promptly returned by the adverse party for that reason. Sutton *v.* Consolidated Apex Min. Co., 12 S. D. 576, 82 N. W. 188.

99. Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227; Furenes *v.* Severtson, (Iowa 1896) 66 N. W. 918; Crawford *v.* Berryhill, 97 Iowa 748, 66 N. W. 876; Kunz *v.* Young, 97 Iowa 597, 66 N. W. 879; Patterson *v.* Gallimore, 79 Mo. App. 457; Ricketts *v.* Hart, 73 Mo. App. 647; Badger *v.* Stephens, 61 Mo. App. 387; Hodges *v.* Bierlein, 4 S. D. 219, 56 N. W. 748. See 3 Cent. Dig. tit. "Appeal and Error," § 2591 *et seq.*

Where the additional abstract of appellee merely presents additional matters and does not otherwise controvert the correctness of appellant's abstract, it will be assumed that appellee's additional abstract is correct, and that there is no controversy, unless appellant files a paper expressly notifying the court that there is a controversy and an issue raised for determination; but where appellant's abstract states that it is an abstract of all the evidence, and this is denied by the abstract of appellee, the case would be different, and it should not be assumed that the original was untrue. Burkhart *v.* Ball, 59 Iowa 629, 10 N. W. 260, 13 N. W. 666.

"This rule does not apply when the controversy arises as to a bill of exceptions. In a very large number of cases the appellant's abstract simply sets forth the testimony, without any statement that it has been properly preserved by bill of exceptions. If no question is made as to the proper filing of a bill of exceptions, we presume that the evidence has been properly preserved. If the appellee states in his abstract that no proper bill of exceptions has been filed, and moves to strike out the evidence on that ground, we do not take the statement as true, but we refer to the transcript for a determination of the question." Wilson *v.* Mt. Ayr First Presb. Church, 60 Iowa 112, 14 N. W. 136.

Denial in argument insufficient.— A denial of additional abstract in appellant's argument will not be considered on appeal. Kunz *v.* Young, 97 Iowa 597, 66 N. W. 879.

Necessity for denial being sustained by a certification of the record.— In Iowa corrections made by appellee in his additional abstract will be taken as true where appellant's denial is neither confessed nor sustained by a certification of the record. Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227, decided in accordance with Iowa Supreme Ct. Rules, § 22.

What amounts to a denial.— Appellee filed an additional abstract denying many statements in appellant's abstract, and then claimed that his additional abstract must be taken as true because not denied by appellant. But appellant filed a separate paper, called a statement, in which he stated that he had caused a transcript to be filed, and demanded that the costs of the transcript be taxed to appellee, and attached an index to the transcript, "by the aid of which all the material facts and points for the verification of the abstract can readily be found in the transcript." It was held that this was by implication a reaffirmance of the correctness of the abstract and required the court to resort to the transcript to determine the questions raised as to the contents of the record. Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184.

Written objection.— Where the appeal is on the short method, and appellant wishes to controvert respondent's additional abstract, he should specify his objections thereto in writing and file them with the clerk of the appellate court, that he may order a certified copy of the original bill of exceptions. Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059; Patterson *v.* Gallimore, 79 Mo. App. 457; Badger *v.* Stephens, 61 Mo. App. 387.

1. Briggs *v.* Coffin, 91 Iowa 329, 59 N. W. 259.

A motion to strike out a bill of exceptions from an additional abstract filed by appellees, where appellant's abstract contains no bill of exceptions, will be refused where such bill of exceptions does not change the legal import of the record as presented by appellant's abstract. Garrett *v.* Bicklin, 78 Iowa 115, 42 N. W. 621.

A motion to strike out a portion of appellee's amended abstract, on the ground that it contains matter not contained in the transcript, will not be passed on if the original abstract sufficiently shows the fact intended to be shown by the amendment. Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

2. Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184.

Allowance of time to file transcript.— "The

5. Agreed Abstracts — a. In General. In some jurisdictions a case on appeal may be submitted on an agreed abstract of the record;[3] and where a case is thus submitted the court will not look beyond the abstract.[4]

b. Specification of Errors. Where a case is submitted on an agreed printed abstract, such abstract must include the petition in error or an abstract of the assignments of error.[5]

appellee's statement that the evidence was not made of record would be taken as true if not denied by appellant. In case it were denied, we would determine the question between the parties by an inspection of the transcript, and, if no transcript had been filed and there had been no lack of diligence on the part of the appellant after the necessity of a transcript had become apparent, we would allow a reasonable time to file one." Loan *v.* Hiney, (Iowa 1879) 1 N. W. 587.

Enforcement of agreement to allow time to file transcript.— Where counsel agreed to dispense with a transcript unless one was required, and that appellant should have time to file one, and it became necessary to file one on account of denials made in an amended abstract, and appellant showed by affidavit, submitted with the case, that one of the papers required for a transcript was temporarily lost from the files of the court below, it was held that the denials in the amended abstract should not be taken as true, but that appellant's motion to strike it from the files should be overruled, the submission set aside, and the cause continued with leave to appellant to file a transcript. Artz *v.* Culbertson, 71 Iowa 366, 32 N. W. 384.

Order to send up certified transcript.— In Missouri, if the appeal is on the short method and appellant does not concur in the counter-abstract filed by the respondent, the clerk of the appellate court, on written objection being made, is required by statute to send an official order to the clerk of the trial court to send up a certified transcript of so much of the record as is in dispute. Badger *v.* Stephens, 61 Mo. App. 387. See also Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059.

3. Doerr *v.* Southwestern Mut. L. Assoc., 92 Iowa 39, 60 N. W. 225; Shattuck *v.* Burlington Ins. Co., 78 Iowa 377, 43 N. W. 228; Renard *v.* Wyckoff, (Nebr. 1900) 84 N. W. 410; People's Bldg., etc., Assoc. *v.* Pearlman, (Nebr. 1900) 84 N. W. 408; Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924; O'Neill *v.* Flood, 58 Nebr. 218, 78 N. W. 497; Grand Lodge, A. O. U. W. *v.* Higgins, 55 Nebr. 741, 76 N. W. 438. See 3 Cent. Dig. tit. "Appeal and Error," § 2606.

A cause may be submitted at any time upon a written stipulation of the parties, on printed briefs, accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined. Closson *v.* Rohman, 50 Nebr. 323, 69 N. W. 760.

Affidavit of counsel insufficient to show agreed abstract.—That an abstract shall be an agreed abstract cannot be established by affidavits of counsel. Doerr *v.* Southwestern Mut. L. Assoc., 92 Iowa 39, 60 N. W. 225.

Necessity for proof that agreed abstract is such.— Where appellant's abstract is entitled or indorsed "Agreed Abstract of Record," it will, in the absence of a denial, be accepted as such; but when appellee denies that it is an agreed abstract the appellant must prove it. Shattuck *v.* Burlington Ins. Co., 78 Iowa 377, 43 N. W. 228.

Submission on appellant's abstract.— In Iowa, by agreement of the parties, the cause may be submitted on appellant's abstract. Talbort *v.* Noble, 75 Iowa 167, 39 N. W. 250, holding, also, that, where the stipulation makes no reference to the transcript and does not in terms waive any defect in appellant's abstract, the omission of the abstract to state that an appeal was taken is not waived and the court will not go back of the abstract to ascertain from the transcript whether an appeal was in fact taken. See also Riegelman *v.* Todd, 77 Iowa 696, 42 N. W. 517, wherein it was held that a motion to strike from the files an additional abstract, filed by appellees, on the ground that it was verbally agreed between the attorneys to submit the case on appellant's abstract, which agreement is denied by appellees, should be refused, though affidavits of attorneys for appellants were filed in support thereof.

4. Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924; O'Neill *v.* Flood, 58 Nebr. 218, 78 N. W. 497; Wheeler *v.* Barker, 51 Nebr. 846, 71 N. W. 750; Closson *v.* Rohman, 50 Nebr. 323, 69 N. W. 760.

Additional abstract by one party not considered.— Where an agreed abstract is filed by the parties to an appeal an additional abstract afterward filed by one party and contradicting the former abstract, will not be considered. Holmes *v.* Lucas County, 53 Iowa 211, 4 N. W. 918.

Presumption as to character of evidence introduced.— If it appears from such an agreed printed abstract that evidence was introduced, the nature of which is not disclosed, it will be presumed to have been of such a character as to sustain the finding of the district court. Shewell *v.* Nebraska City, 52 Nebr. 138, 71 N. W. 952.

Stipulation identifying record must show rendition of final judgment.— In a case submitted in accordance with Nebr. Supreme Ct. Rules, No. 2, under an agreed printed abstract, the court will not look beyond the abstract; and, to entitle the complaining party to a review of the judgment sought to be reversed, the stipulation identifying the record must show the rendition of the final judgment. Zink *v.* Westervelt, 52 Nebr. 90, 71 N. W. 960.

5. Renard *v.* Wyckoff, (Nebr. 1900) 84 N. W. 410; O'Neill *v.* Flood, 58 Nebr. 218, 78 N. W. 497.

6. Amended or Supplemental Abstracts — a. In General. It is not unusual to allow parties to file amended abstracts when they discover that their cases were not fully presented in the original abstracts;[6] and the rules of court in some jurisdictions expressly provide that when a party, through mistake or excusable neglect, has made or consented to an abstract which is incorrect or imperfect, he may, upon a satisfactory showing, be allowed to file an additional abstract.[7]

b. Time of Filing. As a general rule the appellate court need not consider an amended or supplemental abstract, if filed without leave after the case has been submitted,[8] except in very exceptional cases.[9]

c. Obtaining Leave to File. It has been held that it is not necessary to obtain leave of court to file an amended abstract, at least where the filing is within the proper time;[10] and that either party may do so as of course.[11]

Hence, where a cause is submitted on an agreed abstract of the record and the printed abstract contains no specification of the errors relied on for reversal, no question is presented for decision and the judgment will be affirmed. People's Bldg., etc., Assoc. *v.* Pearlman, (Nebr. 1900) 84 N. W. 408. In order to effect a reversal of judgment below, error must affirmatively appear from the abstract itself. Closson *v.* Rohman, 50 Nebr. 323, 69 N. W. 760.

6. Smith *v.* Wellslager, 105 Iowa 140, 74 N. W. 914; Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775; Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16; Paine *v.* Means, 65 Iowa 547, 22 N. W. 669; Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Ricketts *v.* Hart, 150 Mo. 64, 51 S. W. 825; Tipton Bank *v.* Davidson, 40 Mo. App. 421; McFarland *v.* Schuler, 11 S. D. 516, 78 N. W. 994; Iowa, etc., Bank *v.* Oliver, 11 S. D. 444, 78 N. W. 1002; Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453. See 3 Cent. Dig. tit. "Appeal and Error," § 2611 *et seq.* See also Lewiston Steam Mill Co. *v.* Merrill, 78 Me. 107, 2 Atl. 882, holding that one relying on an error of law must see that it appears on the record, and, if the abbreviated record allowed by Me. Rev. Stat. c. 79, § 11, does not show the error, the party should have the record extended and presented to the court for inspection.

An amendment of the record, obtained from the lower court after the filing of an appeal, may be brought before the appellate court by supplemental abstract. Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685.

Abstract containing matter dehors pleading struck from files.— On appeal from a judgment sustaining a demurrer to the complaint, a supplemental abstract, filed by defendant, containing matter *dehors* the pleading, may properly be stricken from the files. Colorado Fuel, etc., Co. *v.* Rio Grande Southern R. Co., 8 Colo. App. 493, 46 Pac. 845.

7. Ayers, etc., Co. *v.* Sundback, 5 S. D. 362, 58 N. W. 929.

An additional abstract of evidence, filed by appellant with his argument in reply, can be considered only so far as it controverts the correctness of appellee's abstract. Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

The portion of the record relied on must be set out by appellant in his first or original abstract. He cannot fail or refuse to furnish such abridgment or abstract in the first instance and then, after respondent shall suggest in his brief such failure, cure the defect by a so-called supplemental abstract. Tipton Bank *v.* Davidson, 40 Mo. App. 421; Cuomo *v.* St. Joseph, 24 Mo. App. 567.

Necessity for denial.— Where an abstract as amended is not denied, the usual rule applies (see *supra*, XIII, F, 4, f, (I)); and its recitals will be taken as true (Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507).

Notice of motion to strike amended abstract.— Motions to strike an amended assignment of error and amendment to the abstract cannot be considered unless notice of their filing has been given to appellant. Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632.

The fact that no service of an amended abstract is made on appellee will not authorize an order striking it from the files, where such abstract was made necessary on account of a change of the record in the trial court upon appellee's motion. Peterson *v.* Adamson, 67 Iowa 739, 21 N. W. 701.

8. Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16; Matter of Caywood, 56 Iowa 301, 9 N. W. 228; Rogers *v.* Carman, 54 Iowa 715, 7 N. W. 153; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543; Mather *v.* Darst, 11 S. D. 480, 78 N. W. 954. See 3 Cent. Dig. tit. "Appeal and Error," § 2612.

This rule is not of universal application.— When the amended or supplementary abstract is essential to a fair presentation of the cause and the opposite party is not prejudiced by the delay, the mere fact that it was not filed in time will not entitle the opposite party to have it stricken from the files. McCuen *v.* Manning, (Iowa 1899) 79 N. W. 274; Galer *v.* Galer, 108 Iowa 496, 79 N. W. 257; Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214; Richards *v.* Knight, 78 Iowa 69, 42 N. W. 584, 4 L. R. A. 453; Harl *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880; Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16; Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Green *v.* Ronen, 62 Iowa 89, 17 N. W. 180.

9. Merchants Nat. Bank *v.* McKinney, 6 S. D. 58, 60 N. W. 162; Ayers, etc., Co. *v.* Sundback, 5 S. D. 362, 58 N. W. 929.

10. Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507.

11. Anonymous, 40 Ill. 56. See 3 Cent. Dig. tit. "Appeal and Error," § 2613.

7. BRIEFS OF EVIDENCE — a. In General. In Georgia the evidence on appeal must be brought up by what is known as a brief of evidence,[12] and where the evidence is not properly brought up by brief as the statute requires it is not before the appellate court for consideration.[13] The supreme court has generally held that, where there is nothing to consider but the evidence, and the brief is not prepared according to law, the presumption is that there was evidence to sustain the verdict or ruling, and has in such cases affirmed the judgment of the lower court.[14]

b. Incorporation in Bill of Exceptions. Formerly, a brief of evidence, though expressly approved and filed, did not become a part of the record.[15] It could not come up in the transcript, but had to come up in the bill of exceptions, or as an exhibit to the same;[16] but this practice was changed by express statutory provision.[17] Under the present code provisions,[18] if plaintiff in error shall so elect, he may have such brief of so much of the evidence as is necessary to a clear understanding of the errors complained of approved by the judge, made a part of the record, and sent up by the clerk as a part thereof, rather than have the same incorporated in the bill of exceptions.[19]

c. Scope and Sufficiency[20] — (1) *IN GENERAL.* A brief of evidence must be

12. Price *v.* High, 108 Ga. 145, 33 S. E. 956; Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787; Berg *v.* Baer, 104 Ga. 587, 30 S. E. 744; Merchants Nat. Bank *v.* Vandiver, 104 Ga. 165, 30 S. E. 650. See 3 Cent. Dig. tit. "Appeal and Error," § 2607 *et seq.*

In an application for a new trial, the omission to file a brief of the testimony in the case cannot be taken advantage of in the supreme court unless it was made an objection to the hearing of the motion in the court below. Watts *v.* Kilburn, 7 Ga. 354.

13. Smith *v.* Georgia Warehouse Co., 99 Ga. 131, 24 S. E. 875; Augusta Southern R. Co. *v.* Williams, 99 Ga. 75, 24 S. E. 852; Hunnicutt, etc., Co. *v.* Rauschenberg, 97 Ga. 341, 22 S. E. 532; Ingram *v.* Clarke, 96 Ga. 777, 22 S. E. 334. See 3 Cent. Dig. tit. "Appeal and Error," § 2607 *et seq.*

14. Henson *v.* Derrick, 104 Ga. 856, 31 S. E. 199; Merchants Nat. Bank *v.* Vandiver, 104 Ga. 165, 30 S. E. 650; Jones *v.* West View Cemetery, 103 Ga. 560, 29 S. E. 710; Moss *v.* Birch, 102 Ga. 556, 28 S. E. 623; Henslee *v.* Henslee, 102 Ga. 554, 27 S. E. 676; Days *v.* Atlanta, etc., Air Line R. Co., 101 Ga. 785, 29 S. E. 21. See 3 Cent. Dig. tit. "Appeal and Error," § 2607 *et seq.*; and *infra*, XVII, E, 2.

There may be a few cases where, by inadvertence, a dismissal was entered instead of an affirmance. But it has been held that the effect in either event is to affirm the judgment of the lower court. Price *v.* High, 108 Ga. 145, 33 S. E. 956.

Where a brief of evidence is in such a confused state, by reason of corrections made by cross-marks, indicating in another place, by corresponding marks, where and how the corrections are to be made, that it cannot be read intelligibly as one statement, and the court cannot be sure that it has deciphered the corrections properly, the decision of the court below refusing to disturb the verdict will be sustained, though the preponderance of the evidence appears to be against the verdict. Kelley *v.* McWhorter, 77 Ga. 91.

Where, however, there is any point in the bill of exceptions which can be decided without reference to the brief, it has been held that the supreme court will not dismiss a writ of error on account of a defect in the brief of evidence. Price *v.* High, 108 Ga. 145, 33 S. E. 956.

15. Carey *v.* Giles, 10 Ga. 1.

16. Stephens *v.* Woolbright, 60 Ga. 322; Wetmore *v.* Chavers, 9 Ga. 546.

17. Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787; Searcy *v.* Tillman, 75 Ga. 504; Stephens *v.* Woolbright, 60 Ga. 322 — to the effect that, while the former practice might still be followed, under the statute, the brief of evidence on motion for a new trial, filed and approved according to law, was "declared to be a part of the record of the case to which it applies, and need not, except by reference thereto, be embodied in the bill of exceptions." See also Central R., etc., Co. *v.* Opie, 58 Ga. 346, holding that this statutory provision is permissive, and not mandatory.

Under this act it was held that, in all cases where no motion for a new trial was made, the brief of evidence should be embodied in the bill of exceptions or attached thereto, and properly identified by the signature of the judge. Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787; Hodges *v.* Roberts, 79 Ga. 212, 9 S. E. 424; McMillan *v.* Davis, 71 Ga. 866; Mann *v.* Archer, 69 Ga. 767; Hightower *v.* Flanders, 69 Ga. 772.

18. Ga. Code (1895), §§ 5528, 5529. See also Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787.

19. Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787, holding that plaintiff in error has an option as to the method which he will pursue.

20. Manner of preparation. — It has been held, in some decisions, that no agreement or understanding of counsel can dispense with the requirements of the law as to the manner in which briefs of evidence shall be prepared. Augusta Southern R. Co. *v.* Williams, 99 Ga. 75, 24 S. E. 852. Where, however,

a condensed and succinct brief of the material portions of the oral testimony, including a similar brief of interrogatories read on the trial. In such brief there shall be included the substance of all material portions of all documentary evidence.[21]

(II) *Briefing Documentary Evidence.* When the evidence consists in part of papers and documents, such evidence should, where possible, be briefed and abstracted.[22]

d. Amendment — (I) *By Trial Court.* The trial judge may correct the brief of evidence to make it conform to the facts proven before him as he remembers them.[23]

(II) *Time of Making.* Such corrections may be made even after the brief has been agreed upon by counsel, approved by the court, and filed.[24]

e. Approval by Trial Judge. A brief of the evidence must, in order to render it a part of the record on appeal, be approved by the trial judge,[25] or be agreed upon by the parties or by counsel.[26] The approval by the trial judge must be in express

the respondent, in a motion for a new trial, agrees to a brief of evidence filed by the movant, and the motion is heard without objection and denied, and the bill of exceptions sued out by the movant affirmatively recites that this brief of evidence was approved as correct and ordered filed, the writ of error will not be dismissed because such brief does not conform to the law prescribing how briefs of evidence shall be prepared, nor because it does not appear from the transcript of the record that the brief of evidence was filed in due time. Berg *v.* Baer, 104 Ga. 587, 30 S. E. 744.

21. Price *v.* High, 108 Ga. 145, 33 S. E. 956. See also Cash *v.* Lowry, 91 Ga. 197, 17 S. E. 121.

Evidence offered and rejected.— The brief of evidence cannot be made the vehicle for bringing to the supreme court evidence which was rejected at the trial. Tompkins *v.* Compton, 97 Ga. 375, 23 S. E. 839.

Full stenographic report of the testimony, containing all the questions to the witnesses, and their answers, is not a compliance with the requirements of the statute. Augusta Southern R. Co. *v.* Williams, 99 Ga. 75, 24 S. E. 852; Stubbs *v.* State, 86 Ga. 773, 13 S. E. 107; Brown *v.* Moore, 83 Ga. 605, 10 S. E. 277.

Interrogatories and answers must be contained in the brief of evidence, and it is not sufficient that they appear in another part of the record. Turner *v.* Wilcox, 65 Ga. 299.

Only so much of the record of the proceedings in the court below need be filed as is necessary for a proper hearing and determination of the cause. Watts *v.* Kilburn, 7 Ga. 354.

Report of the trial, consisting of interrogative and responsive dialogue between counsel and witnesses concerning the facts, interlarded with remarks by court and counsel, is not a brief of evidence. Mehaffey *v.* Hambrick, 83 Ga. 597, 10 S. E. 274. See also Price *v.* High, 108 Ga. 145, 33 S. E. 956; Farmers Alliance Exch. *v.* Crown Cotton Mills, 91 Ga. 178, 16 S. E. 985; Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607.

That bill of exceptions sets forth some of the material evidence by recital and exhibit will not fulfil the requirement that the evidence must be properly briefed. Kirby *v.* Lippincott, 98 Ga. 426, 25 S. E. 267.

The substance only of the material testimony should be set out in succinct narrative form. Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719. But see Merchants Nat. Bank *v.* Vandiver, 104 Ga. 165, 30 S. E. 650.

22. Merely to copy in full the contents of such documents, part of which is immaterial, is not a proper brief within the meaning of the statute. Cash *v.* Lowry, 91 Ga. 197, 17 S. E. 121; Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643; Farmers Alliance Exch. *v.* Crown Cotton Mills, 91 Ga. 178, 16 S. E. 985; Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758.

Agreement that documentary evidence referred to in brief may be used.— If a brief of the evidence be agreed upon by the counsel of the parties the brief of the evidence may be necessary, that is a sufficient compliance with the rule of court. The party so consenting cannot take advantage of the failure or omission to incorporate the written testimony into the brief. Gauldin *v.* Crawford, 30 Ga. 674.

23. Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719; Tritt *v.* Roberts, 64 Ga. 156.

24. Elkins *v.* Roberson, 103 Ga. 558, 29 S. E. 755; Tritt *v.* Roberts, 64 Ga. 156.

Brief of evidence is amendable at the hearing on motion for a new trial after it has been agreed upon by counsel, approved by the court, and filed. Price *v.* Bell, 88 Ga. 740, 15 S. E. 810.

25. Collum *v.* Brown, 102 Ga. 589, 27 S. E. 789; Equitable Mortg. Co. *v.* Slocumb, 102 Ga. 588, 27 S. E. 789. See 3 Cent. Dig. tit. "Appeal and Error," § 2610.

26. Chastain *v.* Smith, 47 Ga. 473. Where the brief of evidence, with the agreement of counsel entered thereon, is attached to the bill of exceptions as an exhibit and is referred to therein, the writ of error will not be dismissed for the want of the approval of such evidence by the judge. Central R., etc., Co. *v.* Opie, 58 Ga. 346.

Brief not signed by all the counsel or approved by court.— Where there is in the record what purports to be a brief of the evidence, but it is not signed by all the counsel, nor approved and ordered filed by the court,

terms,[27] and must be shown by an entry signed by the judge, or by direct affirmation in the bill of exceptions.[28]

f. Time of Filing. A brief of evidence must be filed within thirty days after the trial.[29]

G. Making, Form, and Requisites of Transcript or Return — 1. Office and Functions. The purpose and functions of a transcript or return is to bring the record of the court below, or a part thereof, into the appellate court, in order to exhibit to that court the proceedings of the trial court. As to all matters which are properly of record in the trial court, a transcript duly certified by the clerk of that court will be recognized as legal evidence of the facts therein contained;[30] but, in cases where abstracts of the record are permitted to be made and filed, a transcript will not be considered in behalf of a party who has prepared and filed an abstract of record.[31]

2. Necessity — a. In General. Upon an appeal or writ of error prosecuted from a decree or judgment of a lower court, a transcript of the record is necessary.[32] Where both parties to a cause appeal the appeals are regarded by the

the supreme court will not look into such evidence to ascertain whether the verdict is supported by it or not. Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270.

27. Stephens *v.* Woolbright, 60 Ga. 322.

Qualified approval insufficient.—An approval of a brief of evidence in these words: "This brief of evidence approved and subject to amendment, and ordered to be filed," is not sufficient. Equitable Mortg. Co. *v.* Slocumb, 102 Ga. 588, 27 S. E. 789; Sproull *v.* Walker, 70 Ga. 729; Turner *v.* Wilcox, 65 Ga. 299. See also, to same effect, Collum *v.* Brown, 102 Ga. 589, 27 S. E. 789.

28. Hardin *v.* Lovelace, 79 Ga. 209, 5 S. E. 493; Stephens *v.* Woolbright, 60 Ga. 322; Chastain *v.* Smith, 47 Ga. 473. See also Hilton *v.* McAdams, 82 Ga. 577, 9 S. E. 426.

Fact of revision and approval to be entered on minutes.— The brief of evidence agreed upon by counsel, and revised and approved by the court upon motion for a new trial, need not be entered in the minutes of the court; but the fact of revision and approval should be entered upon the minutes as a part of the proceedings. Powell *v.* Howell, 21 Ga. 214.

29. Days *v.* Atlanta, etc., Air-Line R. Co., 101 Ga. 785, 29 S. E. 21; King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Brief need not be approved within thirty days after trial, when the term of court continues longer than thirty days. The statute only requires the filing of the brief within that time. King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

30. Hoagland *v.* Van Etten, 23 Nebr. 462, 36 N. W. 755; Spaulding *v.* Crawford, 27 Tex. 155.

As to the transmission, filing, printing, and service of copies, of abstracts of record, or transcripts of record, see *infra*, XIII, I.

In judgment of law the record itself is removed to the supreme court from the common pleas, though, in fact, a transcript only is sent up. Brown *v.* Clark, 3 Johns. (N. Y.) 443. And to the same effect is Dougherty *v.* Hurt, 25 Tenn. 429.

31. Leech *v.* Clemons, 14 Colo. App. 45, 59 Pac. 230. See also *supra*, XIII, F.

32. *California.*— Kimball *v.* Semple, 31 Cal. 657.

Georgia.— Lewis *v.* Clegg, 87 Ga. 449, 13 S. E. 693.

Louisiana.— McGregor *v.* Barker, 12 La. Ann. 289; Carson *v.* Wallace, 5 Mart. (La.) 219.

Maine.— Tyler *v.* Erskine, 78 Me. 91, 2 Atl. 845; Denison *v.* Portland Co., 60 Me. 519; Rockland Water Co. *v.* Pillsbury, 60 Me. 425.

Missouri.— Schaeffer *v.* Farrar, 6 Mo. App. 572.

Montana.— Ervin *v.* Collier, 2 Mont. 605.

New York.— Chamberlin *v.* Morey, 19 Wend. (N. Y.) 350.

North Carolina.— Bethea *v.* Byrd, 93 N. C. 141.

Oklahoma.— But see Petrie *v.* Coulter, (Okla. 1900), 61 Pac. 1058.

Tennessee.— Tindall *v.* Shelby, 4 Hayw. (Tenn.) 98.

Texas.— Spaulding *v.* Crawford, 27 Tex. 155.

Washington.— Roberts *v.* Bush, 1 Wash. Terr. 181; Roberts *v.* Tucker, 1 Wash. Terr. 179.

See 3 Cent. Dig. tit. "Appeal and Error," § 2622.

Number of copies.— When the necessary parties are before the court a transcript filed by any one of them will authorize the court to adjudicate upon the merits of the whole cause. McGregor *v.* Barker, 12 La. Ann. 289.

On appeal from an order made after final judgment, it is the duty of appellant to cause the record to contain all the papers used on the trial at which such order was entered, and respondent can compel appellant to present to the supreme court a perfect record. Ervin *v.* Collier, 2 Mont. 605.

Remandment for transcript.— In North Carolina the supreme court will not hear arguments on appeal until the transcript of the record is perfected, but will remand the cause to the end that a proper record may be certified. Bethea *v.* Byrd, 93 N. C. 141.

Where errors appear in bill of exceptions.— Although alleged errors fully appear in a bill of exceptions taken at the trial, a transcript

appellate court as distinct, and separate transcripts of the record must be made and filed.[33]

b. Substitutes. Unless authorized by statute,[34] no substitute can, as a rule, be made to take the place of a transcript or return.[35]

3. By Whom to Be Made and Prepared — a. In General. It is the duty of a party desiring a review in an appellate court of an adverse judgment, order, or decree to require a transcript of the record from the clerk of the trial court,[36]

of the record must, nevertheless, be returned. Chamberlin *v.* Morey, 19 Wend. (N. Y.) 350. See also Lewis *v.* Clegg, 87 Ga. 449, 13 S. E. 693.

33. On cross-appeals.— Fair *v.* Stevenot, 29 Cal. 486; Handley *v.* Edwards, Hard. (Ky.) 604 note; Jones *v.* Heggard, 107 N. C. 349, 12 S. E. 286; Perry *v.* Adams, 96 N. C. 347, 2 S. E. 659; Morrison *v.* Cornelius, 63 N. C. 346; Devereux *v.* Burgwin, 33 N. C. 490. But see Shickle, etc., Iron Co. *v.* Kent, 34 Nebr. 568, 52 N. W. W. 286. See also Robinson Female Seminary *v.* Campbell, 60 Kan. 60, 55 Pac. 276; McDonald *v.* Buckstaff, 56 Nebr. 88, 76 N. W. 476. See 3 Cent. Dig. tit. "Appeal and Error," § 2623.

Contents in case of cross-appeal.—The transcript of the record for use on cross-appeals from a decree by which a cross-bill was dismissed should include the cross-bill and proceedings thereon, although the party filing the cross-bill was dismissed as a defendant in the original bill, and is not named as appellee in the appeal of the original complainant. Gregory *v.* Pike, 64 Fed. 415, 21 U. S. App. 474, 12 C. C. A. 202.

34. See *supra*, XIII, F; also *supra*, V, B, 4 [2 Cyc. 740].

In Missouri, section 2253 of the revised statutes of 1889, providing that appellant or plaintiff in error, in lieu of filing a complete transcript, may file a certified copy of the record-entry of the judgment appealed from, together with the order granting the appeal, and shall thereafter file printed abstracts of the entire record, has been held to apply when the case is brought up on a writ of error, though the judgment was not appealed from and there was no order granting an appeal. Ring *v.* Missouri Pac. R. Co., 112 Mo. 220, 20 S. W. 436.

In South Carolina, under subdivision 5 of section 345 of the code of civil procedure, an agreed statement of the case on appeal, prepared by counsel for the respective parties, will dispense with the necessity of a return, or any other paper, from the circuit court. Davis *v.* Pollock, 35 S. C. 584, 13 S. E. 897; McNair *v.* Craig, 34 S. C. 9, 12 S. E. 367, 664. But where the parties fail to agree upon a case a return is necessary. Geddes *v.* Hutchinson, 39 S. C. 550, 18 S. E. 560.

35. *Arizona.*— Myers *v.* Farmers', etc., Bank, (Ariz. 1900) 60 Pac. 880.

Arkansas.— Hershy *v.* Rogers, 45 Ark. 304.

California.— Stone *v.* Stone, 17 Cal. 513.

Kansas.— Eckert *v.* McBee, 25 Kan. 705.

Michigan.—People's Ice Co. *v.* The Steamer Excelsior, 43 Mich. 336, 5 N. W. 398.

Minnesota.—American Ins. Co. *v.* Schroeder, 21 Minn. 331.

Nebraska.— Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935; White *v.* Smith, 47 Nebr. 625, 66 N. W. 638.

Oklahoma.— Noyes *v.* Tootle, 8 Okla. 505, 58 Pac. 652.

Texas.— But see Hunt *v.* Askew, 46 Tex. 247.

United States.— But see Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169, where a writ of error was issued from the supreme court of the United States to a state court, to bring the judgment of the state court before the supreme court for revision, and no return was made thereto. It was held that the certified copy of the record of the supreme court of the state, which had accompanied the application for the writ of error, might be filed and the case docketed.

See 3 Cent. Dig. tit. "Appeal and Error," § 2688 *et seq.*

Where formal transcripts are not required by statute.— See Williams *v.* Williams, 90 Ky. 28, 13 S. W. 250.

36. *Arkansas.*— *In re* Barstow, 54 Ark. 551, 16 S. W. 574.

California.—Kimball *v.* Semple, 31 Cal. 657.

Florida.— Bridger *v.* Thrasher, 22 Fla. 383.

Georgia.— Blood *v.* Martin, 21 Ga. 127.

Kansas.— Hornaday *v.* State, (Kan. 1900) 62 Pac. 329.

Kentucky.—Houston *v.* Ducker, 86 Ky. 123, 5 S. W. 382; Collins *v.* Cleaveland, 17 B. Mon. (Ky.) 459.

Louisiana.— Carson *v.* Wallace, 5 Mart. (La.) 219.

Missouri.— Messick *v.* Fairburn, 52 Mo. App. 69.

New York.— Cross *v.* Franklin, 18 Wend. (N. Y.) 510.

North Carolina.—Morrison *v.* Cornelius, 63 N. C. 346; Devereux *v.* Burgwin, 33 N. C. 490.

Wisconsin.— Hyde *v.* Gleichman, 41 Wis. 516; Haas *v.* Weinhagen, 30 Wis. 326.

See 3 Cent. Dig. tit. "Appeal and Error," § 2624.

It is the duty of appellant or plaintiff in error to take all steps necessary to the preparation by the clerk of the trial court of a correct transcript of the record, and, in those jurisdictions where only so much of the record need be returned to the appellate court as is necessary to a review of the errors alleged, he must point out to the clerk those portions of the record which he desires to have transcribed. Hardee *v.* Lovett, 85 Ga. 620, 11 S. E. 1021; Clover *v.* Morrissey, 1 Mo. App. 603; Gould *v.* Ogden, 6 Cow. (N. Y.) 52. In North *v.* Alles, 50 Ill. App. 266, it was held that the præcipe for a record, provided for by rule of court, is intended to aid the clerk in determining what a complete record is, and does not affect the statute re-

against whom mandamus will issue in case of his refusal to furnish it when requested to do so.[37]

b. New Transcript in Lieu of Defective One. Where the clerk of the trial court negligently prepares and returns a defective transcript of the record, a new one will be required.[38]

c. Schedule For Partial Transcript. In Kentucky, in order to authorize the prosecution of an appeal upon a partial transcript, appellant must file a schedule with the clerk of the trial court within ninety days after the granting of the appeal, specifying the portions of the record to be transcribed.[39]

quiring a complete record. Under Burns' Rev. Stat. Ind. (1894), § 661, providing that when an appeal is taken a præcipe shall be filed designating the portion of the record to be included in the transcript, a bill of exceptions copied in the transcript, but not included in the præcipe, will not be considered on appeal. McCaslin *v.* Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67. See also, to like effect, Hollis *v.* Roberts, 25 Ind. App. 426, 58 N. E. 502.

It is the duty of the attorney on an appeal to see that the transcript of the proceedings is properly made up by the clerk. Bridger *v.* Thrasher, 22 Fla. 383.

It is the duty of the county judge or justice of the peace to make out a transcript, and, on demand, to deliver it to appellant or his agent, but the demand and the delivery should be at the office of the officer. It is not his duty to deliver a transcript at some other place by mail or messenger. Van Sant *v.* Francisco, 55 Nebr. 650, 75 N. W. 1086. See also Union Pac. R. Co. *v.* Marston, 22 Nebr. 721, 36 N. W. 153; Gifford *v.* Republican Valley, etc., R. Co., 20 Nebr. 538, 31 N. W. 11.

Under a statute providing that the clerk of a court shall be disqualified from acting as such when he is a party to an action, an appeal will be dismissed in which a clerk prepared the appeal papers while he was a party to such appeal. Womack *v.* Stokes, 9 Tex. Civ. App. 592, 29 S. W. 1113.

When time for appeal has expired.— In Houston *v.* Ducker, 86 Ky. 123, 5 S. W. 382, it was held that the court of appeals would not compel the clerk of the lower court to make a transcript where it appeared from the record that the appeal had not been taken within the prescribed time after the right to do so had accrued.

37. Mandamus will lie to compel a prompt preparation of the transcript. *In re* Barstow, 54 Ark. 551, 16 S. W. 574. See also MANDAMUS; and cases cited *supra*, note 36.

Effect of change of venue.—Where an order has been made changing the venue of a suit or action, and the record therein has been transferred in pursuance of such order, the clerk of the original court no longer has power to make return to an appeal, even from an order in the cause entered previous to the change. The transcript and return must be made by the clerk of the court to which the proceedings have been transferred. Blood *v.* Martin, 21 Ga. 127; Hyde *v.* Gleichman, 41 Wis. 516. But *compare* Haas *v.* Weinhagen, 30 Wis. 326.

The time at which the transcript is made out on appeal is not material, in the absence of any regulation by statute or rule of court, provided it is filed with the clerk of the appellate court in due time. Prewitt *v.* Woods, 1 Tex. 521. See also Gardner *v.* Brown, 5 How. Pr. (N. Y.) 351.

38. Wright *v.* Bonta, 19 Tex. 385. But where the clerk claims that the transcript was made in its defective form by, or under, the supervision of appellant, he will not be compelled to make, at his own cost, a new transcript. Edson *v.* McGraw, 37 La. Ann. 294.

39. Martin *v.* Martin, 81 Ky. 588; Polly *v.* Covington, 10 Ky. L. Rep. 361; Geoghegan *v.* Beeler, 9 Ky. L. Rep. 407. See 3 Cent. Dig. tit. "Appeal and Error," §§ 2667, 2682.

Time of filing.— The schedule must be filed after the appeal is granted (Wilder *v.* Hudson, 9 Ky. L. Rep. 719; Hatcher *v.* Snowden, 4 Ky. L. Rep. 733), and within ninety days therefrom (Adams *v.* Bement, 96 Ky. 334, 29 S. W. 22; Brenner *v.* Renner, 4 Ky. L. Rep. 337. See 3 Cent. Dig. tit. "Appeal and Error," § 2668.

Counter-schedule.—Where appellant desires to prosecute, upon a partial transcript, an appeal granted by the clerk of the appellate court, he must allow appellee twenty days after the filing of the schedule in which to file a counter-schedule. Farmers' Bank *v.* Pentecost, 11 Ky. L. Rep. 96; Cain *v.* Cain, 9 Ky. L. Rep. 360.

Notice of filing schedule.—Where appellant wishes to file a partial transcript he must not only file his schedule, but must cause notice of the filing thereof to be served on appellee. Ford *v.* Smith, 13 Ky. L. Rep. 237; Traders' Deposit Bank *v.* Meguiar, 13 Ky. L. Rep. 95; Cleaver *v.* Philips, 8 Ky. L. Rep. 264. But see Louisville, etc., R. Co. *v.* Brice, 83 Ky. 210. The filing in open court of a schedule for an appeal does not dispense with notice of such filing. Farmers' Bank *v.* Pentecost, 11 Ky. L. Rep. 96.

The failure of appellant to file the schedule and assignments of errors in the office of the clerk of the inferior court within ninety days after appeal granted is cause for dismissal. Hawthorne *v.* McArthur, 7 Ky. L. Rep. 39; Gilmore *v.* Stone, 5 Ky. L. Rep. 683; Martin *v.* Martin, 5 Ky. L. Rep. 648; Brenner *v.* Renner, 4 Ky. L. Rep. 337. Such failure has also been held to be ground for affirming the judgment below. Traders' Deposit Bank *v.* Meguiar, 13 Ky. L. Rep. 95; Geoghegan *v.* Beeler, 9 Ky. L. Rep. 407; Stewart *v.* Hendon,

4. Scope and Sufficiency — a. Formal Requisites — (i) *In General.* As a rule the transcript must be arranged in an intelligible and orderly manner, the subject-matter set forth separately and distinctly, and proper captions or marginal notes employed to separate and distinguish the documents or papers made a part of it.[40]

(ii) *Chronological Order of Papers.* The papers and documents incorporated in the transcript of the record on appeal should be arranged in chronological order.[41]

(iii) *Index and Marginal Notes.* Rules of court requiring alphabetical indices specifying the page of each paper, order, and proceeding in the transcript, and marginal notes on each page indicating the matter to be found upon it, must be observed, and a failure to do so may, in the discretion of the court, entail a dismissal of the appeal.[42]

4 Ky. L. Rep. 265. But where appellant takes up the entire record, his failure to file the schedule, indicating the portions of the record required to be filed in the appellate court, is no ground, under Ky. Civ. Code, tit. 10, c. 3, for the dismissal of an appeal. Bush *v.* Webster, 7 Ky. L. Rep. 215. See also Louisville, etc., R. Co. *v.* Brice, 83 Ky. 210.

On cross-appeal.— In Adams *v.* Bement, 96 Ky. 334, 29 S. W. 22, it was held that, as one who files a cross-appeal has the right to file a schedule of the parts of the record he wishes copied in addition to that filed by appellant, he is bound by the record on appeal if he fails to do so.

40. *Alabama.*— Foster *v.* Napier, 74 Ala. 393.

California.— Williams *v.* Hall, 79 Cal. 606, 21 Pac. 965; Peregoy *v.* Sellick, 79 Cal. 568, 21 Pac. 966.

Florida.— Pearson *v.* Grice, 8 Fla. 214.

Illinois.— Ayers *v.* Mussetter, 46 Ill. 472; Napper *v.* Short, 17 Ill. 119.

Louisiana.— Washburn *v.* Frank, 31 La. Ann. 427.

Missouri.— Marshall *v.* Taylor, 4 Mo. App. 589.

Montana.— State *v.* Millis, 19 Mont. 444, 48 Pac. 773.

New York.— Fowler *v.* Fowler, (N. Y. 1895) 42 N. E. 343, 71 N. Y. St. 340.

Texas.— Locker *v.* Miller, 59 Tex. 499; Ellis *v.* McKinley, 33 Tex. 675.

See 3 Cent. Dig. tit. "Appeal and Error," § 2660.

For forms of transcripts see Fla. Supreme Ct. Rules (1895), Special Rule No. 2; Idaho Supreme Ct. Rules (1893), No. 27 [32 Pac. x]; Mont. Supreme Ct. Rules (1899) No. — [57 Pac. vii]; Oreg. Supreme Ct. Rules (1894), No. 2 [37 Pac. v].

Interlineations in printed transcript.— Where a printed transcript is certified by the clerk to be correct, interlineations and writings on the margins of the pages will not be considered. Heilbron *v.* Heinlen, 72 Cal. 376, 14 Pac. 24.

The record of several proceedings, constituting one suit, cannot be changed in its nature, so as to affect the rights of the parties, by being divided and certified as separate proceedings by the clerk. Ayers *v.* Mussetter, 46 Ill. 472.

Rules of court regulating the form and arrangement of transcripts on appeal should be observed, though their non-observance will not, usually, necessitate the dismissal of the appeal.

California.—Martin *v.* Hudson, 79 Cal. 612, 21 Pac. 1135.

Florida.— Pearson *v.* Grice, 8 Fla. 214.

Illinois.— Napper *v.* Short, 17 Ill. 119.

Louisiana.— Washburn *v.* Frank, 31 La. Ann. 427.

Montana.— But see Owsley *v.* Warfield, 7 Mont. 102, 14 Pac. 646; and *compare* Brownell *v.* McCormick, 7 Mont. 12, 14 Pac. 651; Alder Gulch Consol. Min. Co. *v.* Hayes, 6 Mont. 31, 9 Pac. 581.

Texas.—Wright *v.* Bonta, 19 Tex. 385. But see Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. 685.

Appeals in admiralty.— In Sloop Leonede *v.* U. S., 1 Wash. Terr. 153, it was held that transcripts accompanying appeals in admiralty proceedings must be made as prescribed under U. S. Supreme Ct. Rules, No. 53.

41. Authier *v.* Bennett Bros.' Co., 16 Mont. 110, 40 Pac. 182; Wulf *v.* Manuel, 9 Mont. 276, 23 Pac. 723; Newell *v.* Meyendorff, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738, 8 L. R. A. 440; Owsley *v.* Warfield, 7 Mont. 102, 14 Pac. 646. *Compare* Frazier *v.* Harris, 51 Ind. 156, in which it was held that it is not necessary that the copy of a deed which is the foundation of an action should immediately follow the complaint in the record. If it is set out in the bill of exceptions, and the clerk states in the record, immediately after the complaint, that the deed marked "Filed with the complaint" thereafter appears in the record in the bill of exceptions, it is sufficient. See also Truitt *v.* Griffin, 61 Ill. 26.

42. *California.*— Donahue *v.* Mariposa Land, etc., Co., (Cal. 1884) 4 Pac. 881; Kellogg *v.* Mayer, 54 Cal. 583.

Indiana.— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Patterson *v.* Dennis, 80 Ind. 602; Newman *v.* Newman, (Ind. App. 1900) 58 N. E. 560; De Kalb County *v.* Auburn Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689; Anheuser-Busch Brewing Assoc. *v.* George, 14 Ind. App. 1, 42 N. E. 245.

Kentucky.— Louisville, etc., R. Co. *v.* Schick, 94 Ky. 191, 21 S. W. 1036.

(iv) *Indicating Objectionable Instructions.* Instructions, or portions thereof, which are objected to, should be clearly and intelligibly pointed out in the transcript of the record.[43]

(v) *Numbering Lines, Folios, and Pages.* Rules of court requiring the pages, lines, or folios of transcripts on appeal to be numbered are regarded in some jurisdictions as mandatory,[44] while in other jurisdictions they are regarded as directory merely.[45]

b. Matters Included — (i) *In General.* To be sufficient, a transcript or return must contain all matters and proceedings necessary to a review of the alleged errors. Unless otherwise provided by statute or rule of court, cases must be submitted on appeal or writ of error upon a full transcript of the extended, unabbreviated record; and, where a partial transcript is permissible, it must be complete in itself, and contain sufficient matter to clearly show the errors alleged.[46]

Michigon.— Pease *v.* Munro, 83 Mich. 475, 47 N. W. 345.

Missouri.— Walser *v.* Wear, 128 Mo. 652, 31 S. W. 37.

Montana.— Owsley *v.* Warfield, 7 Mont. 102, 14 Pac. 646.

North Carolina.— Baker *v.* Hobgood, 126 N. C. 149, 35 S. E. 253.

Texas.— Blankenship *v.* Thurman, 68 Tex. 671, 5 S. W. 836.

Washington.— Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535.

Wyoming.— Jenkins *v.* Territory, 1 Wyo. 317.

See 3 Cent. Dig. tit. "Appeal and Error," § 2664.

43. Inclosure in brackets.— In Dikeman *v.* Arnold, 83 Mich. 218, 47 N. W. 113, it was held that on appeal it is permissible to indicate the clauses in the judge's charge objected to by inclosing them in brackets in the printed record, and referring to the brackets by number, especially where the record accompanies and forms a part of appellant's brief.

Marks in the margin of the record, such as the words, "Given" or "Refused," placed opposite an instruction in the margin of a transcript, form no part of the record. Barbee *v.* Hereford, 48 Mo. 323.

44. Kellogg *v.* Mayer, 54 Cal. 583; Green *v.* Heaston, 154 Ind. 127, 56 N. E. 87; Trueblood *v.* Nicholson, 52 Ind. 419; Belton *v.* Smith, 45 Ind. 290; Indianapolis, etc., Gravel Road Co. *v.* Johnson, 44 Ind. 389; Montgomery *v.* Hamilton, 43 Ind. 450; Silvers *v.* Junction R. Co., 43 Ind. 435; Rudisill *v.* Edsall, 43 Ind. 376; State *v.* Klaas, 42 Ind. 506; Shrimpton *v.* Keyes, 17 Ind. App. 305, 46 N. E. 651.

45. Farish *v.* New Mexico Min. Co., 5 N. M. 234, 21 Pac. 82.

In North Carolina and Oklahoma, for a failure to comply with the rules of the supreme court as to paging and indexing the record, a case may be dismissed, continued, affirmed, or reversed, as the court may direct. N. C. Supreme Ct. Rules, No. 20; Conkling *v.* Cameron, 3 Okla. 525, 41 Pac. 609.

46. *Arkansas.*— McKee *v.* Murphy, 1 Ark. 19.

California.— Miller *v.* Thomas, 78 Cal. 509, 21 Pac. 11; Weiner *v.* Korn, (Cal. 1884) 4 Pac. 373.

Colorado.— Daum *v.* Conley, 27 Colo. 56, 59 Pac. 753.

Georgia.— Burkhalter *v.* Oliver, 88 Ga. 473, 14 S. E. 704.

Illinois.— Metzger *v.* Wooldridge, 183 Ill. 174, 55 N. E. 694, 75 Am. St. Rep. 100 [*affirming* 83 Ill. App. 113]; Hosmer *v.* People, 96 Ill. 58; Freeland *v.* Jasper County, 27 Ill. 303; O'Kane *v.* West End Dry Goods Store, 79 Ill. App. 191; Wabash, etc., R. Co. *v.* Goodwine, 18 Ill. App. 65.

Indiana.— Louisville, etc., R. Co. *v.* Shanks, 132 Ind. 395, 31 N. E. 1111; Cincinnati, etc., R. Co. *v.* Leviston, 97 Ind. 488; Hill *v.* Mayo, 73 Ind. 357; Indianapolis, etc., Gravel Road Co. *v.* Johnson, 44 Ind. 390; Stephenson *v.* Gillaspie, 23 Ind. App. 187, 55 N. E. 106.

Kansas.— Neiswender *v.* James, 41 Kan. 463, 21 Pac. 573; Kansas City Bank *v.* Mills, 24 Kan. 604.

Kentucky.— Kentucky Mut. Security Fund Co. *v.* Turner, 14 Ky. L. Rep. 257, 19 S. W. 590.

Louisiana.— Minden Bank *v.* Lake Bisteneau Lumber Co., 47 La. Ann. 1432, 17 So. 832; Ruleff *v.* Nugent, 21 La. Ann. 299; Adams *v.* Routh, 8 La. Ann. 121.

Maine.— Atkinson *v.* Peoples' Nat. Bank, 85 Me. 368, 27 Atl. 255.

Missouri.— Lawson *v.* Mills, 150 Mo. 428, 51 S. W. 678.

Nebraska.— Schuyler *v.* Hanna, 28 Nebr. 601, 44 N. W. 731, 11 L. R. A. 321; Nebraska, etc., R. Co. *v.* Storer, 22 Nebr. 90, 34 N. W. 69.

Nevada.— State *v.* Eberhart Co., 6 Nev. 186.

New York.— Zabriskie *v.* Smith, 11 N. Y. 480; Farmers' L. & T. Co. *v.* Carroll, 2 N. Y. 566.

North Carolina.—Rice *v.* Guthrie, 114 N. C. 589, 19 S. E. 636; Mitchell *v.* Moore, 62 N. C. 281; Wright *v.* Stowe, 52 N. C. 622.

Ohio.— Jennings *v.* Mendenhall, 3 Ohio St. 489.

Texas.— Wolff *v.* Toepperwein, (Tex. Civ. App. 1895) 28 S. W. 1009.

Utah.— Rotch *v.* Hamilton, 7 Utah 513, 27 Pac. 694.

Virginia.— Litchford *v.* Day, 87 Va. 71, 12 S. E. 107.

Washington.— Miskel *v.* Stone, 1 Wash. Terr. 229.

Wisconsin.— Smith *v.* Thorp, 7 Wis. 514.

(II) *Bill of Exceptions*—(A) *In General.* A bill of exceptions, to be considered a part of the record, should be embodied in the transcript and shown by the record to have been allowed by the court below.[47]

Wyoming.— Underwood *v.* David, (Wyo. 1900) 61 Pac. 1012; Dobson *v.* Owens, 5 Wyo. 85, 37 Pac. 471.

United States.— Curtis *v.* Petitpain, 18 How. (U. S.) 109, 15 L. ed. 280; Keene *v.* Whittaker, 13 Pet. (U. S.) 459, 10 L. ed. 246.

See 3 Cent. Dig. tit. "Appeal and Error," § 2673 *et seq.*; and *infra*, XIII, G, 4, b, (VII).

Determination of sufficiency.— Where the clerk of the court below tenders to appellant a transcript on appeal which appellant deems insufficient, its sufficiency cannot be determined on an application for mandamus to compel such clerk to furnish a sufficient transcript. State *v.* Clerk Eleventh Judicial Dist. Ct., 46 La. Ann. 1289, 16 So. 207.

Name of the judge and the place of the seal at the end of the bill of exceptions should be shown in transcript. Jones *v.* Sprague, 3 Ill. 55.

Order of adjournment of the term at which final judgment was rendered should be shown in order that it may appear whether the appeal bond was filed in time to perfect the appeal. Burr *v.* Lewis, 6 Tex. 76. But see Nisbet *v.* Lawson, 1 Ga. 275.

Presumption as to seal.—Where the transcript of a paper required to be under the seal of the record recites in the copy of the instrument that the seal of the court is affixed, and contains in the margin opposite, the word "Seal," it will be presumed, nothing appearing to the contrary, that the seal affixed is that of the court of which the attesting officer is a clerk. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

Reference to transcript in another case.— A transcript on appeal should contain all the matters on which the cause is to be determined, and it is insufficient to refer to the transcript in another case to supply omissions in the case on appeal. See Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Pennock *v.* Monroe, 5 Kan. 586.

Showing as to jurisdiction of lower court.— The transcript must show when, where, and the court before which the proceedings were had, so that it shall appear from the records that they were had before a competent court, and were *coram judice*. Cook *v.* Loftin, 31 Ark. 567; Clark *v.* Wright, 6 Nebr. 413; Orr *v.* Orr, 2 Nebr. 170; Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286. *Compare* Chandler *v.* Montgomery County, 31 Ark. 25.

Showing as to proceedings for preparation. — Va. Code (1883), § 3457, requiring notice to be given to the opposite party of an intention to apply for a transcript on appeal or writ of error, and providing that a certificate of the clerk, stating that such notice has been given, shall accompany the transcript when presented to the appellate court, is merely directory, and a failure to comply therewith will not defeat the jurisdiction of such court. Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698. See also Mears *v.* Dexter, 86 Va. 828, 11 S. E. 538.

Showing as to taking and perfecting appeal. — Everything necessary to the taking and perfecting of the appeal must be shown in the transcript.

Arkansas.— Grider *v.* Apperson, 38 Ark. 388.

California.— Pateman *v.* Tyrrel, 59 Cal. 320; Watson *v.* Cornell, 52 Cal. 644.

Indiana.— Myers *v.* Lawyer, 99 Ind. 237.

New York.— Cabre *v.* Sturges, 1 Hilt. (N. Y.) 160; Farmers' L. & T. Co. *v.* Carroll, 2 N. Y. 566.

Texas.— Dutton *v.* Norton, 1 Tex. App. Civ. Cas. § 357.

Specification of errors.— The transcript on appeal must contain a specification of the errors assigned. Maulden *v.* Runyan, 26 Ind. 175; Campbell *v.* Polk County, 3 Iowa 467; McLeod *v.* Dickenson, 11 Mont. 438, 28 Pac. 551.

Assignment of error.— The rule in respect to abstracts does not relieve the necessity of setting out the assignments of error in the transcript. Cottingham *v.* Armour Packing Co., 109 Ala. 421, 19 So. 842.

Variance between transcript and record.— Where the parties to the record returned with the writ of error appear to be different from the record and proceedings required to be removed to the appellate court, the writ of error will be dismissed. McKee *v.* Murphy, 1 Ark. 19.

Where two or more causes are consolidated, the transcript on appeal will be that of the causes as consolidated. Harvey *v.* Harvey, 44 La. Ann. 80, 10 So. 410. See also Vascocu *v.* Woodward, 35 La. Ann. 555.

47. *Illinois.*— Rock Island *v.* Riley, 26 Ill. App. 171.

Indiana.— Minnick *v.* State, 154 Ind. 379, 56 N. E. 851; Luckenbill *v.* Kreig, 153 Ind. 479, 55 N. E. 259; De Hart *v.* Johnson County, 143 Ind. 363, 41 N. E. 825; Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Huber Mfg. Co. *v.* Busey, 16 Ind. App. 410, 43 N. E. 967.

New York.—Monroe *v.* Monroe, 27 How. Pr. (N. Y.) 208; Pettit *v.* Pettit, 20 Wkly. Dig. (N. Y.) 154.

Ohio.— Riverside Rubber Co. *v.* Midland Mfg. Co., 63 Ohio St. 66, 57 N. E. 958; Meyer *v.* Schroeder, 6 Cinc. L. Bul. 698; Thacker *v.* Sheeran, 5 Cinc. L. Bul. 646.

West Virginia.— Winters *v.* Null, 31 W. Va. 450, 7 S. E. 443; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

Wisconsin.— Orton *v.* Noonan, 19 Wis. 350, holding that the mere incorporation of the bill of exceptions in the printed case is not sufficient.

Entries in the transcript, on a page following the close of a bill of exceptions, cannot be considered a part of the bill; and, if they pertain to rulings of the court, and exceptions thereto, the clerk's certificate cannot make them a part of the record. Rock Island *v.* Riley, 26 Ill. App. 171. See also De Hart *v.*

(B) *Original Bill.* Unless authorized or required by statute,[48] the original bill of exceptions should not be returned to the appellate court, but a copy thereof should be incorporated in the transcript.[49]

(III) *Case or Statement of Facts*—(A) *In General.* The case-made or statement of facts on appeal must be sent up with the transcript or return in compliance with an order of the judge, court, or referee who settles it.[50]

Johnson County, 143 Ind. 363, 41 N. E. 825.

Erasures by judge before certifying.—Where the circuit judge, before certifying and signing a bill of exceptions, strikes or erases matters therefrom, such erased or stricken matter forms no part of such bill, and it should be omitted by the clerk in copying such bill into the transcript. Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59.

In the case of conflicting bills of exceptions presented to be made part of the record, that which the judge declares to be the true one is to be received. Lecatt *v.* Strang, 2 Stew. (Ala.) 230.

Presumption from incorporation.—Where a bill of exceptions is regularly incorporated in a transcript of record which is properly certified by the clerk below to contain a true and correct copy of such "papers and proceedings in said cause as appear upon the records and files at his office," in the absence of any proper showing to the contrary, it is sufficient evidence of the fact that such bill of exceptions was filed with the clerk below. Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59.

Reference for contents to other papers.— In copying into the transcript a bill of exceptions containing the evidence, it is sufficient, after stating that an instrument has been read in evidence, to refer to a preceding page of the transcript where the instrument is copied as an exhibit filed with the pleadings. It need not be copied again, even though it was copied into the bill of exceptions filed. Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33. See also Klingensmith *v.* Faulkner, 84 Ind. 331.

Unauthorized interpolations in a bill of exceptions should be omitted by the clerk in certifying the record to the appellate court. Kennedy *v.* Kennedy, 13 Lea (Tenn.) 24.

Where a bill of exceptions refers to matters which can be identified, the clerk of the trial court, in making a transcript for the supreme court, may write said matters in full after the words "Here insert." Garrick *v.* Chamberlain, 94 Ill. 588.

Where judgment is rendered absolute, exceptions cannot, except by special order, be annexed to the judgment-roll for the purpose of review. Anderson *v.* Dickie, 17 Abb. Pr. (N. Y.) 83.

48. Georgia R., etc., Co. *v.* Shorter, 13 Ga. 300; Lake Shore, etc., R. Co. *v.* Hession, 50 Ill. App. 685; Aultman *v.* Patterson, 14 Nebr. 57, 14 N. W. 804. *Compare* Heard *v.* Heard, 8 Ga. 380.

49. *Florida.*— Robinson *v.* Matthews, 16 Fla. 319.

Georgia.—Heard *v.* Heard, 8 Ga. 380. *Compare* Georgia R., etc., Co. *v.* Shorter, 13 Ga. 300, decided under section 3 of the Georgia act of 1852.

Indiana.— Holt *v.* Rockhill, 143 Ind. 530, 40 N. E. 1090; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

Iowa.— Fernow *v.* Dubuque, etc., R. Co., 22 Iowa 528.

Kansas.— Jackson *v.* Stoner, 17 Kan. 605. See also Whitney *v.* Harris, 21 Kan. 96.

See 3 Cent. Dig. tit. "Appeal and Error," § 2647.

In Illinois, under section 8 of chapter 53 of the revised statutes, it has been held that the original bill of exceptions, instead of a copy, can be incorporated in the transcript of the record on appeal only when so agreed. Lake Shore, etc., R. Co. *v.* Hession, 50 Ill. App. 685.

In Indiana, if the bill of exceptions is taken solely for the purpose of incorporating the evidence into the record, the original bill may be certified to the appellate court by the clerk. Where the bill contains other matter a copy must be incorporated into the transcript. Falvey *v.* Jackson, 132 Ind. 176, 31 N. E. 531; McCoy *v.* Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; McCaffrey *v.* Bradford Mill Co., 24 Ind. App. 283, 56 N. E. 679; Stark *v.* Owens, 16 Ind. App. 345, 45 N. E. 194; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305. And see Holt *v.* Rockhill, 143 Ind. 530, 40 N. E. 1090, where it was held, under Ind. Rev. Stat. (1881), § 1410, providing that the original longhand manuscript of the evidence may be certified up to the supreme court after being filed and incorporated in a bill of exceptions, does not authorize the original bill to be certified up where, in addition to the evidence, such bill includes instructions given and refused, and the exceptions thereto, and if so certified it will be disregarded. To like effect see Leach *v.* Mattix, 149 Ind. 146, 48 N. E. 791; Hamilton *v.* Hamilton, (Ind. App. 1901) 59 N. E. 344; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

In Nebraska the original bill of exceptions may be filed in the supreme court, but the clerk must certify that it is the original bill, or it will be quashed. Aultman *v.* Patterson, 14 Nebr. 57, 14 N. W. 804.

50. Teick *v.* Carver County, 11 Minn. 292; Cornish *v.* Graff, 36 Hun (N. Y.) 160; McNish *v.* Bowers, 30 Hun (N. Y.) 214; Whidby Land, etc., Co. *v.* Nye, 5 Wash. 301, 31 Pac. 752; Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010. See 3 Cent. Dig. tit. "Appeal and Error," § 2651.

In New York, after judgment absolute, a case, though made and settled on notice, cannot be annexed to the judgment-roll except by a special order. In the absence of such order an appeal is to be heard on the judg-

(B) *Original Case or Statement.* Whether the original case or statement of facts, or a transcript thereof, is to be returned to the appellate court depends upon statutory requirements.[51] But, even where a copy is called for by the statute, the fact that the original is returned instead is not ground for dismissal.[52]

(IV) *EVIDENCE.* Unless required by statute, or where necessary to a clear understanding of the errors assigned, all the evidence introduced, or offered and excluded, in the trial court need not be set out in the transcript of the record. As a rule, only so much of the evidence need be set out in the transcript as is necessary for a review by the appellate court of the errors alleged; and where the appeal or writ of error is prosecuted only for errors apparent of record, the transcript need not contain the evidence, or any part thereof.[53]

(V) *ORIGINAL PAPERS*—(A) *In General.* Unless required by statute,[54] by

ment-roll itself. Anderson *v.* Dickie, 1 Rob. (N. Y.) 700, 17 Abb. Pr. (N. Y.) 83.

On second trial.— An appeal from a judgment entered after a second trial brings up for review only the judgment appealed from, and the record transmitted to the appellate court should not contain, in addition to the case and exceptions made upon the second trial, the case and exceptions made upon the first trial. Wilcox *v.* Hawley, 31 N. Y. 648.

When amendments to a proposed statement are proposed and allowed, such amendments must be incorporated into the statement before the statement is transcribed in order for the appellate court to consider them. The attachment of the amendments to the statement is not sufficient. Hattabaugh *v.* Vollmer, (Ida. 1896) 46 Pac. 831; Pence *v.* Lemp, (Ida. 1895) 43 Pac. 75. See also Smith *v.* Davis, 55 Cal. 26.

51. In Kansas the original case or statement, and not a copy, must be attached to the petition in error and filed with it in the supreme court. Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47; Missouri, etc., Transp. Co. *v.* Palmer, 19 Kan. 471.

In Washington the statute requires a transcript of the statement of facts to be sent to the supreme court. Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Wilson *v.* Morrell, 5 Wash. 654, 32 Pac. 733.

52. Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Wilson *v.* Morrell, 5 Wash. 654, 32 Pac. 733.

53. *Arkansas.*— The Steamboat Violet *v.* McKay, 23 Ark. 543.

California.— Knowles *v.* Inches, 12 Cal. 212.

Florida.— Orman *v.* Barnard, 5 Fla. 528.

Indiana.— Keesling *v.* Watson, 91 Ind. 578.

Iowa.— McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

Kansas.— Stapleton *v.* Orr, 43 Kan. 170, 23 Pac. 109.

Kentucky.— Cram *v.* Doan, 7 Ky. L. Rep. 833.

Louisiana.— Hebert *v.* Mayer, 47 La. Ann. 563, 17 So. 131; Torres *v.* Falgoust, 35 La. Ann. 818; Stafford *v.* Harper, 32 La. Ann. 1076; Radovich *v.* Frigerio, 27 La. Ann. 68.

Missouri.— Toler *v.* McCabe, 52 Mo. App. 532; Carradine *v.* Flannagan, 6 Mo. App. 589.

Montana.— Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641.

Texas.— Galveston Ins. Co. *v.* Long, 51 Tex. 89.

United States.— Blanks *v.* Klein, 49 Fed. 1, 2 U. S. App. 155, 1 C. C. A. 254.

See 3 Cent. Dig. tit. "Appeal and Error," § 2675.

Documents offered in evidence should be included in the transcript. Hall *v.* Beggs, 17 La. Ann. 130; Harris *v.* Hays, 8 La. Ann. 433. The substance of a deed is sufficient where no question of construction arises upon it. Knowles *v.* Inches, 12 Cal. 212.

Facts admitted of record.— There is no necessity to copy in the transcript on appeal documents which have been offered to prove a fact admitted of record. Coco *v.* Thienman, 25 La. Ann. 236.

Omission of cumulative evidence from the record is not a fatal defect. Hebert *v.* Mayer, 47 La. Ann. 563, 17 So. 131.

On an appeal exclusively for errors of law, the transcript on appeal need not contain any statement of the facts or the evidence adduced below. Meyer *v.* Schurbruck, 37 La. Ann. 373; Townsend's Succession, 36 La. Ann. 535.

Where witnesses testify as to the location of points or objects on a plat, the points or objects indicated should, in order to obtain a review of the finding of the trial court, appear in some appropriate manner in the transcript. Toler *v.* McCabe, 52 Mo. App. 532.

In Louisiana the clerk's certificate to the transcript must show that all the evidence received and considered below has been transcribed, except in cases of appeal for errors apparent of record, or where the omission is of cumulative evidence only. Thibodeaux *v.* Winder, 39 La. Ann. 226, 1 So. 451; Torres *v.* Falgoust, 35 La. Ann. 818; Radovich *v.* Frigerio, 27 La. Ann. 68; Mulligan *v.* New Orleans, 22 La. Ann. 11; Millaudon *v.* New Orleans First Municipality, 1 La. Ann. 215; Powell *v.* Williams, 5 Rob. (La.) 169; Kirkman *v.* Pollitt, 15 La. 442.

54. Nisbet *v.* Lawson, 1 Ga. 275; Stetson *v.* Corinna, 44 Me. 29; Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231; Everdell *v.* Sheboygan, etc., R. Co., 40 Wis. 302.

Stenographic report.— In Louisiana, under Acts (1894), No. 3, it is the duty of the clerk to embody in the transcript of appeal the original transcribed stenographic report of the testimony, whether the duplicate required by said act is on file or not. State *v.* St. Alexandre, 52 La. Ann. 819, 27 So. 291. See also Courier-Journal Job Printing Co. *v.* Columbia F. Ins. Co., 21 Ky. L. Rep. 1258, 54 S. W. 966.

order of the trial judge,[55] or by order of the appellate court,[56] the original papers in a cause, such as pleadings,[57] evidence,[58] appeal bonds, etc.,[59] should not be returned on appeal. They should, as a rule, be copied into the transcript.[60]

55. See Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 13 So. 423; Hobson *v.* Kissam, 8 Ala. 357; Blackburn *v.* Randolph, 33 Ark. 119; Rabon *v.* State, 7 Fla. 9.

Unless there is some special reason why they should not be copied, or something is to be determined by inspection of them, original papers should not be returned to the appellate court. School Trustees *v.* Welchley, 19 Ill. 64.

56. **On suggestion of the necessity of inspection,** the supreme court will, for that purpose, request the clerk of the trial court to send up the original papers in his hands. Anonymous, 40 Ill. 77.

Original paper in hands of party.—Where an original paper used on the trial below is in the hands of a party to the suit the appellate court can compel its production. Holbrook *v.* Nichol, 40 Ill. 75.

57. Where an appeal is required to be heard on a certified transcript of the proceedings, it cannot be heard on the original pleadings, even though the parties may so stipulate. School Dist. No. 49 *v.* Cooper, 44 Nebr. 714, 62 N. W. 1084; Bell *v.* Beller, 40 Nebr. 501, 58 N. W. 941; Moore *v.* Waterman, 40 Nebr. 498, 58 N. W. 940. See also Harris *v.* Allnutt, 12 La. 465; and Louisiana State Bank *v.* Morgan, 4 Mart. N. S. (La.) 344, in which it was held that it was sufficient to maintain an appeal if copies of the petitions and citations were sent up with the record instead of the originals.

58. **Unless warranted by special circumstances** (Harrison *v.* Dewey, 46 Mich. 173, 9 N. W. 152; and see also Pruitt *v.* McWhorter, 74 Ala. 315), or required by law (Richardson *v.* Grays, 85 Iowa 149, 52 N. W. 10; Jamison *v.* Weaver, (Iowa 1891) 50 N. W. 34; State *v.* Clerk Civil Dist. Ct., 47 La. Ann. 358, 17 So. 48; Heugh *v.* Hancock, 1 Mo. 676), copies of evidence used in the court below, and not the original papers, should be returned to the appellate court (Pruitt *v.* McWhorter, 74 Ala. 315; Warnock *v.* Kilpatrick, 70 Ga. 730; Marvin *v.* Sager, 145 Ind. 261, 44 N. E. 310; Proctor Coal Co. *v.* Finley, 17 Ky. L. Rep. 950, 32 S. W. 477; De Riesthal *v.* Walton, 66 Md. 470, 8 Atl. 462; Ladd *v.* Blunt, 4 Mass. 402; Harrison *v.* Dewey, 46 Mich. 173, 9 N. W. 152. But see Scott *v.* Fletcher, 1 Overt. (Tenn.) 488; State *v.* Allyn, 2 Wash. 470, 27 Pac. 233).

On an issue of nul tiel record in an action on a judgment, the supreme court does not inspect the record of the common pleas, but receives attested copies from the clerk of the latter court as evidence of the record. Ladd *v.* Blunt, 4 Mass. 402.

59. **Unless ordered so to do,** the clerk of the court below, in making up the transcript of a case for the appellate court, should not append the original appeal bond thereto. Metzler *v.* James, 9 Colo. 115, 10 Pac. 654; Young *v.* Ward, 21 Ill. 223.

60. *Alabama.*— Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 13 So. 423; Hobson *v.* Kissam, 8 Ala. 357.

Arkansas.—Blackburn *v.* Randolph, 33 Ark. 119.

Florida.— Rabon *v.* State, 7 Fla. 9.

Illinois.— School Trustees *v.* Welchley, 19 Ill. 64.

Iowa.—Cox *v.* Macy, 76 Iowa 316, 41 N. W. 28; Baldwin *v.* Tuttle, 23 Iowa 66.

Kansas.— See Drake *v.* Dodsworth, 4 Kan. 135.

Kentucky.— Courier-Journal Job Printing Co. *v.* Columbia F. Ins. Co., 21 Ky. L. Rep. 1258, 54 S. W. 966.

Louisiana.— Immanuel Presb. Church *v.* Riedy, 104 La. 314, 29 So. 149.

Nebraska.— Royal Trust Co. *v.* Exchange Bank, 55 Nebr. 663, 76 N. W. 425; Beagle *v.* Smith, 50 Nebr. 446, 69 N. W. 956; Peck *v.* Nebraska L. & T. Co., 50 Nebr. 227, 69 N. W. 777.

New York.— Winter *v.* Green, 12 Johns. (N. Y.) 497.

Ohio.— Stewart *v.* Williams, 15 Ohio St. 484.

Wisconsin.— Washington County *v.* Lucas, 30 Wis. 276. See also Bird *v.* Morrison, 9 Wis. 551.

See 3 Cent. Dig. tit. "Appeal and Error," § 2639 *et seq.*

In Kansas it has been held that the supreme court must treat as a transcript whatever the clerk of the court below certifies to be such, though the judge of that court has inadvertently, and the clerk illegally, permitted the original papers to be incorporated therein. Drake *v.* Dodsworth, 4 Kan. 135.

On appeal from interlocutory order.—A clerk should not, even by consent of counsel, send up the original papers of a cause on an appeal from an interlocutory order. Emmons *v.* McKesson, 58 N. C. 92; Douglas County *v.* Walbridge, 36 Wis. 643. But a decree, interlocutory in form, but settling the merits of the case, is so far final as to authorize the clerk, under Wis. Stat. (1859), c. 139, to send up, on appeal therefrom, the original papers instead of copies, unless otherwise directed by the judge. Bird *v.* Morrison, 9 Wis. 551.

Original papers from other clerks' offices will not be received to complete a record in the supreme court. Hayes *v.* Clarke, 12 La. Ann. 666.

Original papers without a certified transcript of the record confer no jurisdiction upon the supreme court on appeal. Huston *v.* Huston, 3 Greene (Iowa) 248.

Sending up originals — Relief of appellee.— In Bird *v.* Morrison, 9 Wis. 551, it was held that if a clerk, not necessarily, though properly, sends up the original papers on appeal instead of copies, so that the appeal incidentally stays proceedings below, appellee may have copies made, and the originals sent back at his own expense, unless the larger undertaking be filed.

(B) *Sufficiency of Copies Where Originals Are Required.* Where, owing to special reasons, an inspection of an original paper is necessary to a review by an appellate court, a copy will not be allowed in the transcript or return on appeal.[61] But where the original is merely required by statute, and there are no special circumstances rendering its inspection by the appellate court necessary, the substitution of a copy will not necessarily prove fatal.[62]

(VI) *Papers Not of Record or on File.* The fact that papers not in the judgment-roll are in the transcript and certified by the clerk does not make them any part of the record on appeal when they are not brought into the record by any bill of exceptions, case, or statement of facts, or in some other way recognized by law.[63]

(VII) *Record, or Part Thereof*—(A) *In General.* In the absence of statutory authority to carry up less than the complete record,[64] the whole record of the court below, including copies of the pleadings,[65] of the judgment or final order

61. Halliwell *v.* Spring, 16 Ark. 644; Harsh *v.* Hanauer, 15 Ark. 252.

Similarly, a copy of a supposed duplicate in place of a copy of an original paper is insufficient. Montgomery *v.* Gorrell, 49 Ind. 230, in which it was held that, where a writing that ought to be copied into the transcript on appeal cannot be found, a supposed duplicate should not be substituted without appellee's consent, but in such case proper proceedings should be had to compel the production of the original, or to prove its contents.

62. Louisiana State Bank *v.* Morgan, 4 Mart. N. S. (La.) 344.

Loss of original.— Where a copy of an instruction was filed in the supreme court, accompanied by a certificate of the clerk of the lower court that the original was lost and by the affidavit of the person who drew it that it was an exact copy, it was held that it would not be stricken from the files on the ground that it was a copy and not the original. Hitchcock *v.* Shager, 32 Nebr. 477, 49 N. W. 374.

63. *Alabama.*— Weaver *v.* Cooper, 73 Ala. 318; Kirk *v.* McAllister, 39 Ala. 343.

Florida.— Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992; Jones *v.* Buddington, 35 Fla. 121, 17 So. 399.

Georgia.— Southern R. Co. *v.* Dantzler, 99 Ga. 323, 25 S. E. 606.

Illinois.— Rosenstiel *v.* Gray, 112 Ill. 282.

Indiana.— Carlson *v.* State, 145 Ind. 650, 44 N. E. 660; Rooker *v.* Wise, 14 Ind. 276.

Iowa.— Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Minnesota.— Mayall *v.* Burke, 10 Minn. 285.

Montana.—Carr, etc., Co. *v.* Closser, (Mont. 1901) 63 Pac. 1043.

New York.—See Eggeling *v.* Allen, 25 Misc. (N. Y.) 496, 54 N. Y. Suppl. 1029; *In re* Byrnes, 12 N. Y. Suppl. 63.

Oregon.— Tatum *v.* Massie, 29 Oreg. 140, 44 Pac. 494; Osborn *v.* Graves, 11 Oreg. 526, 6 Pac. 227.

South Carolina.— Hunter *v.* Columbia, etc., R. Co., 41 S. C. 86, 19 S. E. 197.

Texas.— Ficklin *v.* Strickland, (Tex. 1890) 13 S. W. 272; Sidbury *v.* Ware, 65 Tex. 252.

Wyoming.— Underwood *v.* David, (Wyo. 1900) 61 Pac. 1012.

United States.— Duncan *v.* Atchison, etc., R. Co., 72 Fed. 808, 44 U. S. App. 427, 19 C. C. A. 202.

A question for appellate court.— In Portwood *v.* Feld, 72 Miss. 542, 17 So. 373, it was held that since, on appeal, the question as to what papers are properly a part of the record is a matter to be determined by the appellate court, the clerk cannot be enjoined by the lower court from incorporating certain papers in the transcript on the ground that they are not properly a part of the record.

Where acted on by court below.— In Landreth *v.* Landreth, 9 Ala. 430, it was held that where a paper is sent up with the transcript which is not necessarily a part of the record, it may be noticed by the appellate court if it appears to have been made such, or at least to have been acted upon by the court below. See also Hess *v.* Winder, 30 Cal. 349.

64. The clerk of court has no authority to determine the contents of the transcript or return. These are fixed by law, by order of court, or by the party calling for the transcript. Witteman *v.* Ludden, etc., Music House, 88 Ga. 223, 14 S. E. 211; Day *v.* Hanks, 11 Ky. L. Rep. 138.

65. The pleadings should all be copied in full into the transcript of the record.

Indiana.— Evansville Suburban R. Co. *v.* Lavender, 7 Ind. App. 655, 34 N. E. 847.

Kansas.—Weaver *v.* Hall, 33 Kan. 619, 7 Pac. 238.

North Carolina.—Wyatt *v.* Lynchburg, etc., R. Co., 109 N. C. 306, 13 S. E. 779.

Texas.— Hubby *v.* Harris, 59 Tex. 14.

United States.— Redfield *v.* Parks, 130 U. S. 623, 9 S. Ct. 642, 32 L. ed. 1053.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2630, 2674.

In California it has been held that where an amended complaint and answer are filed, and no question arises on the original complaint, it is not necessary to make the latter a part of the transcript on appeal. Marriner *v.* Smith, 27 Cal. 649. See also, to like effect, Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303; Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

In Iowa if there is no question made as to the correctness of the findings of fact in the

appealed from,[66] of the judgment-roll,[67] of the notice or citation on appeal, etc.,[68] should be included in the transcript and returned to the appellate court.[69] But

court below, the pleadings need not be set forth. Hall *v.* Smith, 15 Iowa 584. But see McMullen *v.* Polk County, 4 Iowa 593.

In Nebraska, if no objection is made to motions, demurrers, or other pleadings below, they should be omitted from the transcript. Winkler *v.* Roeder, 23 Nebr. 706, 37 N. W. 607. 8 Am. St. Rep. 155. See also Hilton *v.* Bachman, 24 Nebr. 490, 39 N. W. 419; Galley *v.* Galley, 13 Nebr. 200, 13 N. W. 172. *Compare* School Dist. No. 49 *v.* Cooper, 44 Nebr. 714, 62 N. W. 1084.

In Texas a transcript may be brought up without the pleading under an agreement between the parties approved by the court. Hubby *v.* Harris, 59 Tex. 14.

A bill of particulars attached to a declaration, and inserted in the transcript by the clerk, is not part of the record. Freas *v.* Truitt, 2 Colo. 489. See also Cook *v.* Hughes, 1 Colo. 51.

Showing as to filing.—A transcript on appeal that begins with what appears to be a copy of the complaint, but which does not anywhere state that such complaint, or any complaint, was filed in the cause, does not constitute a full transcript of the record. Evansville Suburban, etc., R. Co. *v.* Lavender, 7 Ind. App. 655, 34 N. E. 847.

66. *California.*— Glidden *v.* Packard, 28 Cal. 649.

Colorado.— Northrop *v.* Jenison, 12 Colo. App. 523, 56 Pac. 187.

Minnesota.— Chase *v.* Carter, 76 Minn. 367, 79 N. W. 307.

Nebraska.— Snyder *v.* Lapp, 59 Nebr. 243, 80 N. W. 806; Bohman *v.* Chase, 58 Nebr. 712, 79 N. W. 707; Union Pac. R. Co. *v.* Young, 52 Nebr. 190, 71 N. W. 1014.

New York.—Matter of Bailey, 85 N. Y. 629.

Ohio.— Reis *v.* Cincinnati, 4 Ohio Dec. 404.

Wisconsin.— State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

67. Since the record proper is contained in the judgment-roll, the latter must be copied in the transcript on appeal. Kimple *v.* Conway, 69 Cal. 71, 10 Pac. 189; Pabst Brewing Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273. *Compare* Page *v.* Roeding, 89 Cal. 69, 26 Pac. 787, in which it was held, under the provisions of the code of civil procedure that, where the entire judgment-roll is not requisite to the full determination of the appeal, it will not be dismissed because of the omission of an unessential part.

68. Harris *v.* Harris, 41 Ala. 364; Matter of Bailey, 85 N. Y. 629; Dolph *v.* Nickum, 2 Oreg. 202.

The mere fact that the seal of the court does not appear in the citation as copied in the record will not be deemed to show that such seal was not affixed to the original. Semple *v.* Barrow, 2 La. Ann. 141; Medley *v.* Voris, 2 La. Ann. 140.

The transcript of record in chancery appeals should include a copy of the entry of appeal, with a certificate of the clerk of the circuit court showing that it has been duly recorded, giving date and page of record. Chamberlin *v.* Finley, 40 Fla. 91, 23 So. 559.

69. *Alabama.*—Cottingham *v.* Armour Packing Co., 109 Ala. 421, 19 So. 842. *Compare* Street *v.* Street, 113 Ala. 333, 21 So. 138.

Arkansas.—Lemay *v.* Johnson, 35 Ark. 225.

California.— Solomon *v.* Reese, 34 Cal. 28; Glidden *v.* Packard, 28 Cal. 649.

Colorado.— South Boulder Ditch, etc., Co. *v.* Community Ditch, etc., Co., 8 Colo. 429, 8 Pac. 919.

Florida.— Zinn *v.* Dzialynski, 14 Fla. 43.

Georgia.— Stubbs *v.* Central Bank, 7 Ga. 258.

Illinois.— Freeland *v.* Jasper County, 27 Ill. 303; Jones *v.* Sprague, 3 Ill. 55.

Indiana.— Watt *v.* Alvord, 27 Ind. 495; Barnes *v.* Pelham, 18 Ind. App. 166, 47 N. E. 648.

Iowa.— McMullen *v.* Polk County, 4 Iowa 593.

Kansas.— Cook *v.* Challiss, 55 Kan. 363, 40 Pac. 643; West Brook *v.* Schmaus, 51 Kan. 214, 32 Pac. 892; Neiswender *v.* James, 41 Kan. 463, 21 Pac. 573; Heaston *v.* Miller, 1 Kan. App. 157, 41 Pac. 976.

Kentucky.— Green *v.* Duvall, 7 Ky. L. Rep. 819; and see Davis *v.* Day, 100 Ky. 24, 37 S. W. 158.

Louisiana.— Azemard *v.* Campo, McGloin (La.) 64.

Maryland.—Blackburn *v.* Craufurd, 22 Md. 447.

Michigan.— Brown *v.* Thompson, 29 Mich. 72; Duffield *v.* Detroit, 15 Mich. 474; Wright *v.* Dudley, 8 Mich. 115.

Minnesota.— Chase *v.* Carter, 76 Minn. 367, 79 N. W. 307; Firth *v.* Brack, 64 Minn. 242, 66 N. W. 987.

Montana.—Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303.

Nebraska.— Orr *v.* Orr, 2 Nebr. 170. *Compare* Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

New York.— Matter of Bailey, 85 N. Y. 629; McAllister *v.* Sexton, 4 E. D. Smith (N. Y.) 41; Halsey *v.* Van Amringe, 6 Paige (N. Y.) 12.

Ohio.— Reis *v.* Cincinnati, 4 Ohio Dec. 404.

Texas.— Burr *v.* Lewis, 6 Tex. 76.

Wisconsin.— Carpenter *v.* Shepardson, 43 Wis. 406; Hendricks *v.* Van Camp, 10 Wis. 442.

United States.— Hoe *v.* Kahler, 27 Fed. 145.

See 3 Cent. Dig. tit. "Appeal and Error," § 2627; and *supra*, XIII, G, 4, b, (I).

In equity all papers filed in the case become, on appeal, part of the record, and are to be included in the transcript. Lemay *v.* Johnson, 35 Ark. 225.

Right of appellant to determine.— In Indiana the appellant may bring up on appeal such parts of the record as he chooses, but the supreme court will not act upon less than is necessary to enable it to determine whether

the transcript should not be encumbered with useless repetitions and irrelevant matter.[70]

(B) *On Second Appeal.* Where a cause has been remanded by the appellate court for a new trial, and an appeal is taken from the judgment or decree rendered at such new trial, the transcript of the record need contain only so much of the proceedings as have taken place subsequent to the remandment of the cause.[71]

(VIII) *Special Orders as to Contents.* Where a complete transcript is required by statute or rule of court it is not competent for a court or judge to make special orders with regard to the contents of the transcript or return on appeal.[72]

(IX) *Stipulations as to Contents* — (A) *In General.* Unless allowed by statute or rule of court,[73] it has been held that a stipulation between the par-

there was available error. Watt *v.* Alvord, 27 Ind. 495.

70. *Arkansas.*— Farquharson *v.* Johnson, 35 Ark. 536.

California.— Conroy *v.* Duane, 45 Cal. 597; Mendocino County *v.* Morris, 32 Cal. 145; More *v.* Del Valle, 28 Cal. 170.

Kentucky.— Alvord *v.* Mallory, 10 Ky. L. Rep. 80.

Louisiana.— State *v.* Ogden, 50 La. Ann. 982, 24 So. 593.

Nevada.— Greeley *v.* Holland, 14 Nev. 320.

New York.—Kanouse *v.* Martin, 2 How. Pr. (N. Y.) 252.

United States.— Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431; Owens *v.* Hanney, 9 Cranch (U. S.) 180, 3 L. ed. 697; Burnham *v.* North Chicago St. R. Co., 87 Fed. 168, 59 U. S. App. 274, 30 C. C. A. 594.

A copy of the minutes kept by the clerk during the trial should not be inserted in a transcript on appeal. Mendocino County *v.* Morris, 32 Cal. 145; More *v.* Del Valle, 28 Cal. 170; Greeley *v.* Holland, 14 Nev. 320.

Appointment of special judge.— It is not necessary, in making out a transcript of the record for the appellate court, of a case tried by a special judge, to copy the order of the trial court appointing him, which states the facts rendering his appointment necessary and proper. Slone *v.* Slone, 2 Metc. (Ky.) 339.

Instructions are no part of the record, and should not be included in the transcript unless incorporated in the bill of exceptions. Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886. *Compare* Longino *v.* Ward, 1 Tex. App. Civ. Cas. § 522.

Interlocutory proceedings.— In Kanouse *v.* Martin, 2 How. Pr. (N. Y.) 252, it was held that nothing should be returned to a writ of error except the judgment record. Interlocutory proceedings should not be included.

On appeal from the denial of a motion which raises an entirely new and separate issue and involves none of the matters litigated in the original cause, the transcript need not contain the record of the original cause. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

Orders of postponement and notices and subpœnas to take depositions are never necessary to make a complete transcript. Affidavits or vouchers with proofs of claims may or may not be necessary to a complete record, this depending upon the questions to be tried. Alvord *v.* Mallory, 10 Ky. L. Rep. 80.

Where appeal is taken on the judgment-roll alone the transcript need not contain a statement of the grounds of the appeal. Solomon *v.* Reese, 34 Cal. 28.

71. Allred *v.* Kennedy, 74 Ala. 326; Cox *v.* Osburn, 1 A. K. Marsh. (Ky.) 259; Simmons *v.* Allison, 119 N. C. 556, 26 S. E. 171; Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750.

Insertion of mandate.— It is not necessary that the transcript contain a copy of the mandate of the appellate court issued on its former judgment. Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750. *Compare* Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 21 U. S. App. 50, 9 C. C. A. 468.

In Louisiana, if a previous appeal has been taken in the same cause, it is not necessary, on the second appeal, to copy the matter already embodied in a transcript on file in the appellate court. Harrison *v.* Their Creditors, 43 La. Ann. 91, 9 So. 15, in which it was held that the clerk's certificate that the new transcript, "together with the transcript of appeal in this case already on file in the supreme court," do contain, etc., will be sufficient.

The opinion delivered by the appellate court on a former appeal should not be inserted in the transcript on a second appeal. Life Assoc. of America *v.* Neville, 72 Ala. 517; Lake *v.* Security Loan Assoc., 72 Ala. 207. See also Lipscomb *v.* McClellan, 72 Ala. 151, in which it was held that the opinion of the supreme court in an attachment suit, on which the pending action was based, was no part of the record.

72. Williams *v.* Jones, 69 Ga. 277.

In a doubtful case, if the clerk is requested by one party to an appeal to insert in the transcript what he is requested by the other party to leave out, a direction by the court is proper. Hoe *v.* Kahler, 27 Fed. 145.

In Kentucky, under title 10 of chapter 3 of the civil code, it has been held that appellant should present to the judge his assignment of errors, and the judge should make an order to the clerk specifying the parts of the record to be copied material to the questions raised on the appeal. Tompkins *v.* Southern Baptist Seminary, 78 Ky. 72.

73. *Alabama.*—Bradley *v.* Andress, 30 Ala. 80.

Georgia.— Hopgood *v.* Reeves, 77 Ga. 538.

ties to the cause as to the contents of a transcript of the record on appeal is inoperative.[74]

(B) *As to Completeness.* In California a stipulation by the parties that the transcript is complete and correct is permissible as a substitute for the clerk's certificate, and will estop them to impeach it subsequently.[75] In Nebraska such a stipulation will not dispense with the clerk's certificate.[76]

5. Paper Books. A statute or rule of court requiring paper books on appeal, and prescribing their contents, must be substantially complied with. As a rule, everything must be included in the paper book necessary to a review by the appellate court of the errors assigned.[77]

Illinois.— Walker *v.* Pratt, 55 Ill. App. 297. See also Carey *v.* Scherer, 55 Ill. App. 421; Booth *v.* Gaither, 54 Ill. App. 275; Gage *v.* Houts, 54 Ill. App. 231; Canning *v.* McMillan, 54 Ill. App. 207.

Indiana.— Truitt *v.* Truitt, 38 Ind. 16; Mills *v.* Simmonds, 10 Ind. 464. *Compare* Burdick *v.* Hunt, 43 Ind. 381.

Maryland.— State *v.* McCarty, 64 Md. 253, 1 Atl. 116.

Mississippi.— Miller *v.* Peeples, 60 Miss. 45.

Nevada.— White *v.* White, 6 Nev. 20.

Oregon.— Fratt *v.* Wilson, 30 Oreg. 542, 47 Pac. 706, 48 Pac. 356.

Texas.— Whitaker *v.* Gee, 61 Tex. 217.

74. Troy Laundry Machinery Co. *v.* Kelling, 157 Ill. 495, 42 N. E. 58 [*affirming* 57 Ill. App. 210]; Phelan *v.* Cuddy, 57 Ill. App. 590; State *v.* New Orleans, 34 La. Ann. 202; Irwin's Succession, 33 La. Ann. 63; Stewart *v.* Miller, 1 Mont. 301. See also Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. 1896) 37 S. W. 1003. See 3 Cent. Dig. tit. "Appeal and Error," § 2655 *et seq.*; and *supra*, XIII, B, 4 [2 Cyc. 1075].

Stipulation as to additional transcript.— The transcript on appeal must be complete in itself, and omissions therein cannot be remedied by a stipulation between the parties for the use of another transcript. Kern *v.* Pfaff, 44 Mo. App. 29.

Stipulation as to original bill of exceptions. —Under the provisions of the statute in Illinois the original bill of exceptions may be incorporated into the transcript of the record by stipulation. Daube *v.* Tennison, 154 Ill. 210, 39 N. E. 989 [*reversing* 54 Ill. App. 290]; American Vault, etc., Co. *v.* Springer, 80 Ill. App. 231. See also Lake Shore, etc., R. Co. *v.* Hessions, 150 Ill. 546, 37 N. E. 905. But see Mason *v.* Strong, 51 Ill. App. 482; Harris *v.* Shebeck, 51 Ill. App. 382; Overman *v.* Consolidated Coal Co., 51 Ill. App. 289; Rohde *v.* Lehman, 50 Ill. App. 455; Zielinski *v.* Remus, 46 Ill. App. 596.

Waiver.—Where counsel stipulated that all depositions on file might be "read and referred to on the hearing of defendant's motion for a new trial herein as part of the foregoing statement," and that the same "shall be printed in the transcript on appeal" and "form a part of the statement," it was held that a strict compliance with the requirements of the statute as to the manner of making them parts of such statement was waived. Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

When made after trial of cause.— Even where stipulations between the parties as to the contents of a transcript are effective, they cannot be made after the trial of the cause. Indianapolis *v.* Turner, 23 Ind. App. 139, 55 N. E. 41.

Where several causes are tried together, but not consolidated, and an appeal is taken in two or more, the transcript in each must contain all the evidence pertinent to it, and that in one will not be considered in another even though there be a stipulation of the parties to that effect. Jungeman *v.* Joseph Schnaider Brewing Co., 38 Mo. App. 458.

75. Harnish *v.* Bramer, 71 Cal. 155, 11 Pac. 888; Matter of Medbury, 48 Cal. 83; Todd *v.* Winants, 36 Cal. 129; Wetherbee *v.* Carroll, 33 Cal. 549.

76. McDonald *v.* Grabow, 46 Nebr. 406, 64 N. W. 1093.

77. Fowler *v.* Atkinson, 6 Minn. 578; Gerish *v.* Johnson, 5 Minn. 23; McCahan *v.* Wharton, 121 Pa. St. 424, 15 Atl. 615; Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 20 Atl. 718; Ott *v.* Oyer, 106 Pa. St. 6; *In re* La Plume, 18 Wkly. Notes Cas. (Pa.) 82; McBeth *v.* Newlin, 15 Wkly. Notes Cas. (Pa.) 129. See 3 Cent. Dig. tit. "Appeal and Error," § 2690.

Evidence.— In Pennsylvania it is the duty of appellant, and not appellee, to furnish in his paper book all the evidence in the case. Smith *v.* Arsenal Bank, 104 Pa. St. 518; McCandless *v.* Young, 96 Pa. St. 289; Wharmby's Appeal, 4 Kulp (Pa.) 23; Crawford *v.* Allegheny, 23 Wkly. Notes Cas. (Pa.) 141, 16 Atl. 476; Solts' Appeal, 4 Wkly. Notes Cas. (Pa.) 298.

Evidence excluded should be shown in the paper book to obtain a review of the ruling of the court thereon. Sweetzer *v.* Atterbury, 100 Pa. St. 18; Mitchell *v.* Com., 37 Pa. St. 187.

Evidence not introduced upon the trial of a case cannot, by being inserted in a paper book, be brought to the attention of the supreme court. Philadelphia, etc., R. Co. *v.* Conway, 112 Pa. St. 511, 4 Atl. 362.

Exceptions must be entered in the paper book in order that the party excepting may avail himself of them (Walworth *v.* Abel, 52 Pa. St. 370); and the paper book must show that the exception was taken in due time (O'Donnell *v.* Allegheny R. Co., 50 Pa. St. 490).

Exception to the allowance of an amendment to the declaration will not be considered where neither the original nor the

6. Supplemental Transcript or Return. Where necessary to eorrect errors, defects, or omissions in the original transcript or return as filed in the appellate court, an additional or supplemental transcript or return may be obtained upon proper application, and when filed in the appellate court it will be considered as part of the original transcript or return, and the assignment of errors upon the original will be sufficient.[78]

H. Authentication and Certification — 1. Necessity — a. In General. It is a very general requirement that the transcript, case-made, abstract of reeord, etc., on appeal must be authenticated or certified, or the appeal will be dismissed,[79]

amended declaration is set out in the paper book. Richardson *v.* Gosser, 26 Pa. St. 335.

Impertinent matter.—Where a paper book impugns the motives of a master whose report was confirmed by the court, and speaks contemptuously of the master himself, it may be suppressed by the supreme court. Matthew's Appeal, 13 Wkly. Notes Cas. (Pa.) 502.

78. *Arizona.*— Shute *v.* Keyser, (Ariz. 1892) 29 Pac. 386.

Colorado.— Stebbins *v.* Anthony, 5 Colo. 342.

Illinois.— Anonymous, 40 Ill. 53.

New York.— Cumiskey *v.* Lewis, 14 Daly (N. Y.) 466, 15 N. Y. St. 364.

Texas.— Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381.

Washington.—Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

Wisconsin.— Orton *v.* Noonan, 27 Wis. 572.

See 3 Cent. Dig. tit. "Appeal and Error," § 2685.

By appellee.—Where appellee or defendant in error is not satisfied with the transcript filed by appellant or plaintiff in error in the appellate court, he may file a more perfect record, to be filed and docketed as a part of the same case. Cassin *v.* Zavalla County, 71 Tex. 203, 9 S. W. 105.

Time of application.— In Illinois it has been held that where neither a suggestion of diminution of the record nor a motion to supply a further record was made on, or prior to, the second day of the term, when, by the rule, they should have been made, nor until the succeeding term, the appellate court was without jurisdiction to allow a supplemental transcript to be filed. Chicago City R. Co. *v.* Smith, 82 Ill. App. 305. See also, to like effect, Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113 [*affirming* 86 Ill. App. 181].

Filing after submission.—Where the transcript of an amended record shows that notice was given to the opposing counsel of the time when application would be made in the court below for leave to correct the record, and that a copy of the petition in that behalf had been furnished, the amendment having been made, and the cause being still pending in the supreme court, leave will be granted, in furtherance of justice, to file the supplemental record, although the cause has been submitted to the previous term. Stebbins *v.* Anthony, 5 Colo. 342. See also Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381. But see Johnson *v.* Johnson, 1 How. Pr. (N. Y.) 215, in which it was held that an additional return will not be allowed after assignment of errors and joinder therein.

Matters subsequent to decree.— Leave having been granted to file a supplemental transcript of record in the supreme court, and it appearing that the supposed supplemental record was of matters subsequent to, and independent of, the decree in the original record, the same was stricken out upon the court's own motion. Becker *v.* Henderson, 5 Colo. 346.

Want of jurisdiction in the appellate court cannot be shown by a supplemental transcript. Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

Where a transcript of the record below appears on its face to be complete, the appeal will be heard on it as such, and an oral dispute between counsel, in which complainant's counsel claims that leave had been reserved to her to incorporate omitted evidence, and defendant's counsel contends that complainant had not sought with due diligence to avail herself of such leave, and that the transcript is in fact complete, will be disregarded. Evans *v.* Evans, (Tenn. Ch. 1900) 57 S. W. 367.

Where a supplemental return is not made up with the required formality, the appeal will be heard on the original return unless an amended return in proper form is obtained from the lower court within the time granted for that purpose by the appellate court. Cumiskey *v.* Lewis, 14 Daly (N. Y.) 466, 15 N. Y. St. 364.

79. Numerous authorities support the text, among which may be cited the following cases:

California.— Matter of Wierbitszky, 88 Cal. 333, 26 Pac. 174; Viera *v.* Dobyus, (Cal. 1890) 24 Pac. 181.

Florida.— Ramsey *v.* Wells, 36 Fla. 88, 18 So. 181; Orange County High School *v.* Sanford, 17 Fla. 120.

Georgia.— Gresham *v.* Turner, 88 Ga. 160, 13 S. E. 946; Rankin *v.* Anderson, 41 Ga. 419.

Illinois.— Hosmer *v.* People, 96 Ill. 58; Morse *v.* Williams, 5 Ill. 285.

Indiana.— Watson *v.* Finch, 150 Ind. 183, 48 N. E. 245; Marshall *v.* State, 107 Ind. 173, 6 N. E. 142.

Iowa.—Cox *v.* Macy, 76 Iowa 316, 41 N. W. 28; Bracket *v.* Belknap, 41 Iowa 592.

Kansas.— Longwell *v.* Harkness, 57 Kan. 303, 46 Pac. 307; German Reformed Church *v.* Abbey, 54 Kan. 766, 39 Pac. 691.

unless the defect is remedied.[80] And where, instead of a regular transcript, the original papers are sent up on appeal, they must be certified to be such originals, and to constitute, in whole or in part, the record on appeal.[81]

b. Bill of Exceptions. A bill of exceptions must be authenticated or certified, or it will not be considered by the appellate court.[82]

c. Papers Included, Referred to, or Annexed. Papers included in, referred to, or annexed to the transcript, case-made, abstract of record, bill of exceptions, etc., on appeal must also be identified, or they will not be considered by the appellate court.[83]

Michigan.— Grand Rapids *v.* Whittlesey, 32 Mich. 192.

Nebraska.— Littell *v.* Cross, 58 Nebr. 594, 79 N. W. 157; Bailey *v.* Eastman, 54 Nebr. 416, 74 N. W. 959.

Nevada.— Hayes *v.* Davis, 23 Nev. 233, 45 Pac. 466.

New York.— Aldridge *v.* Aldridge, 120 N. Y. 614, 24 N. E. 1022, 31 N. Y. St. 948; Porter *v.* Smith, 107 N. Y. 531, 14 N. E. 446.

Oklahoma.— Stallard *v.* Knapp, 9 Okla. 591, 60 Pac. 234.

Texas.— Missouri Pac. R. Co. *v.* Scott, 78 Tex. 360, 14 S. W. 791; Cross *v.* Crosby, 42 Tex. 114.

Washington.— E. P. Cadwell, etc., Mortg. Loan Co. *v.* North Yakima First Nat. Bank, 3 Wash. 188, 28 Pac. 365 [*distinguishing* Squire *v.* Greer, 2 Wash. 209, 26 Pac. 222]; Parker *v.* Denny, 2 Wash. Terr. 360, 7 Pac. 892.

Wisconsin.— Shewey *v.* Manning, 14 Wis. 448.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2694, 2695, 2708, 2712.

Alteration of record.— It is the clerk's duty to certify the record as it originally existed, ignoring alterations improperly made. *Ex p.* Slocomb, 9 Ark. 375; Keller *v.* Killion, 9 Iowa 329; Kennedy *v.* Kennedy, 13 Lea (Tenn.) 24.

80. *Alabama.*— Kennedy *v.* Spencer, 4 Port. (Ala.) 272.

California.— Hellings *v.* Duval, 119 Cal. 199, 51 Pac. 335.

Idaho.— Simmons Hardware Co. *v.* Alturas Commercial Co., (Ida. 1895) 39 Pac. 553.

Kentucky.— Daniels *v.* Dils, 4 Ky. L. Rep. 836.

Louisiana.— Penn *v.* Evans, 28 La. Ann. 576; Flint *v.* Peck, 22 La. Ann. 246.

United States.—Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433.

See also *infra*, XIII, K, b, (I).

81. Becker *v.* Becker, 24 Nev. 476, 56 Pac. 243; Holmes *v.* Iowa Min. Co., 23 Nev. 23, 41 Pac. 762.

The requirement for a certificate covering the original files and papers on appeal is not satisfied by a certificate made long after the record has been filed and after the time for appeal has expired. Blanchard *v.* U. S., 7 Okla. 13, 54 Pac. 300.

82. Numerous authorities sustain the text, among which may be cited the following cases:

Alaboma.— Kerley *v.* Vann, 52 Ala. 7.

California.— Helsel *v.* Seeger, (Cal. 1893) 34 Pac. 237.

Georgia.— Pendley *v.* State, 87 Ga. 186, 13 S. E. 443; Pearce *v.* State, 86 Ga. 507, 12 S. E. 926.

Illinois.— Rohrheimer *v.* Eagle, 30 Ill. App. 498; Frieze *v.* People, 12 Ill. App. 349.

Indiana.— Moore *v.* Combs, 24 Ind. App. 22, 56 N. E. 35.

Kansas.— Scandia *v.* Sigsbee, 48 Kan. 331, 29 Pac. 559; Linton *v.* Frazier, 29 Kan. 20.

Kentucky.— Williams *v.* Newport News, etc., R. Co., 13 Ky. L. Rep. 202.

Maine.— Coburn *v.* Murray, 2 Me. 336.

Maryland.— Rutherford *v.* Pope, 15 Md. 579.

Michigan.— Lynch *v.* Craney, 95 Mich. 199, 54 N. W. 879.

Missouri.— Roesler *v.* Citizens' Bank, 88 Mo. 565; Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639.

Nebraska.— German Nat. Bank *v.* Terry, 48 Nebr. 863, 67 N. W. 856; Walter A. Wood Mowing, etc., Mach. Co. *v.* Gerhold, 47 Nebr. 397, 66 N. W. 538.

Texas.— Clitus *v.* Langford, (Tex. Civ. App. 1893) 24 S. W. 325.

Washington.— Stinson *v.* Sachs, 8 Wash. 391, 33 Pac. 287.

Wisconsin.— Riker *v.* Scofield, 6 Wis. 367.

Wyoming.— Howard *v.* Bowman, 3 Wyo. 311, 23 Pac. 68.

United States.— Young *v.* Martin, 8 Wall. (U. S.) 354, 19 L. ed. 418; Mussina *v.* Cavazos, 6 Wall. (U. S.) 355, 18 L. ed. 810.

See 3 Cent. Dig. tit. "Appeal and Error," § 2703; 21 Cent. Dig. tit. "Exceptions, Bill of," § 94.

Loss of certificate.—Where there is satisfactory evidence that there had been a proper authentication of a bill of exceptions attached thereto, which authentication, by accident, has become detached and lost, the bill may be considered. Winters *v.* Means, 50 Nebr. 209, 69 N. W. 753.

83. Numerous authorities support the text, among which may be cited the following cases:

California.— Fitzpatrick *v.* Fitch, 83 Cal. 490, 23 Pac. 531.

Colorado.— Dingle *v.* Swain, 15 Colo. 120, 24 Pac. 876.

Florida.— Zinn *v.* Dzialynski, 14 Fla. 187.

Georgia.— Vaughn *v.* Estes, 105 Ga. 501, 30 S. E. 947; Long *v.* Scanlan, 105 Ga. 424, 31 S. E. 436.

Idaho.— Bonner *v.* Powell, (Ida. 1900) 61 Pac. 138.

2. Who May Authenticate or Certify — a. In General. The transcript, case-made, abstract of record, bill of exceptions, etc.,[84] or papers included in, referred to, or annexed to the same, should be authenticated or certified by the officer designated by the statute or rule of court.[85] In the case of a statute authorizing a certification by the clerk, the statute is the limit of the clerk's power as to matters he may certify.[86] So, it has been held that the clerk has no authority to determine what the testimony was,[87] that the record contains all that

Illinois.— Brockenbrough *v.* Dresser, 67 Ill. 225; Tolman *v.* Dreyer, 50 Ill. App. 243.

Indiana.— Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524.

Iowa.— Lee *v.* Lee, 83 Iowa 565, 50 N. W. 33; State *v.* Brewer, 70 Iowa 384, 30 N. W. 646.

Kentucky.— Nickell *v.* Fallen, 11 Ky. L. Rep. 621, 12 S. W. 767.

Louisiana.— Cooley *v.* Broad, 29 La. Ann. 71.

Maryland.— Muir *v.* Beauchamp, 91 Md. 650, 47 Atl. 821.

Missouri.— Stone *v.* Baer, 82 Mo. App. 339.

Montana.— Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

Nebraska.— Hake *v.* Woolner, 55 Nebr. 471, 75 N. W. 1087; Geneva Nat. Bank *v.* Donovan, 53 Nebr. 613, 74 N. W. 33.

Nevada.— Hoppin *v.* Winnemucca First Nat. Bank, 25 Nev. 84, 56 Pac. 1121; Reno Water, etc., Co. *v.* Osburn, 25 Nev. 53, 56 Pac. 945.

New York.— Matter of Cain, 17 N. Y. Suppl. 11, 42 N. Y. St. 145.

North Dakota.— Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893.

South Carolina.— Moore *v.* Perry, 42 S. C. 369, 20 S. E. 200.

Tennessee.— Springer Transp. Co. *v.* Smith, 16 Lea (Tenn.) 498, 1 S. W. 280.

Texas.— Ficklin *v.* Strickland, (Tex. 1890) 13 S. W. 272.

Wisconsin.— Carpenter *v.* Shepardson, 43 Wis. 406.

United States.— San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911; Grand County *v.* King, 67 Fed. 945, 32 U. S. App. 402, 14 C. C. A. 421.

See 3 Cent. Dig. tit. "Appeal and Error." §§ 2714–2717.

84. *Arizona.*— Nigro *v.* Hatch, (Ariz. 1886) 11 Pac. 177.

California.— Walsh *v.* Hutchings, 60 Cal. 228.

Colorado.— Pelton *v.* Bauer, 4 Colo. App. 339, 55 Pac. 918.

Georgia.— Kiser *v.* State, 36 Ga. 260.

Illinois.— Culliner *v.* Nash, 76 Ill. 515.

Indiana.— Rosenbower *v.* Schuetz, 141 Ind. 44, 40 N. E. 256.

Kansas.— Limerick *v.* Gwinn, 44 Kan. 694, 24 Pac. 1097; Burlington, etc., R. Co. *v.* Grimes, 38 Kan. 241, 16 Pac. 472.

Louisiana.— Second Municipality *v.* Laurelle, 8 Rob. (La.) 148; Powell *v.* Williams, 5 Rob. (La.) 169.

Maine.— Jewett *v.* Hodgdon, 2 Me. 335.

Minnesota.— Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256, 43 N. W. 180; Chesley *v.* Mississippi, etc., Boom Co., 39 Minn. 83, 38 N. W. 769.

New York.—Aldridge *v.* Aldridge, 120 N. Y. 614, 24 N. E. 1022, 31 N. Y. St. 948; Porter *v.* Smith, 107 N. Y. 531, 14 N. E. 446.

Oklahoma.— Stallard *v.* Knapp, 9 Okla. 591, 60 Pac. 234; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729.

Pennsylvania.— Com. *v.* Arnold, 161 Pa. St. 320, 34 Wkly. Notes Cas. (Pa.) 313, 29 Atl. 270.

Texas.— Cross *v.* Crosby, 42 Tex. 114.

See 3 Cent. Dig. tit. "Appeal and Error," § 2697.

In Oklahoma the transcript from a probate court must be certified to by the probate judge, and not by the clerk. Walton *v.* Williams, 5 Okla. 642, 49 Pac. 1022.

Change of venue.—When a suit is brought in one parish and transferred to another, where it is tried and judgment rendered, the clerk of the court in which the cause originated cannot certify the record. McIntyre *v.* Whiting, 6 La. 35.

Stenographer.—It is not within the province of the official stenographer to certify that the transcript, bill of exceptions, or case-made is complete. Wieland *v.* Potter, 6 Colo. App. 451, 46 Pac. 370; Gibbs *v.* Oskaloosa, 103 Iowa 734, 72 N. W. 416; Fairfield Independent Dist. *v.* Farmer, 74 Iowa 744, 35 N. W. 450; Ryan *v.* Madden, 46 Kan. 245, 26 Pac. 679; Burlington, etc., R. Co. *v.* Grimes, 38 Kan. 241, 16 Pac. 472. But, in Oregon, a transcript of evidence in an equity case, tried by the court and certified by the official stenographer, is sufficiently authenticated to be considered by the appellate court on appeal. Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127.

85. *California.*— Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

Colorado.— Dingle *v.* Swain, 15 Colo. 120, 24 Pac. 876.

Georgia.— Fleming *v.* Bainbridge, 84 Ga. 622, 10 S. E. 1098; Elsas *v.* Clay, 67 Ga. 327.

Illinois.— Charles *v.* Remick, 50 Ill. App. 534.

Iowa.— Johnston *v.* McPherran, 81 Iowa 230, 47 N. W. 60.

Nebraska.— Chicago, etc., R. Co. *v.* Ringo, 52 Nebr. 163, 71 N. W. 1016.

North Dakota.— Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893.

Oregon.— Skinner *v.* Lewis, (Oreg. 1900) 62 Pac. 523.

Wisconsin.— Binder *v.* McDonald, 106 Wis. 332, 82 N. W. 156.

86. State *v.* Millis, 19 Mont. 444, 48 Pac. 773; Scott *v.* Overall, 50 Nebr. 144, 69 N. W. 777.

87. Howard *v.* Ross, 3 Wash. 292, 28 Pac. 526.

When a review is sought on a transcript of

was offered or considered on a motion,[88] nor concerning matters not in the record.[89]

b. De Facto Officer. Where the certificate of a transcript purports to be signed by the trial judge, the transcript will not be stricken from the files on motion, on the ground that the officer giving the certificate was not in fact the judge.[90]

c. Deputy Clerk. Where the statute or rule of court authorizes a certification by the clerk, a certificate of a deputy clerk is a sufficient authentication.[91]

3. Requisites and Sufficiency — a. In General. The mode of authentication prescribed by statute must be strictly adhered to.[92] Where the statute does not

the record, the clerk of the district court is not authorized to determine what are or what are not material acts and proceedings of the court, but should make a full and correct transcript of the record and proceedings in the cause, and certify the same as such, and, where he has not substantially done so, the petition in error will be dismissed. Cook *v.* Challiss, 55 Kan. 363, 40 Pac. 643; Santa Fe Bank *v.* Hussey, 6 Kan. App. 893, 50 Pac. 977. Nor is he authorized to designate what portion of the record pertains to any particular issue, nor to determine what part of the record relates to any particular matter adjudicated by the court. Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671. See also Territory *v.* Neligh, (Ariz. 1886) 10 Pac. 367.

88. Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256, 43 N. W. 180.

89. Thompson *v.* Reno Sav. Bank, 19 Nev. 293, 9 Pac. 883.

90. Harris *v.* Harris, 41 Ala. 364. See also Clay *v.* Rogers, 7 J. J. Marsh. (Ky.) 340, wherein a record, made out and sworn to be correct by one not the clerk, the clerk having died and no successor having been appointed when necessary to file the record, was admitted in order to prevent dismissal of the appeal.

The clerk pro tempore may attest the copies of the record of a district court. Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852. See also Com. *v.* Connell, 9 Allen (Mass.) 488; Com. *v.* Clark, 16 Gray (Mass.) 88. See also Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435, wherein it was held that a judge *pro tempore* may, after the expiration of the term at which the case has been tried before him, settle and sign a case-made, if he does so within the time allowed by law or the order of the court. And see Garvin *v.* Jennerson, 20 Kan. 371, wherein it was held that, where proceedings are sought to be reviewed upon a case-made, and it appears that the proceedings below were before a judge *pro tempore*, it is not necessary, as a part of the authentication of the case-made, that the record show the reasons of the selection of the *pro tempore* judge, or his qualification for the office.

On appeal from a judgment of a town recorder, where the amended transcript is certified by one who describes himself as "formerly recorder," and signs himself as "Recorder" of the town, it is sufficient. Kirkwood *v.* Heege, 9 Mo. App. 576.

91. Eldridge *v.* Deets, 4 Kan. App. 241, 45 Pac. 948; Burton *v.* Hicks, 27 La. Ann. 507; Downes *v.* Tarkington, 3 La. Ann. 247; Garnau *v.* Dosier, 100 U. S. 7, 25 L. ed. 536. But see Tison *v.* Morgan, 41 Ga. 410, wherein a writ of error, taken, by the incumbent contestant to the office of the clerk of the superior court, without a supersedeas, was dismissed on the ground that the record, certified by his alleged deputy clerk, was not "certified by the clerk of the court."

In Massachusetts the assistant clerks of municipal courts have authority to attest copies of the record to be transmitted to the superior court. Com. *v.* Crawford, 111 Mass. 422; Com. *v.* Harvey, 111 Mass. 420.

92. *California.*— San Francisco, etc., R. Co. *v.* Anderson, 77 Cal. 297, 19 Pac. 517; Winder *v.* Hendrick, 54 Cal. 275.

Georgia.— Bond *v.* Winn, (Ga. 1901) 38 S. E. 328; Godbee *v.* McCathern, 86 Ga. 782, 13 S. E. 83; Anderson *v.* Faw, 79 Ga. 558, 4 S. E. 920.

Indiana.— Tombaugh *v.* Grogg, 156 Ind. 355, 59 N. E. 1060; Painter *v.* Hall, 75 Ind. 208.

Iowa.— Phillips *v.* Starr, 26 Iowa 349.

Kentucky.— English *v.* Young, 10 B. Mon. (Ky.) 141.

Montana.— State *v.* Millis, 19 Mont. 444, 48 Pac. 773.

Nebraska.— Shaffer *v.* Vincent, 53 Nebr. 449, 73 N. W. 932.

Wisconsin.— Thornton *v.* Eaton, 45 Wis. 618.

See 3 Cent. Dig. tit. "Appeal and Error," § 2698.

Abbreviating name of plaintiff.—A certificate of the clerk to a supplemental record is not insufficient because it employs the abbreviation "Chicago F. G. A. Co." for "Chicago Fuel Gas Appliance Company." Chicago Fuel Gas Appliance Co. *v.* Jewett, 66 Ill. App. 489.

Date.—When the clerk of a court below certifies and sends up a transcript, the certificate must be dated, in order to show that it was sent up within the prescribed time. Arnold *v.* Wells, 6 Ga. 380. See also Atlanta, etc., Air-Line R. Co. *v.* Smith, 66 Ga. 205. Where the judge's certificate to a transcript of appeal bears one date at the head, and another at the bottom, just before the judge's signature, the latter date will be taken to be the date of the certificate. Sayles *v.* Smith, 71 Iowa 241, 32 N. W. 333.

Place of authentication.—Where the transcript is a single document, it is immaterial in what part of it the authentication is made. Clements *v.* Collins, 59 Ga. 124.

The use of the word "testimony" for "evidence," in the certificate of the trial judge in

prescribe a mode of authentication, the appellate court may ratify the mode adopted by the lower court.[93]

b. Inclusion of All Proceedings. The statutes generally require that the certificate affirm that the transcript contains a full, true, and complete copy of all of the proceedings.[94] It is not, however, necessary that the certificate should be framed in the exact language of the statute.[95] It is sufficient, even though infor-

the allowance of a bill of exceptions, if the meaning is obvious, or it is clear that the latter is intended, will not render the document inoperative. Columbia Nat. Bank *v.* German Nat. Bank, (Nebr. 1898) 77 N. W. 346.

Form of certificates to abstracts of record, transcripts, etc., are set out in the following cases and rules of court:

California.— Winder *v.* Hendrick, 54 Cal. 275.

Florida.— Fla. Supreme Ct. Rules (1895), Special Rule No. 2 [18 So. xi].

Indiana.— Logan *v.* Smith, 70 Ind. 597.

Kansas.— Kan. Supreme Ct. Rules (1899), Nos. 2, 4 [58 Pac. v].

North Dakota.— N. D. Supreme Ct. Rules (1897), No. 5 [74 N. W. vii].

Texas.—Houston, etc., R. Co. *v.* Greenwood, 40 Tex. 361; Texas Dist. and County Ct. Rules (1892), No. 91 [20 S. W. xvii].

Washington.— Wash. Supreme Ct. Rules (1895), No. 5 [40 Pac. ix].

United States.—Matter of Parker, 120 U. S. 737, 7 S. Ct. 767, 30 L. ed. 818; U. S. *v.* Frémont, 18 How. (U. S.) 30, 15 L. ed. 302.

93. Pieper *v.* Centinela Land Co., 56 Cal. 173. See also Cummings *v.* Conlan, 66 Cal. 403, 5 Pac. 796, 903; People *v.* Jordan, 65 Cal. 644, 4 Pac. 683.

In Colorado it has been held that although the statute providing for appeals to the supreme court does not prescribe a particular mode of authentication for the transcript, the latter should be duly certified by the clerk in the same manner as are transcripts in cases upon error. South Boulder Ditch, etc., Co. *v.* Community Ditch, etc., Co., 8 Colo. 429, 8 Pac. 919.

94. Numerous authorities support the text, among which may be cited the following cases:

Alabama.— Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Cargile *v.* Ragan, 65 Ala. 287.

Arizona.—Territory *v.* Neligh, (Ariz. 1886) 10 Pac. 367.

California.— Pink *v.* Catanich, 51 Cal. 420.

District of Columbia.—Davis *v.* Harper, 14 App. Cas. (D. C.) 298.

Florida.— Finnegan *v.* Fernandina, 14 Fla. 72; Caulk *v.* Cox, 13 Fla. 147.

Georgia.— Elliott *v.* Deason, 64 Ga. 63; Harring *v.* Barwick, 24 Ga. 59.

Idaho.— Simmons Hardware Co. *v.* Alturas Commercial Co., (Ida. 1895) 39 Pac. 553.

Illinois.— Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115; Bertrand *v.* Taylor, 87 Ill. 235.

Indiana.—Yeoman *v.* Shaeffer, 155 Ind. 308, 57 N. E. 546; Richwine *v.* Jones, 140 Ind. 289, 39 N. E. 460.

Iowa.— Avery Planter Co. *v.* Martz, 96 Iowa 747, 65 N. W. 989.

Kansas.— Cook *v.* Challiss, 55 Kan. 363, 40 Pac. 643; Byers *v.* Leavenworth Lodge No. 2, I. O. O. F., 54 Kan. 321, 38 Pac. 302.

Kentucky.— Cox *v.* Frazer, 21 Ky. L. Rep. 579, 52 S. W. 796; Brashears *v.* Venters, 19 Ky. L. Rep. 1285, 43 S. W. 405.

Louisiana.— Waterer's Succession, 25 La. Ann. 210; Gillis *v.* Cuny, 21 La. Ann. 462.

Minnesota.— Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256, 43 N. W. 180; Chesley *v.* Mississippi, etc., Boom Co., 39 Minn. 83, 38 N. W. 769.

Mississippi.—Loper *v.* State, 3 How. (Miss.) 429.

Nebraska.— Herman *v.* Kneipp, 59 Nebr. 208, 80 N. W. 816.

New York.— Aldridge *v.* Aldridge, 120 N. Y. 614, 24 N. E. 1022, 31 N. Y. St. 948; Porter *v.* Smith, 107 N. Y. 531, 14 N. E. 446.

Pennsylvania.— Harris *v.* Philadelphia Traction Co., 180 Pa. St. 184, 40 Wkly. Notes Cas. (Pa.) 3, 36 Atl. 727.

Tennessee.— Burton *v.* Pettibone, 5 Yerg. (Tenn.) 443.

Texas.— Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Jenkins *v.* McNeese, 34 Tex. 189.

Wisconsin.— Glover *v.* Wells, etc., Grain Co., 93 Wis. 13, 66 N. W. 799; Carpenter *v.* Shepardson, 43 Wis. 406.

United States.— Ruby *v.* Atkinson, 93 Fed. 577, 35 C. C. A. 458; Meyer *v.* Mansur, etc., Implement Co., 85 Fed. 874, 52 U. S. App. 474, 29 C. C. A. 465.

See 3 Cent. Dig. tit. "Appeal and Error," § 2699.

95. *California.*— Pink *v.* Catanich, 51 Cal. 420.

Georgia.— Gordon *v.* Mitchell, 68 Ga. 11; Fletcher *v.* Collier, 61 Ga. 653; Bugg *v.* Towner, 41 Ga. 315; Harring *v.* Barwick, 24 Ga. 59.

Indiana.— Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707; Walker *v.* Hill, 111 Ind. 323, 12 N. E. 387; Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218; Boots *v.* Griffiths, 97 Ind. 241; Anderson *v.* Ackerman, 88 Ind. 481; Logan *v.* Smith, 70 Ind. 597.

Kentucky.— Cox *v.* Frazer, 21 Ky. L. Rep. 579, 52 S. W. 796.

Louisiana.— Waterer's Succession, 25 La. Ann. 210; Gillis *v.* Cuny, 21 La. Ann. 462; Wells *v.* Turnage, 20 La. Ann. 234; Barnabe *v.* Snaer, 16 La. Ann. 84; Brown *v.* Thomas, 9 La. Ann. 95.

Mississippi.—Loper *v.* State, 3 How. (Miss.) 429.

United States.— Jacksonville, etc., R. Co. *v.* American Constr. Co., 57 Fed. 66, 13 U. S. App. 377, 6 C. C. A. 249; Pennsylvania Co. *v.* Jacksonville, etc., R. Co., 55 Fed. 131, 2 U. S. App. 606, 5 C. C. A. 53.

mal, if, when fairly and reasonably construed, it affirms that all the proceedings are included.[96]

c. Seal. To give jurisdiction on appeal the transcript must, in most jurisdictions, be under seal,[97] and the fact that the seal is not in the usual place does not render the certificate insufficient.[98] The question whether the transcript is properly verified by the seal of the lower court is for the determination of the appellate court.[99]

d. Signature. The certificate must be signed, in order that the transcript may be considered on appeal.[1]

e. Separate Certificates For Several Actions. One certificate has been held to be sufficient where two actions, involving the same issues, are consolidated,[2] or where the two cases constitute an original and a collateral suit.[3]

96. Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Cargile *v.* Ragan, 65 Ala. 287; Clements *v.* Pearce, 63 Ala. 284.

97. *Alabama.*— Under Ala. Code (1876), § 3933, it is not essential that the clerk's certificate to the transcript of proceedings sent up on appeal should be under the seal of the court. Armstrong *v.* Nelson, 57 Ala. 556.

Arkansas.— Wells *v.* Long, 6 Ark. 252; Heard *v.* Lowry, 5 Ark. 474.

Colorado.— Dingle *v.* Swain, 15 Colo. 120, 24 Pac. 876.

Illinois.— Hosmer *v.* People, 96 Ill. 58; Morse *v.* Williams, 5 Ill. 285; Cowhick *v.* Gunn, 3 Ill. 417; Wagener *v.* Richards, 14 Ill. App. 389; Mason *v.* Gibson, 13 Ill. App. 463; Day *v.* Clinton, 5 Ill. App. 605.

Indiana.— Carpenter *v.* Schaeffer, 154 Ind. 694, 57 N. E. 105; Fidelity Bldg., etc., Union No. 4 *v.* Byrd, 154 Ind. 47, 55 N. E. 867; Conkey *v.* Conder, 137 Ind. 441, 37 N. E. 132; Stitson *v.* Lawrence County, 45 Ind. 173; Jones *v.* Frost, 42 Ind. 543; Sandusky *v.* Webb, 41 Ind. 478; Brunt *v.* State, 36 Ind. 330.

Louisiana.— The statute does not, in express terms, require the seal of the court to the certificate of the clerk to the transcript on appeal. Wood *v.* Harrell, 14 La. Ann. 61.

Maine.— Jewett *v.* Hodgdon, 2 Me. 335.

Ohio.— The omission of the presiding judge to sign the record comes within the maxim *de minimis non curat lex*, and is not available error. Harper *v.* Ashtabula County, Wright (Ohio) 708.

Texas.— Mays *v.* Forbes, 9 Tex. 436; *Ex p.* Barrier, 17 Tex. App. 585.

United States.— Blitz *v.* Brown, 7 Wall. (U. S.) 693, 19 L. ed. 280.

See 3 Cent. Dig. tit. "Appeal and Error," § 2701.

As to seal to bill of exceptions see *supra*, XIII, D, 6, f.

A clerical error in affixing the wrong seal does not affect the jurisdiction of the appellate court, but it may direct that the proper seal be affixed. Hempstead County *v.* Howard County, 51 Ark. 344, 11 S. W. 478.

98. U. S. *v.* Jarvis, 3 Woodb. & M. (U. S.) 217, 26 Fed. Cas. No. 15,469.

In Texas, under 2 Paschal Dig. art. 621, it is provided that the transcript must be fastened together at the upper end with tape, and sealed over the tie with the seal of the court. Mays *v.* Forbes, 9 Tex. 436; Brown *v.* State, 3 Tex. App. 294; Trevinio *v.* State, 2 Tex. App. 90; Hart *v.* State, 2 Tex. App. 39; Mitchell *v.* State, 1 Tex. App. 725; Holden *v.* State, 1 Tex. App. 225. If the requirement as to placing the seal over the tie be disregarded, the clerk will be required to send up a new transcript properly prepared. Sweeney *v.* State, 5 Tex. App. 41.

99. State *v.* Duncan, 28 N. C. 236.

1. *Colorado.*— Kerr *v.* Dudley, 26 Colo. 457, 58 Pac. 610.

Indiana.— Watson *v.* Finch, 150 Ind. 183, 48 N. E. 245; Marshall *v.* State, 107 Ind. 173, 6 N. E. 142; East Chicago Iron, etc., Co. *v.* Siwy, 23 Ind. App. 564, 55 N. E. 785.

Louisiana.— Penn *v.* Evans, 28 La. Ann. 576.

Minnesota.—Abrahams *v.* Sheehan, 27 Minn. 401, 7 N. W. 822.

New Jersey.— *Compare* Lutkins *v.* Den, 21 N. J. L. 337.

Tennessee.— *Compare* Burton *v.* Pettibone, 5 Yerg. (Tenn.) 443.

Texas.— Ficklin *v.* Strickland, (Tex. 1890) 13 S. W. 272.

Wisconsin.— Leonard *v.* Warriner, 20 Wis. 41.

United States.— Blitz *v.* Brown, 7 Wall. (U. S.) 693, 19 L. ed. 280; Pennsylvania Co. *v.* Jacksonville, etc., R. Co., 55 Fed. 131, 2 U. S. App. 606, 5 C. C. A. 53.

See 3 Cent. Dig. tit. "Appeal and Error," § 2701.

2. Insurance Co. of North America *v.* Osborn, (Ind. App. 1901) 59 N. E. 181. See also Gibson *v.* Smith, 31 Nebr. 354, 47 N. W. 1052, wherein it was held that one certificate was sufficient for several stipulations of attorneys in the lower court.

The complaint and warrant in the papers transmitted in a bastardy case on appeal need not bear separate certificates, but the attestation of the clerk, affixed at the end of the record, is sufficient. Fogarty *v.* Connell, 153 Mass. 369, 26 N. E. 880.

3. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484, wherein it was held that a certificate that the transcript is a true, full, etc., of the suit of A *v.* B, and of the same as revived by scire facias and continued at the instance of C, executor of said A, and of the sheriff's returns, etc., and also of the collateral garnishment suit at the instance of said executor against, etc., with one signature and one seal at the end, amounts to a

4. Waiver. The certificate cannot be dispensed with by a stipulation of the parties.[4] It has been held, however, that a motion to dismiss an appeal, because the certificate to the transcript is insufficient, will not be sustained after a joinder in error and submission of the cause by agreement.[5]

5. Alteration of Certificate. Where the certificate of the clerk attached to the record on appeal is materially altered, with the evident intention of misleading the court, the transcript will be stricken from the files.[6]

I. Transmission, Filing, Printing, and Service of Copies — 1. Printing — a. Necessity of. As a usual rule, the transcript or abstract of record is required, by statute or rule of court, to be printed,[7] but in some jurisdictions

certificate as to each suit, and a signature and seal applicable to both, and is therefore sufficient.

A separate certificate to each paper in the record is sufficient to bring up the whole record, even though the general certificate attached to the transcript is defective. Loper *v.* State, 3 How. (Miss.) 429.

4. *Illinois.*— Moore *v.* Bolin, 5 Ill. App. 556.

Kansas.— Hodgden *v.* Ellsworth County, 10 Kan. 637.

Louisiana.— *Compare* Huey *v.* Police Jury, 33 La. Ann. 1091.

Maine.— Jewett *v.* Hodgdon, 2 Me. 335.

Michigan.— Grand Rapids *v.* Whittlesey, 32 Mich. 192.

Minnesota.— Abrahams *v.* Sheehan, 27 Minn. 401, 7 N. W. 822.

Nebraska.— Moore *v.* Waterman, 40 Nebr. 498, 58 N. W. 940.

New York.— Dow *v.* Darragh, 92 N. Y. 537; Gorham Mfg. Co. *v.* Seale, 3 N. Y. App. Div. 515, 38 N. Y. Suppl. 367, 73 N. Y. St. 674.

Washington.— Zenkner *v.* Northern Pac. R. Co., 3 Wash. Terr. 60, 14 Pac. 596; Mulkey *v.* McGrew, 2 Wash. Terr. 259, 5 Pac. 842.

See 3 Cent. Dig. tit. "Appeal and Error," § 2696.

In North Carolina the case is not submitted to the judge for settlement unless counsel fail to agree. Clark's Code Civ. Proc. N. C. (1900), § 550; Roberts *v.* Partridge, 118 N. C. 355, 24 S. E. 15; Booth *v.* Ratcliffe, 107 N. C. 6, 12 S. E. 112; Russell *v.* Davis, 99 N. C. 115, 5 S. E. 895.

5. Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Cooper *v.* Cooper, 86 Ind. 75. But see Morse *v.* Williams, 5 Ill. 285, in which case it was held that it was not too late, after joinder in error, for one of the parties to move to strike the case from the docket on the ground of the insufficiency of the certificate.

6. Felber *v.* Boyd, 44 Nebr. 700, 62 N. W. 1059. See also Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435, wherein it was held that, where the certificate of the trial judge to the case-made is shown to be intentionally false and to have been fraudulently prepared, the appellate court may disregard it.

7. *California.*— Ward *v.* Healy, 110 Cal. 587, 42 Pac. 1071.

Colorado.— Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479; Otto *v.* Hill, 11 Colo. App. 431, 53 Pac. 614.

Idaho.— Buckingham *v.* Reid, (Ida. 1897) 48 Pac. 1069.

Iowa.— Cressey *v.* Lochner, 109 Iowa 454, 80 N. W. 531; McGillivary *v.* Case, 107 Iowa 17, 77 N. W. 483; State *v.* O'Day, 68 Iowa 213, 26 N. W. 81.

Michigan.— Michigan University *v.* Rose, 45 Mich. 284, 4 N. W. 738, 5 N. W. 674, 7 N. W. 875.

Missouri.— Butler County *v.* Graddy, 152 Mo. 441, 54 S. W. 219; Western Storage, etc., Co. *v.* Glasner, 151 Mo. 426, 52 S. W. 237; State *v.* Fields, 82 Mo. App. 152; Hanauer *v.* Bradley, 64 Mo. App. 661.

Nebraska.— Renard *v.* Wyckoff, (Nebr. 1900) 84 N. W. 410; Manning *v.* Freeman, 58 Nebr. 485, 78 N. W. 924; North Platte Water-Works Co. *v.* North Platte, 50 Nebr. 853, 70 N. W. 393.

New York.— Manhattan R. Co. *v.* Taber, 7 Misc. (N. Y.) 347, 31 Abb. N. Cas. (N. Y.) 167, 27 N. Y. Suppl. 860, 58 N. Y. St. 690. But *compare* Fagan *v.* Fagan, 39 Hun (N. Y.) 531, wherein it is held that, while the court is without power to order a husband in a divorce suit to pay for the printing of papers on his wife's appeal, the court may, where the appeal is not apparently frivolous, allow the hearing from the written papers.

South Dakota.— Noyes *v.* Lane, 2 S. D. 55, 48 N. W. 322.

Wisconsin.— Pearson *v.* Martin, 38 Wis. 265; Walker *v.* Guilliford, 36 Wis. 325; Heeron *v.* Beckwith, 1 Wis. 17.

Wyoming.— Spencer *v.* McMaster, 3 Wyo. 105, 3 Pac. 798; Halleck *v.* Bresnahen, (Wyo. 1883) 2 Pac. 537.

See 3 Cent. Dig. tit. "Appeal and Error," § 2766 *et seq.*; and cases cited *infra*, note 8 *et seq.*

An abstract printed on both sides of the paper has been held not to be a sufficient compliance with this requirement. Skiles *v.* Caruthers, 88 Ill. 458.

Motion for leave to be heard without printing the record will be denied where one of the parties declines to be heard in argument and the case is thrown upon the court without any information on that side as to whether the printing is necessary. Michigan University *v.* Rose, 45 Mich. 284, 4 N. W. 738, 5 N. W. 67 , 7 N. W. 875.

Taxation of costs or printer's fee.— Where the abstracts are not in conformity with the rules of the court no costs or printer's fee therefor will be allowed or taxed in favor of appellant. Illinois Cent. R. Co. *v.* Creighton, 53 Ill. App. 45.

the requirement that the record shall be printed depends upon the amount involved.[8]

b. Effect of Not Printing. A failure to comply with the rule requiring the printing of the records is ground for dismissal,[9] or for affirmance of the judgment.[10]

c. Excuses For Failure to Print. It is the duty of appellant to see that the requirements as to printing are complied with,[11] and he cannot excuse a failure to

Typewriting is not "printing" within the rule. Buckingham *v.* Reid, (Ida. 1897) 48 Pac. 1069; Keating *v.* Lewis, 74 Mo. App. 226; Franco-American Loan, etc., Assoc. *v.* Joy, 61 Mo. App. 162; Johnson County *v.* Bryson, 26 Mo. App. 484.

Under Fla. Supreme Ct. Rules (1895), No. 12, the records may be either typewritten or printed, provided, in either case, it is clearly and legibly done, and in black ink. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649.

8. Mora *v.* Schick, 4 N. M. 158, 13 Pac. 341; Deemer *v.* Falkenburg, 4 N. M. 57, 12 Pac. 717 (holding that a judgment in ejectment for land, the value of which is not shown, and for money damages in a less sum than one thousand dollars, does not make a case within N. M. Comp. Laws, § 2201, requiring the record on appeal to be printed if the amount of the judgment or value of the property in controversy exceeds one thousand dollars); Black *v.* Minneapolis, etc., Elevator Co., 8 N. D. 96, 76 N. W. 984, printing not required where judgment appealed from does not exceed three hundred dollars.

9. *California.*— Rumfelt *v.* Trinity River Canal, etc., Min. Co., 83 Cal. 649, 24 Pac. 276.

Florida.— Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649.

Missouri.— Johnson County *v.* Bryson, 26 Mo. App. 484.

North Carolina.— Stainback *v.* Harris, 119 N. C. 107, 25 S. E. 858; Thurber *v.* Eastern Bldg., etc., Assoc., 118 N. C. 129, 24 S. E. 730; Rodman *v.* Archbell, 108 N. C. 413 note, 13 S. E. 111; Hinton *v.* Pritchard, 108 N. C. 412, 12 S. E. 838; Avery *v.* Pritchard, 106 N. C. 344, 11 S. E. 281; Stephens *v.* Koonce, 106 N. C. 255, 11 S. E. 282; Witt *v.* Long, 93 N. C. 388, wherein it was stated that the court would not deem a mere colorable compliance sufficient.

Pennsylvania.— See Nulton *v.* Campbell, 15 Pa. Super. Ct. 151, holding that a failure to print the pleadings, when necessary to an understanding of the case, being violative of the rules of court, subjects the appellant to nonsuit.

South Carolina.— Bowker Fertilizer Co. *v.* Woodward, 41 S. C. 547, 19 S. E. 498.

Wisconsin.— Ingersoll *v.* Mecklem, 16 Wis. 90; Holmes *v.* Braman, 15 Wis. 603; Wilcox *v.* Hathaway, 12 Wis. 543; Bigelow *v.* Goss, 5 Wis. 83.

United States.— Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

See 3 Cent. Dig. tit. "Appeal and Error," § 2767 *et seq.*

Alleging failure to pay fees for printing.— Where it is not alleged that appellant has failed to pay the clerk the estimated cost and fees for printing the record, an appeal will not be dismissed on the ground that the record has not been printed. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

Reinstating cause after reversal for non-appearance, on account of failure to print.— Where a judgment is reversed under the rule for non-appearance of the respondent, a motion to vacate the judgment and reinstate the case will be granted where appellant has failed to print and serve his case, which fact was not known by the court when the judgment was reversed. Bonin *v.* Green Bay, etc., R. Co., 43 Wis. 210.

Size and style of type.— Under N. Y. Gen. Rules Prac. No. 43, prescribing the style of type to be used in printing records for the appellate division, the printing of part of the evidence contained in the record in italics is ground for an order requiring substitution of a properly printed case. Campbell *v.* Jughardt, 50 N. Y. App. Div. 460, 64 N. Y. Suppl. 198. But *compare* Archer *v.* Long, 35 S. C. 585, 14 S. E. 24. In Iowa the fact that the paper filed in the supreme court is printed in type larger than that prescribed by the rules of the court is not ground for striking it from the files. Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

Incorporating two appeals in one book.— Under the New York practice, two independent cases cannot be incorporated in one appeal book. Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 335, 48 N. Y. Suppl. 842. In Garner *v.* Fry, 104 Iowa 515, 73 N. W. 1079, it was held that, where appeal is taken from the judgment sustaining a mortgage and also from a subsequent order denying an injunction restraining foreclosure of the mortgage, a motion to strike out the latter appeal, as in no way connected with the main case, will be overruled, as the rules do not prohibit the printing of two appeals under one cover.

Statutes or rules requiring the printing of records on appeal do not apply to appeals pending before their passage. Stifel *v.* Metz, 35 Ohio St. 396. See also Rawlings *v.* Neal, 122 N. C. 173, 29 S. E. 93. *Contra*, Dresser *v.* Brooks, 4 How. Pr. (N. Y.) 207.

10. Sanborn *v.* Robinson, 22 Mich. 92; Swanson *v.* Leavens, 26 Oreg. 561, 40 Pac. 230.

11. Duty of having the record printed is not a professional one.— When counsel attends to it, he acts merely as the agent of appellant for that purpose, and his neglect in this regard is the neglect of the party himself (Stainback *v.* Harris, 119 N. C. 107, 25 S. E. 858; Wiley *v.* Bessemer City Min. Co., 117 N. C. 489, 23 S. E. 448; Neal *v.* Old North State Land Co., 112 N. C. 841, 17 S. E. 538;

print by showing his inability to pay the costs of printing,[12] that an unexpected delay in the mails prevented the printing where appellant himself procrastinated without reason until almost the last minute,[13] or that he merely requested the clerk, giving him no further instructions, to have the printing done and send the bill to appellant.[14]

d. Time When Printed Record Must Be Ready. It is sufficient if the record be printed at the time the case is called for argument.[15]

e. What Must Be Printed. Unless the court modifies the rule,[16] enough of the record must be printed to enable the court to act understandingly.[17] It should at least contain a brief abstract of the return of the clerk and all the pleadings and evidence bearing on the question sought to be reviewed,[18] this including

Edwards *v.* Henderson, 109 N. C. 83, 13 S. E. 779; Stephens *v.* Koonce, 106 N. C. 255, 11 S. E. 282. See 3 Cent. Dig. tit. "Appeal and Error," § 2774), who cannot excuse himself by alleging that he was ignorant of the requirement (Griffin *v.* Nelson, 106 N. C. 235, 11 S. E. 414).

Misapprehension of requirements.— Cases of the above class were distinguished in Smith *v.* Summerfield, 107 N. C. 580, 12 S. E. 465, from those where appellant displays diligence in learning the requirements of the rules and in complying therewith, but honestly misapprehends instructions given him by his counsel and the clerk. Here the record was printed, but only one copy was sent to the court; the requisite number being filed later, the motion to reinstate was granted.

Who must procure printing.— Under Cal. Supreme Ct. Rules, No. 12, providing for the filing of a written transcript when accompanied by funds to pay for printing it, and requiring the clerk to have it printed, the clerk cannot allow appellant himself to procure and pay for the printing of the transcript and forward a printed copy for filing. Ward *v.* Healy, 110 Cal. 587, 42 Pac. 1071.

12. Turner *v.* Tate, 112 N. C. 457, 17 S. E. 72; Rencher *v.* Anderson, 93 N. C. 105.

13. Blount *v.* Ward, 117 N. C. 241, 23 S. E. 458.

14. Carter *v.* Long, 116 N. C. 44, 20 S. E. 1013.

15. Bragunier *v.* Penn, 79 Md. 244, 29 Atl. 12 (holding that it is not necessary that the record should be printed at the time the case was set for hearing); Armour Packing Co. *v.* Williams, 122 N. C. 406, 29 S. E. 366; Smith *v.* Montague, 121 N. C. 92, 28 S. E. 137; Walker *v.* Scott, 102 N. C. 487, 9 S. E. 488; Cassidy *v.* McFarland, 2 Misc. (N. Y.) 86, 20 N. Y. Suppl. 875, 49 N. Y. St. 123. See 3 Cent. Dig. tit. "Appeal and Error," § 2770.

Ohio Rev. Stat. § 6711, relating to the time within which records must be printed, has no application to cases reserved from the district court. Cow Run Iron Tank Co. *v.* Lehmer, 38 Ohio St. 373.

Objection cannot be taken to the failure to file printed abstracts and brief until the calling of the cause. Gibbs *v.* Blackwell, 40 Ill. 51.

Time extended.— The object of allowing ten days to file a case after settlement is to enable appellant to prepare a copy of the case, as settled, from which to print, and, hence, extending the time to file is equivalent to extending the time to print. Donohue *v.* Hicks, 21 How. Pr. (N. Y.) 438.

16. Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746.

17. *Michigan.*— Michigan University *v.* Rose, 45 Mich. 284, 4 N. W. 738, 5 N. W. 674, 7 N. W. 875, holding that, where there is no appearance by counsel on one side in a chancery case with whom to agree as to how much of the record ought to be printed, the court will require the entire record to be printed.

Minnesota.— Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746.

New York.— See City Real Estate Co. *v.* Gaylor, 31 Misc. (N. Y.) 105, 64 N. Y. Suppl. 1066, wherein it is held that, though N. Y. Code Civ. Proc. § 1353, provides that an appeal from an order must be heard on a certified copy of the notice of appeal and of the papers used before the court on the hearing of the motion, and N. Y. Gen. Rules Prac. No. 41, requires that such papers be printed, the court, on appeal from an order of confirmation of a referee's report, may excuse the printing of clearly immaterial portions of such papers.

North Carolina.— Causey *v.* Empire Plaid Mills, 118 N. C. 395, 24 S. E. 658.

Ohio.— Keefer *v.* Myers, 59 Ohio St. 165, 52 N. E. 125.

South Carolina.—Nott *v.* Thomson, 35 S. C. 589, 14 S. E. 23, holding that S. C. Supreme Ct. Rules, No. 5, providing that, "in the preparation of the case for argument in this court, where amendments have been proposed and allowed, the case must be printed, or, in a case where printing is dispensed with, must be written, as it would read after the amendment allowed was incorporated," refers to the preparation of the case for argument in this court, and not to the case to be filed in the circuit court.

United States.— Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. ed. 1041; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

See 3 Cent. Dig. tit. "Appeal and Error," § 2768.

A mere synopsis of what the attorney deems material will not be accepted. Hunt *v.* Richmond, etc., R. Co., 107 N. C. 447, 12 S. E. 378.

18. Wilcox *v.* Hathaway, 12 Wis. 543.

affidavits,[19] exhibits,[20] and important data.[21] A failure to comply fully with the requirements in this respect can in no event operate to the prejudice of appellee or defendant in error.[22]

2. Transmission and Filing — a. In General. Strict compliance with rules of court requiring the transmission and filing of transcripts or abstracts of the record will be enforced.[23]

b. Appellant's Duty. It is generally the duty of appellant to see that a sufficient transcript or abstract of the proceedings below is filed in the appellate court.[24] Appellant cannot devolve this duty upon appellee,[25] nor upon the clerk of the lower court.[26]

c. Clerk's Duty. It is the duty of the clerk of the lower court to transmit the transcript of the record on appeal.[27] In performing this duty the clerk acts

19. Cowen *v.* Arnold, 11 N. Y. Suppl. 95, 32 N. Y. St. 544.

20. Hicks *v.* Royal, 122 N. C. 405, 29 S. E. 413; Barnes *v.* Crawford, 119 N. C. 127, 25 S. E. 791.

21. Edwards *v.* McKernan, 55 Mich. 520, 22 N. W. 20.

An appeal from an order sustaining a demurrer taken at the general term was considered an enumerated motion within the rules of the supreme court, which should go upon the calendar, and the requisite papers were required to be printed, as in other calendar cases. Reynolds *v.* Freeman, 4 Sandf. (N. Y.) 702. This is also true of an appeal from an order of a county court granting a new trial on the judge's minutes. Harper *v.* Allyn, 3 Abb. Pr. N. S. (N. Y.) 186.

An order of the judge settling the case need not be included. Watson *v.* Neal, 35 S. C. 595, 14 S. E. 289; Archer *v.* Long, 35 S. C. 585, 14 S. E. 24.

Indexes and marginal references.— When another part of the record is printed the indexes and marginal references required by N. C. Supreme Ct. Rules, Nos. 19, 21, to be put in the original record should also be printed. Pretzfelder *v.* Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Lucas *v.* Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265; Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121.

Matter proposed by respondent as an amendment, but disallowed by the trial judge, need not be printed. Kilmer *v.* New York Cent., etc., R. Co., 94 N. Y. 495.

Printing the judgments.— In Wiley *v.* Bessemer City Min. Co., 117 N. C. 489, 23 S. E. 448, the appeal was dismissed because the entire judgment, covering five pages of manuscript, was not printed, where one exception was that "the judgment does not properly guard the rights of the minority of stockholders."

Printing opinion of lower court.— N. Y. Ct. of App. Rules, No. 5, which required the opinion of the court below, was held not to be complied with by a mere reference to the opinion in the case in the supreme court reports. Bastable *v.* Syracuse, 72 N. Y. 64.

Printing papers improperly stricken out.— When the trial court, in settling the case on appeal, improperly strikes out papers which should be included, appellant may, nevertheless, print them, in order that the appellate court may decide whether they should have been included. Evans *v.* Silbermann, 7 N. Y. App. Div. 139, 40 N. Y. Suppl. 298.

Where the testimony as to the matters in dispute is not so full and accurate in the printed case but that resort must be had to the manuscript bill of exceptions to ascertain the facts as to items allowed or rejected by the referee's report, the alleged errors in the report will not be reviewed. Carroll *v.* Little, 73 Wis. 52, 40 N. W. 582.

22. Keefer *v.* Myers, 59 Ohio St. 165, 52 N. E. 125; Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617.

23. Williams *v.* Nottingham, 27 Ind. 461; Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519; Heeron *v.* Beckwith, 1 Wis. 17; and cases cited *infra*, note 24 *et seq.*

24. Norment *v.* Edwards, 6 App. Cas. (D. C.) 107; Grunow *v.* Menge, 36 La. Ann. 925. And see Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605.

25. Patton *v.* Mills, Dall. (Tex.) 364.

26. State *v.* Clerk Eleventh Judicial Dist. Ct., 46 La. Ann. 1289, 16 So. 207; Porter *v.* Cocke, Mart. & Y. (Tenn.) 264; Gillespie *v.* Goddard, 1 Heisk. (Tenn.) 777.

27. *Alabama.*— Ware *v.* McDonald, 62 Ala. 81.

Georgia.— Jones *v.* Payne, 41 Ga. 32; Hampton *v.* Hampton, 13 Ga. 528.

Maryland.— Bourne *v.* Mackall, 1 Harr. & G. (Md.) 86.

North Carolina.— Bailey *v.* Brown, 105 N. C. 127, 10 S. E. 1054; Russell *v.* Davis, 99 N. C. 115, 5 S. E. 895; Owens *v.* Phelps, 91 N. C. 253.

Texas.— Rodgers *v.* Alexander, 35 Tex. 116.

Wisconsin.— Immaculate Conception Congregation *v.* Hellstern, 105 Wis. 602, 81 N. W. 988.

United States.— U. S. *v.* Gomez, 3 Wall. (U. S.) 702, 18 L. ed. 212; Hoe *v.* Kahler, 27 Fed. 145.

See 3 Cent. Dig. tit. "Appeal and Error," § 2722.

Transmitting transcript from state court to federal court.— When a writ of error has been allowed by the judge of a state supreme court to the United States supreme court, but no writ of error has been issued, the clerk of the state court is not bound to transmit to the United States supreme court a copy of the record. *Ex p.* Ralston, 119 U. S. 613, 7 S. Ct. 317, 30 L. ed. 506.

as an officer of, and under the control of, the lower court.[28] The performance of this duty may be compelled by mandamus,[29] by a rule requiring the clerk to show cause,[30] or by certiorari.[31]

d. Effect of Failure to File. According to many decisions, where no transcript, or abstract of record, as the case may be, is filed on appeal the appeal will be dismissed;[32] but, according to another line of decisions, the proper penalty for

28. Hoe *v.* Kahler, 27 Fed. 145.

29. Jones *v.* Payne, 41 Ga. 32; Rodgers *v.* Alexander, 35 Tex. 116; U. S. *v.* Gomez, 3 Wall. (U. S.) 753, 18 L. ed. 212, in which last case it was further held that, where it is doubtful whether mandamus would be effectual to compel the clerk to make a transcript — as where the proceedings had been such that the question as to the pendency of the appeal itself could not well be determined without an inspection of the records — a resort to it is not obligatory. See also, generally, MANDAMUS.

Under the Ga. Code, § 4024, the plaintiff in error must, in order to be entitled to mandamus, make application therefor within a reasonable time. Jones *v.* Payne, 41 Ga. 32. *Compare* Hampton *v.* Hampton, 13 Ga. 528, for the practice under the Georgia act of 1851 providing a summary remedy in such cases.

Where the register in chancery refuses to make out and send up the transcript of the record in a chancery case on appeal, application should be made to the chancellor or to the supreme court for appropriate orders to have the transcript sent up. Ware *v.* McDonald, 62 Ala. 81.

30. Hampton *v.* Hampton, 13 Ga. 528; Bourne *v.* Mackall, 1 Harr. & G. (Md.) 86.

31. Burrell *v.* Hughes, 120 N. C. 277, 26 S. E. 782. See also, generally, CERTIORARI.

In case of an appeal from a decree of the circuit court a certiorari to transmit the record is not necessary. Feather's Appeal, 1 Penr. & W. (Pa.) 322; Konigmacher *v.* Kimmel, 1 Penr. & W. (Pa.) 207, 21 Am. Dec. 374

Where the transcript is not filed at the first term after appeal taken as required by N. C. Supreme Ct. Rules, No. 5, on the failure of appellant to apply at such term, as required by rule No. 41, for certiorari to procure it, he is not entitled to the writ. Haynes *v.* Coward, 116 N. C. 840, 21 S. E. 690; Graham *v.* Edwards, 114 N. C. 228, 19 S. E. 150. Nor will certiorari lie to bring up the case on appeal where appellant failed to docket a transcript of the record proper at the first term of the supreme court after the trial below. State *v.* Freeman, 114 N. C. 872, 19 S. E. 630.

32. *Arkansas.*— Cloninger *v.* Rhodes, 27 Ark. 347.

California.— Coffey *v.* Grand Council, 87 Cal. 370, 25 Pac. 548; *In re* Curtis, (Cal. 1884) 2 Pac. 46.

Colorado.— Bruce *v.* Endicott, 13 Colo. App. 269, 57 Pac. 190; Johnson *v.* Spohr, 12 Colo. App. 317, 56 Pac. 63; Kelly *v.* Doyle, 12 Colo. App. 38, 54 Pac. 394; Grant *v.* Leach, 8 Colo. App. 261, 45 Pac. 510.

District of Columbia.— Norment *v.* Edwards, 6 App. Cas. (D. C.) 107.

Georgia.— Lewis *v.* Clegg, 87 Ga. 449, 13 S. E. 693; Barnes *v.* Colquitt, 67 Ga. 766; Watson *v.* Johnson, 40 Ga. 545.

Illinois.—Bostwick *v.* Williams, 40 Ill. 113; Gibbs *v.* Blackwell, 40 Ill. 51; Easterday *v.* Cutting, 77 Ill. App. 601; Geraty *v.* Druiding, 44 Ill. App. 440.

Iowa.— Cressey *v.* Lochner, 109 Iowa 454, 80 N. W. 531. But see Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275.

Maine.— Tyler *v.* Erskine, 78 Me. 91, 2 Atl. 845.

Missouri.— Butler County *v.* Graddy, 152 Mo. 441, 54 S. W. 219; Western Storage, etc., Co. *v.* Glasner, 150 Mo. 426, 52 S. W. 237; Carlisle *v.* Russell, 127 Mo. 465, 30 S. W. 118; Brand *v.* Cannon, 118 Mo. 595, 24 S. W. 434; Garrett *v.* Kansas City Coal Min. Co., 111 Mo. 279, 20 S. W. 25; Robinson *v.* North Missouri R. Co., 41 Mo. 465; State *v.* Fields, 82 Mo. App. 152; Herrmann *v.* Daily, 74 Mo. App. 505; Atkinson *v.* Wykoff, 58 Mo. App. 86; Brown *v.* Murray, 53 Mo. App. 184.

Nebraska.— Jandt *v.* Deranlieu, 43 Nebr. 422, 61 N. W. 632; Garneau *v.* Omaha Printing Co., 42 Nebr. 847, 61 N. W. 100.

New Mexico.— Gonzales *v.* Atchison, etc., R. Co., 3 N. M. 302, 9 Pac. 247.

New York.— Winter *v.* Green, 12 Johns. (N. Y.) 497.

North Carolina.— Burrell *v.* Hughes, 120 N. C. 277, 26 S. E. 782.

Ohio.— Stewart *v.* Williams, 15 Ohio St. 484; Chatfield *v.* Swing, 8 Ohio Dec. (Reprint) 5, 5 Cinc. L. Bul. 14.

Rhode Island.—*Compare* Matteson *v.* Chase, 12 R. I. 126, construing R. I. Pub. Laws (1875), c. 475.

South Carolina.— Bowker Fertilizer Co. *v.* Woodward, 41 S. C. 547, 19 S. E. 498; Davis *v.* Hood, (S. C. 1887), 18 S. E. 941.

South Dakota.— Neilson *v.* Holstern, 13 S. D. 459, 83 N. W. 581.

Texas.— See Christensen *v.* Anderson, (Tex. Civ. App. 1900) 58 S. W. 962.

Utah.— Bonesteel *v.* Fairchild, 9 Utah 371, 36 Pac. 633; Borlase *v.* Morgan, 9 Utah 370, 36 Pac. 633; Utah Commercial, etc., Bank *v.* Morgan, 9 Utah 369, 36 Pac. 632, (Supreme Ct. Rules, Nos. 3, 4); Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

Wisconsin.— Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146.

Wyoming.— Trabing *v.* Meyer, 3 Wyo. 133, 5 Pac. 569; Spencer *v.* McMaster, 3 Wyo. 105, 3 Pac. 798; Halleck *v.* Bresnahen, 3 Wyo. 73, 2 Pac. 537.

United States.— Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605; Veitch *v.* Farmers' Bank, 6 Pet. (U. S.) 777, 8 L. ed. 578.

a failure to file is an affirmance of the judgment or decree;[33] and, in some few cases, it has been held that the court may, in its discretion, require the appellant in such default to supply a transcript.[34]

e. Effect of Filing Imperfect Transcript. Where appellant files an imperfect transcript, the court will make such order as seems proper under the circumstances.[35]

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2618 *et seq.*, 2691, 2721.

Dismissal or continuance at discretion of court, see Bostwick *v.* Williams, 40 Ill. 113; Gibbs *v.* Blackwell, 40 Ill. 51. At option of respondent, see Sanders *v.* Chartrand, 158 Mo. 352, 59 S. W. 95.

General rule upon plaintiff in error to file an abstract of the record is necessary before the cause will be dismissed or continued for want of an abstract. Bostwick *v.* Williams, 40 Ill. 113. See also Spear *v.* D'Clercy, 40 Ill. 56.

Questions affecting jurisdiction.— Appellant's abstract stated in general terms that defendant appealed from the judgment, and contained a copy of such judgment, but omitted to state, as required by N. D. Supreme Ct. Rules (1897), No. 13, [74 N. W. viii] that such appeal was taken by serving and filing notice of appeal and supersedeas bond. A motion to dismiss the appeal on the ground that the abstract failed to show on its face that an appeal had been perfected was made. No claim was made that the appeal itself was irregular. The motion was denied on the ground that, as to questions affecting jurisdiction, the court should, if necessary, examine the record proper where the abstract is faulty. Erickson *v.* Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46.

Transcript unnecessary.— In Abrens, etc., Mfg. Co. *v.* Patton Sash, etc., Co., 94 Ga. 247, 21 S. E. 523, it was held that a writ of error will not be dismissed for lack of a transcript where it appears from the bill of exceptions and the certificate of the judge thereto that a transcript is unnecessary.

33. *Colorado.*— Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864.

Georgia.— Batchelor *v.* Batchelor, 97 Ga. 425, 24 S. E. 157; Hunnicutt, etc., Co. *v.* Rauschenberg, 97 Ga. 341, 22 S. E. 532.

Illinois.— Chavis *v.* Reed, 40 Ill. 55; Gibbs *v.* Blackwell, 40 Ill. 51; Horn *v.* Yates, 90 Ill. App. 588; Congress Constr. Co. *v.* Interior Bldg. Co., 86 Ill. App. 199; Evans *v.* Gould, 82 Ill. App. 151.

Iowa.— Phillips *v.* Crips, 108 Iowa 605, 79 N. W. 373; Blohm *v.* Sweney, 66 Iowa 604, 24 N. W. 233; Kerr *v.* Wright, 52 Iowa 748, 3 N. W. 715.

Missouri.— Hoffman *v.* St. Louis Trust Co., 151 Mo. 520, 52 S. W. 345; Clark *v.* Fairley, 100 Mo. 236, 13 S. W. 686; Long *v.* Long, 96 Mo. 180, 8 S. W. 766; Brooks *v.* Hannibal, etc., R. Co., 32 Mo. 455; Garesché *v.* Mulloy, 32 Mo. 230; Rogers *v.* Baily, 32 Mo. 229; Laumeier *v.* Steines, 32 Mo. 220; Jackson *v.* Ferguson, 76 Mo. App. 270; Smiley *v.* Smiley, 16 Mo. App. 547; Montieth *v.* Sellers, 16 Mo. App. 547; *In re* Finnessy, 15 Mo. App. 575; Coleman *v.* Kinealy, 15 Mo. App. 575. *Compare* Bell *v.* McCoy, 136 Mo. 552, 38 S. W. 329, wherein it was held that the Missouri act of April 11, 1895, p. 94, providing that, on appeal by both parties, the transcript filed by one may be used on both appeals, does not apply to appeals pending at the time the act was passed.

Nebraska.— Renard *v.* Wyckoff, (Nebr. 1900) 84 N. W. 410; People's Bldg., etc., Assoc. *v.* Pearlman (Nebr. 1900) 84 N. W. 408; O'Neill *v.* Flood, 58 Nebr. 218, 78 N. W. 497.

Texas.— Patton *v.* Mills, Dall. (Tex.) 364.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2618 *et seq.*, 2721 *et seq.*

Consideration of case on merits.— The failure to abstract material parts of the record is sufficient to justify the court in affirming the judgment, but when the adverse party does not ask for an affirmance, and the record is short, the court will ordinarily consider the case on its merits. Bochner *v.* Automatic Time Stamp Co., 80 Ill. App. 27.

34. *District of Columbia.*— Norment *v.* Edwards, 6 App. Cas. (D. C.) 107.

Georgia.— Jones *v.* Payne, 41 Ga. 32.

Iowa.— Phillips *v.* Crips, 108 Iowa 605, 79 N. W. 373 (construing Iowa Supreme Ct. Rules, No. 21); State *v.* O'Day, 68 Iowa 213, 26 N. W. 81; Martin *v.* Cole, 38 Iowa 699.

Wisconsin.— Leonard *v.* Barnum, 32 Wis. 601.

United States.— Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605.

Where necessary to the ends of justice and for the protection of the appellee, the appellant may be required to file the transcript. Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275; White *v.* Savery, 49 Iowa 197; Burrows *v.* Stryker, 45 Iowa 700.

Waiver of errors assigned.— In Colorado and Indiana it has been held that an appellant will be deemed to have waived all errors assigned by neglecting to furnish and file a complete abstract of so much of the transcript as is necessary to present the errors assigned and relied upon. Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479 (construing Colo. Ct. of App. Rules, No. 19); Cox *v.* Behm, 26 Ind. 307; West *v.* Henton, 25 Ind. 364.

35. State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210.

Affirmance.— Courier-Journal Job Printing Co. *v.* Columbia F. Ins. Co., 21 Ky. L. Rep. 1258, 54 S. W. 966.

Dismissal.—Mallory *v.* Waugh, 5 Kan. App. 879, 48 Pac. 147.

Remandment for new trial.—Miller *v.* Shotwell, 38 La. Ann. 103.

Clerical errors not imputable to the appel-

f. Time For Transmission and Filing. The time within which the transcript or abstract of record, as the case may be, must be transmitted and filed is usually regulated by statutes or rules of court.[36] These statutes and rules of court are not uniform in their provisions; some require the transmission and filing to be made before the return-term of the appellate court,[37] others that the transmission and filing shall be during the return-term of the appellate court,[38] and others that the transcript must be filed during the term next succeeding the allowance of the appeal.[39] Under the requirements of some statutes and rules the transcript must

lant will not require dismissal. Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369.

Uncertified proceedings cannot be considered on appeal. Mandell *v.* Weldin, 59 Nebr. 699, 82 N. W. 6.

36. In the absence of a statute fixing the time within which the transcript or abstract of record must be filed (Benjamin *v.* Davis, 6 La. Ann. 472; Sosman *v.* Conlon, 59 Mo. App. 313; Kirkwood *v.* Cairns, 40 Mo. App. 631; Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842. See 3 Cent. Dig. tit. "Appeal and Error," § 2724 *et seq.*), the trial court may adopt a rule fixing such time (Challenor *v.* Mulligan, 110 Ill. 666; Johnson *v.* Stephenson, 104 Ind. 368, 4 N. E. 46).

Compare Union Nat. Bank *v.* Legendre, 35 La. Ann. 787; Laicher *v.* New Orleans, etc., R. Co., 28 La. Ann. 320; Benjamin *v.* Davis, 6 La. Ann. 472 — to the effect that, if the return be filed on the day fixed by law, an error of the court in fixing the return-day will not prejudice appellant. And see also Ford *v.* Lyons, 40 Hun (N. Y.) 557, wherein it was held that the special term of the supreme court of New York could not shorten the time within which, under the rules of the general term, the appellant might file and serve copies of papers on appeal.

37. *Arkansas.*— Hathaway *v.* Smith, 3 Ark. 248.

Georgia.— Spencer *v.* Smith, 59 Ga. 878; Hodges *v.* Myers, 17 Ga. 292; Heard *v.* Heard, 8 Ga. 380. *Compare* Georgia cases cited *infra*, note 39.

Iowa.— Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

Missouri.— Byrne *v.* Rodney, 1 Mo. 742.

North Carolina.— Orme *v.* Smyth, 4 N. C. 32.

Pennsylvania.—Vanlear *v.* Vanlear, 1 Binn. (Pa.) 76; Wirt *v.* Stevenson, 4 Yeates (Pa.) 511; Moore *v.* Witmer, 4 Yeates (Pa.) 234.

Tennessee.—Gregory *v.* Burnett, 1 Humphr. (Tenn.) 59; Crafts *v.* Stockton, 8 Yerg. (Tenn.) 163.

See 3 Cent. Dig. tit. "Appeal and Error," § 2726.

Continuance of term below.— As the proceedings of a court of record may be modified or set aside during the term at which they are had, it is not regular to take a transcript of the judgment before the end of the term without leave of the court, and the continuance of the term below after the commencement of the term in the appellate court is sufficient reason for not filing the record. Truesdail *v.* Sanderson, 30 Mo. 113.

The record and bill of exceptions on appeal in an injunction case must be transmitted to the clerk of the supreme court by the clerk below within fifteen days from the service on the opposite party. Cunningham *v.* Scott, 87 Ga. 506, 13 S. E. 635; Markham *v.* Huff, 72 Ga. 106.

38. Jones *v.* Matthews, 48 Ala. 558; Grunow *v.* Menge, 36 La. Ann. 925; Wood *v.* Wood, 32 La. Ann. 801; Rhea *v.* Simonds, 15 La. Ann. 712; Munson *v.* Cage, 1 Mart. N. S. (La.) 573; Lafon *v.* Riviere, 12 Mart. (La.) 506; Carpentier *v.* Harrod, 11 Mart. (La.) 433; Wilson *v.* Truehart, 12 Tex. 287; Mills *v.* Gooding, 8 Tex. 152.

If the term to which the appeal is made returnable entirely fails, it is sufficient if the record is filed at the succeeding term. Walker *v.* Simon, 21 La. Ann. 669; Lefevre *v.* Haydel, 21 La. Ann. 663; White *v.* Maguire, 16 La. Ann. 337; Kirkman *v.* Butler, 12 La. 535. See 3 Cent. Dig. tit. "Appeal and Error," § 2727. This is true although more than a year has elapsed since the appeal was filed. State *v.* Evans, 11 La. Ann. 626; Malveaux *v.* Lavergne, 10 La. Ann. 673; Wells *v.* Lamothe, 10 La. 410.

But there must be an entire failure of the term in order to excuse the appellant's omission to file. Kirkman *v.* Butler, 12 La. 535, in which case it was held that the appeal would be dismissed where the court was open on three several days, although it transacted no business during that time.

39. *Georgia.*— Logan *v.* Western, etc., R. Co., 86 Ga. 493, 12 S. E. 586; Central R. Co. *v.* Ferguson, 63 Ga. 83; Pope *v.* Tift, 51 Ga. 219. *Compare* Georgia cases cited *supra*, note 37.

Illinois.— Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113; Palmer *v.* Gardiner, 77 Ill. 143; Frink *v.* Phelps, 5 Ill. 580; Illinois Western R. Co. *v.* Gay, 5 Ill. App. 393.

Kentucky.— But see Wearen *v.* Smith, 80 Ky. 216; Williamson *v.* Kenaday, 4 Ky. L. Rep. 263 — to the effect that, under code practice in this state, the transcript must be filed within twenty days before the first day of the second term after the appeal is granted.

Mississippi.— *Compare* McGehe *v.* Caruthers, 2 Sm. & M. (Miss.) 443.

Ohio.— Whetstone *v.* Thorp, 1 Ohio Dec. (Reprint) 482. *Compare* Lindsay *v.* Thompson, 10 Ohio St. 452, holding that the failure to file an appeal with the clerk on the second day of the next term after the appeal is not cured by the fact that, owing to the absence of the judge, the term was not held.

be filed in the appellate court within a specified time — generally a certain number of days — after the appeal has been perfected or taken,[40] after the rendition of the judgment or decree from which the appeal is taken,[41] or after the bill of exceptions, case, or statement has been settled.[42]

Oregon.— Gibbons *v.* Moody, 33 Oreg. 593, 55 Pac. 23; Judkins *v.* Taffe, 21 Oreg. 89, 27 Pac. 221 (construing the Oregon act of Feb. 16, 1891); McCarty *v.* Wintler, 17 Oreg. 391, 21 Pac. 195; Bush *v.* Geisy, 16 Oreg. 267, 19 Pac. 123; Lindley *v.* Wallis, 2 Oreg. 203.

United States.— Hill *v.* Chicago, etc., R. Co., 129 U. S. 170, 9 S. Ct. 269, 32 L. ed. 651; Caillot *v.* Deetken, 113 U. S. 215, 5 S. Ct. 432, 28 L. ed. 983; Edmonson *v.* Bloomshire, 7 Wall. (U. S.) 306, 19 L. ed. 91; German *v.* U. S., 5 Wall. (U. S.) 825, 18 L. ed. 502; Scott *v.* Law, 2 Cranch C. C. (U. S.) 530, 21 Fed. Cas. No. 12,537, relating to the rule in Maryland in 1819.

See 3 Cent. Dig. tit. "Appeal and Error," § 2728.

40. A transcript prepared before the appeal or writ of error is perfected cannot become a record in the appellate court. Wolff *v.* Toepperwein, (Tex. Civ. App. 1895) 28 S. W. 1009.

The decisions are not in harmony as to the time when an appeal is to be deemed perfected or taken so as to allow the running of the time within which the transcript must be filed. For the rule in the several jurisdictions consult the following cases:

California.— Bethell *v.* Rogers, 100 Cal. 175, 34 Pac. 645; Wadsworth *v.* Wadsworth, 74 Cal. 104, 15 Pac. 447.

District of Columbia.— Mackall *v.* Willoughby, 8 App. Cas. (D. C.) 143.

Idaho.— Hattabaugh *v.* Vollmer, (Ida. 1896) 46 Pac. 831.

Indiana.— Dillman *v.* Dillman, 90 Ind. 585; Winsett *v.* State, 54 Ind. 437.

Missouri.— Hicks *v.* Hoos, 44 Mo. App. 571.

New York.— Thompson *v.* Blanchard, 2 N. Y. 561, 4 How. Pr. (N. Y.) 210.

Oregon.— Callahan *v.* Portland, etc., R. Co., 17 Oreg. 556, 21 Pac. 870 (construing Oreg. Code, §§ 537, 541); Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

Pennsylvania.— Eyrman *v.* Melan, 7 Kulp (Pa.) 137.

Texas.— Dew *v.* Weekes, (Tex. Civ. App. 1899) 53 S. W. 706; Hallettsville *v.* Long, (Tex. Civ. App. 1894) 28 S. W. 573; Stephenson *v.* Stephenson, (Tex. 1893) 22 S. W. 150 [*overruling* Weidenmeyer *v.* Broyles, 1 Tex. Civ. App. 258, 21 S. W. 426; Gulf, etc., R. Co. *v.* McMahan, (Tex. Civ. App. 1892) 20 S. W. 954].

Washington.— Oliver *v.* Lewis, 9 Wash. 572, 38 Pac. 139.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2730, 2731; and, generally, *supra*, VII, A [2 Cyc. 789].

41. *Illinois.*— See Toledo, etc., R. Co. *v.* Coomes, 40 Ill. 37.

Indiana.— Simons *v.* Simons, 129 Ind. 248, 28 N. E. 702; Johnson *v.* Stephenson, 104 Ind. 368, 4 N. E. 46; Long *v.* Emery, 49 Ind. 200. Under Ind. Rev. Stat. (1881), § 2455, the appellant had twenty days within which to perfect his appeal. Miller *v.* Carmichael, 98 Ind. 236; Browning *v.* McCracken, 97 Ind. 279; McCurdy *v.* Love, 97 Ind. 62; Yearley *v.* Sharp, 96 Ind. 469. *Compare* Dillman *v.* Dillman, 90 Ind. 585.

Iowa.— But see Calef *v.* Cole, 93 Iowa 679, 62 N. W. 24, in which it was held that the six months from the entry of the decree within which the transcript of the evidence must be filed, on appeal in equity cases, commences to run from the entry of a decree rather than from the date when such decree was corrected to remedy an oversight as to a matter known to the court.

Kansas.— Osborne *v.* Young, 28 Kan. 769, an appeal from an order overruling motion for new trial.

Maryland.— Prout *v.* Berry, 12 Gill & J. (Md.) 285, relating to chancery appeals under the Maryland act of 1826. But see Gamble *v.* Sentman, 68 Md. 71, 11 Atl. 504, wherein it is said that, by rule of court, the time within which the record must be transmitted runs from the date of the order allowing the writ of error, and not from the rendition of the judgment. And see Cross *v.* Hecker, 75 Md. 574, 24 Atl. 99, as to filing within three months after date of appeal.

Nebraska.— Dane County Bank *v.* Garrett, 48 Nebr. 916, 67 N. W. 884 (relating to error from county court to district court); Aldrich *v.* Bruss, 39 Nebr. 569, 58 N. W. 194; Barry *v.* Barry, 39 Nebr. 521, 58 N. W. 193; Brunck *v.* Wood, 33 Nebr. 639, 50 N. W. 960, these last three cases relating to appeals from county court to district court.

United States.— Mauro *v.* Ritchie, 3 Cranch C. C. (U. S.) 147, 16 Fed. Cas. No. 9,312, relating to appeals from orphans' court of Washington county, District of Columbia.

42. *California.*— Wall *v.* Mines, 128 Cal. 136, 60 Pac. 682; Matter of Scott, 124 Cal. 671, 57 Pac. 654; Somers *v.* Somers, 83 Cal. 621, 24 Pac. 162; Newman *v.* State Bank, (Cal. 1887) 15 Pac. 43; McGrath *v.* Hyde, 71 Cal. 454, 12 Pac. 497; Horton *v.* Dominguez, (Cal. 1885) 8 Pac. 213.

Idaho.— Miller *v.* Pine Min. Co., 2 Ida. 1140, 31 Pac. 802.

Michigan.— Ackley *v.* Sager, 30 Mich. 264. *Compare* Van Blarcom *v.* Ætna Ins. Co., 6 Mich. 299.

Missouri.— See Cunningham *v.* Roush, 141 Mo. 640, 43 S. W. 161; St. Clair County Land, etc., Co. *v.* Martin, 125 Mo. 114, 28 S. W. 434.

Nevada.— Hayes *v.* Davis, 23 Nev. 233, 45 Pac. 466.

New York.— Peck *v.* New York, etc., U. S. Mail Steamship Co., 3 Bosw. (N. Y.) 622.

South Carolina.— De Schamps *v.* German-American F. Ins. Co., 45 S. C. 536, 23 S. E. 737; Marjenhoff *v.* Marjenhoff, 40 S. C. 545,

g. Computation of Time. In computing the time within which the transcript or abstract of record must be filed the provisions of the statutes relating thereto must be liberally construed.[43] Whether the words "to" or "until" are to be held words of inclusion or exclusion is usually determined by the context of the statute, rule, or order in which they are used, and will be held to include or exclude the day named, as the evident intention requires.[44] Some courts adopt the rule, in computing the time, that the day on which the time commences to run is to be excluded, and the day to which it should run is to be included;[45] other courts include the first day and exclude the last.[46] Again, it has been held that there is no difference between a rule requiring the performance of an act within ten days of a given time, and a rule which requires the same thing to be done before the expiration of the tenth day; in either case, in computing these ten days, the day from which the time begins to run and the day on which the act is to be done are not to be included.[47] The day on which the term begins is to be reckoned as the first day of the term.[48] The fact that Sunday is not a judicial day does not render it any the less a day of the term;[49] but if the last day of the period falls on Sunday such day shall be excluded.[50]

h. Extension of Time — (i) *Power to Extend.* The return-day of the appeal cannot be prolonged by the court below, but only by the appellate court.[51]

18 S. E. 942; Dial Hardware Co. *v.* Levy, 38 S. C. 552, 16 S. E. 838; Donahue *v.* Enterprise R. Co., 33 S. C. 608, 12 S. E. 560, 665.

But, in Kentucky, under Ky. Civ. Code, § 738, which requires the transcript to be filed a specified time before the first day of the second term of the appellate court following the granting of the appeal, the time must be computed from the date of the order granting the appeal, and not from the date of filing the bill of exceptions. Western Union Tel. Co. *v.* Johnson, 100 Ky. 589, 38 S. W. 1043. See *supra,* note 39.

The disallowance of a bill of exceptions, or the refusal of the court to settle a proposed bill, has the same effect as the settlement with regard to the running of the time. White *v.* White, 112 Cal. 577, 44 Pac. 1026.

43. Stephenson *v.* Stephenson, (Tex. 1893) 22 S. W. 150. *Compare* Bazzo *v.* Wallace, 16 Nebr. 293, 20 N. W. 314, construing Nebr. Comp. Stat. c. 20, §§ 43, 46. See also Davison *v.* West Oxford Land Co., 120 N. C. 259, 26 S. E. 782, in which it was held that the rule that judgments date as of the first day of the term at which they are rendered has no application to appeals. See 3 Cent. Dig. tit. "Appeal and Error," § 2736.

44. Anonymous, 2 N. C. 463; State *v.* Benson, 21 Wash. 365, 58 Pac. 217.

45. Sebree *v.* Smith, 2 Ida. 327, 16 Pac. 477; Chicago, etc., R. Co. *v.* Evans, 39 Ill. App. 261.

46. Jacobs *v.* Graham, 1 Blackf. (Ind.) 392. See Albuquerque *v.* Zeiger, 5 N. M. 518, 25 Pac. 787, where it was held that either day might be included and the other excluded.

47. State *v.* Ellis, 40 La. Ann. 793, 5 So. 63.

A transcript required to be filed by the second day, is in time if filed on the second day. Wachsmuth *v.* Routledge, 36 Oreg. 307, 51 Pac. 443, 59 Pac. 454.

In Louisiana the appellant has three days for filing after the return-day, and these are judicial days. He is in time if he files his transcript on the third judicial day. Chaffe *v.* McIntosh, 36 La. Ann. 824; Bouligny *v.* White, 5 La. Ann. 31. See 3 Cent. Dig. tit. "Appeal and Error," § 2736. If an extension be granted the additional time commences to run after the expiration of the three days of grace. Gigand *v.* New Orleans, 52 La. Ann. 1259, 27 So. 794; Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456. But no days of grace are allowed after the day to which an extension is granted, and the fact that such day is not a judicial day can make no difference if it be a legal day. Mutual Loan, etc., Assoc. *v.* First African Baptist Church, 48 La. Ann. 1458, 21 So. 24; Bienvenu *v.* Factors', etc., Ins. Co., 28 La. Ann. 901. Otherwise if such day be *dies non.* Metropolitan Bank *v.* Aarons-Mendelsohn Co., 50 La. Ann. 1047, 24 So. 125. See 3 Cent. Dig. tit. "Appeal and Error," § 2737. If an extension be applied for on the last day of the time within which the filing may be done, though not allowed by the court till several days later, the time is to be computed from the date of filing the application. Chrétien *v.* Poincy, 33 La. Ann. 131.

48. And, therefore, if the term begins on the fifth day of the month, the fifteenth day of the month is the eleventh day of the term. Metropolitan Acc. Assoc. *v.* Froiland, 59 Ill. App. 513.

49. Brown *v.* Leet, 136 Ill. 203, 26 N. E. 639, holding that an intervening Sunday should be reckoned as any other day. *Contra,* Muzzell *v.* Lee, 23 N. C. 411; Michie *v.* Michie, 17 Gratt. (Va.) 109.

50. Gueringer *v.* His Creditors, 33 La. Ann. 1279; Wachsmuth *v.* Routledge, 36 Oreg. 307, 51 Pac. 433, 59 Pac. 454. But see Adams *v.* Dohrmann, 63 Cal. 417, where it was held that the law relating to holidays has no application to the supreme court.

51. Harbour *v.* Brickel, 10 Rob. (La.) 419; Laville *v.* Rightor, 11 La. 198; Wachsmuth *v.* Routledge, 36 Oreg. 307, 51 Pac. 443, 59 Pac. 454. See also West *v.* Irwin, 54 Fed.

(II) *The Application*— (A) *In General.* One who needs additional time for filing a transcript must apply for it.[52]

(B) *Notice.* An application for an extension of time for filing the transcript must be upon notice [53] and a sufficient showing.[54]

(C) *Time of Making.* The application for an extension of the time within which to file transcript must be made within the time prescribed for such filing.[55] A second extension must be prayed for and granted before the lapse of the time granted in the first extension.[56]

(D) *Grounds.* Within the rule allowing an extension of time within which to

419, 9 U. S. App. 547, 4 C. C. A. 401. See 3 Cent. Dig. tit. "Appeal and Error," § 2727. But see Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127, construing Hill's Anno. Laws Oreg., § 541, as amended by Oreg. Laws (1899), p. 229, to the effect that "the trial court or judge thereof, or the supreme court or a justice thereof, is authorized, upon such terms as may be just, to enlarge the time for filing a transcript."

But, if the time is limited by a statute not providing for an extension, the granting of an extension is not within the discretion of the court. Verges *v.* Roush, 1 Nebr. 113; McCarty *v.* Wintler, 17 Oreg. 391, 21 Pac. 195.

Allowing additional time within which to file bill of exceptions does not operate to extend the time for filing transcript. Mendel *v.* Kinnimouth, 12 Ky. L. Rep. 634.

Improvident order extending time should be rescinded. Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113 [*affirming* 86 Ill. App. 181]; Kuntz's Succession, 33 La. Ann. 30.

The failure, through inadvertence, to file an order of the court for extending the time is ground for dismissal, the respondents having notice of such order. Desmond *v.* Faus, 83 Cal. 134, 23 Pac. 303 (holding a paper signed by four justices to be an order of the court, even before filing); Grant *v.* De Lamori, 71 Cal. 329, 12 Pac. 228. And see Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55.

52. Terhune *v.* Pinkney, 39 N. J. Eq. 494. See also Gadwood *v.* Kerr, 181 Ill. 162, 54 N. E. 906, construing Ill. Prac. Act, § 72.

53. Webster *v.* Pierce, 40 Ill. 39; Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 62 Ill. App. 477 (relating to time for filing certificate of evidence); Hanson *v.* Hammell, 107 Iowa 171, 77 N. W. 839; Newbury *v.* Getchell, etc., Lumber, etc., Co., 106 Iowa 140, 76 N. W. 514; Shepperd *v.* Latourell, 27 Oreg. 137, 44 Pac. 1090; Bush *v.* Geisy, 16 Oreg. 267, 19 Pac. 123 (construing Hill's Anno. Laws Oreg. § 541, subd. 3). See 3 Cent. Dig. tit. "Appeal and Error," § 2739.

Failure to hear on the day named.— If a cause over which the moving party has no control prevents the hearing of the motion on the day named in the notice — as a failure of the court to sit — the adverse party must take notice of the situation, and the motion will continue till it can be legally heard. State *v.* Benson, 21 Wash. 365, 58 Pac. 217.

54. Campbell *v.* Horner, 12 Ind. App. 86, 39 N. E. 768.

55. *Illinois.*— Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113; Leach *v.* People, 118 Ill. 157, 8 N. E. 670; O'Kane *v.* West End Dry Goods Store, 79 Ill. App. 191; Aholtz *v.* Durfee, 13 Ill. App. 327; Simpson *v.* Simpson, 3 Ill. App. 432.

Iowa.— Hanson *v.* Hammell, 107 Iowa 171, 77 N. W. 839.

Louisiana.— Le Blanc *v.* Lemaire, 52 La. Ann. 1635, 28 So. 105; Lacroix *v.* Bonin, 33 La. Ann. 119. A grant of extension made after the expiration of the third day of grace is an absolute nullity. Holz *v.* Fishel, 40 La. Ann. 294, 3 So. 888.

Oregon.— Kelley *v.* Pike, 17 Oreg. 330, 20 Pac. 685.

South Carolina.— Marjenhoff *v.* Marjenhoff, 40 S. C. 545, 18 S. E. 942.

Utah.— Smith *v.* Fisher, 3 Utah 24, 5 Pac. 545.

United States.— West *v.* Irwin, 54 Fed. 419, 9 U. S. App. 547, 4 C. C. A. 401; Platt *v.* Preston, 19 Blatchf. (U. S.) 312, 8 Fed. 182.

See 3 Cent. Dig. tit. "Appeal and Error," § 2740.

Extension must be granted within the period.— Under a statute allowing an extension if obtained within a certain time, it has been held that not only must the motion be made, but it must be decided within such time. Frink *v.* Phelps, 5 Ill. 580.

If appellant is unable within the time limited to procure a complete transcript he should file a transcript of so much of the record as can be obtained, and within the time so prescribed for filing the same should apply for an extension of time to complete the record. Gadwood *v.* Kerr, 181 Ill. 162, 54 N. E. 906; Cook *v.* Cook, 104 Ill. 98. In Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113, appellant filed a record in time, but, after the time had expired, suggested a diminution, and, on leave, filed a supplemental transcript. On submission the appellate court, disregarding such supplemental transcript, and finding that the original record disclosed none of the errors assigned, dismissed the appeal.

56. Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127.

In Louisiana, since an extension does not carry with it days of grace, a second application must be made on or before the day to which the extension is granted. Cane *v.* Caldwell, 28 La. Ann. 790.

file a transcript, the time has been extended where the clerk, after bond filed, refused, until after the return-day, to deliver the transcript because his costs were not paid,[57] where the delay arose from the desire of appellant to reduce the bulk of the record, and save the court from unnecessary labor;[58] as well as under an agreement to the effect that a transcript might be dispensed with unless the court should require it, and that in such case appellant should have a reasonable time to prepare one, coupled with a statement that a necessary paper has been lost from the court below.[59] But it has been held that the time should not be extended where the bond required to perfect the appeal has not been filed;[60] where the clerk of the lower court certifies that he cannot, consistently with his other duties, have the record ready in time;[61] or where the trial judge rescinds an order of appeal previous to the return-day, and, on a rule to reinstate it, makes a decree after the return-day has gone by.[62] Neither will the negligence of appellant's counsel,[63] the pressure of his engagements in other courts, and his inability to procure a stenographer to transcribe the testimony,[64] nor the fact that appellant was financially embarrassed and unable to file the requisite bond in time, constitute a ground for extending the time for filing the transcript.[65]

(III) *STIPULATIONS AS TO EXTENSION.* The time for filing a transcript, as a rule, may be extended by consent of the parties;[66] but, where the filing of a

57. State *v.* Clerk Second Dist. Ct., 22 La. Ann. 585.

58. Massey *v.* Helme, 15 La. Ann. 692, a case where, if the extension had been refused, appellant might still have moved for another appeal.

59. Artz *v.* Culbertson, 71 Iowa 366, 32 N. W. 384.

60. Mathon *v.* Berry, 35 La. Ann. 884.

Delay in deciding on sufficiency of bond.— If appellant's surety is objected to, but the court does not pass upon the question and reject the bond until the day fixed for the return of the appeal, this is good ground for allowing further time. Maignan *v.* Glaise, 3 La. 257.

61. Bulkley *v.* Honold, 18 How. (U. S.) 40, 15 L. ed. 261. See, however, Le Blanc *v.* Lemaire, 52 La. Ann. 1635, 28 So. 105; McDonogh *v.* De Gruys, 10 La. Ann. 75.

If appellant instructs the clerk, long before the return-day, not to prepare the transcript, an extension will not be allowed, even though seasonably asked. Gibert *v.* Tassin, 37 La. Ann. 739.

62. De Bouchel *v.* Kowalski, 34 La. Ann. 102.

63. Smith *v.* James, 1 Ill. 292.

64. Goelet *v.* Lawlor, 19 Misc. (N. Y.) 540, 43 N. Y. Suppl. 1071.

65. Sterling *v.* Sterling, 34 La. Ann. 1030.

66. McKay *v.* Woodruff, 77 Iowa 413, 42 N W. 428; Fairburn *v.* Goldsmith, 56 Iowa 347, 9 N. W. 300; Baldwin *v.* Raplee, 2 Fed. Cas. No. 802. See 3 Cent. Dig. tit. "Appeal and Error," §§ 2741, 2756. But see Williams *v* Kenney, 98 Mass. 142; Wolff *v.* Toepperwein, (Tex. Civ. App. 1895) 28 S. W. 1009; Sehorn *v.* Price, 4 Wash. 262, 30 Pac. 86 — to the effect that the requirements as to filing the transcript cannot be waived by stipulation of counsel

Consent must be in writing or must appear of record, and if the terms of an alleged agreement, not in writing, as to waiver of the rule regarding time be disputed, the court will disregard such agreement.

California.—Agreements in writing extending the time for filing the transcript, though not filed with the clerk, are binding. Poupion *v.* Muzio, 68 Cal. 235, 9 Pac. 97.

Iowa.— Brown *v.* Farmers L. & T. Co., 109 Iowa 440, 80 N. W. 525.

Louisiana.— Caffin *v.* Pollard, 5 Rob. (La.) 124.

North Carolina.— Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534; Rodman *v.* Archbell, 108 N. C. 413 note, 13 S. E. 111; Taylor *v.* Brower, 78 N. C. 8. But see Walton *v.* Pearson, 82 N. C. 464, relating to a qualification of this rule.

Tennessee.— Kiber *v.* Kiber, (Tenn. 1887) 4 S. W. 221.

Texas.— Hall *v.* Claiborne, 27 Tex. 217; Thornton *v.* Foster, (Tex. Civ. App. 1897) 42 S. W. 1027.

Washington.— Sehorn *v.* Price, 4 Wash. 262, 30 Pac. 86.

If a stipulation be made upon consideration — as that the appellant who is granted additional time shall prosecute speedily another case involving the same questions — it may be shown that the consideration has failed, and in such case the stipulation cannot be invoked. Raymond *v.* McMullen, 90 Cal. 122, 27 Pac. 21.

Impossibility of living up to agreement.— In Swygert *v.* Swygert, 30 S. C. 609, 9 S. E. 657, the parties, disregarding the rule as to what constitutes a return and as to the time of filing, agreed on a case, and that it should be filed by a certain day. The appellant, finding that he could not file by the day named, asked for further time, which was refused. It was held that because of his failure thereupon to file the return within the time required, which he could have done, his appeal should be dismissed.

Notwithstanding the courts are disposed to be liberal in relieving parties from the strict

transcript within the time prescribed is a jurisdictional matter, the time for filing cannot be so extended.[67] Neither a stipulation extending the time for filing bond and bill of exceptions,[68] nor a stipulation extending the time for appellant's sureties to justify, has the effect of extending the time for filing the transcript.[69]

i. Effect of Failure to File in Time — (I) *Dismissal or Affirmance* — (A) *In General.* Failure to file the transcript or abstract of record, as the case may be, within the time prescribed by statute or rule,[70] or within the extension, if any has been granted, may be treated as an abandonment of the appeal, and may be taken advantage of by motion to dismiss:[71] or, in some jurisdictions the

letter of the rule wherever a proper case is made, they will not allow a cause to remain on the docket undisposed of for an unconscionable length of time even by stipulation, in the absence of a reasonable excuse for the delay, and may, *sua sponte*, dismiss the appeal. Powell *v.* Curtis, 78 Md. 499, 28 Atl. 390; Smithwick *v.* Kelley, (Tex. Civ. App. 1892) 21 S. W. 690.

67. Chicago Sash, etc., Mfg. Co. *v.* Shaw, 39 Ill. App. 260; Hatch *v.* Wegg, 5 Ill. App. 452; Dufrene *v.* Smeaton, 59 Nebr. 67, 80 N. W. 267. And see Thornton *v.* Foster, (Tex. Civ. App. 1897) 42 S. W. 1027.

Waiver by subsequent general appearance. — But where appellees do not rest upon their motion to dismiss because of the filing of the transcript after the statutory period, but proceed to file pleadings and try the case on its merits, they waive the right to object to the delay. Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

68. Swafford *v.* Rosenbloom, 189 Ill. 392, 59 N. E. 790. But in Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474, the appellate court refused to dismiss on motion of appellee because the transcript was not filed within the statutory time, a stipulation having been entered into to extend the time for preparing the bill of exceptions, which made the preparation of the transcript impossible within the prescribed time, the appellee becoming thereby a participant in the delay. In Buerhaus *v.* De Saussure, 39 S. C. 548, 17 S. E. 500, there was a stipulation extending the time for preparation and service of such appeal. The appellants, having been otherwise diligent, were held to have excused themselves when they alleged that they construed the stipulation as extending the time for filing the return, and were held to be entitled to relief under S. C. Code, § 349.

69. The reason of this is that the failure of the sureties to justify does not render the appeal ineffectual, but merely operates to avoid stay of the execution appealed from. Wittram *v.* Crommelin, 72 Cal. 89, 13 Pac. 160.

An agreement waiving any advantage on account of time of filing the transcript does not reach the defect of no transcript. Wolff *v.* Toepperwein, (Tex. Civ. App. 1895) 28 S. W. 1009. And see Pipkin *v.* Green, 110 N. C. 462, 14 S. E. 966.

A stipulation that the transcript of a former appeal may be used does not dispense with the requirement as to filing in due time. Long *v.* Herrick, 28 Fla. 755, 10 So. 17.

70. Statutes fixing the time for filing, but not prescribing any penalty for failure to file, are directory, and the court in such cases may, in its discretion, refuse to dismiss the appeal. Pierce *v.* Lyman, 28 Ark. 550 (where the appellee having been summoned within the requisite time by the appellant, the case was regularly disposed of); Durand *v.* Gage, 76 Mich. 624, 43 N. W. 583 (construing Howell's Anno. Stat. Mich. (1882), § 5911, the amendment to which was too late to apply to this appeal). See also Pugh *v.* Corwine, 1 Ohio Dec. (Reprint) 451.

Statutes fixing the time for filing the transcript are not statutes of limitation.—Laws prescribing rules of this character, although time may be an element in them, are intended to define the circumstances and manner of prosecuting appeals, while statutes of limitation refer to, and prescribe the time within, which the right of action must be exercised. The latter has relation to the right, the former to the rules controlling and directing its exercise. Cunningham *v.* Perkins, 28 Tex. 488.

71. *Alabama.*— Bayzer *v.* McMillan Mill Co., (Ala. 1893) 13 So. 144; Sears *v.* Kirksey, 81 Ala. 98, 2 So. 90; Owen *v.* Echols, 28 Ala. 689.

Arkansas.— Evan *v.* Walker, 27 Ark. 348.

California.—Johnson *v.* Goodyear Min. Co., (Cal. 1899) 57 Pac. 383; Hart *v.* Kimberly, (Cal. 1896) 46 Pac. 618; *In re* Read, (Cal. 1892) 29 Pac. 245.

Colorado.—Rockwell *v.* Highland Ditch Co., 18 Colo. 503, 33 Pac. 275.

District of Columbia.— District of Columbia *v.* Humphries, 11 App. Cas. (D. C.) 68; McGrane *v.* McCann, 2 App. Cas. (D. C.) 221.

Florida.— Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649; Ellsworth *v.* Haile, 29 Fla. 256, 10 So. 612; Long *v.* Herrick, 28 Fla. 755, 10 So. 17; Williams *v.* La Penotiere, 25 Fla. 473, 6 So. 167.

Georgia.— Cunningham *v.* Scott, 87 Ga. 506, 13 S. E. 635; Jackson *v.* Chastain, 67 Ga. 756; Jones *v.* Boone, 40 Ga. 542.

Idaho.— Pence *v.* Lemp, (Ida. 1895) 43 Pac. 75; Mahony *v.* Marshal, 2 Ida. 1065, 29 Pac. 110.

Illinois.— Rendleman *v.* Rendleman, (Ill. 1894) 37 N. E. 928; Fortman *v.* Ruggles, 58 Ill. 207.

Indiana.— Lindley *v.* Darnall, 24 Ind. App. 399, 56 N. E. 861; Blake *v.* Blake, 15 Ind. App. 492, 44 N. E. 488; Campbell *v.* Horner, 12 Ind. App. 86, 39 N. E. 768.

Indian Territory.— Miami Town Co. *v.* McNeil, (Indian Terr. 1899) 52 S. W. 658.

appellee may bring up the record and move to have the judgment affirmed.[72]

Iowa.— Rickel *v.* Chicago, etc., R. Co., (Iowa 1900) 83 N. W. 957.

Kentucky.— Floyd *v.* Penick, 9 Ky. L. Rep. 719; Williamson *v.* Kenaday, 4 Ky. L. Rep. 263.

Louisiana.— Levy *v.* Levy, 52 La. Ann. 1920, 28 So. 246; Moss *v.* Reims, 52 La. Ann. 566, 27 So. 68; State *v.* Louisiana Debenture Co., 52 La. Ann. 551, 27 So. 87.

Maryland.— Mason *v.* Gauer, 62 Md. 263; Ewell *v.* Taylor, 45 Md. 573.

Michigan.— Van Blarcom *v.* Ætna Ins. Co., 6 Mich. 299.

Missouri.— Marre *v.* Gridley, 81 Mo. App. 470; J. H. Rottman Distilling Co. *v.* Drew, 75 Mo. App. 141; Flier *v.* German Mut. F. Ins. Co., 9 Mo. App. 572.

Nebraska.— Snyder *v.* Lapp, 59 Nebr. 243, 80 N. W. 806; Dufrene *v.* Smeaton, 59 Nebr. 67, 80 N. W. 267; Albers *v.* Omaha, 56 Nebr. 357, 76 N. W. 911; Schoonover *v.* Saunders, 48 Nebr. 463, 67 N. W. 442.

New York.— Webb *v.* Brown, 19 Johns. (N. Y.) 453.

North Carolina.—State *v.* James, 108 N. C. 792, 13 S. E. 112; Whitehead *v.* Blandiford, 108 N. C. 413 note, 12 S. E. 908; Porter *v.* Western North Carolina R. Co., 106 N. C. 478, 11 S. E. 515.

Ohio.— Chatfield *v.* Swing, 8 Ohio Dec. (Reprint) 5, 5 Cinc. L. Bul. 14; *In re* Sears, 7 Ohio Dec. (Reprint) 253, 5 Ohio N. P. 116; Whetstone *v.* Thorp, 1 Ohio Dec. (Reprint) 482.

Oregon.— Lindley *v.* Wallis, 2 Oreg. 203. *Compare* Skinner *v.* Lewis, (Oreg. 1900) 62 Pac. 523.

Pennsylvania.— See Copeland *v.* Burg, 4 Yeates (Pa.) 240; Ferree *v.* Bradenburg, 1 Pa. Super. Ct. 21, 37 Wkly. Notes Cas. (Pa.) 284.

South Carolina.— Talbird *v.* Whipper, 31 S. C. 600, 9 S. E. 742; McElwee *v.* McElwee, 14 S. C. 623.

Tennessee.— *Compare* Gregory *v.* Burnett, 1 Humphr. (Tenn.) 59, an appeal from county court to circuit court.

Texas.— Hicks *v.* Harlan, 1 Tex. 560.

Utah.— Corinne Mill, etc., Co. *v.* Johnston, 5 Utah 147, 13 Pac. 17.

Washington.— Thompson *v.* McDonald, 6 Wash. 298, 33 Pac. 347; Sayward *v.* Guye, 2 Wash. Terr. 420, 7 Pac. 856.

United States.— Small *v.* Northern Pac. R. Co., 134 U. S. 514, 10 S. Ct. 614, 33 L. ed. 1006; Evans *v.* New Orleans State Nat. Bank, 134 U. S. 330, 10 S. Ct. 493, 33 L. ed. 917.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2618 *et seq.*, 2744.

Date of filing, indorsed on a transcript by the clerk, is merely prima facie evidence of the time at which it was received by him, and, if a mistake is made in the date to the prejudice of either party, the court will correct it upon the proper showing being made. Tootle *v.* White, 4 Nebr. 401; Moyer *v.* Strahl, 10 Wis. 83.

One in default cannot claim a default.— If one who has prayed an appeal is in default for failure to perfect his appeal by filing a transcript in the court where the case is to be tried anew, he cannot claim a default against the other party for failure to appear. Pepole *v.* Emigh, 100 Ill. 517.

72. *Alabama.*— Cowles *v.* Frear, 43 Ala. 642; Thacker *v.* Myrick, 3 Stew. (Ala.) 184.

Georgia.— Liverpool Cotton Co. *v.* Wiseman, 36 Ga. 519.

Illinois.— Weber *v.* Hertz, 188 Ill. 68, 58 N. E. 676 [*affirming* 87 Ill. App. 601].

Iowa.— Iowa Code (1897), § 4120; Turner *v.* Hine, 37 Iowa 500. But see Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

Kentucky.—Central Pass. R. Co. *v.* Chatterson, 14 Ky. L. Rep. 205, 519.

Louisiana.— Brumfield *v.* Cunningham, 14 La. 264.

Missouri.— Springfield Steam Laundry Co. *v.* American Cent. Ins. Co., 62 Mo. App. 11; Dean *v.* Jones, 27 Mo. App. 468; Schultz *v.* Haeussler, 9 Mo. App. 572; *In re* Joyaille, 7 Mo. App. 570.

Nebraska.— Schoonover *v.* Saunders, 48 Nebr. 463, 67 N. W. 442.

New York.— Oeters *v.* Groupe, 15 Abb. Pr. (N. Y.) 263, 9 Bosw. (N. Y.) 638.

Oregon.— Heatherly *v.* Hadley, 2 Oreg. 117.

Tennessee.—Thomas *v.* East Tennessee, etc., R. Co., 15 Lea (Tenn.) 533; Suggs *v.* Suggs, 1 Overt. (Tenn.) 2.

Texas.—Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842; Patton *v.* Mills, Dall. (Tex.) 364.

Washington.— Chehalis Flume, etc., Co. *v.* Reinhart, 3 Wash. 428, 28 Pac. 256; Roberts *v.* Tucker, 1 Wash. Terr. 179.

Purpose of this rule.— This practice simply provides means by which a respondent may have the fact that an appeal has been abandoned made a matter of record. It cannot be used for the purpose of determining any controverted questions in the case. Henrichsen *v.* Smith, 29 Oreg. 475, 42 Pac. 486, 44 Pac. 496. And see Smith *v.* Fowler, 5 Ky. L. Rep. 925, where it was held that a partial transcript filed by appellee on a motion to dismiss was not such a transcript as would have the same effect as if filed by appellant.

Under this rule appellee cannot get a hearing of the case within the time allowed appellant in which to file the record and prepare his cause for trial, and such a right is not conferred by a statute giving appellee the right to have a transcript made out and delivered to him. Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842.

If appellee, instead of seasonably filing his transcript for affirmance, sleeps on his rights he, in effect, extends the day of grace to his adversary, and the latter may thereafter file his transcript, and a motion to affirm, subsequently made, will be denied. Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777; Armour Packing Co. *v.* Williams, 122 N. C. 406, 29 S. E. 366; Hunt *v.* Askew, 46 Tex. 247. But *compare* Copley *v.* Routh, 3 La. Ann. 189.

Premature filing by defendant in error.—

The courts, however, have frequently refused to entertain a motion for dismissal made after the default of appellant has been cured by his affirmative action.[73]

If plaintiff in error or appellant files the record within the prescribed time, a copy previously filed by defendant in error or appellee is premature. Hartshorn *v.* Day, 18 How. (U. S.) 28, 15 L. ed. 272.

Relief cannot be had by a nunc pro tunc order.— Courts will seldom, if ever, relieve from result of negligence of appellant or his attorney in this way. Newbury *v.* Getchell, etc., Lumber, etc., Co., 106 Iowa 140, 76 N. W. 514.

The necessity of a motion.— In some states the mere failure to file the transcript does not, *ipso facto*, destroy the appeal, it being contemplated by the statutes and rules of court on the subject that the dismissal of the appeal or affirmance of the judgment shall be on motion only. Winthrow *v.* Woodward Iron Co., 81 Ala. 100, 2 So. 92; Sears *v.* Kirksey, 81 Ala. 98, 2 So. 90. In Cook *v.* Klink, 8 Cal. 347, no motion had been made to dismiss, and it was held to be too late to make the objection in brief after submission. And see Holmes *v.* Hull, 48 Iowa 177, where it was said: "Under our practice we would not look at the transcript if one had been filed."

In some cases, on the other hand, the courts, apparently treating the question as one of jurisdiction merely, have dismissed of their own motion. Schillo *v.* Anderson, 51 Ill. App. 403 (an appeal from an interlocutory order of injunction under a statute allowing such appeal only when perfected by filing the transcript within sixty days from the entry of order); Floyd *v.* Penick, 9 Ky. L. Rep. 719 (where appellee did not enter his appearance); Cunningham *v.* Perkins, 28 Tex. 488.

And, under a statute providing that the failure of appellant to file the record within the time allowed shall constitute an abandonment of the appeal, it has been held that the appeal terminated by operation of law when the time had elapsed without the record having been filed, and that the clerk of the lower court should issue execution immediately upon satisfactory showing of the abandonment of the appeal. Sydenstriker *v.* Beard, 4 W. Va. 707. And see Rau *v.* Bennis, 49 Md. 316, construing Md. Acts (1864), c. 322.

Under the Louisiana practice, the rule that motions to dismiss must be made in three days has no application to motions of this class, since the appeal is considered abandoned if the transcript is not seasonably filed. An order of the court is held to be merely declaratory of an existing fact. Coudroy *v.* Pecot, 51 La. Ann. 495, 25 So. 270; Mutual Loan, etc., Assoc. *v.* First African Baptist Church, 48 La. Ann. 1458, 21 So. 24.

The necessity of filing transcript of judgment.— In order that the appellate court may affirm the judgment or dismiss the appeal there must be on file a transcript of the judgment of the inferior court. The certificate of the clerk, filed for affirmance, is not sufficient. Lloyd *v.* Barnett, 36 Tex. 190. But it is not requisite that two transcripts should be on file. So, if, after the expiration of appellant's time, he should file a transcript the same action may be taken thereon as though it had been filed by appellee. Muldoon *v.* Levi, 25 Nebr. 457, 41 N. W. 280.

The remedy considered as cumulative.— The remedy provided by Md. Acts (1864), c. 322, authorizing the lower court, in case the record is not transmitted to the appellate court within the time prescribed in the act, to strike out the appeal and proceed to execute the judgment as if no appeal had been taken, in no manner interferes with the right of appellee to have the record sent up to the court of appeals if appellant neglects to have it done within the time prescribed by law. Rau *v.* Bennis, 49 Md. 316.

73. *Alabama.*—See Pearsall *v.* McCartney, 25 Ala. 461.

Florida.— Lake *v.* Hancock, 29 Fla. 336, 11 So. 97.

Iowa.— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780; Frank *v.* Levi, 110 Iowa 267, 81 N. W. 459; Ft. Madison *v.* Moore, 109 Iowa 476, 80 N. W. 527; Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845.

Louisiana.— Duperron *v.* Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509; Traverso *v.* Row, 10 La. 500. But see, *contra*, Gigand *v.* New Orleans, 52 La. Ann. 1259, 27 So. 794; French *v.* Harrod, 9 La. Ann. 21; Vancampen *v.* Morris, 6 Rob. (La.) 79.

Michigan.— Gorton *v.* Person, 97 Mich. 561, 56 N. W. 936. The decision in Snyder *v.* Washtenaw Cir. Judge, 80 Mich. 511, 45 N. W. 596, was made clearly on the proposition of the text, though some of the justices also thought that the right to move to dismiss was waived because the objections of appellee on the calling of the docket were calculated to lead appellant and the court to suppose that the objections related only to a want of notice of trial. In Merriman *v.* Peck, 95 Mich. 277, 54 N. W. 871, it was held that the statutory provision relating to the time of the filing of the copy of the record was mandatory, but this case was not intended to overrule Snyder *v.* Washtenaw Cir. Judge, 80 Mich. 511, 45 N. W. 596, nor to hold that the failure to perfect the appeal within the time might not be waived. The difference in the circumstances of the cases was pointed out.

Mississippi.— See Carmichael *v.* West Feliciana R. Co., 2 How. (Miss.) 817.

North Carolina.— Hughes *v.* Boone, 100 N. C. 347, 5 S. E. 192; Bryan *v.* Moring, 99 N. C. 16, 5 S. E. 739; Barbee *v.* Green, 91 N. C. 158.

South Carolina.— *Contra*, see Pregnall *v.* Miller, 26 S. C. 612, 7 S. E. 71.

Washington.— Gustin *v.* Jose, 10 Wash. 217, 38 Pac. 1008; Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

(B) *With Damages.* In some states, in the absence of a showing of "good cause" for appellant's failure to seasonably file the transcript, the court may, upon motion, not only dismiss the appeal or affirm the judgment, as the case may be, but may also award damages as for an appeal taken merely for delay.[74]

(II) *Excuses For Delay*—(A) *In General.* Generally speaking, if some satisfactory cause for the delay is given, the court may, in its discretion, allow the transcript to be filed after the expiration of the time prescribed.[75]

(B) *Appellant's Fault Presumed.* The usual presumption is that the delay is the fault of appellant, and, before permission can be obtained to file at a later day or relief be had from the consequences of failure to file, the court must be satisfied by a clear showing that appellant used proper diligence.[76]

(C) *Appellant's Laches or Negligence.* In order to avail himself of an excuse for failure to file his papers on appeal in the time prescribed, it must appear that appellant has prosecuted his appeal in good faith, used every means to comply with the rules regulating the same, and has not been guilty of laches or neglect of duty in any respect.[77] Appellant may be guilty of laches in not tendering to

United States.— Bingham *v.* Morris, 7 Cranch (U. S.) 99, 3 L. ed. 281.

Duty of clerk as to transcript received too late.— By the rules of the Texas court of civil appeals, if the transcript is received by the clerk too late for filing, it is his duty to keep it without filing, subject to the order of the person sending it, or the disposition of the court. Dew *v.* Weekes, (Tex. Civ. App. 1899) 53 S. W. 706.

Failure of appellant to excuse delay.— If an appellant who files his transcript after the expiration of the period allowed, but before the motion to dismiss is made, makes no attempt to show good cause for not filing in due time, the appeal will be dismissed. Enterprise *v.* State, 24 Fla. 206, 4 So. 535.

74. Long *v.* Herrick, 28 Fla. 755, 10 So. 17; Williams *v.* La Penotiere, 25 Fla. 473, 6 So. 167; Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113 [*affirming* 86 Ill. App. 181]; Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842.

75. Collier *v.* Coggins, 103 Ala. 281, 15 So. 578; Hunt *v.* Askew, 46 Tex. 247. See 3 Cent. Dig. tit. "Appeal and Error," § 2750 *et seq.*

The court is without discretion in the matter, however, if the time within which the transcript must be filed is limited by the legislature, which also fixes the consequences of a neglect to file. Verges *v.* Roush, 1 Nebr. 113. See also Prewit *v.* Smith, 1 A. K. Marsh. (Ky.) 258.

76. *Arkansas.*— Harrison *v.* Trader, 25 Ark. 621.

Idaho.— Fahey *v.* Belcher, 2 Ida. 1076, 29 Pac. 112.

Louisiana.— Police Jury *v.* Garrett, 19 La. Ann. 122; Wright *v.* Brander, 17 La. Ann. 187.

Maryland.— Brown *v.* Ravenscraft, 88 Md. 216, 44 Atl. 170; Ewell *v.* Taylor, 45 Md. 573; Lewin *v.* Simpson, 38 Md. 468; Hooper *v.* Baltimore, etc., Turnpike Road, 34 Md. 521. By the earlier rule in this state the delay in transmission, where the appeal was taken in due time, was presumptively the fault of the clerk. Baltimore *v.* Reynolds, 18 Md. 270; Hannon *v.* State, 9 Gill (Md.) 440. And see Lewin *v.* Simpson, 38 Md. 468; Sample *v.* Motter, 5 Md. 368.

Michigan.— Boardman *v.* Taylor, 16 Mich. 62.

Missouri.— Smith *v.* Merrill, 26 Mo. App. 65.

New York.— Spoore *v.* Fannan, 16 N. Y. 620.

Texas.— Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87.

United States.— U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212; Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

See 3 Cent. Dig. tit. "Appeal and Error," § 2750 *et seq.*

The burden of proof is upon appellant to relieve himself from the presumption arising from his failure to transmit and file the transcript within the time prescribed. To do this, he must furnish proof from which the court will be able to see that the burden put upon him is fully answered, and, generally, this proof must be under oath and usually in the form of affidavits, unless it be of some matter to which an official seal, under the rules of evidence, will impart verity. Northern Cent. R. Co. *v.* Rutledge, 48 Md. 262; Davis *v.* Estes, 4 Tex. Civ. App. 207, 23 S. W. 411. See 3 Cent. Dig. tit. "Appeal and Error," § 2764.

Time of presenting excuse.— The cause for failure to file need not be shown at the return-term. Clay *v.* Notrebe, 11 Ark. 631 [*overruling Ex p.* Jordan, 8 Ark. 285]. The excuse should be made at the time of the motion to dismiss the appeal. If not then made, it is too late to present it on a motion to reinstate. British, etc., Mortg. Co. *v.* Long, 116 N. C. 77, 20 S. E. 964. See 3 Cent. Dig. tit. "Appeal and Error," § 2764.

77. Regulations of this nature are made in the public interest. Their object is to prevent all avoidable delays. If appellant has in all things concerning the appeal been free from any charge of neglect of duty, and has, as far as lay in his power, done everything that he is required to do in order to bring the case in proper shape before the appellate court, the

the clerk his legal fees,[78] in not applying for an extension of time which, upon a

court will be liberal in granting him relief, to the extent of its discretion. What will constitute a sufficient excuse must be decided by the court in view of all the circumstances of the case.

Arkansas.— Reynolds *v.* McCallum, 28 Ark. 453; Real Estate Bank *v.* Bizzell, 4 Ark. 189; Hathaway *v.* Smith, 3 Ark. 248.

California.— Stark *v.* Barnes, 2 Cal. 162.

Colorado.— Craig *v.* Young, 2 Colo. 11.

Florida.— Ellsworth *v.* Haile, 29 Fla. 256, 10 So. 612; Williams *v.* La Penotiere, 25 Fla. 473, 6 So. 167.

Georgia.— Ashley *v.* Howard, 99 Ga. 132, 24 S. E. 875; Farrar *v.* Oglesby, 84 Ga. 188, 11 S. E. 133 (construing Ga. Code, § 4272 *et seq.*); Davis *v.* Bennett, 72 Ga. 762; Perry *v.* Gunby, 41 Ga. 415.

Illinois.— Fortman *v.* Ruggles, 58 Ill. 207.

Iowa.— Howorth *v.* Seevers Mfg. Co., 78 Iowa 627, 43 N. W. 532; Fairburn *v.* Goldsmith, 56 Iowa 347, 9 N. W. 300; Whitehead *v.* Thorp, 22 Iowa 425.

Kentucky.— Bush *v.* Lisle, 86 Ky. 504, 6 S. W. 330; Central Pass. R. Co. *v.* Chatteeson, 14 Ky. L. Rep. 519.

Louisiana.— Heller *v.* Lochte, 28 La. Ann. 45; Haynes *v.* Lawson, 6 La. Ann. 269; Littell *v.* Dolhear, 11 Rob. (La.) 485.

Maryland.— Crise *v.* Lanahan, (Md. 1887) 11 Atl. 842.

Michigan.— Carne *v.* Hall, 7 Mich. 159; Van Blarcom *v.* Ætna Ins. Co., 6 Mich. 299.

Mississippi.— Boyd *v.* Hawkins, 59 Miss. 325.

Missouri.— Boggs *v.* America Ins. Co., 31 Mo. 499; Dean *v.* Jones, 27 Mo. App. 468.

Nebraska.— Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211; Steele *v.* Haynes, 20 Nebr. 316, 30 N. W. 63; Republican Valley R. Co. *v.* McPherson, 12 Nebr. 480, 11 N. W. 739.

Nevada.— Lightle *v.* Ivancovich, 10 Nev. 41.

New York.— Gilman *v.* Gilman, 35 Barb. (N. Y.) 591.

North Carolina.— Critz *v.* Sparger, 121 N. C. 283, 28 S. E. 365.

North Dakota.— Walter A. Wood Harvester Co. *v.* Heidel, 4 N. D. 427, 64 N. W. 155.

South Carolina.— Tompkins *v.* Augusta, etc., R. Co., 40 S. C. 550, 18 S. E. 893; Buerhaus *v.* De Saussure, 39 S. C. 548, 17 S. E. 500; Stoddard *v.* Roland, 31 S. C. 600, 9 S. E. 741.

South Dakota.— Merchants Nat. Bank *v.* McKinney, 1 S. D. 78, 45 N. W. 203.

Texas.— Hoefling *v.* Esser, (Tex. Civ. App. 1898) 46 S. W. 294; Williams *v.* Walker, (Tex. Civ. App. 1895) 33 S. W. 556; Malone *v.* Medford, (Tex. Civ. App. 1895) 31 S. W. 685.

Virginia.— Craigen *v.* Thorn, 3 Hen. & M. (Va.) 269.

Washington.— Chehalis County *v.* Pearson, 10 Wash. 216, 38 Pac. 996.

West Virginia.— Modisett *v.* Dayton, 11 W. Va. 339.

United States.— Platt *v.* Preston, 19 Blatchf. (U. S.) 312, 8 Fed. 182.

See 3 Cent. Dig. tit. "Appeal and Error," § 2750 *et seq.*

Appeal taken before final judgment.— That the appeal was taken before the entry of final judgment is not good cause for failure to file the record, but is, on the contrary, an additional reason for dismissing the appeal. Webster *v.* Barnett, 17 Fla. 119.

Failure of the printer to have the record ready within the time promised will sometimes be accepted as a sufficient excuse. Stoddard *v.* Roland, 31 S. C. 600, 9 S. E. 741.

Filing of a defective transcript — Lost papers.— It is the practice, in some states, when a transcript has been in good faith filed and is defective because of the loss of a necessary paper, to permit the filing of a supplemental record at any time before submission. Bush *v.* Lisle, 86 Ky. 504, 6 S. W. 330. See 3 Cent. Dig. tit. "Appeal and Error," § 2758.

Inability to serve the citation is a good excuse for not filing the transcript. Thomas *v.* Childs, 36 Tex. 148; Chambers *v.* Shaw, 16 Tex. 143 [*overruling*, in effect, Spann *v.* French, 13 Tex. 91].

Irregularities of the mail.— Where it is alleged, without contradiction, that the transcript was mailed in ample time to have reached the office of the clerk of the appellate court before the expiration of the limit, and that the delay was caused by some irregularity in the mail, a motion to dismiss will be denied. Walker *v.* Scott, 104 N. C. 481, 10 S. E. 523. But, where a party holds the papers without cause till barely enough time is left for them to reach their destination, he cannot excuse himself by alleging delay in the mail. Williams *v.* Walker, (Tex. Civ. App. 1895) 33 S. W. 556.

The court may impose such terms as, under all the circumstances of the case, seem to it to be just, when in the exercise of its discretion it relieves against delay in filing transcript. Crosswell *v.* Connecticut Indemnity Assoc., 49 S. C. 374, 27 S. E. 388, construing S. C. Code Civ. Proc. §§ 339, 349. See also Fortman *v.* Ruggles, 58 Ill. 207; Venable *v.* Chavous, 40 S. C. 545, 18 S. E. 943; Pregnall *v.* Miller, 26 S. C. 612, 7 S. E. 71; Western Union Tel. Co. *v.* Walker, 86 Tex. 72, 23 S. W. 380; Chambers *v.* Fisk, 20 Tex. 343. See 3 Cent. Dig. tit. "Appeal and Error," § 2765.

78. Steiner *v.* Harding, 88 Md. 343, 41 Atl. 799 (where the court said that "the duty of an attorney with respect to the transmission of a record is not ended when he gives instructions to enter an appeal and to transmit the record"); Critz *v.* Sparger, 121 N. C. 283, 28 S. E. 365; Bailey *v.* Brown, 105 N. C. 127, 10 S. E. 1054.

A clerk has a right to refuse to transmit the transcript until he is paid for it (Steiner *v.* Harding, 88 Md. 343, 41 Atl. 799; Parsons *v.* Padgett, 65 Md. 356, 4 Atl. 410; British, etc., Mortg. Co. *v.* Long, 116 N. C. 77, 20 S. E. 964); but not to refuse to make up the record before he is paid (Walter *v.* Baltimore Second Nat. Bank, 56 Md. 138).

An exorbitant charge for the transcript is

proper showing, would have been granted,[79] or in failing to resort to mandamus or other appropriate remedy to procure the transmission and filing of the transcript.[80] The general rule is that the neglect or fault of the attorney is imputable to the client.[81]

(D) *Nature of Excuse* — (1) IN GENERAL. By the wording of some provisions appellant's delay in filing his transcript can only be excused by his showing the delay to have been consequent upon the happening of an event beyond his control;[82] other provisions are to the effect that a good cause is sufficient to excuse the delay,[83] and still others go so far as to excuse such a delay only for providential cause.[84]

(2) ABSENCE OR INABILITY OF APPELLANT'S ATTORNEY. The absence from the state of appellant's counsel,[85] though it is alleged to have been unavoidable,[86] unless under circumstances which appeal strongly to the discretionary power of the court, and every effort is made to atone for the delay, is not sufficient excuse for a failure to file a transcript within the prescribed time;[87] but it has been held that, if appellant uses all possible diligence, his failure to properly present his case on appeal, in consequence of the illness of his attorney, may be excused.[88]

not an excuse for failure to send it up. Brown *v.* House, 119 N. C. 622, 26 S. E. 160.

79. *Kentucky.*— Chesapeake, etc., R. Co. *v.* Houseman, 8 Ky. L. Rep. 778.

Louisiana.—Llula's Succession, 42 La. Ann. 475, 7 So. 585.

Mississippi.— Boyd *v.* Hawkins, 59 Miss. 325.

New Jersey.— Terhune *v.* Pinkney, 39 N. J. Eq. 494.

South Carolina.—See Jacobs *v.* Gilreath, 44 S. C. 557, 21 S. E. 885.

80. *Alabama.*— Arrington *v.* Howell, 4 Port. (Ala.) 317.

Arkansas.— *In re* Barstow, 54 Ark. 551, 16 S. W. 574.

Georgia.— Jones *v.* Payne, 41 Ga. 32.

Mississippi.— Martin *v.* Phelps, 53 Miss. 134.

North Carolina.— Burrell *v.* Hughes, 120 N. C. 277, 26 S. E. 782; Brown *v.* House, 119 N. C. 622, 26 S. E. 160; Porter *v.* Western North Carolina R. Co., 106 N. C. 478, 11 S. E. 515; Seay *v.* Yarborough, 94 N. C. 291; Roulhac *v.* Miller, 89 N. C. 190; Howerton *v.* Henderson, 86 N. C. 718. See also Rothchild *v.* McNichol, 121 N. C. 284, 28 S. E. 364; Critz *v.* Sparger, 121 N. C. 283, 28 S. E. 365; Murray *v.* Shanklin, 20 N. C. 345.

Texas.— Hoefling *v.* Esser, (Tex. Civ. App. 1898) 46 S. W. 294; Davis *v.* American Freehold Land Mortg. Co., 12 Tex. Civ. App. 37, 33 S. W. 271.

Wisconsin.— Immaculate Conception Congregation *v.* Hellstern, 105 Wis. 632, 81 N. W. 988.

United States.— U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212.

81. Nevertheless, a distinction has been sometimes recognized between the negligence of an attorney and that of the party to the action, and the circumstances of a case may preclude the application of the rule. Wiley *v.* Logan, 94 N. C. 564; Western Union Tel. Co. *v.* Walker, 86 Tex. 72, 23 S. W. 380.

82. Littell *v.* Dolbear, 11 Rob. (La.) 485; Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87. And where the failure can be excused only by a showing of a cause beyond appellant's control this requires the exercise of the greatest possible diligence. Blackburn *v.* Blackburn, 16 Tex. Civ. App. 564, 42 S. W. 132.

83. See Stephenson *v.* Stephenson, (Tex. 1893) 22 S. W. 150.

The court itself is the only proper judge as to what constitutes "good cause." Smith *v.* Curtis, 19 Fla. 786. And no general rule can be laid down as to what will constitute such a good cause. Each case will depend upon its own peculiar facts. Boggs *v.* America Ins. Co., 31 Mo. 499; Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777.

84. Davis *v.* Bennett, 72 Ga. 762; cases cited *infra*, notes 85 *et seq.* See also 3 Cent. Dig. tit. "Appeal and Error," § 2750 *et seq.*

Where appellant himself was in fault and the clerk had a deputy who was not ill, it was held, in Mitchell *v.* Brown, 59 Ga. 374, that appellant, by showing illness of the clerk, could not shelter himself behind a provision making providential cause an excuse. See also Osborn *v.* Hale, 70 Ga. 731.

Pressure of other engagements will not, ordinarily, be accepted as an excuse for delay in filing the record. Smith *v.* Tenney, 60 Ill. App. 442; Brown *v.* Farmers L. & T. Co., 109 Iowa 440, 80 N. W. 525. And see Marjenhoff *v.* Marjenhoff, 40 S. C. 545, 18 S. E. 942, where counsel, being pressed by other engagements, called in another attorney, and each expected the other to file.

85. Wright *v.* Brander, 17 La. Ann. 187.

86. Gulf, etc., R. Co. *v.* Edwards, 72 Tex. 303, 10 S. W. 525, where it was not shown why the absence was unavoidable, and no effort was made to file the transcript and submit the case.

87. Chapman *v.* State Bank, 88 Cal. 419, 26 Pac. 608.

88. Mott *v.* Ramsay, 90 N. C. 372. And see Davis *v.* Pollock, 35 S. C. 584, 13 S. E. 897. See also 3 Cent. Dig. tit. "Appeal and Error," § 2760.

But the death of appellant's attorney a

(3) APPELLANT'S INABILITY TO PAY COSTS. While, as a general rule, delay in filing a transcript cannot be excused because appellant failed to provide his attorneys with funds to pay therefor,[89] it has been held that if appellant has been diligent in the prosecution of his appeal, and appellee is not prejudiced by the delay, the former will not be deprived of the benefit of the appeal merely because he was unable, by reason of poverty, to provide the funds for the payment of the costs within the time prescribed by the rules for filing the transcript.[90]

(4) FAULT OF APPELLEE OR RESPONDENT. Appellee cannot be successful, in a motion to dismiss the appeal or affirm the judgment, on the ground of delay in transmitting or filing the record, where such delay occurred through his own fault, or was equally attributable to him.[91] On the other hand, the court may take such action as will fully protect appellant's rights.[92]

(5) FAULT OF OFFICER OF COURT. In the language used by several courts, if due diligence is shown, parties will not be allowed to suffer through the default of an officer of the court.[93] This rule has been applied where it was shown that

sufficient length of time before the case arises in the appellate court to enable appellant to procure another attorney, is not a sufficient excuse. House *v.* Williams, 40 Tex. 346.

The fact that an appellant is so ill as to be unable to attend to the filing of the papers and the payment of fees is no excuse for delay when it is not shown that his attorney was unable to attend to the matter. McManus *v.* Humes 6 Iowa 159.

Where the attorney's clerk, contrary to his employer's instructions, took the appeal during his employer's illness, but failed to file the transcript, the attorney knowing nothing of this till he was served with notice of motion to dismiss, after which he used all diligence in rectifying the mistake, a motion to dismiss was properly denied. Bates *v.* Schroeder, (Cal. 1888) 19 Pac. 121.

89. Monett Bank *v.* Moulder, 43 Mo. App. 279 (where the party had left the state shortly after the trial); Bobb *v.* Pennsylvania Ins. Co., 32 Mo. App. 256 (where appellant was a non-resident); Trotter *v.* Kleinschmidt, 21 Mont. 532, 55 Pac. 29 (where appellant had left the state temporarily, without leaving any address). See 3 Cent. Dig. tit. "Appeal and Error," § 2759.

Appeal by an administrator.— In Becker *v.* Fairley, 41 Mo. App. 52, an administrator *de bonis non,* who had been appointed since the appeal was taken, attempted to excuse the delay by alleging that there were no means of the estate wherewith to pay for the transcript, but made no affidavit of the fact. The court affirmed the judgment, saying that the fact that an administrator might appeal without bond, the appeal itself operating as a supersedeas, forms an additional reason why he, above all others, should be held to a diligent prosecution of his appeal.

90. Hubback *v.* Ross, 79 Cal. 564, 21 Pac. 965; Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777.

91. *Maryland.*—McGonigal *v.* Plummer, 30 Md. 422, where the delay was in consequence of an agreement entered into as to the papers that should form the transcript. See also Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474, the case of a stipulation.

Michigan.— Wattles *v.* Warren, 7 Mich. 309, where the papers were in the possession of counsel for defendant in error.

Missouri.— Musick *v.* Kansas City, etc., R. Co., 124 Mo. 544, 28 S. W. 72, where it was held, however, that appellant could not shift the consequences of his own neglect in not demanding in due season the papers left with appellee's counsel.

New Hampshire.— Rochester *v.* Roberts, 25 N. H. 495.

South Carolina.— Geddes *v.* Hutchinson, 39 S. C. 550, 17 S. E. 560, where appellant was not intentionally led to believe that a delay would not be taken advantage of.

South Dakota.— Merchant's Nat. Bank *v.* McKinney, 1 S. D. 78, 45 N. W. 203, where the delay was on account of the loss of papers which, on a diligent search, could not be found in time, and which were subsequently found in the office of respondent's counsel.

Tennessee.— Hahr *v.* Musgrove, 12 Lea (Tenn.) 289.

Texas.— Reynolds *v.* Dechaumes, 22 Tex. 116.

Washington.— Bast *v.* Hysom, 5 Wash. 88, 31 Pac. 319, where some of the papers had been taken from the clerk's office and misplaced by respondent's attorney, and appellant acted with diligence after the papers were found.

United States.— And see U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212.

See 3 Cent. Dig. tit. "Appeal and Error," § 2755.

92. **Remandment.**— In Beard *v.* Poydras, 13 La. 82, it was held that, if it appear that appellant is without fault and had been prevented by the adverse party from bringing up a complete record, the court may, in its discretion, remand the cause.

Rule to show cause against reversal.— Where the original papers in a suit are lost or destroyed by the prevailing party, so that the opposite party is precluded from having a transcript made for his appeal, the appellate court will grant a rule on such prevailing party to show cause why the decree shall not be reversed if the papers are not produced. Quarles *v.* Hiern, 70 Miss. 259, 12 So. 145.

93. Westheimer *v.* Thompson, 2 Ida. 1137, 31 Pac. 797; Allis *v.* Newman, 29 Nebr. 207, 45 N. W. 621.

the delay in filing the transcript was due to no shortcoming of appellant,[94] but was caused entirely by the neglect or fault of the clerk or judge.[95] But the failure of a judge or clerk acting, not in the performance of any official duty, but as an agent of appellant, is the failure of appellant.[96]

(6) INEFFECTUAL ATTEMPT TO FILE. If appellant alleges that he made an attempt to file the transcript, but found the clerk's office closed, he must, in order to make his excuse valid, show that he attempted to file during business hours.[97]

94. Inadvertence of the clerk in entering judgment as of a later day than that on which it was rendered cannot be urged by appellant as an excuse. Vigo County *v.* Terre Haute, 147 Ind. 134, 46 N. E. 350.

That the official stenographer was busy with other matters and did not transcribe the evidence is not a sufficient excuse for failure to file transcript. Stewart *v.* Davis, 44 Mo. App. 562.

95. *Arkansas.*— Real Estate Bank *v.* Bizzell, 4 Ark. 189.

California.— Stark *v.* Barnes, 2 Cal. 162.

Colorado.— Swenson *v.* Girard F. & M. Ins. Co., 4 Colo. 475.

Illinois.— Little *v.* Smith, 5 Ill. 400. *Compare* Thomas *v.* John O'Brien Lumber Co., 185 Ill. 374, 56 N. E. 1113.

Kansas.— St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239.

Maryland.— Miller *v.* Gehr, 91 Md. 709, 47 Atl. 1032; Ellinger *v.* Baltimore, 90 Md. 696, 45 Atl. 884; Steiner *v.* Harding, 88 Md. 343, 41 Atl. 799; Brown *v.* Ravenscraft, 88 Md. 216, 44 Atl. 170; Garritee *v.* Popplein, 73 Md. 322, 20 Atl. 1070; Hardt *v.* Birely, 72 Md. 134, 19 Atl. 606.

Missouri.— It is a good excuse if the clerk fails, after he has been promptly directed to make out a perfect transcript, to notify appellant of the completion of the transcript in time for filing. State *v.* Gage, 50 Mo. App. 201, 52 Mo. App. 464.

New York.— Vreedenburgh *v.* Calf, 7 Paige (N. Y.) 419.

Ohio.— Broerman *v.* Townsend, 8 Ohio Dec. (Reprint) 258, 6 Cinc. L. Bul. 722; Pugh *v.* Corwine, 1 Ohio Dec. (Reprint) 451, 10 West. L. J. 79.

Oregon.— State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

Pennsylvania.— See Humphreys *v.* Darling, 6 Knlp (Pa.) 200.

Tennessee.—Laymance *v.* Laymance, 15 Lea (Tenn.) 476.

Texas.— See Davis *v.* American Freehold Land Mortg. Co., 12 Tex. Civ. App. 37, 33 S. W. 271.

Vermont.— See Lillie *v.* Lillie, 56 Vt. 714.

Washington.— Freeburger *v.* Gazzam, 5 Wash. 491, 31 Pac. 319 (where the delay was the result of the misapprehension of the clerk as to his duty); Callahan *v.* Houghton, 2 Wash. 539, 27 Pac. 175. See also *infra*, this note.

United States.— U. S. *v.* Vigil, 10 Wall. (U. S.) 423, 19 L. ed. 954. And see U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212.

See 3 Cent. Dig. tit. "Appeal and Error," § 2751 *et seq.*

In some states, by statute, the mere failure of the clerk to perform his duty within the time prescribed works no injury to the party. Farrar *v.* Oglesby, 84 Ga. 188, 11 S. E. 133. But, if the officer is prevented from performing his legal duty by the acts of appellant or his attorney, the delay will not be tolerated. Ashley *v.* Howard, 99 Ga. 132, 24 S. E. 875; Bernd *v.* Pritchett, 84 Ga. 730, 11 S. E. 396; Farrar *v.* Oglesby, 84 Ga. 188, 11 S. E. 133; State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25 [*citing* Callahan *v.* Houghton, 2 Wash. 539, 27 Pac. 175; Crawford *v.* Haller, 2 Wash. Terr. 161, 2 Pac. 353].

Where the fault of the clerk is shown by the clerk's own certificate, it is sufficient unless what the clerk states is disputed or controverted by appellee, in which case the question must be determined upon affidavits taken under the order of the court. Lewin *v.* Simpson, 38 Md. 468.

96. *Alabama.*— Arrington *v.* Howell, 4 Port. (Ala.) 317.

Louisiana.— State *v.* Clerk Eleventh Judicial Dist. Ct., 46 La. Ann. 1289, 16 So. 207; McDowell *v.* Read, 5 La. Ann. 42.

Michigan.— Carne *v.* Hall, 7 Mich. 159; Lathrop *v.* Hicks, 2 Dougl. (Mich.) 223.

Missouri.— Caldwell *v.* Hawkins, 46 Mo. 263; McCaffery *v.* Memphis, etc., R. Co., 31 Mo. App. 340; Dean *v.* Jones, 27 Mo. App. 468.

Nebraska.— Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211; Oppenheimer *v.* McClay, 30 Nebr. 654, 46 N. W. 915; Cheney *v.* Buckmaster, 29 Nebr. 420, 45 N. W. 640; Union Pac. R. Co. *v.* Marston, 22 Nebr. 721, 36 N. W. 153; Gifford *v.* Republican Valley, etc., R. Co., 20 Nebr. 538, 31 N. W. 11; Republican Valley R. Co. *v.* McPherson, 12 Nebr. 480, 11 N. W. 739.

North Carolina.— Muzzell *v.* Lee, 23 N. C. 411, 413 note; Hester *v.* Hester, 20 N. C. 376.

Ohio.— *In re* Sears, 7 Ohio Dec. (Reprint) 253, 5 Ohio N. P. 116.

Tennessee.— Gillespie *v.* Goddard, 1 Heisk. (Tenn.) 777; Porter *v.* Cocke, Mart. & Y. (Tenn.) 264.

Texas.— Reynolds *v.* Dechaumes, 22 Tex. 116.

See 3 Cent. Dig. tit. "Appeal and Error," § 2751 *et seq.*

97. In the absence of proof, it will be presumed that he went to the clerk's office after business hours. Buckley *v.* Lacroix, 14 La. Ann. 29. In Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477, appellant's excuse was accepted where he showed that he carried the transcript to the door of the clerk's office at five o'clock, on the last day of filing. See 3 Cent. Dig. tit. "Appeal and Error," § 2763.

(7) MISTAKE. A mere mistake of fact or of law, for which appellee is not responsible, will not excuse the failure to file within the prescribed time.[98] It has been held, however, that a mistake as to the construction of a statute relating to the time of filing is good cause for failure to file in time.[99]

(8) PENDENCY OF NEGOTIATIONS FOR COMPROMISE. That negotiations are pending for a compromise is no reason for not seasonably filing the transcript.[1]

(9) PENDENCY OF PROCEEDINGS TO PERFECT APPEAL. A failure to seasonably file a transcript, or causing an incomplete transcript to be filed, in the appellate court, which failure is due to the pendency of proceedings to perfect the appeal or settle the case or exceptions, is ordinarily excusable, it appearing that appellant had done all that is required of him to entitle him to a settlement of the bill of exceptions, case, or statement.[2]

The rule applies with equal force where the clerk ineffectually attempts to send up the transcript as where he wholly forbears from doing so, unless the attempt be such as, if made by the party himself, would have been deemed a substantial compliance with the requirements of the law. Hester *v.* Hester, 20 N. C. 376.

98. *Florida.*—Rain *v.* Thomas, 12 Fla. 493.

Louisiana.— Gill *v.* Hudson, 14 La. 203, where appellant's mistake was in supposing that the clerk had filed the transcript.

Missouri.— Ellis *v.* Wyatt, 10 Mo. App. 580.

Nebraska.— Howard *v.* Goodrich Lodge Hall Assoc., 41 Nebr. 700, 60 N. W. 82.

Pennsylvania.— Humphreys *v.* Darling, 6 Kulp (Pa.) 200.

South Carolina.—Lamb *v.* Padgett, 45 S. C. 534, 23 S. E. 628 (where appellant's counsel thought he could not file the return till the judge had settled the case); Harman *v.* Lexington, 32 S. C. 583, 10 S. E. 552 (where a motion to reinstate was made, on the ground of appellant's belief that the filing had been done within the required time); Ihley *v.* Thompson, 32 S. C. 582, 10 S. E. 550; Calvo *v.* Railroad Co., 30 S. C. 608, 10 S. E. 389 (where appellant thought that the pendency of a motion to vacate the judgment prevented him from proceeding). See also Ballew *v.* Anderson, 31 S. C. 602, 9 S. E. 743, to the effect that a local practice cannot take the place of a rule of court.

Washington.— See Tustin *v.* McFarland, 4 Wash. 103, 29 Pac. 929, where appellant sought to excuse delay in filing briefs by the excuse that he was not sure whether the delayed filing of the transcript was sufficient.

United States.— In Owings *v.* Tiernan, 10 Pet. (U. S.) 447, 9 L. ed. 489, however, where appellants had lodged the transcript with the clerk, who refused to file the same till the fee bond was executed, and appellants refused to execute the fee bond, supposing that they had done all that the law required them to do, the court refused to dismiss, and allowed additional time.

See 3 Cent. Dig. tit. "Appeal and Error," § 2757.

Mistake relieved from under provisions of a statute.— In Tribble *v.* Poore, 28 S. C. 565, 6 S. E. 577, where the delay had arisen through the mistake of appellant's counsel in supposing that the case formed part of the return, the court, being satisfied that the appeal was taken in good faith and not for delay, held that the case came within S. C. Code, § 349, providing that, when any party shall omit, through mistake or inadvertence, to do any act necessary to perfect an appeal, the supreme court may, in its discretion, permit such act to be done on such terms as may be just. See also Cummings *v.* Wingo, 30 S. C. 611, 9 S. E. 658. It having been frequently pointed out, however, that the case forms no part of the return, recent cases have held such a mistake inexcusable. See Lamb *v.* Padgett, 45 S. C. 534, 23 S. E. 628.

99. Gulf, etc., R. Co. *v.* McMahan, (Tex. Civ. App. 1892) 20 S. W. 954, it appearing that there was uncertainty surrounding the statutory provisions and a lack of any authoritative construction. See also Nottingham *v.* McKendrick, (Oreg. 1899) 57 Pac. 195, where the delay was caused by a misunderstanding of the rule.

1. British, etc., Mortg. Co. *v.* Long, 116 N. C. 77, 20 S. E. 964. Similarly, in Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150, it was held that a motion to affirm a judgment for want of an abstract and argument should be denied where the failure to file was due to pending negotiations for a settlement, and, upon the failure of such negotiations, full abstracts and arguments were filed.

2. *California.*—*In re* Walkerly, (Cal. 1894) 37 Pac. 893; Matter of Burton, 93 Cal. 613, 29 Pac. 224; Hyde *v.* Boyle, (Cal. 1890) 24 Pac. 1060.

Missouri.— Kirkwood *v.* Cairns, 40 Mo. App. 631, holding, however, that an appellant fails to show conclusively that he could not, by the use of reasonable diligence, have filed a complete transcript in the appellate court by showing that an extension of time to file his bill of exceptions was granted, extending over the time for filing the transcript, unless he shows also that the extension was necessary.

Nebraska.— But in Omaha L. & T. Co. *v.* Ayer, 38 Nebr. 891, 57 N. W. 567, an equity cause, it was held that, the statutory provision requiring appeals in equity causes to be taken within six months, being mandatory (Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992), and jurisdiction being conferred

j. Manner of Transmission. The manner in which the transcript shall be transmitted is left to appellant's option, and he uses any method at his own peril,[3] statutory provisions relating to the transmission being considered as merely directory.[4]

k. Sufficiency of Filing. Not only must appellant see that the appeal papers are transmitted to, and filed in, the appellate court,[5] but it is also his duty to see that they are filed and entered on the docket in the proper manner.[6]

by filing transcript of pleadings and final decree (Schuyler *v.* Hanna, 28 Nebr. 601, 44 N. W. 731, 11 L. R. A. 321), the failure to file transcript within the time limited would not be excused by inability of appellant, without any fault of his, to procure allowance of bill of exceptions within such time.

South Carolina.— In Donahue *v.* Enterprise R. Co., 33 S. C. 608, 12 S. E. 560, 665, appellee's amendments to the case not having been agreed to, the case was referred to the judge for settlement, who allowed the amendments, but, at the request of both parties, allowed the omission of such formal facts as counsel should agree upon. It was held that appellant was not justified in omitting to file within the proper time, because it would have entailed upon him some inconvenience to do so, in view of the interlineations and corrections made by such subsequent agreement. See also Beattie *v.* Latimer, 41 S. C. 552, 19 S. E. 748, holding that, the case as prepared for argument being no part of the return, an inadvertent delay in settling it is not ground for reinstating an appeal, dismissed by the clerk for failure to file the return in season.

Washington.—Norager *v.* Norwald, 3 Wash. Terr. 246, 14 Pac. 593.

See 3 Cent. Dig. tit. "Appeal and Error," § 2761.

Exceptions to rulings after judgment.— But it is no excuse for failure to file in time that a bill of exceptions, taken to rulings on motions made subsequent to entry of judgment, had not been settled. Pignaz *v.* Burnett, 121 Cal. 292, 53 Pac. 633.

Motion to dismiss on this ground will be denied, where the notice of such motion is given before the settling of the bill of exceptions. Reay *v.* Butler, (Cal. 1890) 25 Pac. 350, where the bill of exceptions was settled only two days before the return of the notice. And see Matter of Scott, 124 Cal. 671, 57 Pac. 654, where the statement was settled subsequent to the giving of the notice to dismiss.

Where the full time allowed for settling has elapsed without appellant having taken any step in the matter, he cannot excuse his failure to file the transcript on the ground that the bill of exceptions is not settled. Smith *v.* Solomon, 84 Cal. 537, 24 Pac. 286.

Where the time for a statement on appeal in the lower court has expired, the presentation of such statement, after a motion to dismiss in the appellate court has been made for want of transcript, is not an excuse that will prevent dismissal. Buckley *v.* Althoff, (Cal. 1890) 24 Pac. 635.

3. Placing the document in the hands of an express company, to be forwarded to the clerk for filing, is not the equivalent of filing. Ward *v.* Healy, 110 Cal. 587, 42 Pac. 1071. And see Blackburn *v.* Blackburn, 16 Tex. Civ. App. 564, 42 S. W. 132.

Showing that transcript was forwarded by mail by the clerk of the lower court, appellant making no effort to learn of its arrival or non-arrival, is not a showing of the diligence required by law. Hathaway *v.* Smith, 3 Ark. 248.

4. In Beebe *v.* Young, 13 Mich. 221, it was held that a statutory provision, requiring the return to be transmitted to the nearest clerk's office, was not designed for the protection of the rights of parties, but only to promote the orderly transaction of business, and was to be regarded as directory only.

Compare, however, Best *v.* Young, 6 Wis. 67, wherein it is held that, if it is required that the clerk shall attach together and file certain papers which shall constitute the judgment-roll, sending up in an envelope a number of papers not attached is not sufficient.

See 3 Cent. Dig. tit. "Appeal and Error," § 2743.

Requirement that papers are to be "enveloped" when transmitted means simply that they should be securely wrapped. It does not require that they should be sent under seal. Harring *v.* Barwick, 24 Ga. 59.

5. See *supra,* XIII, I, 2, b.

6. Furthman *v.* McNulta, 182 Ill. 310, 55 N. E. 371; Grunow *v.* Menge, 36 La. Ann. 925; Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737. But see Brafford *v.* Reed, 124 N. C. 345, 32 S. E. 726, to the effect that, when a case on appeal comes into possession of the clerk of the supreme court, it is his duty to docket it at once.

See 3 Cent. Dig. tit. "Appeal and Error," § 2743; and *supra,* VII, F [2 Cyc. 876].

File-marks are but evidence of filing, and, if the necessary papers are transferred to the office of the clerk of the appellate court, this is a sufficient filing without additional file-marks. Nimmons *v.* Westfall, 33 Ohio St. 213. See also Newman *v.* Clyburn, 40 S. C. 549, 18 S. E. 889 (where the case was delivered at the clerk's office on the last day of the time allowed, but not marked "Filed" by him till the next day); Aultman *v.* Utsey, 33 S. C. 611, 12 S. E. 628 (where the papers were taken from the office of the clerk for the use of the printer before they had been marked "Filed").

Marking as filed in the lower court.— In Holmes *v.* Parker, 2 Ill. 567, a writ of certiorari was granted to have a true record sent up, because, among the papers sent up in the record, were some that had not been marked "Filed" in the court below.

3. Withdrawal and Refiling. Appellant will be allowed to withdraw the transcript and supply defects and omissions in his appeal.[7] On refiling a record which has been withdrawn, plaintiff in error should comply with all the statutory requirements.[8]

4. Service of Copies — a. Necessity. When required by statute or rule of court to do so, a party appealing must serve on appellee or respondent a copy of the papers on appeal within the time prescribed for so doing.[9]

Obvious mistakes, which do not tend to prejudice either party, will be ignored. McClellan *v.* Pycatt, 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

7. Glenn *v.* Botts, 79 Ga. 212, 9 S. E. 425; Nichols *v.* Fraser, 54 Ga. 696; Miller *v.* Jasper, 10 Tex. 513 (in which case it was held that, where appellant had filed his transcript before he was compelled to, he might, on motion, withdraw it); Porter *v.* Foley, 21 How. (U. S.) 393, 16 L. ed. 154; Ballance *v.* Forsyth, 21 How. (U. S.) 389, 16 L. ed. 143. See 3 Cent. Dig. tit. "Appeal and Error," § 2723. *Compare* Brafford *v.* Reed, 124 N. C. 345, 32 S. E. 726, wherein it is said that, when the transcript reaches the clerk, it becomes a record of the appellate court, and neither party to the appeal has thereafter any control over it.

If an application for a supersedeas be overruled, the transcript of the record must remain with the clerk of the court applied to, unless the court refused to decide on the merits of the errors assigned, for want of jurisdiction. Whitney *v.* Douds, Hard. (Ky.) 373.

Where, after argument and before decision, counsel for plaintiff in error moved to withdraw the bill of exceptions, on the ground that the case had not been settled, the motion will be granted even though other counsel, who were interested in the decision but did not represent the original parties, objected. Glenn *v.* Botts, 79 Ga. 212, 9 S. E. 425. But see, however, Green *v.* Southern Express Co., 41 Ga. 515, and Chambers *v.* O'Brian, 14 Tex. 205, to the effect that the record should at all times be guarded with vigilance, and that, after a cause has been argued and submitted, the withdrawal of the record might seriously impede the course of justice, and neither party should be permitted to take it out of the clerk's office. So, also, when a case has been finally determined in the appellate court, important rights depending upon the judgment may be acquired by third parties, and sound policy demands that the transcript upon which the case has been decided should be carefully preserved, and not withdrawn even with the consent of the parties. Hart *v.* West, 92 Tex. 416, 49 S. W. 361. To the same effect see Cheney *v.* Hughes, 138 U. S. 403, 11 S. Ct. 303, 34 L. ed. 993.

Where the transcript has been prematurely sent up by defendant in error before errors have been assigned, the proper course for plaintiff in error is to file an assignment, and then apply for a new transcript, and not to move to withdraw the assigned errors. Hutchinson *v.* Owen, 20 Tex. 287.

Withdrawal by appellant of the entire record on appeal, leaving nothing of the case in the supreme court after the expiration of the six months from the rendition of the decree, without any saving order as to appellant's rights under the appeal, is equivalent to a voluntary dismissal of the appeal. Jefferson County *v.* Saxon, 10 Nebr. 14, 4 N. W. 309.

Withdrawn to be used in another proceeding.— Leave will be granted to withdraw the record from the supreme court, in order to be used in the appellate court on a motion to tax costs, the record to be returned after use. Highway Com'rs *v.* People, 100 Ill. 474.

Withdrawn without leave of court.— But where the transcript was filed before errors were assigned, and was afterward withdrawn, without leave, that errors might be assigned and made part of the record, and was not again filed before the expiration of the time limited, the appeal was dismissed. Flanagan *v.* McClarty, 10 Tex. 286.

8. Nichols *v.* Fraser, 54 Ga. 696.

Where the transcript has been prematurely filed appellant may, on motion, withdraw it, and, upon returning it to the clerk with a copy of the assignment of errors attached, it may be refiled; or, if he returns it with such a copy and requests the clerk, in the presence of the appellee's attorney, to attach it, it is sufficient even though the clerk refuses to do so. Miller *v.* Jasper, 10 Tex. 513.

9. Wade *v.* De Leyer, 63 N. Y. 318; Wright *v.* New York, 13 N. Y. St. 153. See 3 Cent. Dig. tit. "Appeal and Error," § 2773 *et seq.*

A rule requiring, in effect, that respondent be served with a copy of the judgment-roll is not abrogated by a statutory provision requiring appellant to furnish the court with such copy. Livingston *v.* Miller, 1 Code Rep. (N. Y.) 117.

Effect of discontinuance of call.— It is held in Missouri that, where the hearing of a call is ordered continued, this is tantamount to an order for a resetting of the docket, and, if counsel prepare and serve their abstracts and briefs in time for the day on which the case is set, they will not be deemed in default. Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059.

Rule applies to appeals pending at the time of its adoption. Dresser *v.* Brooks, 2 N. Y. 559.

Service not necessary on one not a party.— In Holliman *v.* Hawkinsville, 109 Ga. 107, 34 S. E. 214, a bill of exceptions was sued out to review a certiorari to a judgment of a municipal court, where there had been conviction for violating a municipal ordinance, and it was held that, the state not being a party, there need be no service on the solicitor-general.

b. Effect of Failure to Serve. Appellant cannot be deprived of the full time allowed in which to serve the papers.[10] But if he fails to serve a copy of the record or other papers within the time allowed, as a general rule his appeal will be dismissed on motion as a penalty for the delay.[11]

c. Excuse For Failure to Serve. The rule to dismiss for a failure to serve appeal papers within the prescribed time [12] is in the public interest and to promote the dispatch of business,[13] and, however hard its enforcement may seem in individual cases, the court is bound to look at both sides, and will, generally, grant the motion.[14] The facts that the case was so bulky that it could not be

Service must be made upon all of the opposite parties or their attorneys. It is not sufficient to serve one where there are several. Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829.

Where a joint and several judgment is rendered against a number of defendants, and proceedings in error are instituted by a part of the defense, the other defendants must be served with a copy of the case. Eaton *v.* Mendenhall, (Kan. 1896) 44 Pac. 683.

Where there are several plaintiffs in error, or appellants, it is sufficient if one of them serves a copy of the transcript on the opposite party or his attorney. Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829.

10. Ford *v.* Lyons, 40 Hun (N. Y.) 557, where the special term attempted to shorten the time.

11. *Georgia.*— Bradley *v.* Sadler, 57 Ga. 191.

Kansas.— Kauter *v.* Entz, 8 Kan. App. 788, 61 Pac. 818.

Michigan.— Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

Missouri.— Chinn *v.* Davis, 18 Mo. App. 539.

New York.— Dresser *v.* Brooks, 2 N. Y. 559; Wetter *v.* Erichs, 21 N. Y. App. Div. 475, 47 N. Y. Suppl. 688.

South Carolina.— Caldwell *v.* Davis, 35 S. C. 607, 14 S. E. 361; Rogers *v.* Nash, 12 S. C. 559.

See 3 Cent. Dig. tit. "Appeal and Error," § 2773 *et seq.*

A failure to serve a substantially correct copy is equivalent to want of service. Green *v.* McMann, 79 Cal. 561, 21 Pac. 964. However, in Allen *v.* Lewis, 38 Fla. 115, 20 So. 821, the paging of the copy served was different from that of the original, but appellee was not allowed to gain advantage from this, because he refused to surrender it to appellant for correction within the time allowed for service. And see People *v.* Infant Asylum, 4 N. Y. St. 669, where the papers were returned with objections.

File-marks need not appear in the copy served. Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

If some defendants are not interested in the appeal, a motion to dismiss, on the ground that the statement was not served on all the adverse parties, will be denied. Dore *v.* Dougherty, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48.

In North Carolina it is held that the proper way to take advantage of a failure of appellants to serve a case-stated on appeal is, in the absence of errors appearing in the record or properly assigned, to move to affirm the judgment. Howell *v.* Jones, 109 N. C. 102, 13 S. E. 889; Walker *v.* Scott, 102 N. C. 487, 9 S. E. 488.

Remedy by dismissal not exclusive.—Brown *v.* Niess, 46 How. Pr. (N. Y.) 465. And see Wright *v.* New York, 14 Daly (N. Y.) 349.

Service of imperfect case.— In Bowers *v.* Tallmadge, 20 How. Pr. (N. Y.) 516, it was held there could be a motion to dismiss only where there has been a total failure to serve the case within the time required. Upon service of an imperfect case the remedy is by motion to amend.

To justify the court in dismissing the cause for failure of service appellee must take advantage of such failure in the manner and at the time prescribed in the rule. Mora *v.* Schick, 4 N. M. 158, 13 Pac. 341. And it has been held that an order of dismissal for such a cause cannot be regularly entered, if service has actually been made. By failure to follow up his advantage, respondent waives the laches of appellant. Flanders *v.* McDonald, 39 Wis. 288; Hundhausen *v.* Atkins, 36 Wis. 250. So, an objection that the statement was not authenticated, as not being signed, cannot be made by appellee when, without objection, he accepted service from appellant's attorney of a statement indorsed: "Defendant's Statement of the Case." Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458.

Question raised after commencement of argument.—In Davis, etc., Bldg., etc., Co. *v.* Riverside Butter, etc., Co., 84 Wis. 262, 54 N. W. 506, the court refused to entertain a motion to dismiss for failure to serve within the proper time, made after the argument had been commenced.

Under a rule requiring service of copies within twenty days after the filing of the return, where the return had not been filed when notice requiring service was given, and no demand that the return be filed has been made as required by another rule, it was held, in Hogg *v.* Pinckney, 15 S. C. 616, that the notice was premature, and that the appeal should not have been dismissed for failure to comply with it.

12. See *supra*, XIII, I, 4, b.

13. Chinn *v.* Davis, 18 Mo. App. 539.

14. Lysaght *v.* Berkeley County Land, etc., Co., 41 S. C. 554, 19 S. E. 747.

Where the appeal is brought in good faith it has been held that a default in not serving

printed within the time allowed for service, and the party failed to ask for an extension of time,[15] or that respondent's former attorney declined to surrender exhibits used upon the trial, upon which exhibits the attorney claims a lien, are not sufficient excuses to prevent the application of the rule.[16] An oral agreement of counsel that the rule might be dispensed with will not, generally, be considered.[17]

J. Defects, Objections, Amendments, and Correction — 1. Effect of Defects or Omissions — a. In General. Where the transcript, return, case, or statement on appeal is so imperfect, by reason of defects or omissions therein, that the rights of the parties cannot properly be determined, the practice to be pursued varies in the different jurisdictions. In some, the appeal will be dismissed;[18] in others, the judgment below will be affirmed;[19] in others, an oppor-

papers within the time prescribed will be relieved against unless respondent shows some delay or inconvenience resulting therefrom. Waterman *v.* Whitney, 7 How. Pr. (N. Y.) 407. And see Jones *v.* Mann, 72 Fed. 85, 18 C. C. A. 442. *Compare* Matter of Boyd, 25 Cal. 511, wherein it was held that, if reasonable diligence has been used, the appeal will not be dismissed, though appellant will not be permitted to bring up the hearing on the first term against the objection of respondent that he has not had time since the service to prepare for argument.

15. Lysaght *v.* Berkeley County Land, etc., Co., 41 S. C. 554, 19 S. E. 747.

An affidavit of inability to print will not prevent an order of dismissal for failure to serve. Wallace *v.* Thomson, 36 S. C. 604, 15 S. E. 510.

16. Morris *v.* Josephs, 1 N. Y. City Ct. 82, assigning as a reason the fact that, upon proper motion, the court would compel the attorney to file such papers, which he had no legal right to suppress, as part of the evidence.

17. Ashe *v.* Glenn, 33 S. C. 606, 12 S. E. 423.

The burden of proof is upon a party claiming a waiver of service by agreement. Williams *v.* Pitt, 38 Fla. 162, 20 So. 936.

18. *Alabama.*— McRae *v.* Columhus Bank, 1 Ala. 578.

Arkansas.— Jackson *v.* Wight, 6 Ark. 387; McKee *v.* Murphy, 1 Ark. 19.

California.— Miller *v.* Thomas, 78 Cal. 509, 21 Pac. 11; Douglas *v.* Fulda, 54 Cal. 588.

Colorado.— Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Ph. Zang Brewing Co. *v.* Howlett, 6 Colo. App. 558, 42 Pac. 186.

Florida.— Adams *v.* Fry, 29 Fla. 318, 10 So. 559; Caulk *v.* Fox, 13 Fla. 147. *Compare* Sams *v.* King, 18 Fla. 552.

Georgia.— Wing *v.* Harris, 75 Ga. 236; Poppell *v.* Thigpen, 74 Ga. 412. See also Smith *v.* Wrightsville, etc., R. Co., 83 Ga. 671, 10 S. E. 361.

Indiana.— Indianapolis, etc., Gravel Road Co. *v.* Johnson, 44 Ind. 390.

Iowa.— McCoy *v.* American Emigrant Co., 76 Iowa 720, 39 N. W. 703; Perry *v.* Reineger, 61 Iowa 750, 16 N. W. 136. *Compare* Searles *v.* Haag, 85 Iowa 754, 52 N. W. 328.

Kansas.— Houck *v.* Medbery, (Kan. 1900) 60 Pac. 743; Kerndt *v.* Cheyenne County, 47 Kan. 6, 27 Pac. 183.

Kentucky.— Kentucky Mut. Security Fund Co. *v.* Turner, 14 Ky. L. Rep. 257, 19 S. W. 590.

Louisiana.— Sompeyrac *v.* Cable, 12 Mart. (La.) 431; Smith *v.* Kemper, 6 Mart. (La.) 563.

Maine.— Atkinson *v.* People's Nat. Bank, 85 Me. 368, 27 Atl. 255; Hunter *v.* Cole, 49 Me. 556.

Maryland.— Pannell *v.* Farmers Bank, 7 Harr. & J. (Md.) 202.

Michigan.— McCulloch *v.* Barnebee, 43 Mich. 622, 5 N. W. 676.

Missouri.— Lemp *v.* Pfund, 21 Mo. 114. *Compare* Atkinson *v.* Wykoff, 58 Mo. App. 86.

Nevada.— State *v.* Eberhart Co., 6 Nev. 186.

North Carolina.— Remanded, corrected by certiorari, or dismissed, in the discretion of the court. Clark's Code Civ. Proc. N. C. (1900), pp. 759, 760, 783, 784.

Pennsylvania.— Saxton's Estate, 195 Pa. St. 459, 46 Atl. 141.

Texas.— Clark *v.* Thompson, 42 Tex. 128; Ellis *v.* McKinley, 33 Tex. 675.

Utah.— Rotch *v.* Hamilton, 7 Utah 513, 27 Pac. 694.

Washington.—See Medcalf *v.* Bush, 4 Wash. 386, 30 Pac. 325; Squire *v.* Greer, 2 Wash. 209, 26 Pac. 222.

Wisconsin.— Superior Consol. Land Co. *v.* Superior, 104 Wis. 463, 80 N. W. 739; Green *v.* Stacy, 90 Wis. 46, 62 N. W. 627.

United States.— Burr *v.* Des Moines Nav., etc., Co., 1 Wall. (U. S.) 99, 17 L. ed. 561; Curtis *v.* Petitpain, 18 How. (U. S.) 109, 15 L. ed. 280.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2775, 2776.

Conditional dismissal.— Where the record is not prepared in accordance with the rules of court, the submission will be set aside, the transcript stricken from the files, and appellant allowed a certain time to file a transcript conforming to the rule. Martin *v.* Hudson, 79 Cal. 612, 21 Pac. 1135. See also Westcott *v.* Thompson, 16 N. Y. 613; Carpenter *v.* Shepardson, 43 Wis. 406.

19. *Georgia.*— Barnett *v.* New South Bldg., etc., Assoc., 105 Ga. 849, 32 S. E. 608.

Illinois.— Buckley *v.* Eaton, 60 Ill. 252; Johnson *v.* Bantock, 38 Ill. 111; Lewinsohn *v.* Stevens, 70 Ill. App. 307.

Indiana.— Cox *v.* Behm, 26 Ind. 307; Cunningham *v.* Thomas, 25 Ind. 171.

tunity will be afforded to correct the defects;[20] in others the cause will be remanded;[21] while yet in others the disposition of the case is dependent upon the discretion of the court, in view of all the circumstances.[22] Judgments of reversal have also been entered where the record fails to show facts necessary to the jurisdiction of the court below.[23] But an appeal will not be dismissed, nor the judgment affirmed, if any questions properly arise on the partial record.[24]

b. Particular Defects or Omissions — (i) *In Authentication or Certificate.* The due authentication of the transcript or return is necessary in order to confer jurisdiction on the appellate court, and, consequently, defects of a material character in the certificate of the judge or clerk below will necessitate the dismissal of the appeal or writ of error.[25] But mere formal or trivial defects are not ground for dismissal, and, where necessary, they may be corrected upon proper application.[26]

Kentucky.— Ford *v.* Smith, 13 Ky. L. Rep. 237; Stewart *v.* Hendon, 4 Ky. L. Rep. 265.
Maine.— Hunter *v.* Cole, 49 Me. 556.
Missouri.— Carradine *v.* Flannagan, 6 Mo. App. 589.
Utah.— Wild *v.* Union Pac. R. Co., (Utah 1901) 63 Pac. 886.

20. *California.*—Martin *v.* Hudson, 79 Cal. 612, 21 Pac. 1135.
Indiana.— Montgomery *v.* Gorrell, 49 Ind. 230.
Nebraska.— Hoagland *v.* Van Etten, 27 Nebr. 705, 43 N. E. 422.
New York.— Westcott *v.* Thompson, 16 N. Y. 613.
South Carolina.— Archer *v.* Long, 35 S. C. 585, 14 S. E. 24.
Wisconsin.— Carpenter *v.* Shepardson, 43 Wis. 406.

21. Walker *v.* Smith, 7 Mart. (La.) 563; Wyatt *v.* Lynchburg, etc., R. Co., 109 N. C. 306, 13 S. E. 779; State *v.* Farrar, 103 N. C. 411, 9 S. E. 449. Though it may be dismissed in the discretion of the court. State *v.* May, 118 N. C. 1204, 24 S. E. 118; Rice *v.* Guthrie, 114 N. C. 589, 19 S. E. 636.

22. Hoagland *v.* Van Etten, 27 Nebr. 705, 43 N. W. 422; Clark *v.* Gell, 17 Nebr. 284, 22 N. W. 562; State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210; Adams *v.* Mathis, 18 N. J. L. 310. See also Smith *v.* Wrightsville, etc., R. Co., 83 Ga. 671, 10 S. E. 361.

23. *Georgia.*— Worsham *v.* Murchison, 66 Ga. 715.
Illinois.— Keller *v.* Brickey, 63 Ill. 496; Miller *v.* Glass, 14 Ill. App. 177.
Indiana.— Fountain County *v.* Coats, 17 Ind. 150.
Missouri.— Cooper *v.* Barker, 33 Mo. App. 181.
Texas.— Larkin *v.* Fenn, (Tex. Civ. App. 1900) 59 S. W. 290; Houston, etc., R. Co. *v.* McGlasson, 1 Tex. App. Civ. Cas. § 1120.
Utah.— Spanish Fork City *v.* Thomas, 4 Utah 485, 11 Pac. 667.
United States.— Houston *v.* Filer, etc., Co., 104 Fed. 163, 43 C. C. A. 457.

24. *Colorado.*—Orman *v.* Keith, 1 Colo. 81.
Georgia.— Churchill *v.* Bee, 66 Ga. 621; Cutts *v.* Johnson, 49 Ga. 370.
Iowa.— Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810; Mayo *v.* Temple, 16 Iowa 585.
Louisiana.— Meyer *v.* Schurhruck, 37 La. Ann. 373; Waters *v.* Briscoe, 11 La. Ann. 639; Beard *v.* Poydras, 13 La. 82.
Mississippi.— Rankin *v.* Holloway, 3 Sm. & M. (Miss.) 614.
New York.— Keefer *v.* Keefer, 2 How. Pr. (N. Y.) 67.
South Dakota.— Ellis *v.* Wait, 4 S. D. 31, 54 N. W. 925.
Wisconsin.— Schraer *v.* Stefan, 80 Wis. 653, 50 N. W. 778.
Wyoming.— Dobson *v.* Owens, 5 Wyo. 85, 37 Pac. 471.

25. *California.*— Winder *v.* Hendrick, 54 Cal. 275.
Georgia.— Gresham *v.* Turner, 88 Ga. 160, 13 S. E. 946; McBride *v.* Beckwith, 67 Ga. 764.
Indiana.— Fidelity Bldg., etc., Union No. 4 *v.* Byrd, 154 Ind. 47, 55 N. E. 867.
Kentucky.— *Compare* Daniels *v.* Dils, 4 Ky. L. Rep. 836, in which it was held that, where a party has in good faith attempted to take an appeal to the circuit court from an inferior court, and his transcript is not properly certified, he should be allowed to have the defect cured even though a motion to dismiss has been made.
Louisiana.— No appeal to the supreme court shall he dismissed on account of any defect, error, or irregularity in the certificate of the clerk or judge. Garland's Rev. Code Prac. La. (1894), § 898; Edwards' Succession, 34 La. Ann. 216; Penn *v.* Evans, 28 La. Ann. 576. But where the defects are attributable to appellant it seems that the appeal may he dismissed. Edson *v.* McGraw, 37 La. Ann. 294. And, similarly, it is good ground for dismissal if appellant fails to have the certificate corrected after notice of existing defects. Hoover *v.* York, 33 La. Ann. 652.
Missouri.— See St. Louis *v.* Bird, 31 Mo. 88.
Nebraska.— Felber *v.* Boyd, 44 Nebr. 700, 62 N. W. 1059.
New Jersey.— Mere matter of verification cannot be assigned for error. Lutkins *v.* Den, 21 N. J. L. 337.
Texas.— Mays *v.* Forbes, 9 Tex. 436.
Wisconsin.— Dill *v.* White, 37 Wis. 617.
United States.— Blitz *v.* Brown, 7 Wall. (U. S.) 693, 19 L. ed. 280.
See 3 Cent. Dig. tit. "Appeal and Error," § 2789; and *supra*, XIII, H.

26. *Georgia.*— Moore *v.* Kelly, etc., Co., 109 Ga. 798, 35 S. E. 168; Fletcher *v.* Collier, 61 Ga. 653.

(II) *In Evidence.* In some jurisdictions, the failure to incorporate in the transcript or return all the evidence introduced, or offered and excluded, which is necessary to a decision upon the errors assigned, will cause the appeal or writ of error to be dismissed. In others, for cause shown, or in the discretion of the court, the case may be remanded, or certiorari issue, for insertion of omitted matter, or, in the absence of errors upon the face of the record proper, the judgment may be affirmed.[27]

(III) *In Findings or Judgment.* The omission from the transcript or return on appeal of the findings upon which the judgment or decree below was based will necessitate the dismissal of the appeal or writ of error.[28] So, where the transcript or return does not contain the judgment or decree appealed from,[29]

Indiana.— Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387.

Indian Territory.— Atchison, etc., R. Co. *v.* Young, (Indian Terr. 1899) 53 S. W. 481.

Mississippi.—Loper *v.* State, 3 How. (Miss.) 429.

South Dakota.— Starkweather *v.* Bell, 12 S. D. 146, 80 N. W. 183.

United States.— Idaho, etc., Land. Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433.

See 3 Cent. Dig. tit. "Appeal and Error," § 2790.

27. *Georgia.*— Turner *v.* Wilcox, 65 Ga. 299.

Iowa.— Donovan *v.* Hayes, 62 Iowa 36, 17 N. W. 109.

Louisiana.— Henri *v.* Francincues, 31 La. Ann. 856; Carrollton *v.* Magee, 19 La. Ann. 261; Hall *v.* Beggs, 17 La. Ann. 130; Harris *v.* Hays, 8 La. Ann. 433; Gilloutet *v.* Marcelin, 7 La. Ann. 442.

Missouri.— See Snider *v.* St. Louis, etc., R. Co., 73 Mo. 465.

North Carolina.— Brendle *v.* Reese, 115 N. C. 552, 20 S. E. 721; Boyer *v.* Teague, 106 N. C. 571, 11 S. E. 330.

Wisconsin.— Flint *v.* Jones, 5 Wis. 84.

See 3 Cent. Dig. tit. "Appeal and Error," § 2779.

Evidence offered, but not introduced by appellee.— In Stafford *v.* Harper, 32 La. Ann. 1076, the court refused to dismiss an appeal because documents offered, but not introduced in evidence by appellee, had not been transcribed in the record. See also Bethancourt *v.* Stephens, 19 La. Ann. 291.

Evidence missing at time of transcription — Remandment.— In Meyer *v.* Dupree, 25 La. Ann. 216, a clerk of the lower court certified that part of the evidence used in the court below was missing at the time the record was made out, and it was held that the appeal should be remanded, but not dismissed.

28. *In re* De Leon, (Cal. 1893) 35 Pac. 309; Wright *v.* Kuhn, 20 Md. 421; Wood *v.* Lary, 124 N. Y. 83, 26 N. E. 338, 35 N. Y. St. 53; Reinmiller *v.* Skidmore, 59 N. Y. 661; Jaycox *v.* Cameron, 49 N. Y. 645; Essex County Bank *v.* Russell, 29 N. Y. 673; Gamble *v.* Queens County Water Co., 4 N. Y. Suppl. 955, 20 N. Y. St. 917; Morrison *v.* McElrath, 20 N. C. 504. See 3 Cent. Dig. tit. "Appeal and Error," § 2780.

In Missouri the practice is to reverse the judgment below. Derrick *v.* Jewett, 21 Mo. 444; Farrar *v.* Lyon, 19 Mo. 122; Bates *v.* Bower, 17 Mo. 550.

The omission of the certificate of the judge as to the point decided is fatal, and the appeal will be dismissed. Wright *v.* Kuhn, 20 Md. 421.

Showing as to signing and filing.— Where the transcript on appeal does not show that the findings of fact and conclusions of law set out in it were signed and filed as required by statute, the appeal will be dismissed. *In re* De Leon, (Cal. 1893) 35 Pac. 309.

29. *Alabama.*— Moses *v.* Katzenberger, (Ala. 1887) 3 So. 302; Hall *v.* Cannon, 9 Port. (Ala.) 274.

California.— Savings, etc., Soc. *v.* Meeks, 66 Cal. 371, 5 Pac. 624.

Florida.— Endell *v.* Walls, 18 Fla. 697.

Georgia.— Strohecker *v.* Dessau, 72 Ga. 900. *Compare* Gunn *v.* Calhoun, 51 Ga. 501, in which a judgment, enforcing a decree of attachment in contempt, was affirmed, though such decree did not appear in the record.

Illinois.— Armstrong *v.* People, 74 Ill. 178; Siegel *v.* Schueck, 60 Ill. App. 429; Launtz *v.* Heller, 41 Ill. App. 528.

Indiana.— Ætna L. Ins. Co. *v.* Benson, 142 Ind. 323, 40 N. E. 797.

Kansas.— Ft. Scott *v.* Deeds, 36 Kan. 621, 14 Pac. 268.

Louisiana.— Adams *v.* Routh, 8 La. Ann. 121.

Maryland.—Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249.

Minnesota.— Anderson *v.* Kittell, 37 Minn. 125, 33 N. W. 330.

Mississippi.— Rogers *v.* McDaniel, 3 How. (Miss.) 172.

Missouri.— Price *v.* Brown, 63 Mo. 347; Dade County *v.* Burnett, 61 Mo. 388.

Montana.—Brunell *v.* Logan, 16 Mont. 307, 40 Pac. 597.

Nebraska.— Baker *v.* Kloster, 41 Nebr. 890, 60 N. W. 318.

New York.— Ridgway *v.* Bacon, 68 Hun (N. Y.) 506, 22 N. Y. Suppl. 1016, 52 N. Y. St. 600.

North Carolina.— Rosenthal *v.* Roberson, 114 N. C. 594, 19 S. E. 667; Merritt Milling Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4; Logan *v.* Harris, 90 N. C. 7. *Compare* Harvey *v.* Rich, (N. C. 1887) 1 S. E. 647, in which the cause was remanded.

Wisconsin.— Sayles *v.* Gudath, 9 Wis. 159.

See 3 Cent. Dig. tit. "Appeal and Error," § 2780.

or show that one was, in fact, rendered, the appeal or writ of error will be dismissed.[30]

(IV) *In Making Up Case, Statement, Transcript, or Return*—(A) *Case or Statement*—(1) In General. A case or statement of facts on appeal, not made up, settled, signed, and filed as required by statute, will, on motion in the appellate court, be stricken from the record;[31] and, in some jurisdictions, the appeal or writ of error will be dismissed or the judgment below affirmed.[32] But,

Though the transcript states that a judgment was rendered, the appeal will be dismissed if the judgment of the trial court does not appear in the record. Johnson *v.* McFall, 61 Mo. 413; Matter of Spencer, 61 Mo. 375.

30. *Alabama.*—Wagnon *v.* Keenan, 77 Ala. 519.

Colorado.—Winscott *v.* Shelton, 5 Colo. App. 357, 38 Pac. 595.

Florida.—Vanhorne *v.* Henderson, 37 Fla. 354, 19 So. 659; Tunno *v.* International R., etc., Co., 34 Fla. 300, 16 So. 180; Savage *v.* State, 19 Fla. 561; Sedgwick *v.* Dawkins, 17 Fla. 556.

Georgia.—McAndrew *v.* Augusta Mut. Loan Assoc., 57 Ga. 607; Smith *v.* Cook, 56 Ga. 661.

Illinois.—Harrison *v.* Singleton, 3 Ill. 21; Alton Lime, etc., Co. *v.* Calvey, 41 Ill. App. 597.

Indiana.—Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109; Reese *v.* Beck, 9 Ind. 238; Jeffersonville *v.* Tomlin, 7 Ind. App. 681, 35 N. E. 29.

Iowa.—Pittman *v.* Pittman, 56 Iowa 769, 2 N. W. 536; Shannon *v.* Scott, 40 Iowa 629; Heath *v.* Groce, 10 Iowa 591.

Kansas.—Russell *v.* Thompson, 1 Kan. App. 467, 40 Pac. 831.

Louisiana.—Bynum *v.* Hamilton, 19 La. Ann. 446.

Mississippi.—Parrott *v.* Poppenheimer, (Miss. 1895) 16 So. 911.

Missouri.—State *v.* Wymer, 79 Mo. 277; Conover *v.* Berdine, 58 Mo. 508; Dale *v.* Copple, 53 Mo. 321; State *v.* Miller, 39 Mo. 432; Mills *v.* McDaniels, 59 Mo. App. 331.

Texas.—St. Louis, etc., R. Co. *v.* Wills, (Tex. Civ. App. 1895) 29 S. W. 431.

See 3 Cent. Dig. tit. "Appeal and Error," § 2780.

31. *Iowa.*—Mitchell *v.* Laub, 59 Iowa 36, 12 N. W. 755.

Minnesota.—Mower *v.* Hanford, 6 Minn. 535. See also Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117.

Montana.—Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

North Dakota.—McTavish *v.* Great Northern R. Co., 8 N. D. 94, 76 N. W. 985.

Texas.—McGuire *v.* Newbill, 58 Tex. 314; Western Union Tel. Co. *v.* Walker, (Tex. Civ. App. 1894) 26 S. W. 858.

Washington.—Barkley *v.* Barton, 15 Wash. 33, 45 Pac. 654; Merchants' Nat. Bank *v.* Ault, 14 Wash. 701, 44 Pac. 129; Scott *v.* Bourn, 13 Wash. 471, 43 Pac. 372. *Compare* U. S. Savings, etc., Co. *v.* Jones, 9 Wash. 434, 37 Pac. 666. And see Rauh *v.* Scholl, 19 Wash. 30, 52 Pac. 332, in which it was held that a motion to strike out a statement of facts, because settled by a judge after his term of office had expired, will be denied where a certificate was also procured from his successor.

Wisconsin.—The supreme court will not entertain a motion for respondent to dismiss an appeal because of appellant's non-compliance with the rules respecting the mode of preparing the printed case, but will, on its own motion, make such order as may be proper. Pearson *v.* Martin, 38 Wis. 265.

See 3 Cent. Dig. tit. "Appeal and Error," § 2785.

Filing copy instead of original.—In Archer *v.* Long, 35 S. C. 585, 14 S. E. 24, it was held that the filing of a copy instead of the original case, as provided for in S. C. Cir. Ct. Rules, No. 49, was not ground for dismissing the appeal.

Filing original instead of copy.—It is no ground for striking the statement of facts from the transcript or dismissing the appeal that the clerk has sent up the original statement instead of a copy, such error not being prejudicial. Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Wilson *v.* Morrell, 5 Wash. 654, 32 Pac. 733.

Remandment for settlement.—In U. S. *v.* Adams, 6 Wall. (U. S.) 101, 18 L. ed. 792, it was held that, though the statement of facts by the court below did not comply with the rules of the supreme court, this would not affect the jurisdiction of the appellate court or be a ground for the dismissal of the case. The case should be remanded to be resettled.

Want of seal.—Even though a seal is required by statute, the want of it will not invalidate a statement of facts. Lacey *v.* Ashe, 21 Tex. 394. By permission of the appellate court, the seal may be attached to the clerk's certificate of a case-made which was settled and signed in due time, even after the expiration of the time to appeal. Atchison, etc., R. Co. *v.* Whitbeck, 57 Kan. 729, 48 Pac. 16.

32. Hughes *v.* Miller, 56 Kan. 183, 42 Pac. 696; Ship *v.* Cuny, 9 Mart. (La.) 91; Dubreuil *v.* Dubreuil, 5 Mart. (La.) 81; Davis *v.* Littel, 64 N. J. L. 595, 46 Atl. 631; Marjenhoff *v.* Marjenhoff, 40 S. C. 545, 18 S. E. 942. *Compare* Wilson *v.* Janes, 29 Kan. 233, in which it was held that a case-made will not necessarily be dismissed for the reason that it was changed by the judge below after, strictly speaking, it had passed from his jurisdiction, the alteration being one manifestly originally intended by both parties, and one which justice required should be made.

Waiver.—A petition in error will not be dismissed because the case for the supreme court was settled and signed without notice to defendant in error, if the latter acknowl-

where appellant or plaintiff in error is not chargeable with negligence, the error may be overlooked, and, where necessary, the case or statement remanded for resettlement.[33]

(2) Failure to Take Proceedings in Time. The effect of failure to make, settle, sign, or file a case or statement of facts in the prescribed time varies in different jurisdictions. In some the appeal or writ of error will be dismissed,[34] while in others the case or statement will be disregarded, and, in the absence of errors apparent upon the face of the record, the judgment below affirmed.[35]

(B) *Transcript or Return.* For a failure to comply with the rules of court as to the making of a transcript or return, the appeal or writ of error may be dismissed or continued, or the judgment below be affirmed or reversed, or such other order made as the court may direct.[36]

(V) *In Pleadings.* Where the transcript of the record on appeal or the return contains no pleadings, an appeal or writ of error will be dismissed,[37] or the

edged service of the case-made and afterward suggested amendments, all of which, of any importance, were made. Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 36 Kan. 99, 12 Pac. 338.

33. Arrington *v.* Arrington, 114 N. C. 115, 19 S. E. 145. See also Worley *v.* McIntire, (Tex. Civ. App. 1893) 23 S. W. 996.

34. *Arizona.*—Sandford *v.* Moeller, 1 Ariz. 362, 25 Pac. 534.

Iowa.— Wisconsin, etc., R. Co. *v.* Iowa Toilers' Protective Assoc., 70 Iowa 441, 30 N. W. 685.

Kansas.— Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247.

Louisiana.— Logan *v.* Winder, 20 La. Ann. 253; State *v.* Judge Second Dist. Ct., 13 La. Ann. 485; Hill *v.* Tippett, 10 La. Ann. 554.

South Carolina.— Mensing *v.* Jervey, 38 S. C. 557, 17 S. E. 29; McElhose *v.* Ludeke, 38 S. C. 552, 16 S. E. 771; Ridgeway *v.* Cutter, 36 S. C. 603, 15 S. E. 429; Bomar *v.* Means, 35 S. C. 591, 14 S. E. 24, 309.

See 3 Cent. Dig. tit. "Appeal and Error," § 2786.

35. *Arkansas.*— Gray *v.* Nations, 1 Ark. 557.

California.— Macomber *v.* Chamberlain, 8 Cal. 322.

Michigan.— Lake Shore, etc., R. Co. *v.* Chambers, 89 Mich. 5, 50 N. W. 741.

New York.— Brown *v.* Heacock, 9 How. Pr. (N. Y.) 345.

North Carolina.— Heath *v.* Lancaster, 116 N. C. 69, 20 S. E. 962; Twitty *v.* Logan, 85 N. C. 592.

Texas.—Attoway *v.* Goldsmith, (Tex. 1891) 18 S. W. 604; Ivey *v.* Williams, 78 Tex. 685, 15 S. W. 163; Broussard *v.* Sabine, etc., R. Co., 75 Tex. 702, 13 S. W. 68.

Washington.— Kenyon *v.* Knipe, 3 Wash. Terr. 243, 13 Pac. 759. But see Snyder *v.* Kelso, 3 Wash. 181, 28 Pac. 335, in which a motion to dismiss the appeal was sustained rather than an affirmance of the judgment below.

United States.— Avendano *v.* Gay, 8 Wall. (U. S.) 376, 19 L. ed. 422; Generes *v.* Bonnemer, 7 Wall. (U. S.) 564, 19 L. ed. 227.

36. *California.*— Donahue *v.* Mariposa Land, etc., Co., (Cal. 1884) 4 Pac. 881; Kellogg *v.* Mayer, 54 Cal. 583.

Indiana.— Smith *v.* State, 137 Ind. 198, 36 N. E. 708; Patterson *v.* Dennis, 80 Ind. 602; Conradt *v.* Sullivan, 45 Ind. 180, 15 Am. Rep. 261.

Kentucky.— Hawthorne *v.* McArthur, 7 Ky. L. Rep. 39; Brenner *v.* Renner, 4 Ky. L. Rep. 337. But the failure to file a schedule is no ground for dismissal where appellant brings up the entire record. Louisville, etc., R. Co. *v.* Brice, 83 Ky. 210; Bush *v.* Webster, 7 Ky. L. Rep. 215.

Louisiana.— Washburn *v.* Frank, 31 La. Ann. 427.

Montana.— Owsley *v.* Warfield, 7 Mont. 102, 14 Pac. 646.

New Mexico.— Gonzales *v.* Atchison, etc., R. Co., 3 N. M. 302, 9 Pac. 247.

Oklahoma.— Conkling *v.* Cameron, 3 Okla. 525, 41 Pac. 609.

Texas.— Wright *v.* Bonta, 19 Tex. 385; Womack *v.* Stokes, 9 Tex. Civ. App. 592, 29 S. W. 1113.

Virginia.— Litchford *v.* Day, 87 Va. 71, 12 S. E. 107.

Wyoming.— Jenkins *v.* Territory, 1 Wyo. 317.

See 3 Cent. Dig. tit. "Appeal and Error," § 2788.

Marginal notes.— An appeal will not be dismissed for violation of the rule requiring marginal notes on the transcript where the transcript is brief, the judgment chiefly assailed on the insufficiency of the pleadings, and the merits have been fully discussed. Bass *v.* Doerman, 112 Ind. 390, 14 N. E. 377; Lucas *v.* Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265.

Numbering folios.— In New Mexico it has been held that the rule requiring the numbering of the folios of the transcript is directory only, and the failure to comply with it is not ground for striking out the record. Farish *v.* New Mexico Min. Co., 5 N. M. 234, 21 Pac. 82.

In North Carolina it has been held that the rule is mandatory, but not necessarily ground for dismissal. Pretzfelder *v.* Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121.

37. *California.*—Hart *v.* Plum, 14 Cal. 148.

Georgia.— Slater *v.* Manes, 60 Ga. 594.

judgment will be affirmed,[38] or the cause remanded;[39] and, where it appears that no declaration was filed or issue joined, the judgment below will be reversed.[40]

(VI) *In Proceedings For Review.* An appeal or writ of error will be dismissed where the transcript or return fails to show affirmatively that all the steps necessary to a review — as the taking of the appeal or suing out of the writ of error,[41] the service of notice, where required,[42] the granting of the appeal,[43] and the filing of the required bond, which must be transcribed[44] — have been taken.

c. Immaterial Defects or Omissions. Where the transcript or return contains all that is necessary to the decision of the matters assigned as error, a motion to dismiss or affirm, on the ground of defects or omissions therein of an immaterial character, will not be sustained.[45]

Kansas.—Weaver *v.* Hall, 33 Kan. 619, 7 Pac. 238.

North Carolina.—Rice *v.* Guthrie, 114 N. C. 589, 19 S. E. 636; Bethea *v.* Byrd, 93 N. C. 141.

Texas.— Hubby *v.* Harris, 59 Tex. 14.

See 3 Cent. Dig. tit. "Appeal and Error," § 2778.

38. Galley *v.* Knapp, 14 Nebr. 262, 15 N. W. 329.

39. Bouligny *v.* White, 5 La. Ann. 31.

40. Chicago *v.* Brennan, 61 Ill. App. 247; Wakefield *v.* Pennington, 9 Ill. App. 374; Clagget *v.* Foree, 1 Dana (Ky.) 428; Ritchie *v.* Hastings, 2 Yeates (Pa.) 433; Marion Mach. Works *v.* Craig, 18 W. Va. 559.

41. *Alabama.*— Alabama, etc., River R. Co. *v.* Hungerford, 41 Ala. 388.

Iowa.— Swigart *v.* Jackson County, (Iowa 1896) 66 N. W. 881; Sanger *v.* Skidmore, 97 Iowa 742, 66 N. W. 176.

Missouri.— Clelland *v.* Shaw, 51 Mo. 440.

North Carolina.— Howell *v.* Jones, 109 N. C. 102, 13 S. E. 889; Randleman Mfg. Co. *v.* Simmons, 97 N. C. 89, 1 S. E. 923. *Compare* Fore *v.* Western North Carolina R. Co., 101 N. C. 526, 8 S. E. 335; Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338, holding that it was no ground for dismissal of the appeal that the record failed to show that any appeal was entered in the trial court where the case on appeal showed that it was duly taken and perfected.

South Dakota.— De Smet First Nat. Bank *v.* Northwestern Elevator Co., 2 S. D. 356, 50 N. W. 356.

Texas.— Hicks *v.* Gray, 25 Tex. 82.

United States.— Jacobs *v.* Jacobs, Hempst. (U. S.) 101, 13 Fed. Cas. No. 7,161*a*.

See 3 Cent. Dig. tit. "Appeal and Error," § 2781.

Showing as to authority to appeal.—Where the authority of one assuming to appeal as administrator is not shown by the transcript the appeal will be dismissed. Azemard *v.* Campo, McGloin (La.) 64.

42. *California.*— Pateman *v.* Tyrrel, 59 Cal. 320; Frederick *v.* Tierney, 54 Cal. 583.

Florida.— Kennesaw Mills Co. *v.* Bynum, 34 Fla. 360, 16 So. 276.

Idaho.— Anderson *v.* Knott, 1 Ida. 626.

Iowa.—Merchant *v.* Soleman, (Iowa 1895) 63 N. W. 464; Baer *v.* Merchants, etc., Ins. Co., 86 Iowa 752, 53 N. W. 287.

Kansas.— State *v.* Ashmore, 19 Kan. 544.

New York.— Cabre *v.* Sturges, 1 Hilt. (N. Y.) 160.

North Carolina.— Howell *v.* Jones, 109 N. C. 102, 13 S. E. 889.

South Dakota.—Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356.

Texas.—Attoway *v.* Goldsmith, (Tex. 1891) 18 S. W. 604; Thomas *v.* Thomas, 57 Tex. 516.

Utah.—Voorhees *v.* Manti City, 13 Utah 435, 45 Pac. 564.

Washington.— Merchants Nat. Bank *v.* Ault, 14 Wash. 701, 44 Pac. 129.

Wisconsin.— Shewey *v.* Manning, 14 Wis. 448.

See 3 Cent. Dig. tit. "Appeal and Error," § 2781.

43. *Arkansas.*— Neale *v.* Peay, 21 Ark. 93.

Louisiana.— Lewis *v.* Boyet, 45 La. Ann. 1220, 14 So. 119, 120.

Missouri.— Swank *v.* Swank, 85 Mo. 198; State *v.* Missouri Pac. R. Co., 84 Mo. 129.

North Carolina.— Moore *v.* Vanderburg, 90 N. C. 10.

Tennessee.— Craighead *v.* Rankin, 6 Baxt. (Tenn.) 131; Clark *v.* Lowry, 1 Overt. (Tenn.) 313; Simmons *v.* Leonard, (Tenn. Ch. 1895) 36 S. W. 846.

44. *California.*—Watson *v.* Cornell, 52 Cal. 644.

Louisiana.— Lewis *v.* Boyet, 45 La. Ann. 1220, 14 So. 119, 120.

North Carolina.— Manning *v.* Sawyer, 8 N. C. 37.

Texas.— Bastrop Corp. *v.* Gilmore, Dall. (Tex.) 573.

Washington.— Fisher *v.* Fisher, 9 Wash. 694, 38 Pac. 133.

Wisconsin.— Shewey *v.* Manning, 14 Wis. 448.

Omission of date of approval.— In Robinson *v.* Chadwick, 22 Ohio St. 527, it was held that an appeal would not be dismissed because the date of the approval of the bond did not appear in the record.

45. *Alabama.*— Richardson *v.* Farnsworth, 1 Stew. (Ala.) 55.

Georgia.—Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643.

Illinois.— Roach *v.* Glos, 181 Ill. 440, 54 N. E. 1022 [*affirming* 80 Ill. App. 283]; Auerbach *v.* Arguelles, 80 Ill. App. 167.

Indiana.—Hall *v.* Durham, 113 Ind. 327, 15 N. E. 529; Cooter *v.* Baston, 89 Ind. 185.

Iowa.— Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799; Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16.

Kentucky.— Hume *v.* Ben, 1 Bibb (Ky.) 402; McIlvoy *v.* Russell, 8 Ky. L. Rep. 523.

d. Inclusion of Unnecessary Matter. The practice of the courts varies as to the disposition of an appeal or writ of error where the transcript, return, case, statement, or abstract is encumbered with unnecessary matter. The true rule would seem to be that the appellate court, in the absence of statutory enactment on the subject, will be guided by the circumstances of each case, and make such order as will be most just and equitable.[46]

2. Amendment and Correction[47]— a. Defects or Errors Which May Be Amended or Corrected. Defects or errors in a transcript or return on appeal, when not of a jurisdictional character, are, as a rule, amendable, in the discretion of the court, where laches is not imputable to the applicant.[48] They must,

Louisiana.— Hebert *v.* Mayer, 47 La. Ann. 563, 17 So. 131; Rogers *v.* Gibbs, 25 La. Ann. 563.

Michigan.— Parker *v.* Fields, 48 Mich. 250, 12 N. W. 194; Campau *v.* Brown, 48 Mich. 145, 11 N. W. 845.

Ohio.—Sedam *v.* Meeksback, 6 Ohio Cir. Ct. 219.

Washington.— Freeburger *v.* Caldwell, 5 Wash. 769, 32 Pac. 732.

United States.— Dufau *v.* Couprey, 6 Pet. (U. S.) 170, 8 L. ed. 359; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 21 U. S. App. 50, 9 C. C. A. 468.

See 3 Cent. Dig. tit. "Appeal and Error," § 2777.

Omission of immaterial instructions.— Where the trial judge certified that the statement contained all the material facts in the case, it was held that the omission of an instruction not claimed to be material by appellees was no ground for dismissing the appeal. Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010.

Omission of immaterial issue.— In Dufau *v.* Couprey, 6 Pet. (U. S.) 170, 8 L. ed. 359, it was held that a writ of error would not be dismissed because one of the matters put in issue in the court below did not appear by the record to have been decided, where the issue actually found made the other issues immaterial.

46. Affirmance.—Ansley *v.* Davidson, 110 Ga. 279, 34 S. E. 611; Cressey *v.* Lochner, 109 Iowa 454, 80 N. W. 531; Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638.

Amercement in costs of party at fault.— Murrell *v.* McCallister, 78 Ky. 73; Richmond Cedar Works *v.* Kilby, 126 N. C. 33, 35 S. E. 186; Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679; Blackwell Durham Tobacco Co. *v.* McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404; Williams *v.* House, (Tex. Civ. App. 1898) 45 S. W. 960; Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556; Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431.

Dismissal.— Delk *v.* Pickens, 92 Ga. 576, 17 S. E. 862; McDermott *v.* Iowa Falls, etc., R. Co., (Iowa 1891), 47 N. W. 1037. But when the judge makes the statement of facts a needless encumbering of the record with questions and answers it is no ground for the dismissal of the appeal (McManus *v.* Wallis, 52 Tex. 534), or for striking out the statement of facts (Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684). Similarly, an appeal will not be dismissed on the ground that the certificate of the clerk contains more than is necessary. Simon *v.* Walker, 26 La. Ann. 603.

Refusal to consider case.— Burr *v.* Des Moines Nav., etc., Co., 1 Wall. (U. S.) 99, 17 L. ed. 561. See also Heidenheimer *v.* Tannenbaum, 23 Tex. Civ. App. 567, 56 S. W. 776.

Rejection of unnecessary matter.— *California.*—Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

Iowa.— Garrett *v.* Bicklin, 78 Iowa 115, 42 N. W. 621; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Michigan.—Matter of Wisner, 20 Mich. 128; Heimbach *v.* Weinberg, 18 Mich. 48.

Nevada.— Paul *v.* Cragnas, 25 Nev. 293, 59 Pac. 857, 47 L. R. A. 540.

Oregon.— Osborn *v.* Graves, 11 Oreg. 526, 6 Pac. 227.

Wisconsin.— Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487.

United States.— Tuttle *v.* Claflin, 88 Fed. 122, 31 C. C. A. 419.

Remandment for resettlement.— Smith *v.* New York Cent., etc., R. Co., 30 Hun (N. Y.) 144.

Striking from record.— Seekell *v.* Norman, 76 Iowa 234, 40 N. W. 726; Mayall *v.* Burke, 10 Minn. 285; Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863; Brown *v.* Vizcaya, (Tex. Civ. App. 1899) 54 S. W. 636. *Compare* Oriental Invest. Co. *v.* Barclay, 93 Tex. 425, 55 S. W. 1111. And see Gulf, etc., R. Co. *v.* Mitchell, 21 Tex. Civ. App. 463, 51 S. W. 662, in which it was held that a statement would not be stricken as unnecessarily voluminous where the prevailing party refused to agree to a shorter statement, which plaintiff in error tendered him.

See 3 Cent. Dig. tit. "Appeal and Error," § 2783.

47. As to certiorari to bring up record see *infra*, XIII, J, 4.

48. *California.*— Duffy *v.* Duffy, 104 Cal. 602, 38 Pac. 443.

Kentucky.— Ford *v.* Cullins, 21 Ky. L. Rep. 927, 53 S. W. 646.

Massachusetts.—Wingate *v.* Com., 5 Cush. (Mass.) 446.

New Jersey.— Emery *v.* King, 64 N. J. L. 221, 44 Atl. 971.

New York.— Tracey *v.* New York, etc., R. Co., 9 Bosw. (N. Y.) 615; Coster *v.* Phoenix, 7 Cow. (N. Y.) 524; Stakes *v.* Campbell, 7 Cow. (N. Y.) 425.

however, in order to allow their correction, either be apparent upon the face of the transcript or return, or be satisfactorily shown by affidavit or other evidence.[49]

b. Jurisdiction — (i) *Of Lower Court.* Defects and omissions in the record may be amended in the lower court in all cases where the amendment or correction is made before filing in the appellate court.[50] As to the power of the lower court to amend after the transcript or return has been filed above, except in the case of formal or trivial errors,[51] the decisions are hopelessly conflicting.[52]

(ii) *Of Appellate Court.* While the appellate court may make appropriate orders for the amendment or correction of a record by the lower court, it cannot, itself, make such amendments or corrections[53] save in cases of formal and

Oregon.— Skinner *v.* Lewis, (Oreg. 1900) 62 Pac. 523.

United States.— Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433.

See 3 Cent. Dig. tit. "Appeal and Error," § 2799.

Matters not of record.— The record on a writ of error cannot be amended by adding to it an agreement, entered into between counsel in the trial court, which was never a part of the record in that court. Johnson *v.* State, 2 Houst. (Del.) 378.

Matters of substance.— Leave to file a supplemental record, which will contain an amendment to a scire facias in respect to matters of substance, will not be allowed after error brought. Clelland *v.* People, 4 Colo. 244. See also Cregler *v.* Durham, 9 Ind. 375, in which it was held that an objection cannot be substituted, in the appellate court, for one made in the court below.

Mere clerical defects and omissions in a transcript or return on appeal may be amended. Rowland *v.* Tite, 110 Ga. 248, 34 S. E. 212; Gay *v.* Peacock, 41 Ga. 84; Tompkins *v.* Venable, 19 Ga. 33; Williamson *v.* Nabers, 14 Ga. 285; Guild *v.* Hall, 91 Ill. 223; Frink *v.* Schroyer, 18 Ill. 416; Lahens *v.* Fielden, 3 Abb. Dec. (N. Y.) 1.

Where effect is to substitute new record.— A motion to correct the record, where the effect will be to make another and different record than the one certified by the trial judge, will be denied. Eicholtz *v.* Holmes, 6 Wash. 297, 34 Pac. 151. See also Sullivan *v.* New York, etc., R. Co., (Conn. 1900) 47 Atl. 131.

49. Sowle *v.* Cosner, 56 Ind. 276; Wilson *v.* Me-ne-chas, 40 Kan. 648, 20 Pac. 468; Garrott *v.* Ratliff, 7 Ky. L. Rep. 463; Parsons *v.* Parsons, 1 Ky. L. Rep. 123.

50. By what judge.— A transcript or return should only be amended and corrected by the judge who tried the cause (Halstead *v.* Brown, 17 Ind. 202), and this is true even though his term of office has expired (Frazier *v.* Laughlin, 6 Ill. 185; Tappan *v.* Tappan, 31 N. H. 41).

51. Stephens *v.* Bradley, 23 Fla. 393, 2 So. 667; Jones *v.* Van Patten, 3 Ind. 107; Apgar *v.* Hiler, 24 N. J. L. 808; Boyer *v.* Teague, 106 N. C. 571, 11 S. E. 330.

52. Amendment allowed after filing.— *Indiana.*— Lake Erie, etc., R. Co. *v.* Bates, 17 Ind. App. 386, 46 N. E. 831.

Iowa.— De Wolfe *v.* Taylor, 71 Iowa 648, 33 N. W. 154; Reynolds *v.* Sutliff, 71 Iowa 549, 32 N. W. 502; Brier *v.* Chicago, etc., R. Co., 66 Iowa 602, 24 N. W. 232.

Kansas.— Hoffman *v.* Torslund, 6 Kan. App. 352, 51 Pac. 816.

Kentucky.— Keans *v.* Rankin, 2 Bibb (Ky.) 88.

Louisiana.— Lafonta *v.* McAllister, 4 Rob. (La.) 390. *Compare* Trenchard *v.* Elderkin, 3 La. 294.

Maine.— Treat *v.* Union Ins. Co., 56 Me. 231, 96 Am. Dec. 447.

Michigan.— Sears *v.* Schwarz, 1 Dougl. (Mich.) 504.

Minnesota.— See Dayton *v.* Craik, 26 Minn. 133, 1 N. W. 813.

New Hampshire.— Tappan *v.* Tappan, 31 N. H. 41.

New York.— McManus *v.* Western Assur. Co., 40 N. Y. App. Div. 86, 57 N. Y. Suppl. 559; O'Gorman *v.* Kamak, 5 Daly (N. Y.) 517. But see Adams *v.* Bush, 2 Abb. Pr. N. S. (N. Y.) 118.

Ohio.— Cleveland, etc., R. Co. *v.* Wick, 35 Ohio St. 247; Doty *v.* Rigour, 9 Ohio St. 526.

Oregon.— Bloch *v.* Sammons, 37 Oreg. 600, 55 Pac. 438, 62 Pac. 290; State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

Pennsylvania.— Clark *v.* Clark, 180 Pa. St. 186, 36 Atl. 747.

Tennessee.— Kimbro *v.* Continental Ins. Co., 101 Tenn. 245, 47 S. W. 413.

Wisconsin.— Falk *v.* Goldberg, 45 Wis. 94.

United States.— Lincoln Nat. Bank *v.* Perry, 66 Fed. 887, 32 U. S. App. 15, 14 C. C. A. 273; Whiting *v.* Equitable L. Assur. Soc., 60 Fed. 197, 8 C. C. A. 558.

See 3 Cent. Dig. tit. "Appeal and Error," § 2803.

Amendment not allowed after filing.— *Georgia.*— Perry *v.* Central R. Co., 74 Ga. 411.

Massachusetts.— McCarren *v.* McNulty, 7 Gray (Mass.) 139. But see Welch *v.* Damon, 11 Gray (Mass.) 383.

Missouri.— Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278.

Nevada.— Lamburth *v.* Dalton, 9 Nev. 64.

North Dakota.— Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Texas.— Davis *v.* McGehee, 24 Tex. 209; Evans *v.* Smith, 22 Tex. Civ. App. 472, 54 S. W. 1050.

United States.— Case *v.* Hall, 94 Fed. 300, 36 C. C. A. 259.

53. Numerous authorities support the text, among which may be cited the following cases:

Alabama.— Camden *v.* Bloch, 65 Ala. 236; Humphreys *v.* Thompson, 6 Ala. 649.

trivial errors apparent on the face of the transcript or return, and amendable by reference thereto.[54]

c. Time of Amendment or Correction — (I) *In General.* Amendments must be applied for and made within a reasonable time, to be determined by circumstances of the particular case;[55] but if a time is fixed by statute in which

Arkansas.— Hagerman *v.* Moon, 68 Ark. 279, 57 S. W. 935.

California.— Santa Barbara *v.* Eldred, 95 Cal. 378, 30 Pac. 562; Boyd *v.* Burrel, 60 Cal. 280.

Connecticut.—Judson *v.* Blanchard, 3 Conn. 579, Perrin *v.* Sikes, 1 Day (Conn.) 19.

Florida.— Mizell *v.* Travelers Ins. Co., 40 Fla. 148, 24 So. 148.

Georgia.— Wyatt *v.* Crowder, 112 Ga. 168, 37 S. E. 380; Clark *v.* State, 110 Ga. 911, 36 S. E. 297.

Illinois.— Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

Indiana.— Driver *v.* Driver, (Ind. 1898) 52 N. E. 401; Smith *v.* State, 131 Ind. 441, 31 N. E. 353.

Iowa.— Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950; Gardner *v.* Burlington, etc., R. Co., 68 Iowa 588, 27 S. W. 768.

Kansas.— Teagarden *v.* Linn County, 49 Kan. 146, 30 Pac. 171. See also Alexander *v.* Alexander, 8 Kan. App. 571, 54 Pac. 1036.

Kentucky.—Craig *v.* Horine, 1 Bibb (Ky.) 8.

Maine.— Hobbs *v.* Staples, 19 Me. 219.

Massachusetts.— Hutchinson *v.* Crossen, 10 Mass. 251.

Michigan.— Evans *v.* Norris, 6 Mich. 69.

Missouri.— Gamble *v.* Gibson, 83 Mo. 290; St. Louis *v.* Bird, 31 Mo. 88.

Montana.— Pardee *v.* Murray, 4 Mont. 35, 1 Pac. 737.

Nebraska.— J. Thompson, etc., Mfg. Co. *v.* Nicholls, 52 Nebr. 312, 72 N. W. 217; Merchants Sav. Bank *v.* Noll, 50 Nebr. 615, 70 N. W. 247; Warner *v.* Hutchins, 48 Nebr. 672, 67 N. W. 745.

Nevada.— Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240.

New Hampshire.—Bell *v.* Twilight, 17 N. H. 528; Rowell *v.* Bruce, 5 N. H. 381.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 808.

New York.— Carter *v.* Beckwith, 82 N. Y. 83; Ropes *v.* Arnold, 32 N. Y. Suppl. 911, 66 N. Y. St. 306.

North Carolina.— Neal *v.* Cowles, 71 N. C. 266. *Compare* Moore *v.* Hinnant, 87 N. C. 505, in which an omission was, by consent, remedied in the appellate court.

Ohio.— Findlay Brewing Co. *v.* Brown, 62 Ohio St. 202, 56 N. E. 871; Cleveland, etc., R. Co. *v.* Wick, 35 Ohio St. 247.

Oklahoma.— Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11; Noyes *v.* Tootle, 8 Okla. 505, 58 Pac. 652.

Oregon.— Dolph *v.* Nickum, 2 Oreg. 202.

South Carolina.— State *v.* Scheper, 33 S. C. 562, 11 S. E. 623, 12 S. E. 564, 816.

South Dakota.— Wright *v.* Lee, 10 S. D. 203, 72 N. W. 895.

Tennessee.— Elliot *v.* Cochran, 1 Coldw. (Tenn.) 388; Clariday *v.* Reed, (Tenn. Ch. 1898) 53 S. W. 302.

Texas.— Boggess *v.* Harris, 90 Tex. 476, 39 S. W. 565; Wichita Valley R. Co. *v.* Peery, 88 Tex. 378, 31 S. W. 619.

Vermont.— Adams *v.* Gay, 19 Vt. 358.

Washington.— State *v.* Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

Wisconsin.— Gerrmann *v.* Schwartz, 21 Wis. 661.

United States.— Goodenough Horseshoe Mfg. Co. *v.* Rhode Island Horseshoe Co., 154 U. S. 635, 14 S. Ct. 1180, 24 L. ed. 368; Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380.

England.— Doe *v.* Perkins, 3 T. R. 749; Petre *v.* Hannay, 3 T. R. 659.

See 3 Cent. Dig. tit. "Appeal and Error," § 2816.

54. *Alabama.*— Kennedy *v.* Young, 25 Ala. 563.

California.— Hill *v.* Finnigan, 54 Cal. 311.

Colorado.— Pleyte *v.* Pleyte, 15 Colo. 44, 24 Pac. 579.

Florida.— Brett *v.* Ming, 1 Fla. 498.

Georgia.— Rowland *v.* Fite, 110 Ga. 248, 34 S. E. 212. See Hardin *v.* Lovelace, 79 Ga. 209, 5 S. E. 493.

Indiana.— Tobin *v.* Young, (Ind. 1888) 17 N. E. 625.

Iowa.— Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192.

Kansas.— McLaughlin *v.* Darlington, 6 Kan. App. 212, 50 Pac. 507.

Kentucky.— Garrott *v.* Ratliff, 83 Ky. 384.

Louisiana.— Jewell's Succession, 11 La. Ann. 83.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

Michigan.— Emery *v.* Wnitwell, 6 Mich. 474.

Missouri.— Hall *v.* School Dist. No. 10, 24 Mo. App. 213.

New Jersey.— Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525.

New York.— Dunford *v.* Weaver, 84 N. Y. 445; Holmes *v.* Remson, 2 Cow. (N. Y.) 410.

North Carolina.— See Huyett etc., Mfg. Co. *v.* Gray, 126 N. C. 108, 35 S. E. 236.

Tennessee.— Elliot *v.* Cochran, 1 Coldw. (Tenn.) 388.

United States.— Burnham *v.* North Chicago St. R. Co., 87 Fed. 168, 59 U. S. App. 274, 30 C. C. A. 594.

55. *Alabama.*— Barr *v.* Collier, 54 Ala. 39.

California.— Bryan *v.* Berry, 8 Cal. 130.

Colorado.— O'Haire *v.* Burns, 25 Colo. 158, 53 Pac. 326; Reynolds *v.* Campling, 21 Colo. 86, 39 Pac. 1092.

Florida.— Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685.

Georgia.— Beck *v.* Thompson, etc., Spice Co., 112 Ga. 683, 37 S. E. 983.

amendments and corrections may be made, the limitation will be enforced.[56] Laches on the part of appellant or plaintiff in error is generally fatal to the application.[57]

(II) *After Assignment of, and Joinder in, Error.* An assignment of, and joinder in, error are an admission that the record upon which issue is joined is correct, and, afterward, neither party has a right to amend or urge defects in the record.[58]

(III) *After Argument and Submission.* Application for leave to amend, or objection on the grounds of defects in the transcript of the record or the return on appeal, must be made prior to the submission of the cause,[59] and will not be

Illinois.— Steele *v.* People, 40 Ill. 59; Gebbie *v.* Mooney, 22 Ill. App. 369.

Indiana.— State *v.* Terre Haute, etc., R. Co., 64 Ind. 297; Importers', etc., Nat. Bank *v.* Knight, 18 Ind. App. 257, 47 N. E. 837.

Kansas.— Bridge *v.* Main St. Hotel Co., (Kan. 1900) 61 Pac. 754; Webber *v.* Genoways, 9 Kan. App. 670, 58 Pac. 1036.

Kentucky.— Williams *v.* Thompson, 80 Ky. 325.

Louisiana.— Bell *v.* Bell, 4 La. 470.

Michigan.— Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Evans *v.* Norris, 6 Mich. 69.

Nebraska.— Yates *v.* Kinney, 23 Nebr. 648, 37 N. W. 590.

New Hampshire.— Hanson *v.* Hoitt, 14 N. H. 56.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 808.

New York.— Van Clief *v.* Mersereau, 8 Abb. Pr. N. S. (N. Y.) 193 note. *Compare* Manhattan Co. *v.* Osgood, 1 Cow. (N. Y.) 65.

North Carolina.— Rothchild *v.* McNichol, 121 N. C. 284, 28 S. E. 364; Haynes *v.* Coward, 116 N. C. 840, 21 S. E. 690.

Pennsylvania.— Cochran *v.* Parker, 6 Serg. & R. (Pa.) 549.

Texas.— Hough *v.* Coates, (Tex. Civ. App. 1894) 25 S. W. 995.

Washington.—Clark-Harris Co. *v.* Douthitt, 5 Wash. 96, 31 Pac. 422.

Wisconsin.— Fitzpatrick *v.* Cottingham, 14 Wis. 219.

United States.— Bein *v.* Heath, 142 U. S. 704, 12 S. Ct. 902, 35 L. ed. 1174; Redfield *v.* Parks, 130 U. S. 623, 9 S. Ct. 642, 32 L. ed. 1053.

See 3 Cent. Dig. tit. "Appeal and Error," § 2791.

56. Mason *v.* Gibson, 13 Ill. App. 463. See also Palmer *v.* Gardiner, 77 Ill. 143; Day *v.* Clinton, 5 Ill. App. 605.

57. *Georgia.*— Harvey *v.* Bowles, 112 Ga. 421, 37 S. E. 364; Walker *v.* Jackson, 41 Ga. 413.

Indiana.— Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

Louisiana.— Minden Bank *v.* Lake Bisteneau Lumber Co., 47 La. Ann. 1432, 17 So. 832; Grunow *v.* Menge, 36 La. Ann. 925.

Michigan.— Verplank *v.* Hall, 21 Mich. 469.

North Carolina.— McDaniel *v.* Pollock, 87 N. C. 503. See also Broadwell *v.* Ray, 112 N. C. 191, 16 S. E. 1009; Wilson *v.* Lineberger, 84 N. C. 836.

Texas.— Houston, etc., R. Co. *v.* McGlasson, 1 Tex. App. Civ. Cas., § 1120.

Wisconsin.— Davis, etc., Bldg., etc., Co. *v.* Riverside Butter, etc., Co., 84 Wis. 262, 54 N. W. 506.

United States.— Sowles *v.* U. S., 21 Fed. 223.

See 3 Cent. Dig. tit. "Appeal and Error," § 2782.

Effect of mutual laches.—In Apgar *v.* Hiler, 24 N. J. L. 808, it was held that, although two terms of court had intervened between the return of a writ of error and an application by defendant in error to amend the record below by allegation or diminution and certiorari, yet, if plaintiff in error had been guilty of laches in the matter, amendment might be permitted on terms; but if plaintiff in error had been guilty of no laches, no amendment could be made on any terms.

58. *Alabama.*— Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321; Alexander *v.* Nelson, 42 Ala. 462.

Arkansas.— Earle *v.* Byrd, 14 Ark. 499; Causin *v.* Taylor, 4 Ark. 55.

Colorado.— Central *v.* Wilcoxen, 3 Colo. 566; Murphy *v.* Cunningham, 1 Colo. 467.

Illinois.— Bates *v.* Ball, 72 Ill. 108; Carolan *v.* Board of Education, 81 Ill. App. 359.

Maine.— Howard *v.* Folger, 15 Me. 447.

Michigan.— People *v.* Manistee Cir. Judge, 31 Mich. 72; O'Flynn *v.* Holmes, 7 Mich. 454.

Mississippi.— Patrick *v.* McKernon, 5 How. (Miss.) 578.

New Jersey.— Cory *v.* Somerset County, 44 N. J. L. 445; Gilliland *v.* Rappleyea, 15 N. J. L. 138.

New York.—Cheetham *v.* Tillotson, 4 Johns. (N. Y.) 499.

See 3 Cent. Dig. tit. "Appeal and Error," § 2792.

59. *Alabama.*— Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321.

California.— Ross *v.* Roadhouse, 36 Cal. 580; St. John *v.* Kidd, 26 Cal. 263.

Colorado.— Reynolds *v.* Campling, 21 Colo. 86, 39 Pac. 1092.

Georgia.— Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

Illinois.— Purvis *v.* Standifer, 14 Ill. App. 435.

Kentucky.— Fearons *v.* Wright, 5 Ky. L. Rep. 850.

Louisiana.— Dupre *v.* Board of Police, 42 La. Ann. 801, 8 So. 597; Lewis *v.* Peterkin, 39 La. Ann. 780, 2 So. 577.

Maryland.— Mitchell *v.* Smith, 2 Md. 270.

Massachusetts.— Johnson *v.* Couillard, 4 Allen (Mass.) 446.

entertained by the court after argument and submission [60] save in peculiar and exceptional cases.[61]

(IV) *AFTER DECISION.* Very special and exceptional circumstances must be shown to obtain leave to have omissions and defects in the transcript or return on appeal or writ of error supplied after a case has once been decided, and while an application for a rehearing is pending.[62]

(V) *ALLOWANCE OF TIME TO AMEND.* Where it satisfactorily appears to the appellate court that an error has been committed in making up the record below, and that the party aggrieved thereby has not, since its discovery, had an opportunity to apply to that court for its correction, and that justice requires he should have such opportunity, the cause will be continued in order that he may apply to the court below to have the record amended.[63]

New York.— Robert *v.* Good, 36 N. Y. 408; Farmers' Bank *v.* Cowan, 2 Abb. Dec. (N. Y.) 88.

North Carolina.— McDaniel *v.* Pollock, 87 N. C. 503; Wilson *v.* Lineberger, 84 N. C. 836.

Texas.— Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952; Wichita Valley R. Co. *v.* Peery, (Tex. Civ. App. 1894) 27 S. W. 751.

United States.— Redfield *v.* Parks, 130 U. S. 623, 9 S. Ct. 642, 32 L. ed. 1053.

See 3 Cent. Dig. tit. "Appeal and Error," § 2793.

After briefs filed.— In Reynolds *v.* Campling, 21 Colo. 86, 39 Pac. 1092, a motion to dismiss appellant's bill of exceptions because not properly prepared was denied where it was not insisted upon until six months after submission of the case, and after the parties had filed their respective briefs. See also Matter of Myers, 111 Iowa 584, 82 N. W. 961; Yates *v.* Kinney, 23 Nebr. 648, 37 N. W. 590; Whipple *v.* Southern Pac. R. Co., 34 Oreg. 370, 55 Pac. 975.

60. *Arizona.*— Woffenden *v.* Charauleau, 1 Ariz. 346, 25 Pac. 662.

Georgia.— Shealy *v.* Toole, 66 Ga. 573.

Iowa.— Watson *v.* Burroughs, 104 Iowa 745, 73 N. W. 866.

Louisiana.— Niblett *v.* Scott, 4 La. Ann. 246.

Minnesota.— Anderson *v.* St. Croix Lumber Co., 47 Minn. 24, 49 N. W. 407.

Missouri.— State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200; Boulton *v.* Columbia, 71 Mo. App. 519.

Nebraska.— Yates *v.* Kinney, 23 Nebr. 648, 37 N. W. 590.

Tennessee.— Home Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79.

Texas.— Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952; Wichita Valley R. Co. *v.* Peery, (Tex. Civ. App. 1894) 27 S. W. 751.

Washington.— Boyer *v.* Boyer, 4 Wash. 80, 29 Pac. 981.

United States.— Redfield *v.* Parks, 130 U. S. 623, 9 S. Ct. 642, 32 L. ed. 1053; Tefft *v.* Stern, 74 Fed. 755, 43 U. S. App. 442, 21 C. C. A. 73.

61. Quigley *v.* Campbell, 12 Ala. 58; Watson *v.* Burroughs, 104 Iowa 745, 73 N. W. 866; Brown *v.* Warden, 44 N. J. L. 177; Boyer *v.* Teague, 106 N. C. 571, 11 S. E. 330.

Amendment upon condition.— In Jackson *v.* Brownell, 3 Johns. (N. Y.) 140, the case was allowed to be amended after argument and before judgment, at the instance of defendant, on paying the costs of the argument and giving to plaintiff the election afterward to be nonsuited or to have a new trial.

62. *Alabama.*— Kerley *v.* Vann, 52 Ala. 7; Adams *v.* Horsefield, 14 Ala. 223.

Georgia.— Harvey *v.* Bowles, 112 Ga. 421, 37 S. E. 364; Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719.

Illinois.— Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424; Allen *v.* Le Moyne, 101 Ill. 655.

Indiana.— Porter *v.* Choen, 60 Ind. 338; Gatling *v.* Newell, 12 Ind. 116.

Iowa.— Hintrager *v.* Hennessy, 46 Iowa 600.

Kentucky.— Standford *v.* Parker, 12 Ky. L. Rep. 878, 15 S. W. 784, 16 S. W. 268; Cummins *v.* Miller, 7 Ky. L. Rep. 830.

Mississippi.— Ross *v.* McIntyre, 53 Miss. 133.

New York.— Drake *v.* New York Iron Mine, 38 N. Y. App. Div. 71, 55 N. Y. Suppl. 920.

North Carolina.— Wilson *v.* Lineberger, 84 N. C. 836.

North Dakota.— Ricks *v.* Bergsvendsen, 8 N. D. 578, 80 N. W. 768.

South Carolina.— Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552.

Tennessee.—See Gaut *v.* Wimberly, 99 Tenn. 496, 42 S. W. 265.

Texas.— Missouri Pac. R. Co. *v.* Scott, 78 Tex. 360, 14 S. W. 791; Nasworthy *v.* Draper, 9 Tex. Civ. App. 650, 29 S. W. 557.

Washington.— Clark-Harris Co. *v.* Douthitt, 5 Wash. 96, 31 Pac. 422. But see Blinn *v.* Crosby, 2 Wash. Terr. 109, 3 Pac. 847.

United States.— U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769, U. S. *v.* Adams, 9 Wall. (U. S.) 554, 19 L. ed. 584.

See 3 Cent. Dig. tit. "Appeal and Error," § 2794.

On rehearing.— Where a record on appeal contains no copy of an exhibit alleged to have been filed as part of an answer, it was held to be too late to amend it on rehearing. Phenix Ins. Co. *v.* Lorenz, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495.

63. *Alabama.*—Alabama, etc., River R. Co. *v.* Hungerford, 41 Ala. 388.

Colorado.— Knox *v.* McFerran, 4 Colo. 348.

Georgia.— Smith *v.* Wrightsville, etc., R. Co., 83 Ga. 671, 10 S. E. 361.

d. Procedure — (I) *In Lower Court* — (A) *Application.* Notice of an application to amend the record should be given to the adverse party.[64]

(B) *Certifying, Transmitting, and Incorporating Amendments* — (1) In General. Amendments to the record made in the court below must be properly certified, and incorporated in, or annexed to, the transcript or return, and transmitted to the appellate court, or they cannot be considered. And where the transcript or return is already on file in the appellate court, and has not been withdrawn for amendment, the amendments, after certification, should be transmitted to the appellate court, and there annexed to the transcript or return.[65]

(2) Necessity of Certiorari or Other Order. Amendments and corrections made in a record before the transcript or return has been certified to, and filed in, the appellate court may be incorporated in, and made part of, the transcript or return without certiorari or other order of the appellate court.[66] But, after the transcript or return has been filed in the appellate court, amendments can, as a rule, only be made by certiorari or other order of that court.[67]

Illinois.— Shipley *v.* Spencer, 40 Ill. 105; Bergen *v.* Riggs, 40 Ill. 61, 89 Am. Dec. 335.

Iowa.— Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Tomlinson *v.* Funston, 1 Greene (Iowa) 544.

Kentucky.— Williams *v.* Thompson, 4 Ky. L. Rep. 9.

Louisiana.— Cory *v.* Eddens, 12 La. Ann. 582; Barham *v.* Livingston, 11 La. Ann. 604.

Massachusetts.— McCarren *v.* McNulty, 7 Gray (Mass.) 139.

New York.—Rice *v.* Isham, 1 Keyes (N. Y.) 44; Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86; Brush *v.* Blot, 42 N. Y. Suppl. 761; Livingston *v.* Miller, 7 How. Pr. (N. Y.) 219; Yale *v.* Coddington, 21 Wend. (N. Y.) 175.

North Carolina.— Ballard *v.* Carr, 15 N. C. 575.

Ohio.— Bradley *v.* Sneath, 6 Ohio 490.

Texas.— Boggess *v.* Harris, 90 Tex. 476, 39 S. W. 565; Wright *v.* Benta, 19 Tex. 385.

See 3 Cent. Dig. tit. "Appeal and Error," § 2809.

64. Goodrich *v.* Minonk, 62 Ill. 121; Magee *v.* Duncan, 8 La. Ann. 125. See 3 Cent. Dig. tit. "Appeal and Error," § 2808.

In North Carolina an application for leave to apply to the trial court to amend the case, by including evidence omitted therefrom, must state that appellant believes the trial court will make the amendment, and set out the grounds of such belief, and it must, further, be shown that the omission complained of was made by mistake or inadvertence. Riggan *v.* Sledge, 116 N. C. 87, 20 S. E. 1016; City Nat. Bank *v.* Bridgers, 114 N. C. 107, 19 S. E. 276; Lowe *v.* Elliott, 107 N. C. 718, 12 S. E. 383; State *v.* Sloan, 97 N. C. 499, 2 S. E. 666; Porter *v.* Western North Carolina R. Co., 97 N. C. 63, 2 S. E. 580; Clark's Code Civ. Proc. N. C. (1900), pp. 725–727.

Where the proposed amendment is only to the certificate to the transcript or return, notice of the time and place of making such amendment need not be served on appellee or defendant in error. Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758.

65. *California.*— Moore *v.* Besse, 35 Cal. 183; Skillman *v.* Riley, 10 Cal. 300.

Illinois.— Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941 [*affirming* 44 Ill. App. 115]; Myers *v.* Phillips, 68 Ill. 269; Fuller *v.* Bates, 6 Ill. App. 442.

Indiana.— Marley *v.* Hornaday, 69 Ind. 106.

Michigan.— O'Flynn *v.* Eagle, 7 Mich. 306.

Nebraska.— Haggerty *v.* Walker, 21 Nebr. 596, 33 N. W. 244.

New York.— Luysten *v.* Sniffen, 1 Barb. (N. Y.) 428; Cumiskey *v.* Lewis, 15 N. Y. St. 364.

Texas.— Peak *v.* Lynch, 43 Tex. 276.

Washington.— Dewey *v.* South Side Land Co., 11 Wash. 210, 39 Pac. 368.

United States.—Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406.

See 3 Cent. Dig. tit. "Appeal and Error," § 2812.

66. Ware *v.* Brewer, 34 Ala. 114.

67. *Indiana.*— Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; Wilcox *v.* Majors, 88 Ind. 203; Mitchell *v.* Stinson, 80 Ind. 324; Phelps *v.* Osgood, 34 Ind. 150.

Missouri.— Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; Baker *v.* Loring, 65 Mo. 527.

North Carolina.— State *v.* Jackson, 112 N. C. 849, 16 S. E. 906. Except to make the record speak the truth. Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270.

Texas.— Harris *v.* Hopson, 5 Tex. 529.

United States.— Wilcox *v.* U. S., 6 Ct. Cl. 77.

See 3 Cent. Dig. tit. "Appeal and Error," § 2813.

In Illinois no writ of certiorari is necessary to bring up an amended record, but the party interested in making the amendment can file it as an additional or amended record, and it will be considered in connection with the original transcript. Rowley *v.* Hughes, 40 Ill. 71. See also Flagler *v.* Crow, 40 Ill. 70, in which counsel for the plaintiff in error asked leave to file an additional transcript of the record instead of applying for a writ of certiorari. The court said: "There being no objection, the motion will be allowed."

In Louisiana the filing of properly certified

(II) *In Appellate Court* — (A) *In General.* To correct defects, omissions, or errors, the appellate court may, on motion, issue certiorari,[68] remand for correction,[69] or make such other order as may appropriately meet the requirements of the case.[70]

(B) *Remitting Cause to Lower Court.* An order remitting a cause to the lower court, in order to allow an amended transcript or return to be filed, may be made, in the discretion of the appellate court.[71] A remandment, however, cannot be made to permit an amendment as to matters outside of the record.[72] An appellate court will often, instead of causing amendments to be made, disregard mere formal and harmless defects in the transcript or return.[73]

copies of missing parts of a transcript, absent by fault of the clerk of the lower court, is permissible, although it is not the method prescribed for perfecting an incomplete record. Borde *v.* Erskine, 29 La. Ann. 822.

In New York the court below may amend the record and order the amendment certified to the court of appeals and filed with the clerk of that court after the record has been filed pursuant to the notice of appeal. A motion to remit the record for the purpose of an amendment is unnecessary. Peterson *v.* Swan, 119 N. Y. 662, 23 N. E. 1004, 30 N. Y. St. 208.

68. See *infra*, XIII, J, 4.

69. See *infra*, XIII, J, 2, d, (II), (B).

70. *California.*— Kelley *v.* Plover, 103 Cal. 35, 36 Pac. 1020; Wormouth *v.* Gardner, 35 Cal. 227.

Illinois.— Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Ross *v.* Plano Steel Works, 34 Ill. App. 323.

Indiana.— Sumner *v.* Goyings, 74 Ind. 293.

Louisiana.—Troustine *v.* Ware, 38 La. Ann. 779; Edson *v.* McGraw, 37 La. Ann. 294.

New York.—Bliss *v.* Hoggson, 84 N. Y. 667.

South Dakota.— Foley-Wadsworth Implement Co. *v.* Porteous, 7 S. D. 34, 63 N. W. 155.

United States.— U. S. *v.* Child, 9 Wall. (U. S.) 661, 19 L. ed. 808.

71. Numerous authorities support the text, among which may be cited the following cases:

Colorado.— Patrick *v.* Weston, 21 Colo. 73, 39 Pac. 1083.

District of Columbia.— Hardesty *v.* Hosmer, 4 App. Cas. (D. C.) 280.

Florida.— Lott *v.* Meacham, 2 Fla. 566.

Georgia.— Bonner *v.* Andrews, 30 Ga. 287.

Louisiana.— Grand Lodge *v.* Cavanac, 39 La. Ann. 1109, 3 So. 285.

Maryland.—Fulton *v.* Harman, 44 Md. 251.

Massachusetts.— Merriam *v.* Merriam, 6 Cush. (Mass.) 91.

Michigan.— Stickle *v.* Haskins, 54 Mich. 130, 19 N. W. 919; Lambert *v.* Griffith, 40 Mich. 174.

Minnesota.— Phoenix *v.* Gardner, 13 Minn. 294.

Mississippi.— Kendrick *v.* Kyle, (Miss. 1900) 28 So. 950.

Nebraska.— Brennan-Love Co. *v.* McIntosh, 56 Nebr. 140, 76 N. W. 461.

New York.— Witherbee *v.* Taft, 47 N. Y. App. Div. 627, 62 N. Y. Suppl. 242; People *v.* Ash, 44 N. Y. App. Div. 6, 14 N. Y. Crim. 167, 60 N. Y. Suppl. 436.

North Carolina.— Taylor *v.* Simmons, 116 N. C. 70, 20 S. E. 961; Cox *v.* Jones, 110 N. C. 309, 14 S. E. 782.

North Dakota.— See Baumer *v.* French, 8 N. D. 319, 79 N. W. 340.

Ohio.— Portsmouth, etc., Turnpike Co. *v.* Byington, 12 Ohio 114.

Oklahoma.— Ryland *v.* Coyle, 7 Okla. 226, 54 Pac. 456.

Pennsylvania.— Pittsburg Wagon Works' Estate, 198 Pa. St. 250, 47 Atl. 966.

South Carolina.— State *v.* Perry, 49 S. C. 269, 27 S. E. 99; Correll *v.* Georgia Constr., etc., Co., 35 S. C. 593, 14 S. E. 65.

Tennessee.— Mynatt *v.* Hubbs, 6 Heisk. (Tenn.) 320.

Virginia.—See Houghton *v.* Mountain Lake Land Co., 93 Va. 149, 24 S. E. 920.

West Virginia.—Love *v.* Tinsley, 32 W. Va. 25, 9 S. E. 44.

Wisconsin.—Murphey *v.* Weil, 86 Wis. 643, 57 N. W. 1112; Carpenter *v.* Shepardson, 43 Wis. 406.

United States.— Cervantes *v.* U. S., 16 How. (U. S.) 619, 14 L. ed. 1083.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2830–2833.

72. McKinley *v.* Sherry, 2 Lea (Tenn.) 200.

73. *Alabama.*—Levystein *v.* Marks, 56 Ala. 564; Schuessler *v.* Wilson, 56 Ala. 516.

California.— Sutton *v.* Symons, 97 Cal. 475, 32 Pac. 588.

Indiana.— Longworth *v.* Higham, 89 Ind. 352.

Kentucky.— Williams *v.* Norris, 2 Litt. (Ky.) 157; Herndon *v.* Waters, 15 Ky. L. Rep. 269.

Minnesota.— Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239.

Mississippi.— Young *v.* Walker, 70 Miss. 813, 12 So. 546, 901.

Missouri.— Todd *v.* Gunn, 21 Mo. 306. But see Brandenburger *v.* Easley, 78 Mo. 659, in which it was held that the appellate court cannot act on the conjecture that a date in the record is a clerical mistake.

Montana.— Doyle *v.* Gore, 13 Mont. 471, 34 Pac. 846, 36 Pac. 762.

Wisconsin.—Schweppe *v.* Wellauer, 76 Wis. 19, 45 N. W. 17.

United States.—U. S. *v.* Wilkinson, 12 How. (U. S.) 246, 13 L. ed. 974.

See 3 Cent. Dig. tit. "Appeal and Error," § 2825.

e. Review of Action Allowing or Refusing Amendments. On appeal from an order amending or refusing to amend the record, every presumption will be in favor of the action of the lower court; unless there is record evidence clearly showing that the order of the lower court is erroneous, the appellate court will not interfere.[74]

f. Stipulations For Amendment. An appellate court will not, as a rule, consider agreements of counsel to amend and supply deficiencies in a properly certified and authenticated transcript or return;[75] but, where the consent of the court below to such amendment is obtained, it seems that such agreements may be considered.[76]

g. Operation and Effect of Amendment. Amendments and corrections, duly made, certified to, and filed in the appellate court, are considered, together with the original transcript or return, as constituting the true record of the court below, upon which the decision of the appellate court is to be rendered.[77]

3. Waiver of Defects and Objections — a. In General. Defects and omissions in the transcript or return may be either expressly or impliedly waived where they are not jurisdictional.[78]

74. *Alabama.*—Youngblood *v.* Youngblood, 54 Ala. 486. See also Camden *v.* Bloch, 65 Ala. 236.

California.— Matter of Fisher, 75 Cal. 523, 17 Pac. 640.

Colorado.— Magna Charta Silver Min., etc., Co. *v.* Tapscott, 4 Colo. App. 1, 34 Pac. 842.

Illinois.— See People *v.* Hanecy, 88 Ill. App. 445.

Iowa.— Sloan *v.* Davis, 105 Iowa 97, 74 N. W. 922; State *v.* Drorsky, 73 Iowa 484, 35 N. W. 586; State *v.* Crosby, 67 Iowa 352, 25 N. W. 279.

North Carolina.— Murrill *v.* Humphrey, 76 N. C. 414. See also State *v.* Warren, 95 N. C. 674.

See 3 Cent. Dig. tit. "Appeal and Error," § 2811.

75. *Alabama.*— See Mobile Sav. Bank *v.* Fry, 69 Ala. 348.

Dakota.— Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132.

Florida.— Pickett *v.* Bryan, 34 Fla. 38, 15 So. 681.

Georgia.— Baldwin *v.* Lee, 7 Ga. 186.

Illinois.— Illinois Cent. R. Co. *v.* Garish, 40 Ill. 70; Ballance *v.* Leonard, 40 Ill. 72.

Kansas.— Parker *v.* Remington Sewing-Mach. Co., 24 Kan. 31.

Maryland.— See Philadelphia, etc., R. Co. *v.* Shipley, 72 Md. 88, 19 Atl. 1; Armstrong *v.* Hagerstown, 32 Md. 54; Parrish *v.* State, 14 Md. 238.

Massachusetts.—Com. *v.* Suffolk Trust Co., 161 Mass. 550, 37 N. E. 757; Ashley *v.* Root, 4 Allen (Mass.) 504.

Michigan.—See Farrand *v.* Collins Iron Co., 8 Mich. 136.

Missouri.— See St. Louis *v.* Missouri R. Co., 12 Mo. App. 576; Collins *v.* Baker, 6 Mo. App. 588.

Texas.— Tennille *v.* Morgan, (Tex. Civ. App. 1896) 35 S. W. 514.

United States.— Hooey *v.* Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762.

See 3 Cent. Dig. tit. "Appeal and Error," § 2802.

76. Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132; Com. *v.* Suffolk Trust Co., 161 Mass. 550, 37 N. E. 757; Ashley *v.* Root, 4 Allen (Mass.) 504.

77. *Alabama.*— Brown *v.* Torver, Minor (Ala.) 370.

California.— Lee Chuck *v.* Quan Wo Chong Co., 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

Connecticut.— Weed *v.* Weed, 25 Conn. 494.

Georgia.— Ladd *v.* McDonald, 65 Ga. 665.

Illinois.—Tucker *v.* Hamilton, 108 Ill. 464.

Indiana.— Fisher *v.* Dynes, 62 Ind. 348.

Pennsylvania.— Taylor *v.* Sattler, 179 Pa. St. 451, 39 Wkly. Notes Cas. (Pa.) 419, 36 Atl. 323.

See 3 Cent. Dig. tit. "Appeal and Error," § 2815.

Effect of unauthorized amendment.—Where the judge of the trial court, without authority from the appellate court or assent of both parties, amended the bill of exceptions after it had been entered in the supreme court, it was held that a party who did not assent to the amendment might elect either to argue the bill as amended, or to have it stand over for hearing before the trial judge. Perry *v.* Breed, 117 Mass. 155.

78. *Alabama.*— Thompson *v.* Lea, 28 Ala. 453.

California.— Madden *v.* Occidental, etc., Steamship Co., (Cal. 1890) 24 Pac. 169; Rogers *v.* Parish, 35 Cal. 127.

Colorado.—Murphy *v.* Cunningham, 1 Colo. 467; Mackey *v.* Monahan, 13 Colo. App. 144, 56 Pac. 680.

Georgia.— Moore *v.* Reid, 110 Ga. 248, 34 S. E. 211.

Indiana.— Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

Iowa.— Allen *v.* Hull, 56 Iowa 767, 9 N. W. 387.

Kansas.— Hindman *v.* Askew Saddlery Co., 7 Kan. App. 811, 52 Pac. 908.

Maine.— Howard *v.* Folger, 15 Me. 447.

Massachusetts.— Canfield *v.* Canfield, 112 Mass. 233.

b. Failure to Make Application For Amendment. The failure of a party to apply for amendment of the transcript or return, or to object on the ground of defects or omissions therein, will constitute a waiver of the objection where the defects do not go to the jurisdiction of the appellate court.[79]

c. Failure to Object in Trial Court. The failure to object in the lower court to defects or omissions in the transcript or return, where the amendments might be there made, constitutes a waiver of non-jurisdictional defects.[80]

d. Stipulation to Waive. Defects and omissions in the transcript or return of a case on appeal may be waived by stipulation.[81]

Michigan.— Brown *v.* Bissell, 1 Dougl. (Mich.) 273.

Missouri.— Flannery *v.* Kansas City, etc., R. Co., 97 Mo. 192, 10 S. W. 894; Bombeck *v.* Bombeck, 18 Mo. App. 26.

Montana.— Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

Nebraska.— Yates *v.* Kinney, 23 Nebr. 648, 37 N. W. 590.

Nevada.— Bliss *v.* Grayson, 25 Nev. 329, 56 Pac. 231.

Oklahoma.—Petrie *v.* Coulter, (Okla. 1900) 61 Pac. 1058.

Pennsylvania.— Sweeney *v.* Horn, 190 Pa. St. 237, 42 Atl. 709.

Tennessee.— Ninney *v.* Damron, 1 Overt. (Tenn.) 184; Barksdale *v.* Ward, (Tenn. Ch. 1898) 46 S. W. 771.

Texas.— Mills *v.* Paul, 1 Tex. Civ. App. 419, 23 S. W. 189.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. See also Maxwell *v.* Griffith, 20 Wash. 106, 54 Pac. 938.

Wisconsin.— Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903.

See 3 Cent. Dig. tit. "Appeal and Error," § 2795.

Jurisdictional defects.— Where a record on appeal from a county court to the circuit court fails to show all of the evidence given at the trial, or the jurisdictional papers, the fact that the parties appear, and the cause is thereupon determined, does not cure the defect. *Re* Plunkett, 33 Oreg. 414, 54 Pac. 152. And see Sloan *v.* Davis, 105 Iowa 97, 74 N. W. 922.

79. *Colorado.*— Greig *v.* Clement, 20 Colo. 167, 37 Pac. 960.

Illinois.— Hyde Park *v.* Dunham, 85 Ill. 569. And see Rossville *v.* Cook, 71 Ill. App. 320.

Indiana.— Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320. *Compare* Seymour Woollen Factory Co. *v.* Brodhecker, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528; Creamer *v.* Sirp, 91 Ind. 366.

Iowa.— Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241; Austin *v.* Bremer County, 44 Iowa 155.

Louisiana.— Clew's Succession, 18 La. Ann. 229; New Orleans *v.* Jeter, 10 La. Ann. 767.

Maine.— Thompson *v.* McIntire, 48 Me. 34.

Montana.— Ervin *v.* Collier, 2 Mont. 605.

North Carolina.— Byrd *v.* Bazemore, 122 N. C. 115, 28 S. E. 965.

Washington.—Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458. *Compa* Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886.

Wisconsin.— Matteson *v.* Curtis, 11 Wis. 424.

United States.— Elder *v.* McClaskey, 70 Fed. 529, 37 U. S. App. 1, 199, 17 C. C. A. 251.

See 3 Cent. Dig. tit. "Appeal and Error," § 2796.

Objection made in brief.— In San Francisco, etc., R. Co. *v.* Anderson, 77 Cal. 297, 19 Pac. 517, it was held that an objection to the sufficiency of the certificate that an undertaking had been filed, made in a printed brief, together with a request that an appeal be dismissed, was a sufficient compliance with a rule of the supreme court requiring such objection to be taken and notice given to appellant in writing.

The submission of a cause by agreement without objection, on the ground of defects in the transcript, is a waiver thereof. State *v.* Madison County, 92 Ind. 133. See also Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

80. *Illinois.*— Hyde Park *v.* Dunham, 85 Ill. 569, failure to object to improper bill of exceptions.

Iowa.— Jones *v.* Hockman, 12 Iowa 101, failure to object on ground of improper filing of bill.

Kentucky.— Huling *v.* Fort, 2 Litt. (Ky.) 193, failure to object to illegality of authentication of record.

Nebraska.— Cattle *v.* Haddox, 14 Nebr. 59, 14 N. W. 803, failure to object where bill was not signed by referee before the case was tried.

Utah.— McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574, failure to object to order allowing statement on motion for new trial to stand as bill of exceptions.

See 3 Cent. Dig. tit. "Appeal and Error," § 2798.

81. *California.*— Solomon *v.* Reese, 34 Cal. 28.

Louisiana.— Huey *v.* Police Jury, 33 La. Ann. 1091.

Minnesota.— Hall *v.* Smith, 16 Minn. 58.

North Carolina.— State *v.* Price, 110 N. C. 599, 15 S. E. 116.

Wisconsin.— Carroll *v.* More, 30 Wis. 574.

See 3 Cent. Dig. tit. "Appeal and Error," § 2797.

But a stipulation that a case should be heard on appeal at a term designated therein does not waive the objection that assignments of error, based on the evidence, cannot

4. Certiorari to Bring Up Record — a. Jurisdiction to Issue — (I) *In General.* The authority to issue certiorari, or to make similar orders directing a return of a full and complete transcript, is vested in the appellate court, and may be exercised, in its discretion, in all proper cases.[82]

(II) *Issuance by Court Sua Sponte.* Where, upon inspection of the record, it appears that there are defects or omissions in the transcript or return which may be important, the appellate court may, of its own motion, issue a certiorari to the proper court or officer to supply such defects or omissions.[83]

b. Grounds of Issuance — (I) *In General.* Where there is shown to be a defect[84] or a diminution in the record,[85] or for the purpose of bringing up amend-

be considered when the abstract fails to show that it contains all the evidence. Hartnett *v.* Sioux City, 66 Iowa 253, 23 N. W. 654.

82. Dooley *v.* Martin, 28 Ind. 189; Evans *v.* Norris, 6 Mich. 69; Wood *v.* Newkirk, 15 Ohio St. 295; Hay *v.* Lewis, 39 Wis. 364. See 3 Cent. Dig. tit. "Appeal and Error," § 2832.

After submission.— In St. Louis, etc., R. Co. *v.* Wills, (Tex. Civ. App. 1895) 30 S. W. 248, it was held that, after an appeal has been submitted, the record may be perfected by certiorari so as to incorporate therein the judgment of the trial court, which had been omitted, and thereby give the appellate court jurisdiction of the appeal.

Upon a review of a judgment of an intermediate court dismissing an appeal thereto from a judgment of a justice of the peace, the appellate court cannot require the justice to certify directly to itself an amended transcript. Wight *v.* Warner, 1 Dougl. (Mich.) 384; Cleghorn *v.* Waterman, 16 Nebr. 225, 20 N. W. 252.

83. *Iowa.*— Porter *v.* Garrett, 1 Greene (Iowa) 368.

Kentucky.— Franklin Academy *v.* Hall, 16 B. Mon. (Ky.) 472; Blanton *v.* Breckinridge, Litt. Sel. Cas. (Ky.) 25; Boyle *v.* Connelly, 2 Bibb (Ky.) 7; Louisville, etc., R. Co. *v.* Gartin, 10 Ky. L. Rep. 774.

North Carolina.— State *v.* Beal, 119 N. C. 809, 25 S. E. 815; State *v.* Preston, 104 N. C. 733, 10 S. E. 84; State *v.* Butts, 91 N. C. 524.

Tennessee.— Newport *v.* Rowen, 4 Hayw. (Tenn.) 195.

Texas.— *Compare* Robinson *v.* Varnell, 16 Tex. 382.

West Virginia.— Rohrbaugh *v.* Bennett, 30 W. Va. 186, 3 S. E. 593.

United States.— Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727; Morgan *v.* Curtenius, 19 How. (U. S.) 8, 15 L. ed. 576.

See 3 Cent. Dig. tit. "Appeal and Error," § 2847.

84. *Alabama.*— Williams *v.* McConico, 25 Ala. 538; Carey *v.* McDougald, 25 Ala. 109.

Arkansas.— Jones *v.* State, 14 Ark. 170; State Bank *v.* Bates, 10 Ark. 631.

Florida.—Underwood *v.* Underwood, 12 Fla. 434.

Illinois.— Toledo, etc., R. Co. *v.* Chenoa, 43 Ill. 209.

Indiana.— Phelps *v.* Osgood, 34 Ind. 150; Baldwin *v.* Marsh, 6 Ind. App. 533, 33 N. E. 973.

Kansas.— Green *v.* Bulkley, 23 Kan. 130.

Kentucky.— Worsham *v.* Lancaster, (Ky. 1898) 47 S. W. 448.

Michigan.— Maynard *v.* Hoskins, 8 Mich. 81.

Mississippi.— Kendrick *v.* Kyle, (Miss. 1900) 28 So. 950; Harris *v.* Planters Bank, 4 Sm. & M. (Miss.) 701.

Missouri.— Dickerson *v.* Apperson, 19 Mo. 319.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 808; Idle *v.* Idle, 11 N. J. L. 92.

New York.— Burr *v.* Waterman, 2 Cow. (N. Y.) 36 note; Sweet *v.* Overseers of Poor, 3 Johns. (N. Y.) 23.

North Carolina.— McMillan *v.* McMillan, 122 N. C. 410, 29 S. E. 361; Sherrill *v.* Western Union Tel. Co., 116 N. C. 654, 21 S. E. 400.

Tennessee.—Hamilton *v.* Hodgkiss, 1 Overt. (Tenn.) 109.

Virginia.— Scott *v.* Hall, 2 Munf. (Va.) 229.

See 3 Cent. Dig. tit. "Appeal and Error," § 2835.

85. *Alabama.*—Curry *v.* Woodward, 44 Ala. 305.

California.— Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Colorado.— Las Animas County *v.* Bond, 3 Colo. 222.

Georgia.— Georgia Southern, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813.

Indiana.— Gregory *v.* Slaughter, 19 Ind. 342; F. W. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1002.

Louisiana.—Woods' Succession, 30 La. Ann. 1002.

Mississippi.— Byrne *v.* Jeffries, 38 Miss. 533.

New Hampshire.— Fabyan *v.* Russell, 38 N. H. 84.

New Jersey.— Smick *v.* Opdycke, 12 N. J. L. 85.

New York.— Kanouse *v.* Martin, 2 How. Pr. (N. Y.) 252.

North Carolina.— Broadwell *v.* Ray, 111 N. C. 457, 16 S. E. 408; Lowe *v.* Elliott, 107 N. C. 718, 12 S. E. 383.

Pennsylvania.—Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85.

Texas.—Western Union Tel. Co. *v.* O'Keefe, 87 Tex. 423, 28 S. W. 945; Clark *v.* Burk, (Tex. Civ. App. 1896) 35 S. W. 27.

Virginia.— Hooper *v.* Royster, 1 Munf. (Va.) 119.

West Virginia.— Springston *v.* Morris, 47 W. Va. 50, 34 S. E. 766; Sims *v.* Charleston Bank, 8 W. Va. 274.

United States.—Hoskin *v.* Fisher, 125 U. S. 217, 8 S. Ct. 834, 31 L. ed. 759; Missouri, etc.,

ments to the record made by the lower court subsequent to the filing of the transcript or return in the appellate court,[86] a certiorari, or other similar order, will issue from the appellate court, as auxiliary process, directing a return of a full and complete transcript.[87] In order that certiorari may issue, however, it must appear from the transcript or return, itself, or be shown otherwise to the satisfaction of the court, that a better transcript or return can be made out.[88]

(II) *Correcting Fault of Clerk.* Unless appellant or plaintiff in error has been guilty of laches in not bringing up a complete record,[89] the appellate court will grant him relief, by certiorari, for defects or omissions due to the ignorance or negligence of the clerk below.[90]

c. Matters Which May Be Brought Up—(I) *In General.* Certiorari, or other similar proceeding, is employed, generally, to perfect a defective transcript or return, by bringing up matters of record omitted therefrom, or defectively incorporated, to bring up a record amended below, or to compel the production of papers in the hands of a party.[91]

(II) *Immaterial or Unnecessary Matter.* A writ of certiorari will not issue for the purpose of bringing up immaterial or unnecessary matter.[92]

R. Co. *v.* Dinsmore, 108 U. S. 30, 2 S. Ct. 9, 27 L. ed. 640.

See 3 Cent. Dig. tit. "Appeal and Error," § 2834.

86. Montevallo Coal Min. Co. *v.* Reynolds, 44 Ala. 252; James *v.* Hughill, 3 Ill. 361; James *v.* Neal, 3 T. B. Mon. (Ky.) 369; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525. See 3 Cent. Dig. tit. "Appeal and Error," § 2836.

87. Several writs of certiorari may be issued in one case where necessary in order to bring up the entire record. Matter of Woodbine St., 17 Abb. Pr. (N. Y.) 112; State *v.* Munroe, 30 N. C. 258; State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572. *Compare* Reed *v.* De Wolf, Wright (Ohio) 418.

88. Portis *v.* Newman, 43 Ala. 506; Hagan *v.* Gaunt, 15 La. Ann. 63; Boler *v.* Day, 16 La. 251; Beard *v.* Poydras, 13 La. 82; Allen *v.* McLendon, 113 N. C. 319, 18 S. E. 205; Ware *v.* Nisbet, 92 N. C. 202; Cheek *v.* Watson, 90 N. C. 302; Currie *v.* Clark, 90 N. C. 17. See 3 Cent. Dig. tit. "Appeal and Error," § 2839.

89. Rohrbaugh *v.* Bennett, 30 W. Va. 186, 3 S. E. 593.

90. Miller *v.* Shriner, 87 Ind. 141; Garnet *v.* McIntyre, Dall. (Tex.) 607. And see Stearns *v.* U. S., 4 Wall. (U. S.) 1, 18 L. ed. 451, in which certiorari for diminution of the record was allowed where the cause had been continued to the next term, although the motion therefor was made after more than one term had passed since the entry of the case, and contrary to the rule of the court, it appearing that counsel for appellant was unacquainted with such rule.

See 3 Cent. Dig. tit. "Appeal and Error," § 2838.

91. *Alabama.*— Looney *v.* Bush, Minor (Ala.) 413.

Arkansas.— Johnson *v.* Terry, 35 Ark. 220.

California.— Parsons *v.* Davis, 3 Cal. 421.

New York.— Smith *v.* Johnston, 30 How. Pr. (N. Y.) 374.

United States.— Stimpson *v.* Westchester R. Co., 3 How. (U. S.) 553, 11 L. ed. 722.

See 3 Cent. Dig. tit. "Appeal and Error," § 2840.

In Michigan it has been held that the action of the trial judge in entering the jury-room and giving instructions, without the presence of counsel, may properly be brought before the appellate court by certiorari in aid of the writ of error. Fox *v.* Peninsula White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

Papers improperly considered below.— In Sedgwick *v.* Dawkins, 17 Fla. 555, certiorari was awarded to the circuit court to send up certain papers alleged to have been considered upon a motion in arrest of judgment, even though the papers were improperly considered.

Reversal matter.— An appellate court will not award a certiorari to bring up new matter for the purpose of reversing a judgment of an inferior tribunal. Earle *v.* Byrd, 14 Ark. 499; State Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685; Kesler *v.* Myers, 41 Ind. 543; Hutchison *v.* Sinclair, 7 T. B. Mon. (Ky.) 291; Jones *v.* Williams, 4 T. B. Mon. (Ky.) 42. See 3 Cent. Dig. tit. "Appeal and Error," § 2842.

To compel production of papers.— In Holbrook *v.* Nichol, 40 Ill. 75, on affidavit that the record copy of a certain paper used on the trial at the court below, although as to language a correct copy, was not a facsimile, and did not contain certain important evidences of erasures, interlineations, and interpolations appearing in the original, the court granted a rule on the party having the paper in his possession to show cause why he should not produce it. See also Hatfield *v.* Noe, 8 N. J. L. 364, in which a rule was granted upon a party to produce his day-book upon the argument of a bill of exceptions, where the book was referred to therein.

92. *Alabama.*— Hightower *v.* Crow, 102 Ala. 584, 15 So. 350.

Colorado.— Jones *v.* Carruthers, 1 Colo. 291.

(III) *Matters Not of Record or Not Considered Below.* Certiorari will not be issued to bring up matters not of record or not considered in the court below.[93]

d. Procedure — (I) *Application* — (A) *Mode of Application.* An application for a writ of certiorari may be made by motion.[94]

(B) *Notice.* Notice of an application for a writ of certiorari should be served on the adverse party or his attorney, if this be required by statute or rule of court.[95]

(C) *Requisites and Sufficiency.* An application for a writ of certiorari to correct defects or omissions in the transcript or return must point out the alleged defects or omissions.[96]

(II) *Proof.* A writ of certiorari to bring up a corrected record does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by evidence of the defects alleged to exist.[97]

Connecticut.— Sullivan *v.* New York, etc., R. Co., (Conn. 1900) 47 Atl. 131.

North Carolina.— City Nat. Bank *v.* Bridgers, 114 N. C. 107, 19 S. E. 276; Lewis *v.* Foard, 112 N. C. 402, 17 S. E. 9.

Texas.— Willis *v.* Chambers, 8 Tex. 150.

United States.—McGuire *v.* Massachusetts, 3 Wall. (U. S.) 382, 18 L. ed. 164.

See 3 Cent. Dig. tit. "Appeal and Error," § 2843.

Where an interpolation in the record is alleged, a writ of certiorari will be granted without regard to the materiality of the grounds on which it is asked. Reed *v.* Curry, 40 Ill. 73.

93. *Colorado.*— Clements *v.* Hahn, 1 Colo. 490.

Delaware.— Russel *v.* Hepburn, 5 Harr. (Del.) 386.

Illinois.— Western Union Tel. Co. *v.* Pacific, etc., Tel. Co., 49 Ill. 90.

Indiana.— Rout *v.* Ninde, 111 Ind. 597, 13 N. E. 107; Ross *v.* Stockwell, 17 Ind. App. 77, 46 N. E. 360.

Missouri.— Gale *v.* Pearson, 6 Mo. 253.

North Carolina.—Wood *v.* Southern R. Co., 118 N. C. 1056, 24 S. E. 704.

Oklahoma.— Grand Lodge, A. O. U. W., *v.* Furman, 6 Okla. 649, 52 Pac. 932.

United States.— Union Pac. R. Co. *v.* U. S., 116 U. S. 154, 6 S. Ct. 631, 29 L. ed. 584; Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647.

See 3 Cent. Dig. tit. "Appeal and Error," § 2841.

94. Steele *v.* People, 40 Ill. 59; Figart *v.* Halderman, 59 Ind. 424; Kesler *v.* Myers, 41 Ind. 543. See 3 Cent. Dig. tit. "Appeal and Error," § 2844.

In New Jersey the proper method to bring the facts before the supreme court, for the trial of an appeal from a justice in the court of common pleas, is to take a rule on the court below to certify the facts, and if the court cannot certify, then resort may be had to a rule for affidavits. Moore *v.* Hamilton, 24 N. J. L. 532.

To whom directed.— Certiorari to bring up certain records in the legal custody of a town clerk is properly directed to the town by its corporate name. State *v.* Harrison, 46 N. J. L. 79.

95. Driver *v.* Driver, (Ind. 1898) 52 N. E. 401; Figart *v.* Halderman, 59 Ind. 424; Pelletreau *v.* Jackson, 7 Wend. (N. Y.) 478; Rowan *v.* Lytle, 4 Cow. (N. Y.) 91. See 3 Cent. Dig. tit. "Appeal and Error," § 2845.

In Oregon notice of a motion to have omitted matter sent up is unnecessary. Hill's Anno. Laws Oreg. § 542; Garbade *v.* Larch, Mountain Invest. Co., 36 Oreg. 368, 59 Pac. 711.

Waiver of notice.— Notice of a motion for certiorari to correct the record may be waived by the opposite party. Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

96. Brown *v.* Lathrop, 64 Ga. 430.

Statement of grounds of belief.—In North Carolina, on an application for a writ of certiorari to amend a case on appeal, in order to entitle the applicant to have his petition granted, the grounds of his belief that the judge will make a change or addition to the case should be given, and it ought to appear upon the facts shown that the court will probably make the correction. Allen *v.* McLendon, 113 N. C. 319, 18 S. E. 205; Porter *v.* Western North Carolina R. Co., 97 N. C. 63, 2 S. E. 580; Clark's Code Civ. Proc. N. C. (1900), pp. 725–727. See also Sanders *v.* Thompson, 114 N. C. 282, 19 S. E. 225; Broadwell *v.* Ray, 111 N. C. 457, 16 S. E. 408; Peebles *v.* Braswell, 107 N. C. 68, 12 S. E. 44.

Verification.— An application for a writ of certiorari must be verified. Mitchell *v.* Tomlin, 64 Ga. 368; Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73; Rothchild *v.* McNichol, 121 N. C. 284, 28 S. E. 364; Critz *v.* Sparger, 121 N. C. 283, 28 S. E. 365.

Writing.— A motion for certiorari must be in writing. Waterman *v.* Raymond, 40 Ill. 63.

97. *Alabama.*— Curry *v.* Woodward, 50 Ala. 258; Mullary *v.* Caskaden, Minor (Ala.) 20.

California.—People *v.* Bartlett, 40 Cal. 142.

Illinois.— Waterman *v.* Raymond, 40 Ill. 63.

Indiana.— Louisville, etc., R. Co. *v.* Kendall, 138 Ind. 313, 36 N. E. 415; Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73.

Kentucky.—Meaux *v.* Meaux, 5 Ky. L. Rep. 548.

e. Return. The return to a writ of certiorari should be responsive to the writ and contain all the matter therein required, or the appeal or writ of error may be dismissed.[98]

K. Conclusiveness and Effect, Impeaching and Contradicting — 1. Conclusiveness and Effect — a. Of Record in General. The record filed for the purpose of appeal imports absolute verity. It is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court.[99] If incomplete or incorrect, amendment or correction must be sought by appropriate proceedings.[1]

b. Of Certificate. Within the rule just stated, the certificate of the trial judge as to the proceedings in the trial court,[2] or to the truthfulness of the bill of excep-

Mississippi.—Patrick *v.* McKernon, 5 How. (Miss.) 578.

Missouri.—State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329.

Pennsylvania.— Handley *v.* Delaware, etc., R. Co., 10 Wkly. Notes Cas. (Pa.) 8.

Tennessee.—Trott *v.* West, 1 Meigs (Tenn.) 163.

Texas.— Davis *v.* McGehee, 24 Tex. 209.

United States.—Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510; The Bark Grapeshot *v.* Wallerstein, 7 Wall. (U. S.) 563, 19 L. ed. 83; Randolph *v.* Allen, 73 Fed. 23, 41 U. S. App. 117, 19 C. C. A. 353.

See 3 Cent. Dig. tit. "Appeal and Error," § 2846.

Oral testimony is not sufficient to authorize the correction of a record. McCaslin *v.* Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67.

98. Adams *v.* Owens, 1 Ark. 135; Debary-Baya Merchants' Line *v.* Cotter, 34 Fla. 43; 15 So. 581; Skinner *v.* Badham, 80 N. C. 14.

See, generally, Certiorari; and 3 Cent. Dig. tit. "Appeal and Error," § 2848.

Amendment pending appeal or certiorari.— Where a record has been amended below after appeal, or after the issuance of a writ of certiorari, it is proper to incorporate the amendments in the return to the writ. Drake *v.* Johnston, 50 Ala. 1; Dow *v.* Whitman, 36 Ala. 604; Cunningham *v.* Fontaine, 25 Ala. 644; Caro *v.* Pensacola City Co., 19 Fla. 766; Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505; Greff *v.* Fickey, 30 Md. 75; Chapman *v.* Davis, 4 Gill (Md.) 166.

99. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Prinz *v.* Weber, 126 Ala. 146, 28 So. 10; National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47.

Arkansas.— Daniel *v.* St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214; State Bank *v.* Bates, 10 Ark. 631.

California.— Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220; Derby *v.* Jackman, 89 Cal. 1, 26 Pac. 610.

Colorado.— Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537; Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Florida.— Glaser *v.* Hackett, 38 Fla. 84, 20 So. 820; Sams *v.* King, 18 Fla. 552.

Illinois.— Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576.

Indiana.— State *v.* Halter, (Ind. 1898) 49 N. E. 7; Berkshire *v.* Young, 45 Ind. 461.

Iowa.— McArthur *v.* Schultz, 78 Iowa 364, 43 N. W. 223; Stiles *v.* Botkin, 30 Iowa 60.

Kansas.— Clark *v.* St. Louis, etc., R. Co., 8 Kan. App. 550, 54 Pac. 795.

Kentucky.— Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210; Cook *v.* Conway, 3 Dana (Ky.) 454.

Louisiana.— Saramia *v.* Courégé, 13 La. Ann. 25.

Maine.— Codman *v.* Armstrong, 28 Me. 91.

Maryland.— Mitchell *v.* Mitchell, 1 Gill (Md.) 66.

Mississippi.— Kane *v.* Burrus, 2 Sm. & M. (Miss.) 313.

Missouri.— Bryson *v.* Johnson County, 100 Mo. 76, 13 S. W. 239; Jones *v.* Shaw, 53 Mo. 68.

Nebraska.— Lewis Invest. Co. *v.* Boyd, 48 Nebr. 604, 67 N. W. 456; Davis *v.* Snyder, 45 Nebr. 415, 63 N. W. 789.

New Jersey.— Young *v.* Delaware, etc., R. Co., 38 N. J. L. 502; Morton *v.* Beach, 56 N. J. Eq. 791, 41 Atl. 214.

New York.— Smith *v.* Ferguson, 35 N. Y. App. Div. 328, 55 N. Y. Suppl. 994; Manning *v.* Ferrier, 27 Misc. (N. Y.) 522, 58 N. Y. Suppl. 332.

North Carolina.— State *v.* Journigan, 120 N. C. 568, 26 S. E. 696; State *v.* Hart, 116 N. C. 976, 20 S. E. 1014.

Pennsylvania.— Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Brindle *v.* McIlvaine, 9 Serg. & R. (Pa.) 74.

South Dakota.—Wright *v.* Sherman, 3 S. D. 367, 53 N. W. 425, 17 L. R. A. 792.

Tennessee.— Gilchrist *v.* Cannon, 1 Coldw. (Tenn.) 581.

Texas.— Harris *v.* Reed, 47 Tex. 523.

Washington.— Winsor *v.* McLachlan, 12 Wash. 154, 40 Pac. 727.

Wisconsin.— Deuster *v.* Milwaukee St. R. Co., 89 Wis. 191, 61 N. W. 766; Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792.

United States.— Chaffee *v.* Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Bingham *v.* Cabot, 3 Dall. (U. S.) 382, 1 L. ed. 646.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2850–2852.

1. See *supra*, XIII, J.

2. *Georgia.*— Alston *v.* Grantham, 26 Ga. 374.

Iowa.— Seymour *v.* Hoyt, 23 Iowa 19.

New York.— Goldenson *v.* Lawrence, 1 Misc. (N. Y.) 2, 20 N. Y. Suppl. 616, 48 N. Y. St. 636.

tions, case-made,[3] etc., or that the bill of exceptions, case-made, etc., contains all the proceedings in the transcript, is conclusive.[4] It has been held, however, that a general statement in a bill of exceptions or case-made that it contains all the evidence will not control where it appears from the body of the bill or case-made that evidence is omitted therefrom.[5] It has also been held that the judge's certificate cannot overcome a specific recital in the record.[6]

2. Impeaching and Contradicting. Accordingly, neither the certificate of the trial judge[7] nor of the clerk,[8] nor affidavits nor other evidence *dehors* the record, can be received to contradict, vary, or extend the record.[9] But if, by statute, the

North Carolina.— Antietam Paper Co. *v.* Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367.

Pennsylvania.— Com. *v.* Fitzpatrick, 1 Pa. Super. Ct. 518, 38 Wkly. Notes Cas. (Pa.) 156.

Texas.— International, etc., R. Co. *v.* Hawes, (Tex. Civ. App. 1899) 54 S. W. 325; Blount *v.* Lewis, (Tex. Civ. App. 1898) 47 S. W. 681.

See 3 Cent. Dig. tit. "Appeal and Error," § 2853.

3. Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458; Salina Bldg., etc., Assoc. *v.* Beebe, 24 Kan. 363; Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502; Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

Conflicting certificates.— A recital in the bill of exceptions, which is duly certified by the judge, showing that it was tendered within due time, will be taken as true even though, according to the clerk's certificate, the court adjourned long before the time specified in the bill. Merritt *v.* Gill, 59 Ga. 459.

4. Ayers *v.* Roper, 111 Ala. 651, 20 So. 460; Goodwin *v.* Durham, 56 Ill. 239; McCormick *v.* Holmes, 41 Kan. 265, 21 Pac. 108; Libbey *v.* Ralston, 2 Kan. App. 125, 43 Pac. 294. See 3 Cent. Dig. tit. "Appeal and Error," § 2854.

5. Hoover *v.* Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; Farr *v.* Bach, 13 Ind. App. 125, 41 N. E. 393; Rhea *v.* Crunk, 12 Ind. App. 23, 39 N. E. 879; Sage *v.* Rudnick, 67 Minn. 362, 69 N. W. 1096; Greene *v.* Greene, 49 Nebr. 546, 68 N. W. 947, 59 Am. St. Rep. 560, 34 L. R. A. 110; Missouri Pac. R. Co. *v.* Hays, 15 Nebr. 224, 18 N. W. 51. See also Dill *v.* White, 37 Wis. 617, wherein it was held that a clerk's certificate, stating that the papers annexed are all the papers in the cause, is incorrect on its face if accompanied by loose papers apparently belonging to the cause.

6. Gimbel *v.* Turner, 36 Kan. 679, 14 Pac. 255, wherein it was held that a certificate by the judge that the cause was duly served will not overcome a specific recital in the record showing that the case was not served in due time.

7. *Florida.*— Glaser *v.* Hackett, 38 Fla. 84, 20 So. 820.

Iowa.— Conner *v.* Long, 63 Iowa 295, 19 N. W. 221; Dedric *v.* Hopson, 62 Iowa 562, 17 N. W. 772.

Louisiana.— Wood *v.* Lewis, 1 Mart. N. S. (La.) 594.

Nebraska.— Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999.

Ohio.— Steinbarger *v.* Steinbarger, 19 Ohio 106.

Pennsylvania.— Bughman *v.* Byers, (Pa. 1888) 12 Atl. 357; Sperring's Application, 7 Pa. Super. Ct. 131, 42 Wkly. Notes Cas. (Pa.) 37.

Texas.— See Blount *v.* Lewis, (Tex. Civ. App. 1898) 47 S. W. 681, where a motion to strike the statement from the files was allowed, it appearing from a certificate of the trial judge appended to the statement that such statement was not filed within the time allowed.

See 3 Cent. Dig. tit. "Appeal and Error," § 2864.

8. *California.*— Belt *v.* Davis, 1 Cal. 134.

Illinois.— Meath *v.* Watson, 76 Ill. App. 516.

Indiana.— Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 435, 22 N. E. 125.

Iowa.— Corliss *v.* Conable, 74 Iowa 58, 36 N. W. 891; Gardner *v.* Burlington, etc., R. Co., 68 Iowa 588, 27 N. W. 768; Daniels *v.* Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525; White *v.* Savery, 49 Iowa 197.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58, 3 S. W. 836.

Oregon.— Hislop *v.* Moldenhauer, 24 Oreg. 106, 32 Pac. 1026.

Texas.— Trawick *v.* Martin Brown Co., 74 Tex. 522, 12 S. W. 216.

See 3 Cent. Dig. tit. "Appeal and Error," § 2864.

9. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Chapman *v.* Holding, 54 Ala. 61; Hollingsworth *v.* Chapman, 50 Ala. 23.

California.—Boston *v.* Haynes, 31 Cal. 107.

Florida.— Glaser *v.* Hackett, 38 Fla. 84, 20 So. 820; Florida Cent., etc., R. Co. *v.* St. Clair-Abrams, 35 Fla. 514, 17 So. 639.

Georgia.— Middlebrooks *v.* Middlebrooks, 57 Ga. 193.

Illinois.— Lawver *v.* Langhans, 85 Ill. 138; People *v.* Cadwell, 86 Ill. App. 460.

Indiana.— Denton *v.* Thompson, 136 Ind. 446, 35 N. E. 264; F. W. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1002.

Indian Territory.— Barringer *v.* Booker, 1 Indian Terr. 432, 35 S. W. 246.

Iowa.— Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; France *v.* Smith, 87 Iowa 552, 54 N. W. 366.

Kentucky.— Garrott *v.* Ratliff, 83 Ky. 384, 6 Ky. L. Rep. 72; Thompson *v.* Probert, 2 Bush (Ky.) 144.

appellate court is authorized to ascertain matters of fact necessary to the proper exercise of its jurisdiction, it may inquire as to the truth of the record sent up.[10]

3. Conflict in Record — a. In General. In case of conflicting statements entitled to equal weight the court will consider the whole record, and put that construction upon it which is consistent and which is evidently in accord with the facts.[11] A recital in the judgment will be given credit in preference to a memorandum on the bench docket,[12] the record of the clerk,[13] the minutes of the judge,[14] or a declaration in an assignment of error.[15] And the record-entry governs a certificate of the clerk.[16] So, too, the regular record-entry of the verdict will be received in preference to a copy of the verdict inserted elsewhere in the transcript.[17]

b. Between Abstracts. In case of discrepancy between an abstract and a counter-abstract, the original record will be examined.[18]

c. Between Bill of Exceptions and Other Parts of Record. Where the recitals of the record as made up by the clerk, and the statements of a bill of excep-

Louisiana.— Bartoli *v.* Huguenard, 39 La. Ann. 411, 2 So. 196, 6 So. 30; Edwards' Succession, 34 La. Ann. 216.

Massachusetts.— Miller *v.* Shea, 150 Mass. 283, 22 N. E. 912; Robinson *v.* Robinson, 129 Mass. 539.

Mississippi.— Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62.

Missouri.— Wilson *v.* Taylor, 119 Mo. 626, 25 S. W. 199.

Montana.— Largey *v.* Sedman, 3 Mont. 357.

Nebraska.— Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105; Security Nat. Bank *v.* Latimer, 51 Nebr. 498, 71 N. W. 38.

New Hampshire.— Watson *v.* Walker, 33 N. H. 131.

New Jersey.— Marsh *v.* Mitchell, 26 N. J. Eq. 497.

New York.— Gormly *v.* McIntosh, 22 Barb. (N. Y.) 271; Meise *v.* Doscher, 21 N. Y. Suppl. 337, 50 N. Y. St. 469.

North Carolina.— McDaniel *v.* King, 89 N. C. 29; Clark's Code Civ. Proc. N. C. (1900), pp. 766, 767.

Ohio.— Heddleson *v.* Hendricks, 49 Ohio St. 297, 34 N. E. 696.

Oklahoma.— *Compare* Blanchard *v.* U. S., 6 Okla. 587, 52 Pac. 736.

Pennsylvania.— Beringer *v.* Lutz, 179 Pa. St. 1, 37 Atl. 640.

Tennessee.—Carney *v.* McDonald, 10 Heisk. (Tenn.) 232.

Texas.—Chrisman *v.* Graham, 51 Tex. 454; Brown *v.* Durham, (Tex. Civ. App. 1897) 41 S. W. 369.

Utah.— Center Creek Water, etc., Co. *v.* Thomas, 19 Utah 360, 57 Pac. 30; Whipple *v.* Preece, 18 Utah 454, 56 Pac. 296.

Washington.— Ward *v.* Springfield F. & M. Ins. Co., 12 Wash. 631, 42 Pac. 119.

Wisconsin.—Wilmot *v.* Smith, 86 Wis. 299, 56 N. W. 873.

United States.— Evans *v.* Stettnisch, 149 U. S. 605, 13 S. Ct. 931, 37 L. ed. 866; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2861, 2862.

10. Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236. See also Poole *v.* Muel, (Tex. Civ. App. 1895) 30 S. W. 951.

11. Board of Education *v.* State, 7 Kan. App. 620, 52 Pac. 466; Wooten *v.* Wingate, 6 Sm. & M. (Miss.) 271, wherein it was held that, where the bill of exceptions states that an order was made at the instance of plaintiff himself, but the judgment of the court states that it was on motion of defendant, the latter statement will be accepted where it is the only sensible and consistent one. But see Hale *v.* Johnson, 6 Kan. 137, wherein it was held that of several conflicting statements in a bill of exceptions the last one will be presumed correct.

See 3 Cent. Dig. tit. "Appeal and Error," § 2856.

If of two conflicting portions of a record one is regularly kept or made up under the authority and express direction of law, that one will prevail. Kurtz *v.* Hoke, 172 Pa. St. 165, 37 Wkly. Notes Cas. (Pa.) 369, 33 Atl. 549; Bear *v.* Patterson, 3 Watts & S. (Pa.) 233. See also Vanmeter *v.* McHard, 31 Ill. 257.

If there be a conflict between the stenographer's report, expressly made a part of the bill of exceptions, and allegations of fact in the bill, the former will control. Tower *v.* Haslam, 84 Me. 86, 24 Atl. 587; Harmon *v.* Harmon, 63 Me. 437.

12. Keller *v.* Killion, 9 Iowa 329.

13. Buck *v.* Holt, 74 Iowa 294, 37 N. W. 377.

14. Gage *v.* Bloomington Town Co., 37 Nebr. 699, 56 N. W. 491. See also Ward *v.* Curcier, 1 Litt. (Ky.) 202.

15. Graves *v.* Cameron, 77 Tex. 273, 14 S. W. 59.

16. Ferrier *v.* Wood, 9 Ark. 85.

17. Langley *v.* Grill, 1 Colo. 71; Catholic Order of Foresters *v.* Fitz, 181 Ill. 206, 54 N. E. 952.

18. Hobbie *v.* Andrews, 111 Ala. 176, 19 So. 974; Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507; O'Neal *v.* Simonton, 109 Ala. 369, 19 So. 8; Lookahill *v.* Foulks, 83 Iowa 423, 49 N. W. 1019; Zimmerman *v.* Merchants, etc., Ins. Co., 77 Iowa 350, 42 N. W. 318; Webb *v.* Allington, 27 Mo. App. 559; Hemelreich *v.* Carlos, 24 Mo. App. 264; Kehoe *v.* Hanson, 6 S. D. 322, 60 N. W. 31. See 3 Cent. Dig. tit. "Appeal and Error," § 2860.

tions, duly signed and sealed by the judge, are not in harmony, the real truth will be taken to be as stated by the latter.[19] Thus, if a bill of exceptions has been agreed to by the parties, and has been approved by the judge, its statements cannot be varied by a subsequent statement of facts in the case settled on appeal to which the parties have not agreed.[20] But that which belongs to the record proper and is contained therein cannot be contradicted by anything contained in the bill of exceptions.[21]

d. Between Case and Other Parts of Record. Where there is a discrepancy between the record and the case on appeal, the record controls.[22]

L. Questions Presented For Review[23]**— 1. In General.** As a general rule, a question will not be reviewed by the appellate court in the absence of a full and complete record of the proceedings relating thereto in the court below.[24]

19. *Alabama.*— National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47; Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770.

Arkansas.— Rogers *v.* Diamond, 13 Ark. 474.

Colorado.—Atchison, etc., R. Co. *v.* Denver, 2 Colo. App. 436, 31 Pac. 240.

Georgia.—Poullain *v.* Poullain, 72 Ga. 412; Clements *v.* Collins, 59 Ga. 124.

Illinois.— Catholic Order of Foresters *v.* Fitz, 181 Ill. 206, 54 N. E. 952; McChesney *v.* People, 174 Ill. 46, 50 N. E. 1110; Stern *v.* Glattstein, 80 Ill. App. 367.

Indiana.— Blair *v.* Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; Indiana, etc., R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80; Boyd *v.* Smith, 15 Ind. App. 324, 43 N. E. 1056.

Iowa.—Oskaloosa College *v.* Western Union Fuel Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903.

Kentucky.— Louisville, etc., R. Co. *v.* Yowell, 10 Ky. L. Rep. 721.

Massachusetts.—Carroll *v.* Daly, 162 Mass. 427, 38 N. E. 1119.

Michigan.— Guerold *v.* Holtz, 103 Mich. 118, 61 N. W. 278.

Mississippi.— Keithler *v.* State, 10 Sm. & M. (Miss.) 192; Helm *v.* Smith, 2 Sm. & M. (Miss.) 403.

Missouri.— McGinnis *v.* Loring, 126 Mo. 404, 28 S. W. 750.

Ohio.—Bowen *v.* Gazlay, 8 Ohio Cir. Ct. 256. See 3 Cent. Dig. tit. "Appeal and Error," § 2857.

20. McClelland *v.* Fallon, 74 Tex. 236, 12 S. W. 60; Gaines *v.* Salmon, 16 Tex. 311. See also Wright *v.* Solomon, (Tex. Civ. App. 1898) 46 S. W. 58; Gulf, etc., R. Co. *v.* Wedel, (Tex. Civ. App. 1897) 42 S. W. 1030; Byers *v.* Wallace, (Tex. Civ. App. 1894) 25 S. W. 1043.

21. *Alabama.*— Butler *v.* Savannah Guano Co., 122 Ala. 326, 25 So. 241 (a conflict between recital in a judgment entry and the bill of exceptions); Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Arkansas.— Trammell *v.* Bassett, 24 Ark. 499; Crump *v.* Starke, 23 Ark. 131; Touchstone *v.* Harris, 22 Ark. 365.

Colorado.— Kirkpatrick *v.* Wheeler, 8 Colo. 414, 8 Pac. 664.

Georgia.— Rushing *v.* Willingham, 105 Ga. 166, 31 S. E. 154; Adams *v.* Holland, 101 Ga. 43, 28 S. E. 434.

Iowa.— Cook *v.* U. S., 1 Greene (Iowa) 56.

Missouri.— Jacobs *v.* Western Fertilizer, etc., Works, 9 Mo. App. 575.

New York.— Boynton *v.* Page, 13 Wend. (N. Y.) 425.

Ohio.— Upham Mfg. Co. *v.* Gibson, 15 Ohio Cir. Ct. 670, 8 Ohio Cir. Dec. 127, 371.

Utah.—Reece *v.* Knott, 3 Utah 436, 24 Pac. 759.

22. State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646; McDaniel *v.* Scurlock, 115 N. C. 295, 20 S. E. 451; Finlayson *v.* American Acc. Co., 109 N. C. 196, 13 S. E. 739; State *v.* Carlton, 107 N. C. 956, 12 S. E. 44; McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359; Farmer *v.* Willard, 75 N. C. 401; Abel *v.* Blair, 3 Okla. 399, 41 Pac. 342; Day *v.* Territory, 2 Okla. 409, 37 Pac. 806. See 3 Cent. Dig. tit. "Appeal and Error," § 2858.

23. As to extent of review, generally, see *infra*, XVII.

As to presumptions in absence of complete record see *infra*, XVII, E.

As to review of matters not apparent of record see *infra*, XIII, M.

24. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Hobbie *v.* Andrews, 111 Ala. 176, 19 So. 974.

Arkansas.— Bassham *v.* Kansas City, etc., R. Co., 58 Ark. 399, 24 S. W. 1071.

California.— Martin *v.* Splivalo, (Cal. 1889) 21 Pac. 547.

Florida.— Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822.

Georgia.— Smith *v.* Chambers, 62 Ga. 162.

Illinois.— Tolman *v.* Wheeler, 57 Ill. App. 342.

Indiana.— Hoover *v.* Wood, 9 Ind. 286.

Iowa.— Sweet *v.* Billings, 14 Iowa 384.

Kansas.— Toof *v.* Cragun, 53 Kan. 139, 35 Pac. 1103.

Kentucky.— May *v.* Ewing, 17 Ky. L. Rep. 304, 29 S. W. 634.

Massachusetts.— Weld *v.* Walker, 130 Mass. 422, 39 Am. Rep. 465.

Michigan.— State Ins. Co. *v.* Reynolds, 35 Mich. 304.

Minnesota.— Dow *v.* Northern Land, etc., Co., 51 Minn. 326, 53 N. W. 649.

Missouri.— Sudarth *v.* Cox, 33 Mo. 149.

North Carolina.— Weil *v.* Everitt, 83 N. C. 685.

Oregon.— Fisher *v.* Kelly, 26 Oreg. 249, 38 Pac. 67.

2. Jurisdiction of Trial Court. Objections, on appeal, to the jurisdiction of the trial court will not be considered when the record contains recitals showing jurisdiction, and nothing conflicting therewith except allegations of a motion by the objecting party for the dismissal of the cause.[25]

3. Form of Action. In order to determine questions as to the proper form of action on appeal, the evidence on which the judgment was based should be made to appear by the record.[26]

4. Parties. Where no question as to parties is presented by the record none will be considered.[27]

Pennsylvania.— Brindle *v.* Brindle, 50 Pa. St. 387.

South Carolina.— Floyd *v.* Floyd, 4 Rich. (S. C.) 23.

Texas.— Randon *v.* Cartwright, 3 Tex. 267.

Vermont.— Hazeltine *v.* Page, 4 Vt. 49.

Washington.— Link *v.* Bosse, 5 Wash. 491, 31 Pac. 599.

United States.— Keene *v.* Whittaker, 13 Pet. (U. S.) 459, 10 L. ed. 246.

See 3 Cent. Dig. tit. "Appeal and Error," § 2867 *et seq.*

25. Mathews *v.* Heisler, 58 Mo. App. 145. See 3 Cent. Dig. tit. "Appeal and Error," § 2874.

As to necessity of record showing jurisdiction of trial court see *supra*, XIII, A, 2, b [2 Cyc. 1032].

As to presumptions as to jurisdiction of trial court see *infra*, XVII, E, 2, h.

Denial of relief.— An appellate court cannot pass on a question of the power of the lower court to grant certain relief unless it appears in the order or decree that the denial of such relief was upon the ground of want of power. Matter of Whittall, 49 N. Y. Suppl. 282.

Disqualification of trial judge.— An objection, on the ground of the disqualification of the trial judge, cannot be sustained where the case or statement of facts fails to show the disqualification. Thomson *v.* Brown, 48 S. C. 350, 26 S. E. 655; Wright *v.* Sherwood, (Tex. Civ. App. 1896) 37 S. W. 468.

Failure to show that property seized was without the limits of the trial justice.— Where the record does not state that property seized in replevin was without the territorial limits of the justice of the peace who tried the cause, such an objection cannot be considered. Coleman *v.* Gordon, (Miss. 1894) 16 So. 340.

26. Bartling *v.* Thielman, 183 Ill. 88, 55 N. E. 677, wherein it was held that, in the absence of a bill of exceptions containing the evidence, the supreme court cannot sustain an objection that the action should not sound in tort; Janes *v.* Buzzard, Hempst. (U. S.) 240, 13 Fed. Cas. No. 7,206*a*, wherein it was held that an objection, entered because of the misconception of an action, is not valid in error where the bill of exceptions does not present all the facts as detailed in evidence in the court below.

See 3 Cent. Dig. tit. "Appeal and Error," § 2873.

As to record showing that action was properly constituted see *supra*, XIII, A, 3, a [2 Cyc. 1035].

Cause of action.— The appellate court will not pass upon a question as to the cause of an action unless all the evidence is in the record. Gunn *v.* Strong, 20 Ky. L. Rep. 650, 47 S. W. 339; Bragg *v.* Rutland, 70 Vt. 606, 41 Atl. 578.

Defenses to action.— Where the answer is omitted from the record, and there is nothing to show that the defense insisted upon was an issue in the trial court, the question as to the alleged defense will not be considered. St. Louis Brokerage Co. *v.* Bagnell, 8 Mo. App. 565.

Splitting cause of action.— A defendant may, if he wishes, waive the benefit of the rule that a single cause of action cannot be split; a refusal of the trial court, therefore, to find that there was a single cause of action will not be disturbed on appeal unless all the evidence is in the record, as there may have been evidence of the waiver of defendant. Gardner *v.* Patten, 15 N. Y. Suppl. 324, 36 N. Y. St. 1023.

27. Rogers *v.* West, 9 Ind. 400; Shelby *v.* Bohn, 25 Ind. App. 473, 57 N. E. 566; Lawton *v.* Eagle, (Kan. App. 1900) 61 Pac. 868; Campau *v.* Campau, 19 Mich. 116.

See, generally, Parties; and 3 Cent. Dig. tit. "Appeal and Error," § 2876.

As to presumptions as to parties see *infra*, XVII, E, 1, c.

As to record showing jurisdiction of the parties see *supra*, XIII, A, 2, b, (III) [2 Cyc. 1034].

As to review of discretion of trial court in allowing amendments as to parties see *infra*, XVII, F, 2, a.

Coverture.— On error, a judgment will not be reversed, on the ground that it was rendered against a married woman upon a contract which she could not legally make, unless the fact of coverture is apparent on the record. Evans *v.* Jones, 8 Ohio Dec. (Reprint) 543, 8 Cinc. L. Bul. 308; Hahner *v.* Kaufman, 5 Ohio Dec. (Reprint) 412, 7 Ohio Dec. (Reprint) 226, 1 Cinc. L. Bul. 364. *Compare* Shreve *v.* Parrott, 4 Ohio Dec. (Reprint) 373, 7 Ohio Dec. (Reprint) 581, 4 Cinc. L. Bul. 39.

Infancy or incapacity to sue.— The question of a plaintiff's infancy or his legal incapacity to sue is not presented on appeal where his age is not stated in any of the pleadings. Edwards *v.* Beall, 75 Ind. 401.

New parties.— Upon the allowance of an amendment introducing new parties it is the duty of appellant to put into the record all the grounds he relies on to show error in that allowance, and if none appear it will be sustained. Pass *v.* McRea, 36 Miss. 143.

5. Process. Questions as to the sufficiency of process, or the service or return thereof, will not be considered where such process or the return thereto are not contained in the record.[28]

6. Pleadings — a. In General. An assignment of error in regard to the pleadings will not be considered on appeal if the record does not contain the pleadings.[29]

b. Amendments. The action of the trial court in allowing, or refusing to allow, an amendment of a pleading will not be reviewed where the record fails to show the amendment allowed or refused.[30]

28. *Kentucky.*— Layton *v.* Weed Sewing Mach. Co., 4 Ky. L. Rep. 263.

Maine.— Bliss *v.* Day, 68 Me. 201.

Nevada.— Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895.

Texas.— Hamilton Gin, etc., Co. *v.* Sinker, 74 Tex. 51, 11 S. W. 1056.

Vermont.— Olcott *v.* Hutchins, 4 Vt. 17.

See, generally, Process; and 3 Cent. Dig. tit. "Appeal and Error," § 2877.

As to presumptions as to process see *infra*, XVII, E, 2.

As to process as part of record see *supra*, XIII, B, 1, b [2 Cyc. 1055].

As to record showing service of process see *supra*, XIII, A, 2, b, (III) [2 Cyc. 1034].

As to review of discretion of trial court as to amendment of process see *infra*, XIII, F, 2, a.

Absence of seal.— Where the validity of process is challenged on appeal, on the ground of the absence of a seal, the record must affirmatively show that the seal was not on the writ; and the mere fact that there is no scroll or word "Seal" on the copy at the place where the seal is usually affixed is insufficient to show the absence thereof, when opposed to a recital in the writ itself that the seal was affixed. Morris *v.* Bunyan, 58 Kan. 210, 48 Pac. 864.

Showing as to finding upon service.— Upon appeal from an order vacating a judgment for want of service of process, it is necessary that the record should show how the judge found upon the question of such service. Cardwell *v.* Cardwell, 64 N. C. 621.

Variance between summons and copy.— In order that an appellate court may take notice of an alleged variance between the original summons and the copy served, the record should fully set out such variance, so that the court may determine its materiality. Dunschen *v.* Higgins, 2 Mont. 302.

Where, in support of the objections to service of summons, made by a special appearance for that purpose, affidavits were filed, but did not appear in the record, the rulings of the lower court must be sustained. Life Ins. Clearing Co. *v.* Altschuler, 53 Nebr. 481, 73 N. W. 942.

29. *Alabama.*— Hobbie *v.* Andrews, 111 Ala. 176, 19 So. 974.

Georgia.— Beck *v.* Thompson, etc., Spice, etc., Co., 112 Ga. 683, 37 S. E. 983; Garner *v.* Keaton, 13 Ga. 431.

Illinois.— Shields *v.* Brown, 64 Ill. App. 259; Reichmann *v.* Baier, 46 Ill. App. 346.

Indiana.— Huntington *v.* Folk, 154 Ind. 91, 54 N. E. 759; State *v.* Earl, 133 Ind. 389, 32 N. E. 1126.

Iowa.— Snell *v.* Hancock, 11 Iowa 117.

Kansas.— Rinard *v.* Gardner, 49 Kan. 563, 31 Pac. 134.

Kentucky.— Finnell *v.* Higginbotham, 97 Ky. 21, 29 S. W. 740; Wells *v.* Luttrell, 21 Ky. L. Rep. 141, 50 S. W. 684.

Maine.— Carleton *v.* Lewis, 67 Me. 76.

Maryland.— Brooke *v.* Waring, 7 Gill (Md.) 5.

Massachusetts.— Raymond *v.* Rhodes, 135 Mass. 337.

Minnesota.— White *v.* Balch, 24 Minn. 264.

Missouri.— Sullivan *v.* Knights of Father Mathew, 73 Mo. App. 43.

Montana.— Haggin *v.* Lorentz, 13 Mont. 406, 34 Pac. 607.

Nebraska.— Western Seed, etc., Co. *v.* Morton, 59 Nebr. 579, 81 N. W. 616; Reynolds *v.* Reynolds, 10 Nebr. 574, 7 N. W. 322.

New York.— Lewis *v.* Chronicle Co., 16 N. Y. Suppl. 349, 41 N. Y. St. 435; Lamberty *v.* Roberts, 9 N. Y. Suppl. 607, 31 N. Y. St. 148.

South Carolina.— Johnston *v.* Holmes, 32 S. C. 434, 11 S. E. 208.

Texas.— Bynum *v.* Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; Bonner *v.* Huckaby, (Tex. Civ. App. 1896) 36 S. W. 305.

Wisconsin.— Evans *v.* Rector, 107 Wis. 286, 83 N. W. 292; Clifford *v.* Minneapolis, etc., R. Co., 105 Wis. 618, 81 N. W. 143.

See, generally, Pleading; and 3 Cent. Dig. tit. "Appeal and Error," § 2878 *et seq.*

As to presumptions as to pleadings see *infra*, XVII, E, 2, c.

As to pleadings as part of record see *supra*, XIII, B, 1, c [2 Cyc. 1056].

As to record showing pleadings see *supra*, XIII, A, 3, b [2 Cyc. 1035].

Preservation of bill of particulars.— Where the record does not contain a bill of particulars, the appellate court cannot consider its alleged contents. Bolte *v.* Third Ave. R. Co., 38 N. Y. App. Div. 234, 56 N. Y. Suppl. 1038. See also Schofield *v.* Settley, 31 Ill. 515.

The testimony is not necessary for the review on appeal of the legal sufficiency of the pleadings. Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188.

30. *Arkansas.*—Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

California.— Jessup *v.* King, 4 Cal. 331.

Illinois.— Field *v.* Golconda, 81 Ill. App. 165; McFarland *v.* Claypool, 30 Ill. App. 38 [*affirmed* in 128 Ill. 397, 21 N. E. 587].

Indiana.— Hedrick *v.* Whitehorn, 145 Ind. 642, 43 N. E. 942; Lime City Bldg., etc., Assoc. *v.* Black, 136 Ind. 544, 35 N. E. 829.

c. Demurrers. The ruling on a demurrer cannot be reviewed on appeal unless the demurrer, with the grounds thereof,[31] and the pleading demurred to are set out in the record.[32] The record should also show a judgment entered on the ruling.[33]

Iowa.— Boyd *v.* Ames, 110 Iowa 749, 82 N. W. 774.

Kentucky.— Bartram *v.* Burns, 19 Ky. L. Rep. 1295, 43 S. W. 248, 686; McCleavy *v.* Raymond, 19 Ky. L. Rep. 177, 39 S. W. 421.

Massachusetts.— Clark *v.* Lamb, 6 Pick. (Mass.) 512.

Minnesota.— Schumann *v.* Mark, 35 Minn. 379, 28 N. W. 927.

Mississippi.— Watts *v.* Patton, 66 Miss. 54, 5 So. 628.

Montana.— Babcock *v.* Caldwell, 22 Mont. 460, 56 Pac. 1081.

Nebraska.— Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483; German-American Ins. Co. *v.* Hart, 43 Nebr. 441, 61 N. W. 582.

New York.— Mellen *v.* Banning, 76 Hun (N. Y.) 225, 27 N. Y. Suppl. 753, 59 N. Y. St. 95.

Ohio.— Ferguson *v.* Miami Powder Co., 9 Ohio Cir. Ct. 445.

Pennsylvania.— Richardson *v.* Gosser, 26 Pa. St. 335.

Texas.— Texas Sav. Loan Assoc. *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 380.

Virginia.— Reid *v.* Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 64 Am. St. Rep. 708, 36 L. R. A. 274.

United States.— Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567, 25 L. ed. 815.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2883, 2884.

As to original pleading as part of record see *supra*, XIII, B, 1, c, (VI) [2 Cyc. 1060].

As to presumptions as to amendments see *infra*, XVII, E, 2, c.

As to review of discretion of trial court as to amendments of pleadings see *infra*, XVII, F, 2, b, (I).

Necessity of evidence.— An order permitting an amendment to conform to the proof will not be reviewed in the absence of the evidence. Harvey *v.* Ferguson, 10 Ind. 393.

Showing as to original pleading.— Permission to amend a complaint by substitution will not be reviewed if the record does not disclose the original pleading. O'Connor *v.* Adams, (Ariz. 1899) 59 Pac. 105. See also Long *v.* Bolen Coal Co., 56 Mo. App. 605.

Showing as to ruling.— In order to decide whether the court below erred in refusing to allow the filing of an amended complaint, the record should set forth a statement of the grounds on which exception was taken, and the ruling of the court below. Rooney *v.* Tong, 4 Mont. 597, 2 Pac. 312.

Showing as to submission of amendment.— Where the record does not show that the substituted answer was proposed and submitted to the court, with a motion for leave to file it, the appellate court cannot consider the substituted answer. Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267. So, refusal to allow an amendment is not error where the transcript does not show that any amendment was prepared or submitted, or that good cause was shown therefor. Bickle *v.* Irvine, 9 Mont. 251, 23 Pac. 244. See also Schneider *v.* Tombling, 34 Nebr. 661, 52 N. W. 283.

31. *Alabama.*— Holley *v.* Coffee, 123 Ala. 406, 26 So. 239; Burgess *v.* Martin, 111 Ala. 656, 20 So. 506; Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

California.— Clark *v.* Taylor, 91 Cal. 552, 27 Pac. 860; Damsguard *v.* Gunnoldson, (Cal. 1885) 7 Pac. 772.

Illinois.— Illinois Cent. R. Co. *v.* Parks, 88 Ill. 373; Carter *v.* Lewis, 29 Ill. 500.

Indiana.— Jones *v.* Mayne, 154 Ind. 400, 55 N. E. 956; Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268.

Iowa.— Andregg *v.* Brunskill, 87 Iowa 351, 54 N. W. 135, 43 Am. St. Rep. 388.

Nebraska.— Ball *v.* Nelson, 45 Nebr. 205, 63 N. W. 361.

Texas.— Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

See 3 Cent. Dig. tit. "Appeal and Error," § 2880 *et seq.*

As to demurrers as part of record see *supra*, XIII, B, 1, c, (I), (B) [2 Cyc. 1057].

As to presumptions as to demurrers see *infra*, XVII, E, 2, c.

Election to stand on demurrer.— Where a demurrer to an answer is overruled, and plaintiff elects to stand on the ruling, he must have this fact shown by the record. Seippel *v.* Blake, 80 Iowa 142, 41 N. W. 193, 45 N. W. 728; Wilcox *v.* McCune, 21 Iowa 294.

Necessity of evidence.— In Masland *v.* Kemp, 70 Ga. 786, it was held that an exception to a ruling on a demurrer to a bill, plea, or the like may be heard without the evidence.

32. *Alabama.*— Birmingham *v.* Coleman, 111 Ala. 407, 20 So. 383; Western Union Tel. Co. *v.* Crawford, 110 Ala. 460, 20 So. 111.

Georgia.— Kemp *v.* Lowe, 51 Ga. 273.

Illinois.— Illinois Cent. R. Co. *v.* Parks, 88 Ill. 373; Haas *v.* Metz, 78 Ill. App. 46.

Indiana.— Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; White *v.* Fatout, 152 Ind. 126, 52 N. E. 700.

Kansas.— Scully *v.* Porter, 3 Kan. App. 493, 43 Pac. 924.

Kentucky.— Huffaker *v.* National Bank, 13 Bush (Ky.) 644.

Missouri.— Scott *v.* Howard, 41 Mo. App. 488.

South Carolina.— Suber *v.* Chandler, 28 S. C. 382, 6. S. E. 155.

Texas.— Rice *v.* Lemon, 16 Tex. 593.

33. Bessemer Land, etc., Co. *v.* Dubose, 125 Ala. 442, 28 So. 380; Carter *v.* Long, 125 Ala. 280, 28 So. 74; Crawford *v.* Crawford, 119 Ala. 34, 24 So. 727; Condon *v.* Enger, 113 Ala. 233, 21 So. 227; Park *v.* Lide, 90 Ala. 246, 7 So. 805.

Showing in bill of exceptions.— In Alabama demurrers will not be considered on appeal where the rulings thereon are shown in

d. Striking Out. The ruling of the lower court, on a motion to strike out a pleading, or a part thereof, will not be considered on appeal where the motion,[34] the pleading to which the motion is addressed,[35] and the ruling on the motion[36] are not, by bill of exceptions or otherwise, made a part of the record.

7. Interlocutory Proceedings[37]— a. In General. The action of the trial court upon interlocutory proceedings will not be reviewed on appeal unless the record sets out such facts in regard to such proceedings as will enable the appellate court to determine the propriety and correctness of the decision of the trial court.[38]

the bill of exceptions only. Heard *v.* Hicks, 101 Ala. 102, 13 So. 256; Powell *v.* Henry, 96 Ala. 412, 11 So. 311; Beck *v.* West, 91 Ala. 312, 9 So. 199, 87 Ala. 213, 6 So. 70; Steele *v.* Savage, 85 Ala. 230, 4 So. 46; Baker *v.* Keith, 77 Ala. 544; Bean *v.* Chapman, 62 Ala. 58; Buckley *v.* Wilson, 56 Ala. 393; Hunter *v.* Wood, 54 Ala. 71.

34. *Colorado.*— Whitney *v.* Teichfuss, 11 Colo. 555, 19 Pac. 507.

Illinois.— Gaddy *v.* McCleave, 59 Ill. 182.

Indiana.— Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142, 28 N. E. 271; Ford *v.* Griffin, 100 Ind. 85; Flora *v.* Cline, 89 Ind. 208; Broker *v.* Scobey, 56 Ind. 588.

Maryland.— Shartzer *v.* Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786.

Missouri.—Waters *v.* School Dist. No. 4, 59 Mo. App. 580; Austin *v.* Boyd, 28 Mo. App. 52.

Nebraska.— Fremont Butter, etc., Co. *v.* Peters, 45 Nebr. 356, 63 N. W. 791.

See 3 Cent. Dig. tit. "Appeal and Error," § 2885.

As to review of discretion of trial court in striking out pleading see *infra*, XVII, F, 2, b, (III).

As to stricken pleading as part of record see *supra*, XIII, B, 1, c, (V) [2 Cyc. 1059].

35. *Alabama.*—Lake *v.* Gaines, 75 Ala. 143; Hale *v.* Vaughan, 73 Ala. 145; Cotten *v.* Bradley, 38 Ala. 506.

Georgia.— Polleys *v.* Brinson, 84 Ga. 513, 11 S. E. 356; Central R. Co. *v.* Smith, 69 Ga. 268.

Illinois.— Barger *v.* Hobbs, 67 Ill. 592.

Indiana.— Knowlton *v.* Dolan, 151 Ind. 79, 51 N. E. 97; State *v.* Crowe, 150 Ind. 455, 50 N. E. 471; Sprague *v.* Pritchard, 108 Ind. 491, 9 N. E. 416; DeKalb Nat. Bank *v.* Nicely, 24 Ind. App. 147, 55 N. E. 240.

Missouri.— Martin *v.* Jones, 72 Mo. 23; Robinson *v.* Rice, 20 Mo. 229; Ober *v.* Indianapolis, etc., R. Co., 13 Mo. App. 81.

Nebraska.— Doolittle *v.* American Nat. Bank, 58 Nebr. 454, 78 N. W. 926.

South Carolina.— Donaldson *v.* Ward, 20 S. C. 585.

Utah.— See Gregg *v.* Groesbeck, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

See 3 Cent. Dig. tit. "Appeal and Error," § 2886.

36. Livingston *v.* L'Engle, 22 Fla. 427; Barger *v.* Hobbs, 67 Ill. 592; Waters *v.* School Dist. No. 4, 59 Mo. App. 580; Clarke *v.* Van Court, 34 Nebr. 154, 51 N. W. 756.

Showing that plea was stricken out.— Striking out of a plea cannot be reviewed where the fact that it was stricken out is not certified, and does not appear in the record. Findley *v.* Johnson, 84 Ga. 69, 10 S. E. 594.

37. As to review of interlocutory proceedings, generally, see *infra*, XVII, B.

38. *Alabama.*— Ewing *v.* Wofford, 122 Ala. 439, 25 So. 251, motion to set aside sale of lands under levy by execution.

Arizona.— Scott *v.* Hurley, (Ariz. 1898) 53 Pac. 578, order distributing a surplus arising on a foreclosure sale.

Illinois.— Sheehan *v.* Richardson, 147 Ill. 366, 35 N. E. 619 (discharge of bail); Greenwald Furniture Co. *v.* American Lamp, etc., Co., 78 Ill. App. 492 (amendment of order).

Indiana.— Shepard *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346 (motion to require plaintiff to elect as to capacity in which he will sue); Rodman *v.* Kelly, 13 Ind. 377 (motion to suppress deposition).

Iowa.— Teller *v.* Equitable Mut. L. Assoc., 108 Iowa 17, 78 N. W. 674 (motion to suppress deposition); Huston *v.* Stringham, 21 Iowa 36 (attorney's authority to appear).

Kansas.— McIntosh *v.* Crawford County, 13 Kan. 171, overruling motion.

Kentucky.— Robinson *v.* Talbott, (Ky. 1900) 56 S. W. 717 (reasonableness of allowance to administrator); Creutz *v.* Knecht, 9 Ky. L. Rep. 772, 6 S. W. 717 (exceptions to commissioner's report).

Maryland.— Cox *v.* Chalk, 57 Md. 569 (order of orphans' court in summary proceedings); State *v.* Layman, 46 Md. 190 (rule for security).

Michigan.— Schwab *v.* Coots, 48 Mich. 116, 11 N. W. 832, transfer of cause to federal court.

Minnesota.—Du Toit *v.* Fergestad, 55 Minn. 462, 57 N. W. 204, order disposing of interlocutory motion.

Missouri.— Force *v.* Van Patton, 149 Mo. 446, 50 S. W. 906, order on a motion to quash an execution.

Nebraska.— Hudson *v.* Pennock, 48 Nebr. 359, 67 N. W. 188; Barr *v.* State, 45 Nebr. 458, 63 N. W. 856.

New York.— Fitchett *v.* Murphy, 30 N. Y. App. Div. 304, 51 N. Y. Suppl. 556 (order granting inspection of books); Matter of McBride, 90 Hun (N. Y.) 259, 35 N. Y. Suppl. 689, 70 N. Y. St. 486 (order directing payment of money into court).

Pennsylvania.—Lowenstein *v.* North Schuylkill Mut. F. Ins. Co., 132 Pa. St. 410, 20 Atl. 688, order discharging rule to show cause why decree should not be rescinded.

Texas.— Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64 (motion to suppress deposition); Cochran *v.* Walker, (Tex. Civ. App. 1899) 49 S. W. 403 (order refusing to consolidate a cause).

See 3 Cent. Dig. tit. "Appeal and Error," § 2887.

b. Appointment or Discharge of Receiver. An order appointing or refusing to appoint, discharging or refusing to discharge, a receiver will not be reviewed where the evidence on which the trial court acted is not incorporated into the record.[39]

c. Attachment or Garnishment. An order of the trial court, in attachment or garnishment proceedings, will not be reviewed on appeal where the evidence on which the court acted is not preserved in the record.[40]

d. Change of Venue. The action of the trial court, upon an application for a change of venue, will not be reviewed unless the application and the affidavits in support thereof,[41] and the evidence heard on the application, appear in the record.[42]

As to interlocutory motions and orders as part of record see *supra*, XIII, B, 1, e [2 Cyc. 1061].

39. Robinson *v.* Dickey, 143 Ind. 214, 42 N. E. 638; Brown *v.* Muncie Nat. Bank, 110 Ind. 323, 11 N. E. 239; Haas *v.* Murdock, 91 Iowa 749, 60 N. W. 618; Fitzgerald *v.* Daniels, 52 Iowa 744, 3 N. W. 630; U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199.

See, generally, RECEIVERS; and 3 Cent. Dig. tit. "Appeal and Error," § 2889.

As to review of discretion of trial court in appointing or discharging a receiver see *infra*, XVII, F, 2, c, (v).

An allowance made to a receiver for his services, by a court which has a complete and personal knowledge of all the circumstances, will not be disturbed where the evidence on which the allowance was based is not made a part of the record on appeal. Van Brocklin *v.* Queen City Printing Co., 21 Wash. 447, 58 Pac. 575.

Disposition of application.— The action of the trial court, upon an application to vacate an order appointing a receiver, will not be reviewed on appeal where the record fails to show what disposition was made of the application. Rumsey *v.* Peoples R. Co., 154 Mo. 215, 55 S. W. 615.

Inclusion of affidavits.— An interlocutory order appointing a receiver, made on a complaint and affidavits, will not be reviewed on appeal unless the affidavits are included in the record. Chicago, etc., R. Co. *v.* McBeth, 149 Ind. 78, 47 N. E. 678.

Payment of fund into court.— If the record shows neither the motion nor the grounds on which it was made or granted, or that any exception was taken to the granting of it, an order directing a receiver to pay the fund into court will not be disturbed. Coburn *v.* Ames, 80 Cal. 243, 22 Pac. 174.

40. *Florida.*— Stearns *v.* Jaudon, 27 Fla. 469, 8 So. 640.

Illinois.—Woven Coral Bed Cord Spring Co. *v.* Coxedge, 50 Ill. App. 334.

Indiana.— Murphy *v.* Crayton, 51 Ind. 147; Fechheimer *v.* Hays, 11 Ind. 478.

Iowa.— Gilman *v.* Andrews, 66 Iowa 116, 23 N. W. 291; Langworthy *v.* Waters, 11 Iowa 432.

Kentucky.— Herndon *v.* Waters, 14 Ky. L. Rep. 667.

Maryland.— Hollowell *v.* Miller, 17 Md. 305.

Minnesota.— Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Missouri.—Lane *v.* White, 64 Mo. App. 191.

Montana.— Vaughn *v.* Dawes, 7 Mont. 360, 17 Pac. 114.

New York.— Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794.

Oklahoma.— Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594.

Utah.— Cochrane *v.* Bussche, 7 Utah 233, 26 Pac. 294.

Virginia.— Joslyn *v.* State Bank, 86 Va. 287, 10 S. E. 166.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

See, generally, ATTACHMENT; GARNISHMENT; and 3 Cent. Dig. tit. "Appeal and Error," § 2889.

As to review of discretion of trial court in granting or dissolving attachment or garnishment see *infra*, XVII, F, 2, c, (II).

Attachment for contempt.—On appeal from an interlocutory decree making absolute a rule to show cause why an attachment should not issue for contempt in refusing to turn over property to a receiver, the record should contain a finding of the facts and conclusions of law drawn therefrom. Wilt *v.* Reed Electric Co., 187 Pa. St. 424, 41 Atl. 317.

Priority between attachments.—The action of the court in determining the priority between two attachment creditors is subject to review only when all the evidence is preserved in the record. Lane *v.* White, 64 Mo. App. 191.

41. Brewer, etc., Brewing Co. *v.* Boddie, 80 Ill. App. 353; Van Etten *v.* Butt, 32 Nebr. 285, 49 N. W. 365; Zeidler *v.* Johnson, 38 Wis. 335. See also Akron Bank *v.* Dole, 25 Colo. 1, 52 Pac. 673; Lawless *v.* Harrington, 75 Ind. 379.

See, generally, VENUE; and 3 Cent. Dig. tit. "Appeal and Error," § 2875.

As to presumptions as to change of venue see *infra*, XVII, E, 2, d.

As to review of discretion of trial court as to change of venue see *infra*, XVII, F, 2, g, (IV).

Notice of application.— A judgment will not be reversed by an appellate court, because of the trial court's refusal to grant a change of venue, where the record does not show that notice of the application for the change was given as required by statute. Johnson *v.* Moffett, 19 Mo. App. 159.

Showing that order was made.—The appellate court will dismiss an appeal from an alleged order refusing a change of venue where the fact that such order was made is not shown either by the printed case or by the record. Horicon Shooting Club *v.* Gorsline, 73 Wis. 196, 41 N. W. 78. See also Waco Ice, etc., Co. *v.* Wiggins, (Tex. Civ. App. 1895) 32 S. W. 58.

42. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Ramsey *v.* Bush, 27 Iowa 17; Allen

e. Continuance. The action of the trial court, upon an application for a continuance, will not be reviewed if the application and the affidavits in support thereof are not made a part of the record.[43]

f. Injunction. The appellate court will not review the action of the trial court in granting or dissolving an injunction where the evidence before the trial court is not preserved in the record.[44]

8. Dismissal or Nonsuit. In order that the appellate court may review the action of the court below upon a motion for a dismissal or a nonsuit, the record must set out sufficient for the appellate court to determine whether such ruling was erroneous.[45]

v. Skiff, 2 Iowa 433; Osborn *v.* Shotwell, 33 Nebr. 348, 50 N. W. 164; Williams *v.* Planters', etc., Nat. Bank, 91 Tex. 651, 45 S. W. 690.

Where there has been an appearance without an objection to the jurisdiction, an appeal will not be dismissed, on the ground that the record does not contain a transcript of the proceedings in the court from which the venue was changed. Louisville, etc., R. Co. *v.* Lockridge, 93 Ind. 191.

43. *Arkansas.*— Watts *v.* Cohn, 40 Ark. 114.

Illinois.— Coleman *v.* Wiley, 56 Ill. App. 466.

Indiana.— Swails *v.* Coverdill, 21 Ind. 271; New Albany, etc., R. Co. *v.* Powell, 13 Ind. 373.

Iowa.— State *v.* Heavlin, 85 Iowa 752, 52 N. W. 668.

Kentucky.— Powell *v.* Mead, 3 Ky. L. Rep. 334.

Louisiana.— Peuch *v.* Palfrey, 16 La. 97.

Mississippi.— Holden *v.* Brimage, 72 Miss. 228, 18 So. 383.

Montana.— Sherman *v.* Higgins, 7 Mont. 479, 17 Pac. 561.

Nebraska.— Reid *v.* Panska, 56 Nebr. 195, 78 N. W. 534.

New Mexico.— Ford *v.* McGarvey, 6 N. M. 222, 27 Pac. 415.

Ohio.— Holt *v.* State, 11 Ohio St. 691.

Texas.— Parker *v.* McKelvain, 17 Tex. 157; Campion *v.* Angier, 16 Tex. 93.

See, generally, Continuances; and 3 Cent. Dig. tit. "Appeal and Error," § 2888.

As to review of discretion of trial court as to continuance see *infra*, XVII, F, 2, g, (vi).

Calling application to court's attention.— Error, complaining of the refusal of a continuance, cannot be considered where the record, though showing an application therefor was made, does not show that the error was called to the court's attention. Bumpass *v.* Anderson, (Tex. Civ. App. 1899) 51 S. W. 1103. See also Nelson *v.* Farmland Security Co., 58 Nebr. 604, 79 N. W. 161.

Continuance because of amendment.— It is only when material amendments are made changing in some degree the character of the claim that a continuance is allowed, and a refusal of a continuance because of an amendment to the declaration cannot be reviewed where the record does not show what the amendment was. Eames *v.* Morgan, 37 Ill. 260; Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. 736.

Number of continuances.— The denial of a motion for a continuance cannot be reviewed on appeal where the bill of exceptions does not disclose how many continuances had already been granted to the applicant. East Dallas *v.* Barksdale, 83 Tex. 117, 18 S. W. 329; Arnold *v.* Hockney, 51 Tex. 46.

Showing of merit.— In the absence from the record of an affidavit showing merit, the supreme court will not review the decision of the trial court in refusing another continuance in a case which has been continued for several terms. Moore *v.* Dickson, 74 N. C. 423.

44. *California.*—Fowler *v.* Heinrath, (Cal. 1884) 2 Pac. 248.

Illinois.— Kohlsaat *v.* Crate, 144 Ill. 14, 32 N. E. 481.

Indiana.— Davis *v.* Fasig, 128 Ind. 271, 27 N. E. 726; Clark *v.* Shaw, 101 Ind. 563.

Kansas.— State *v.* Harper County, 43 Kan. 195, 23 Pac. 101.

Kentucky.— Hunt *v.* Kemper, 10 Ky. L. Rep. 593, 9 S. W. 803.

Nebraska.— Thesing *v.* School Dist. No. 57, 16 Nebr. 134, 19 N. W. 625.

Pennsylvania.— Laufer *v.* Sell, 141 Pa. St. 159, 21 Atl. 504.

Wisconsin.—Guldemann *v.* Lerdall, 99 Wis. 495, 75 N. W. 172; Glover *v.* Wells, etc., Grain Co., 93 Wis. 13, 66 N. W. 799.

See, generally, Injunctions; and 3 Cent. Dig. tit. "Appeal and Error," § 2889.

As to discretion of trial court in granting or refusing injunction see *infra*, XVII, F, 2, c, (iv).

As to injunction proceedings as part of record see *supra*, XIII, B, 1, e, (ii) [2 Cyc. 1062].

Certificate as to return.— The record on an appeal from an order granting a preliminary injunction is insufficient where there is no certificate of the judge that the return shows all that was considered by him on the hearing, or certificate of the clerk that the return contains copies of all the papers filed in the case. Aure *v.* Becker County, 68 Minn. 85, 70 N. W. 791.

45. *Alabama.*—Downs *v.* Minchew, 30 Ala. 86.

California.— McGarrity *v.* Byington, 12 Cal. 426; Freeborn *v.* Glazer, 10 Cal. 337.

Georgia.— Coston *v.* Coston, 66 Ga. 382.

Illinois.— Blair *v.* Ray, 103 Ill. 615; Buettner *v.* Norton, etc., Mfg. Co., 90 Ill. 415; Buckland *v.* Goddard, 36 Ill. 207.

Indiana.— Williams *v.* Stevenson, 103 Ind.

9. Trial by Jury — a. Right to Jury Trial. In order that the appellate court may pass upon the refusal of a trial by jury the record should show that the case was a proper one for a jury,[46] that a request therefor was made at the proper time, that such request was refused, and that an exception was taken.[47]

b. Impaneling of Jury. Before an appellate court can examine alleged errors occurring in the impaneling of a jury, the evidence and proceedings in the lower court must be preserved in the record.[48]

10. Reference. Questions relating to the report of a referee cannot be reviewed unless the record shows what issues were referred,[49] the evidence,[50] the

243, 2 N. E. 728; Coffman *v.* Reeves, 62 Ind. 334; Forrester *v.* Buffalo, etc., R. Co., 13 Ind. 481.

Iowa.— McArthur *v.* Schultz, 78 Iowa 364, 43 N. W. 223.

Mississippi.— Balfour *v.* Mitchell, 12 Sm. & M. (Miss.) 629.

New York.— Dennis *v.* Snell, 50 Barb. (N. Y.) 95. See Compton *v.* Bowne, 23 N. Y. Civ. Proc. 225, 25 N. Y. Suppl. 465, 54 N. Y. St. 795.

South Carolina.— Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745.

See, generally, Dismissal and Nonsuit; and 3 Cent. Dig. tit. "Appeal and Error," §§ 2890, 2895.

Insufficiency of cost bond.— Denial of a motion to dismiss for insufficiency of the cost bond cannot be reviewed where the bond is not in the record. Johnson *v.* Atwood, 14 Ind. 423.

46. Reynolds *v.* Reynolds, 11 Ala. 1023.

See, generally, Juries; and 3 Cent. Dig. tit. "Appeal and Error," § 2891.

As to presumptions in case of trial without jury see *infra*, XVII, E, 2, d.

47. Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60. See also Patton *v.* Gash, 99 N. C. 280, 6 S. E. 193.

Prepayment of jury-fee.— An applicant in the municipal court of Minneapolis who assigns as error the denial of his demand for a jury trial should make it appear from the record that his demand was accompanied by payment of the jury-fee into court. McGeagh *v.* Nordberg, 53 Minn. 235, 55 N. W. 117.

48. *California.*— Bostwick *v.* Mahoney, 73 Cal. 238, 14 Pac. 832.

Illinois.— Emmons *v.* Hilton, 72 Ill. App. 124.

Indiana.— Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

Iowa.— Walters *v.* Houck, 7 Iowa 72.

Kansas.— State *v.* Eaton, 5 Kan. App. 55, 47 Pac. 317.

Michigan.— Tunnicliffe *v.* Bay Cities Consol. R. Co., 107 Mich. 261, 65 N. W. 226.

Missouri.— Meff *v.* Greene County Nat. Bank, 89 Mo. 581, 1 S. W. 747.

Nebraska.— Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794.

New York.— De Puy *v.* Quinn, 61 Hun (N. Y.) 237, 16 N. Y. Suppl. 708, 40 N. Y. St. 837.

Pennsylvania.— *In re* Pottstown, 117 Pa. St. 538, 12 Atl. 573.

See, generally, Juries; and 3 Cent. Dig. tit. "Appeal and Error," § 2892.

As to record showing impaneling of jury see *supra*, XIII, A, 3, d [2 Cyc. 1036].

As to review of discretion of trial court in impaneling jury see *infra*, XIII, F, 2, e.

When a question is asked of a juror on his *voir dire*, and the court refuses to permit it to be answered, in order to subject the court's action to a review the record must show what the questioner expected or proposed to prove by the juror. Atlantic, etc., R. Co. *v.* Rieger, 95 Va. 418, 28 S. E. 590.

49. Kent *v.* Dakota F. & M. Ins. Co., 2 S. D. 300, 50 N. W. 85.

See, generally, References; and 3 Cent. Dig. tit. "Appeal and Error," § 2893.

As to presumptions as to reference see *infra*, XVII, E, 2, d, (III).

As to proceedings on reference as part of record see *supra*, XIII, B, 1, h [2 Cyc. 1067].

As to review of discretion of trial court as to reference see *infra*, XIII, F, 2, f.

Showing that cause was referred.— An assignment of error founded on an exception taken to the exclusion of the report of a referee cannot be considered where the record does not show that the case was one proper to be referred, or that it was, in fact, referred. McGrath *v.* Hervey, 64 N. J. L. 364, 44 Atl. 962. See also Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847.

50. *California.*— Fulton *v.* Cox, 40 Cal. 101.

Georgia.— Mackenzie *v.* Flannery, 90 Ga. 590, 16 S. E. 710.

Illinois.— Rockwell *v.* O'Brien-Green Co., 62 Ill. App. 293.

Kansas.— Foster *v.* Voigtlander, 36 Kan. 572, 13 Pac. 777.

Kentucky.— Kincaid *v.* Wilson, Ky. Dec. 149.

Massachusetts.—McLaughlin *v.* Old Colony R. Co., 166 Mass. 260, 44 N. E. 252.

Mississippi.— Smith *v.* Hurd, 8 Sm. & M. (Miss.) 682.

New Mexico.— Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328.

New York.— Davis *v.* Gallagher, 55 Hun (N. Y.) 593, 9 N. Y. Suppl. 11, 29 N. Y. St. 882; Frost *v.* Smith, 7 Bosw. (N. Y.) 108; Thomson *v.* Fairfield, 21 N. Y. Suppl. 712, 50 N. Y. St. 472; Clegg *v.* New York Newspaper Union, 9 N. Y. St. 235.

Pennsylvania.— Wagenhurst's Appeal, 126 Pa. St. 127, 17 Atl. 534.

South Carolina.— Connor *v.* Edwards, 36 S. C. 563, 15 S. E. 706.

referee's report of the proceedings had before him,[51] and the exceptions taken thereto.[52]

11. Conduct of Trial[53] — a. Argument of Counsel. Alleged improper remarks by counsel, made in argument to the jury, should be incorporated in the record in order to make them a basis for error.[54]

b. Poll of Jury. A trial court's refusal to allow a poll of the jury will not be reviewed on error where there is nothing on the face of the record to show any demand made by plaintiff in error for a poll.[55]

c. Separation of Jury. Alleged error in permitting the jury to separate after hearing the evidence and arguments, without instructions as to their duties, cannot be considered where the fact of such separation and failure to instruct is not shown by the record.[56]

Vermont.— Ward *v.* Baker, 16 Vt. 287.

Wisconsin.— Cairns *v.* O'Bleness, 40 Wis. 469.

Exceptions to conclusions of law.— On appeal from a judgment entered on the report of a referee, appellant may be heard on exceptions taken to the referee's conclusions of law upon the facts found although the printed case does not contain any of the evidence, but cannot be heard on exceptions to the findings of fact. Frost *v.* Smith, 7 Bosw. (N. Y.) 108.

Issues presented by pleadings.— Inasmuch as error may be assigned upon issues of fact presented by the pleadings, although the record contains no certificate of evidence, the appellate court will review, without a certificate of evidence, an order of the court below directing the referee to ignore questions relating to a certain defense set up by the pleadings. Jenkins *v.* International Bank, 9 Ill. App. 461.

51. Milton *v.* Thompson, 8 Ky. L. Rep. 700; Poindexter *v.* Green, 6 Leigh (Va.) 504; Hills *v.* Seeley, 37 Wis. 246.

52. Milton *v.* Thompson, 8 Ky. L. Rep. 700.

Date of filing exceptions.— An objection to the ruling of the trial court in sustaining exceptions to a referee's report, urged upon the ground that the exceptions were not filed within the time prescribed by the statute, cannot be reviewed on appeal when neither the date of the filing of the report nor the date of the filing of the exceptions appear in the record by bill of exceptions. Clarke *v.* Kane, 37 Mo. App. 258.

The grounds upon which reversal of order on report of referee is claimed should be contained in the record. Johnson *v.* Moser, 66 Iowa 536, 24 N. W. 32.

53. As to presumptions as to conduct of trial see *infra*, XVII, E, 2, d, (v).

As to review of discretion of trial court as to conduct of trial see *infra*, XIII, F, 2, g.

54. *Colorado.*— Hurd *v.* Atkins, 1 Colo. App. 449, 29 Pac. 528.

Illinois.— Crown Coal, etc., Co. *v.* Taylor, 184 Ill. 250, 56 N. E. 328; Goldstein *v.* Smiley, 168 Ill. 438, 48 N. E. 203; North Chicago St. R. Co. *v.* Cotton, 140 Ill. 286, 29 N. E. 899; East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529.

Indiana.—Forsythe *v.* Kreuter, 100 Ind. 27.

Kentucky.— Herman *v.* Brown, 7 Ky. L. Rep. 377.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628; Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552.

Missouri.— Havens *v.* Lawton, 49 Mo. App. 1.

Texas.— Atchison, etc., R. Co. *v.* Locklin, (Tex. Civ. App. 1895) 29 S. W. 690.

Virginia.— Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

Washington.— Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

United States.— Rhodes *v.* U. S., 79 Fed. 740, 49 U. S. App. 156, 25 C. C. A. 186.

See, generally, Trial; and 3 Cent. Dig. tit. "Appeal and Error," § 2896.

As to review of discretion of trial court as to opening and closing see *infra*, XIII, F, 2, g, (III).

Reading book to jury.— An exception to a ruling allowing counsel in argument to read to the jury portions of a book is not available where it does not disclose what the counsel read, or even that he read anything. Lyons *v.* Erie R. Co., 57 N. Y. 489. *Compare* Kingsland *v.* New York, 15 N. Y. Suppl. 420, 37 N. Y. St. 943.

Refusal to permit argument.— If a party litigant desires to raise the question in the appellate court of the refusal of the court below to allow him to argue the case, he must not only preserve such action of the court by a proper bill of exceptions, but also the fact that he did not argue the case at all. Curtin *v.* Long, 62 Ill. App. 36.

Right to open and close.— Where the answer upon which a case proceeded to trial is not before the court it cannot be determined whether the trial court abused its discretion in permitting plaintiff to open and close a case. Keokuk Stove Works *v.* Hammond, 94 Iowa 694, 63 N. W. 563. So, a judgment will not be reversed for error in granting one party the right to open and close where the bill of exceptions fails to show that such privilege was exercised. Railway Co. *v.* Orenbaum, (Tex. 1890) 16 S. W. 936.

55. Byrne *v.* Grossman, 65 Pa. St. 310.

56. Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

As to review of discretion of trial court as to custody and conduct of jury see *infra*, XIII, F, 2, g.

d. View by Jury. Whether the trial court has made a proper order for a view by the jury is a question the appellate court can neither consider nor decide when the evidence is not in the record.[57]

12. Evidence[58]**— a. In General.** Generally, it may be stated that questions which depend upon the evidence are not available on appeal where such evidence does not appear of record.[59]

b. Admission of Evidence. Alleged error in the admission of evidence will not be considered on appeal unless the evidence admitted,[60] and the fact that it

57. Rozell *v.* Anderson, 91 Ind. 591.

58. As to review of discretion of trial court in reception of evidence see *infra*, XIII, F, 2, g, (XII).

59. *Alabama.*— Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687.

Arizona.—Federico *v.* Hancock, 1 Ariz. 511, 25 Pac. 650.

Arkansas.— Nelson *v.* Green, 22 Ark. 547.

California.— Shain *v.* Maxwell, 115 Cal. 208, 46 Pac. 1069.

Colorado.— Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529.

Georgia.— Morrison *v.* Dodge, 94 Ga. 730, 20 S. E. 422.

Illinois.— Bartling *v.* Thielman, 183 Ill. 88, 55 N. E. 677.

Indiana.— Kessler *v.* Citizens' St. R. Co., 20 Ind. App. 427, 50 N. E. 891.

Iowa.— Odden *v.* Lewis, 104 Iowa 747, 73 N. W. 863.

Kansas.—Jackson *v.* Anderson, 9 Kan. App. 666, 58 Pac. 1026.

Kentucky.— Brannin *v.* Louden, 10 Ky. L. Rep. 282.

Louisiana.— Pellerin *v.* Levois, 8 La. Ann. 436.

Maine.— Mayall, Petitioner, 29 Me. 474.

Michigan.— Connor *v.* Levinson, 115 Mich. 297, 73 N. W. 232.

Minnesota.— Spriesterbach *v.* Schmidt, 64 Minn. 211, 66 N. W. 721.

Mississippi.— Merchants' Nat. Bank *v.* Meridian Sash, etc., Factory, (Miss. 1895) 18 So. 921; Crowder *v.* Shackelford, 35 Miss. 321.

Missouri.— Trimble *v.* Wollman, 62 Mo. App. 541.

Nebraska.— Home F. Ins. Co. *v.* Weed, 55 Nebr. 146, 75 N. W. 539.

New York.— Orlando *v.* Del Piano, 20 Misc. (N. Y.) 369, 45 N. Y. Suppl. 755.

North Carolina.— Falkner *v.* Thompson, 112 N. C. 455, 16 S. E. 852.

Pennsylvania.— Walter *v.* Sun Fire Office, 165 Pa. St. 381, 30 Atl. 945.

Texas.— Robinson *v.* Velde, (Tex. Civ. App. 1895) 32 S. W. 825.

Utah.— Warner *v.* U. S. Mutual Acc. Assoc., 8 Utah 431, 32 Pac. 696.

Vermont.— Bragg *v.* Rutland, 70 Vt. 606, 41 Atl. 578.

Virginia.— Cooper *v.* Hepburn, 15 Gratt. (Va.) 551.

Washington.— Link *v.* Bosse, 5 Wash. 491, 31 Pac. 599.

United States.— Corinne Mill, etc., Co. *v.* Johnson, 156 U. S. 574, 15 S. Ct. 409, 39 L. ed. 537.

See 3 Cent. Dig. tit. "Appeal and Error," § 2869.

As to evidence as part of record see *supra*, XIII, B, 1, f [2 Cyc. 1062].

As to record showing questions and objections and rulings thereon see *supra*, XIII, A, 7, a, (III) [2 Cyc. 1044].

As to what evidence should be incorporated into record see *supra*, XIII, C, 2, b [2 Cyc. 1083].

60. *Alabama.*— McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

Arizona.— Hale *v.* Hughes, (Ariz. 1899) 56 Pac. 732.

California.— Watson *v.* Miller, (Cal. 1899) 58 Pac. 135.

Colorado.— Nelson *v.* La Junta First Nat. Bank, 8 Colo. App. 531, 46 Pac. 879.

Georgia.— Webb *v.* Wight, etc., Co., 112 Ga. 432, 37 S. E. 710.

Idaho.— Naylor *v.* Vermont L. & T. Co., (Ida. 1898) 55 Pac. 297.

Illinois.— Shoudy *v.* School Directors, 32 Ill. 290.

Indiana.— Dunn *v.* Dunn, 149 Ind. 424, 49 N. E. 346.

Indian Territory.— McBee *v.* Purcell Nat. Bank, 1 Indian Terr. 288, 37 S. W. 55.

Iowa.— Lucas *v.* Jones, 44 Iowa 298.

Kansas.— Marbourg *v.* Smith, 11 Kan. 554.

Kentucky.— Louisville, etc., R. Co. *v.* Rogers, 10 Ky. L. Rep. 726.

Maine.—French *v.* Day, 89 Me. 441, 36 Atl. 909.

Maryland.— Clemens *v.* Baltimore, 16 Md. 208.

Massachusetts.— O'Brien *v.* Murphy, 158 Mass. 417, 33 N. E. 587.

Michigan.— Carr *v.* McCarthy, 70 Mich. 258, 38 N. W. 241.

Mississippi.— Bone *v.* McGinley, 7 How. (Miss.) 671.

Missouri.— Samuel *v.* Withers, 9 Mo. 166.

Nebraska.— Zimmerman *v.* Klingeman, 31 Nebr. 495, 48 N. W. 268.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

New York.— Tiffany *v.* Lord, 65 N. Y. 310.

North Carolina.— Wilhelm *v.* Burleyson, 106 N. C. 381, 11 S. E. 590.

Ohio.— Dudley *v.* Geauga Iron Co., 13 Ohio St. 168.

Oklahoma.— Custer County *v.* De Lana, 8 Okla. 213, 57 Pac. 162.

Pennsylvania.—McElroy *v.* Braden, 152 Pa. St. 78, 31 Wkly. Notes Cas. (Pa.) 196, 25 Atl. 235.

Rhode Island.— Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876.

was admitted,[61] appears in the record.[62] And if the competency of certain evidence depends on other evidence, such other evidence must also be set out in the record.[63]

c. Exclusion of Evidence. A ruling of the trial court, refusing to allow a witness to answer a question, is not presented for review where the record does not set out the question,[64] and what was expected to be elicited by it.[65]

South Carolina.— Gaines *v.* Drakeford, 51 S. C. 37, 27 S. E. 960.

South Dakota.— Clark *v.* Darlington, 11 S. D. 418, 78 N. W. 997.

Tennessee.— Stockell *v.* Ryan, 1 Baxt. (Tenn.) 476.

Texas.— Elder *v.* Galveston First Nat. Bank, (Tex. Civ. App. 1897) 42 S. W. 124.

Vermont.— McKindly *v.* Drew, (Vt. 1898) 41 Atl. 1039.

Virginia.— Gatewood *v.* Burrus, 3 Call (Va.) 194.

Washington.— Greely *v.* Newcomb, 21 Wash. 357, 58 Pac. 216.

West Virginia.— Dawson *v.* Prichard, 5 W. Va. 18.

Wisconsin.— French *v.* State, 98 Wis. 341, 73 N. W. 991.

United States.— Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87.

See 3 Cent. Dig. tit. "Appeal and Error," § 2899.

As to presumptions as to admission of evidence see *infra*, XVII, E, 2, d, (v), (B).

61. *Illinois.*— Graham *v.* Dixon, 4 Ill. 115; Peoria Commission Co. *v.* Maguire, 53 Ill. App. 470.

Kentucky.—Thomas *v.* Turner, 6 T. B. Mon. (Ky.) 52.

Michigan.— Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

Mississippi.— Ferriday *v.* Selser, 4 How. (Miss.) 506.

Texas.— Scott *v.* Childers, (Tex. Civ. App. 1900) 60 S. W. 775.

United States.— Masonic Benev. Assoc. *v.* Lyman, 60 Fed. 498, 18 U. S. App. 507, 9 C. C. A. 104.

See 3 Cent. Dig. tit. "Appeal and Error," § 2897.

62. As to record showing questions and objections, and rulings thereon, see *supra*, XIII, A, 7, a, (III) [2 Cyc. 1044].

63. *Alabama.*— Rodgers *v.* Gaines, 73 Ala. 218.

California.— Roberts *v.* Unger, 30 Cal. 676.

Colorado.—Schwed *v.* Robson, 12 Colo. 400, 21 Pac. 189.

Florida.— Petty *v.* Mays, 19 Fla. 652.

Georgia.— Moore *v.* Brown, 81 Ga. 10, 6 S. E. 833.

Idaho.— U. S. *v.* Alexander, 2 Ida. 354, 17 Pac. 746.

Illinois.— Nason *v.* Letz, 73 Ill. 371.

Indiana.— Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227.

Iowa.— Gilbert *v.* Miller, 82 Iowa 728, 47 N. W. 1016.

Kansas.— Gray *v.* Emporia, 43 Kan. 704, 23 Pac. 944.

Kentucky.— Kimberlin *v.* Faris, 5 Dana (Ky.) 533.

Maine.— Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954.

Massachusetts.— Atherton *v.* Atkins, 139 Mass. 61, 29 N. E. 223.

Michigan.— Bostwick *v.* Losey, 67 Mich. 554, 35 N. W. 246.

Minnesota.— Acker Post No. 21, G. A. R., *v.* Carver, 23 Minn. 567.

Mississippi.— Dogan *v.* Bloodworth, 56 Miss. 419.

Missouri.— Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557.

Nebraska.— Latham *v.* Schaal, 25 Nebr. 535, 41 N. W. 354.

Ohio.— Pavey *v.* Pavey, 30 Ohio St. 600.

Pennsylvania.— Wacker *v.* Straub, 88 Pa. St. 32.

South Carolina.— Charles *v.* Jacobs, 6 S. C. 69.

Tennessee.— Crawford *v.* Bynum, 7 Yerg. (Tenn.) 380.

Texas.— Harris *v.* Spence, 70 Tex. 616, 8 S. W. 313.

Vermont.— Tenney *v.* Harvey, 63 Vt. 520, 22 Atl. 659.

Virginia.— Triplett *v.* Goff, 83 Va. 784, 3 S. E. 525.

Washington.— Francioli *v.* Brue, 4 Wash. 124, 29 Pac. 928.

West Virginia.— Carlton *v.* Mays, 8 W. Va. 245.

Wisconsin.— Eaton *v.* Lyman, 33 Wis. 34.

United States.— Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 11 S. Ct. 195, 34 L. ed. 801.

See 3 Cent. Dig. tit. "Appeal and Error," § 2902.

64. Warner *v.* Manski, 17 Ill. 234; Gipe *v.* Cummins, 116 Ind. 511, 19 N. E. 466; Swearingen *v.* Hartford F. Ins. Co. 52 S. C. 309, 29 S. E. 722.

65. *Alabama.*— Perry *v.* Danner, 74 Ala. 485.

California.— Matter of Carpenter, 127 Cal. 582, 60 Pac. 162.

Colorado.— Grant *v.* Leach, 8 Colo. App. 261, 45 Pac. 510.

District of Columbia.— Tolson *v.* Inland, etc., Coasting Co., 6 Mackey (D. C.) 39.

Florida.— Horne *v.* Carter, 20 Fla. 45.

Georgia.— Story *v.* Brown, 98 Ga. 570, 25 S. E. 582.

Illinois.— Curtis *v.* Baugh, 90 Ill. 184.

Indiana.— Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641.

Iowa.— Paddleford *v.* Cook, 74 Iowa 433, 38 N. W. 137.

Kansas.— Jones *v.* Humphrey, (Kan. App. 1900) 63 Pac. 26.

Kentucky.— Reid *v.* Lilly, 15 Ky. L. Rep. 474, 23 S. W. 955.

d. On Cross-Examination. An appellate court will not pass upon rulings as to the admissibility of testimony on cross-examination where the record does not contain enough of the testimony in chief to enable the court to see that the rulings objected to were erroneous.[66]

e. Sufficiency of Evidence[67]—(i) *Necessity of Setting Out Evidence*—(a) *In General.* The record must set forth all the evidence, in order that its sufficiency may be reviewed on appeal,[68] except in cases where the omitted part

Louisiana.— Pasquier's Succession, 12 La. Ann. 758.

Maine.— Small *v.* Sacramento Nav., etc., Co., 40 Me. 274.

Maryland.— Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773.

Massachusetts.—Spaulding *v.* Jennings, 173 Mass. 65, 53 N. E. 204.

Minnesota.—La May *v.* Brett, 81 Minn. 506, 84 N. W. 339.

Mississippi.— Mhoon *v.* Colment, 51 Miss. 60.

Missouri.— Kraxberger *v.* Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262.

Montana.— Sullivan *v.* Schultz, 22 Mont. 541, 57 Pac. 279.

Nebraska.— Omaha F. Ins. Co. *v.* Berg, 44 Nebr. 522, 62 N. W. 862.

Nevada.— Springer *v.* Pritchard, 22 Nev. 313, 39 Pac. 1009.

New Jersey.— Stults *v.* East Brunswick Turnpike Co., 48 N. J. L. 596, 9 Atl. 193.

New York.— Matter of Bateman, 145 N. Y. 623, 40 N. E. 10.

North Carolina.— McGowan *v.* Wilmington, etc., R. Co., 95 N. C. 417.

Ohio.— Hummel *v.* State, 17 Ohio St. 628.

Oregon.— Oyler *v.* Dautoff, 36 Oreg. 357, 59 Pac. 474.

Pennsylvania.— Hill *v.* Hill, 42 Pa. St. 198.

Rhode Island.—Whittier *v.* Collins, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879.

South Carolina.—Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286.

South Dakota.— Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81.

Tennessee.—Cincinnati, etc., R. Co. *v.* Stonecipher, 95 Tenn. 311, 32 S. W. 208.

Texas.— Thompson *v.* Lester, 75 Tex. 521, 14 S. W. 20.

Vermont.— Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

Virginia.— Driver *v.* Hartman, 96 Va. 518, 31 S. E. 899.

West Virginia.— Nease *v.* Capepart, 15 W. Va. 299.

Wisconsin.— Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

United States.— Patrick *v.* Graham, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460.

See 3 Cent. Dig. tit. "Appeal and Error," § 2905.

As to presumptions as to exclusion of evidence see *infra*, XVII, E, 2, d, (v), (B).

As to record showing questions and objections, and rulings thereon, see *supra*, XIII, A, 7, a, (III) [2 Cyc. 1044].

66. *Iowa.*— Cook *v.* Sioux City, etc., R. Co., 37 Iowa 426.

Maine.— Grant *v.* Libby, 71 Me. 427.

Maryland.— Devoe *v.* Singleton, 80 Md. 68, 30 Atl. 614.

Massachusetts.— Parmenter *v.* Coburn, 6 Gray (Mass.) 509.

Missouri.— Spence *v.* Crow, 47 Mo. App. 321.

Pennsylvania.— McElheny *v.* McKeesport, etc., Bridge Co., 153 Pa. St. 108, 32 Wkly. Notes Cas. (Pa.) 7, 25 Atl. 1021; Thomas *v.* Snyder, 23 Pa. St. 515.

See 3 Cent. Dig. tit. "Appeal and Error," § 2904.

Matters brought out on direct examination. —Where a cause assigned in a motion for a new trial was that the court erred in refusing to permit a question to be asked plaintiff on his cross-examination, and there was no evidence showing that the question was as to matters testified to by the witness on his examination in chief, it was held that the overruling of the motion was not error. Indianapolis, etc., R. Co. *v.* Ferguson, 42 Ind. 243.

67. As to review of sufficiency of evidence, generally, see *infra*, XVII, G.

68. *Alabama.*— Speakman *v.* Burleson, (Ala. 1899) 27 So. 322.

Arizona.— Myers *v.* Farmers', etc., Bank, (Ariz. 1900) 60 Pac. 880.

Arkansas.— Overton *v.* Lohmann, 67 Ark. 464, 55 S. W. 841.

California.— Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61.

Colorado.— Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289.

Connecticut.— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147.

District of Columbia.— Davis *v.* Harper, 14 App. Cas. (D. C.) 298.

Florida.—Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59.

Georgia.— Phillips *v.* Southern R. Co., 112 Ga. 197, 37 S. E. 418.

Idaho.— Stickney *v.* Hanrahan, (Ida. 1900) 63 Pac. 189.

Illinois.— Martens *v.* People, 186 Ill. 314, 57 N. E. 871 [*affirming* 85 Ill. App. 66].

Indiana.— Charlestown *v.* Olvey, 156 Ind. 59, 59 N. E. 166.

Iowa.— Loomis *v.* Des Moines News Co., 110 Iowa 515, 81 N. W. 790.

Kansas.— Missouri Pac. R. Co. *v.* Preston, (Kan. 1901) 63 Pac. 444.

Kentucky.— Scott *v.* Ford, 20 Ky. L. Rep. 1932, 50 S. W. 552.

Louisiana.— Otis *v.* Sweeney, 43 La. Ann. 1073, 10 So. 247.

Maine.— Cyr *v.* Dufour, 68 Me. 492.

has no bearing on the question presented.[69] If the record affirmatively discloses that it does not contain all the material evidence, it will not present for review questions involving the sufficiency of the evidence, notwithstanding it purports to contain all the evidence.[70]

(B) *Showing That Evidence Is Set Out*— (1) NECESSITY OF SHOWING. It is a further essential to a review of the sufficiency of the evidence that the record affirmatively show that it contains all the evidence.[71]

Maryland.— Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206.
Massachusetts.— Sprague *v.* Brown, (Mass. 1901) 59 N. E. 631.
Michigan.— Mason, etc., Co. *v.* Gage, 119 Mich. 361, 78 N. W. 130.
Minnesota.— Klein *v.* Funk, (Minn. 1900) 84 N. W. 460.
Mississippi.— Pratt *v.* Hargreaves, 75 Miss. 897, 23 So. 519.
Missouri.— Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458.
Montana.— Beatty *v.* Murray Placer Min. Co., 15 Mont. 314, 39 Pac. 82.
Nebraska.— Scott *v.* Russian Israelites Soc., 59 Nebr. 571, 81 N. W. 624.
Nevada.— Sadler *v.* State, 23 Nev. 141, 43 Pac. 915.
New Hampshire.— Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.
New Jersey.—Whitaker *v.* Miller, 63 N. J. L. 587, 44 Atl. 643.
New Mexico.—Wagner *v.* Eaton, 2 N. M. 211.
New York.— McCabe *v.* O'Connor, 162 N. Y. 600, 57 N. E. 1116 [*affirming* 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572, 74 N. Y. St. 200].
North Carolina.— Travers *v.* Deaton, 107 N. C. 500, 12 S. E. 373.
North Dakota.— Thuet *v.* Strong, 7 N. D. 565, 75 N. W. 922.
Ohio.— Pugh *v.* Edison Electric Light Co., 19 Ohio Cir. Ct. 594.
Oklahoma.—Cecil *v.* Washita County, (Okla. 1900) 61 Pac. 1065.
Oregon.— Fowler *v.* Fowler, (Oreg. 1897) 48 Pac. 692.
Pennsylvania.—Wilson *v.* Keller, 195 Pa. St. 98, 45 Atl. 682.
Rhode Island.— Olney *v.* Chadsey, 7 R. I. 224.
South Carolina.— *In re* Neubert, 58 S. C. 469, 36 S. E. 908.
South Dakota.— Northern Grain Co. *v.* Pierce, 13 S. D. 265, 83 N. W. 256.
Tennessee.— Coe *v.* Nelson, (Tenn. Ch. 1900) 59 S. W. 170.
Texas.— Chamberlain *v.* Carroll, (Tex. Civ. App. 1900) 59 S. W. 624.
Utah.— Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518.
Vermont.— Moore *v.* Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114.
Virginia.—Saunders *v.* Pruntey, (Va. 1897) 26 S. E. 584.
Washington.— Bernier *v.* Bernier, 17 Wash. 689, 50 Pac. 495.
West Virginia.— McClure-Mabie Lumber Co. *v.* Brooks, 46 W. Va. 732, 34 S. E. 921.
Wisconsin.— Weyerhaeuser *v.* Earley, 99 Wis. 445, 75 N. W. 80.
Wyoming.— Groves *v.* Groves, (Wyo. 1900) 61 Pac. 866.
United States.— Sternenberg *v.* Mailhos, 99 Fed. 43, 39 C. C. A. 408.
See 3 Cent. Dig. tit. "Appeal and Error," § 2911.

69. *Alabama.*— Anderson *v.* McGowan, 42 Ala. 280.
California.— Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.
Colorado.—Nutter *v.* O'Donnell, 6 Colo. 253.
Illinois.— Moore *v.* School Trustees, 19 Ill. 83; Nichols *v.* Thornton, 16 Ill. 113.
Indiana.— Shaffer *v.* Shaffer, 90 Ind. 472; Meyers *v.* Home Ins. Co., 15 Ind. App. 425, 42 N. E. 950.
Nevada.— Sherwood *v.* Sissa, 5 Nev. 349.
New York.—Palm *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 162, 17 N. Y. Suppl. 471.
Ohio.— *Compare* Combes *v.* Miller, 6 Ohio Cir. Ct. 446.
Pennsylvania.— Greenhoe *v.* College, 144 Pa. St. 131, 29 Wkly. Notes Cas. (Pa.) 99, 22 Atl. 905.
See 3 Cent. Dig. tit. "Appeal and Error," § 2913.

70. *Alabama.*— Elmore *v.* Mustin, 28 Ala. 309.
District of Columbia.— Bell *v.* Sheridan, 21 D. C. 370.
Indiana.— Thorne *v.* Indianapolis Abattoir Co., 152 Ind. 317, 52 N. E. 147; Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. 332; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.
Iowa.—Hart *v.* Hart, 74 Iowa 487, 38 N. W. 375.
Kansas.— Missouri, etc., R. Co. *v.* Williamson, (Kan. 1897) 49 Pac. 157.
Louisiana.— Harrison *v.* Soulabere, 52 La. Ann. 707, 27 So. 111.
Minnesota.— Acker Post No. 21, G. A. R., *v.* Carver, 23 Minn. 567.
Nebraska.— Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020.
New York.— Matchett *v.* Lindberg, 2 N. Y. App. Div. 340, 37 N. Y. Suppl. 854, 73 N. Y. St. 66; Howe *v.* Woolsey, 7 Misc. (N. Y.) 33, 27 N. Y. Suppl. 377, 57 N. Y. St. 507; Upington *v.* Pooler, 19 N. Y. Suppl. 428, 47 N. Y. St. 30.
Ohio.— Armleder *v.* Lieberman, 33 Ohio St. 77, 31 Am. Rep. 530.
Washington.— Murray *v.* Shoudy, 13 Wash. 33, 42 Pac. 631.

71. *Alabama.*—Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009.
Arizona.— Glencross *v.* Evans, (Ariz. 1894) 36 Pac. 212.
Arkansas.— St. Louis, etc., R. Co. *v.* Amos, 54 Ark. 159, 15 S. W. 362.
California.— Moore *v.* Tice, 22 Cal. 513.
Colorado.—Wasson *v.* Dyer, 3 Colo. 398.

(2) Sufficiency of Showing. In the absence of a positive statute or rule of court to the contrary, a recital or certificate need not state in express terms that all the evidence is set out. It is sufficient if it affirmatively appears from a reasonable construction of the language used that all the material evidence is preserved.[72] It has been held, however, that a statement "that this was all the testimony given in the cause" is defective, "testimony" and "evidence" not being synonymous.[73]

Connecticut.—Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827.
Florida.— Bailey *v.* Clark, 6 Fla. 516.
Illinois.— Horn *v.* Yates, 90 Ill. App. 588.
Indiana.— Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.
Iowa.— Baldwin *v.* Ryder, 85 Iowa 251, 52 N. W. 201.
Kansas.—Cox *v.* Chicago, etc., R. Co., (Kan. 1898) 51 Pac. 904.
Kentucky.— Castle *v.* Bays, 19 Ky. L. Rep. 345, 40 S. W. 242.
Louisiana.— Hodge *v.* His Creditors, 4 La. 8.
Maine.— Simpson *v.* Norton, 45 Me. 281.
Maryland.—Wolfe *v.* Hauver, 1 Gill (Md.) 84.
Massachusetts.— Lord *v.* Advent Christian Soc., 156 Mass. 387, 30 N. E. 817.
Michigan.— Hayes *v.* Homer, 36 Mich. 374.
Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.
Mississippi.— Clark *v.* Lopez, 75 Miss. 932, 23 So. 648, 957.
Missouri.— Campbell *v.* Buller, 32 Mo. App. 646.
Montana.— Currie *v.* Montana Cent. R. Co., 24 Mont. 123, 60 Pac. 989.
Nebraska.— McClain *v.* Morse, 42 Nebr. 52, 60 N. W. 334.
Nevada.— Sherwood *v.* Sissa, 5 Nev. 349.
New York.—Whyte *v.* Denike, 53 N. Y. App. Div. 320, 65 N. Y. Suppl. 577.
North Dakota.— Edmonson *v.* White, 8 N. D. 72, 76 N. W. 986.
Ohio.— Farmers' College *v.* Butler, 18 Ohio St. 418.
Oklahoma.—Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.
Oregon.— Portland First Nat. Bank *v.* Philadelphia F. Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8.
South Dakota.— McKennett *v.* Barringer, 8 S. D. 556, 67 N. W. 622.
Tennessee.— Kingsley *v.* State Bank, 3 Yerg. (Tenn.) 106.
West Virginia.—Williamson *v.* Hays, 35 W. Va. 52, 12 S. E. 1092.
Wisconsin.— Conatty *v.* Milwaukee Electric R., etc., Co., 100 Wis. 467, 76 N. W. 482.
Wyoming.— France *v.* Omaha First Nat. Bank, 3 Wyo. 187, 18 Pac. 748.
United States.— Cohn *v.* Daley, 174 U. S. 539, 19 S. Ct. 802, 43 L. ed. 1077.
See 3 Cent. Dig. tit. "Appeal and Error," § 2916.

72. *Alabama.*—Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949; Tallman *v.* Drake, 116 Ala. 262, 22 So. 485.
Arkansas.— Hibbard *v.* Kirby, 38 Ark. 102; Jordan *v.* Adams, 7 Ark. 348.
Colorado.— Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259.
District of Columbia.—Merrick *v.* Giddings, 1 Mackey (D. C.) 394.
Illinois.— Hand *v.* Waddell, 167 Ill. 402, 47 N. E. 772.
Indiana.— Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894.
Iowa.—Greenlee *v.* Home Ins. Co., 103 Iowa 484, 72 N. W. 676.
Kansas.— Harms *v.* O. S. Kelley Co., 7 Kan. App. 672, 53 Pac. 879.
Kentucky.— Humphrey *v.* White, 8 Ky. L. Rep. 962.
Michigan.— Godkin *v.* Obenauer, 113 Mich. 93, 71 N. W. 456; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. 808.
Minnesota.—Vassau *v.* Campbell, 79 Minn. 167, 81 N. W. 829; Reiff *v.* Bakken, 36 Minn. 333, 31 N. W. 348.
Missouri.— Gamble *v.* Hamilton, 7 Mo. 469.
New York.— Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506; Hallenbeck *v.* Smith, 51 N. Y. App. Div. 344, 64 N. Y. Suppl. 957.
North Dakota.— Edmonson *v.* White, 8 N. D. 72, 76 N. W. 986.
Ohio.— Robertson *v.* Consolidated Boat Store Co., 6 Ohio Dec. 557, 5 Ohio N. P. 257.
Oklahoma.— Lilly *v.* Russell, 4 Okla. 94, 44 Pac. 212.
Oregon.— Cleveland Oil, etc., Mfg. Co. *v.* Norwich Union F. Ins. Soc., 34 Oreg. 228, 55 Pac. 435.
Texas.— Darcy *v.* Turner, 46 Tex. 30.
Washington.— McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35.
West Virginia.— Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.
Wisconsin.—Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737.
United States.— Gunnison County *v.* Rollins, 172 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689.
See 3 Cent. Dig. tit. "Appeal and Error," § 2918.
As to recital in an abstract or transcript that all the evidence is included see *supra*, XIII, F, 3, b, (II), (B); XIII, G, 4, b, (IV).

73. *Illinois.*— People *v.* Henckler, 137 Ill. 580, 27 N. E. 602.
Indiana.— Kleyla *v.* State, 112 Ind. 146, 13 N. E. 255; Central Union Telephone Co. *v.* State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Miller *v.* Fuller, 21 Ind. App. 254, 52 N. E. 101. *Compare* Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.
Nebraska.— *Compare* Woolworth *v.* Parker, 57 Nebr. 417, 77 N. W. 1090.
New York.— Grening *v.* Malcom, 83 Hun

(II) *Necessity of Setting Out Pleadings.* It is also essential to a review of the sufficiency of the evidence that the record contain either a copy of the pleadings or a statement of the issues in controversy between the parties.[74]

13. Instructions[75] — a. Necessity of Setting Out Evidence — (I) *In General.* Where an instruction given or refused depends upon the evidence which was adduced, and is proper or otherwise, according to the proof, the record should set out the evidence in order to permit a review.[76] If, however, an instruction is

(N. Y.) 9, 31 N. Y. Suppl. 612, 64 N. Y. St. 325; Randall *v.* New York El. R. Co., 76 Hun (N. Y.) 427, 27 N. Y. Suppl. 1062, 59 N. Y. St. 352; Koehler *v.* Hughes, 73 Hun (N. Y.) 167, 25 N. Y. Suppl. 1061, 57 N. Y. St. 131.

Wyoming.—Wheaton *v.* Rampacker, 3 Wyo. 441, 26 Pac. 912; Wyoming L. & T. Co. *v.* W. H. Holliday Co., 3 Wyo. 386, 24 Pac. 193.

United States.— *Compare* Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

See 3 Cent. Dig. tit. "Appeal and Error," § 2923.

"Facts" and "evidence" as synonymous.— A bill of exceptions stating that the cause was submitted on an agreed statement of facts, which it recites, and then stating that such statement contained all the facts agreed on, and which were admitted to the court, and all the facts heard or considered by the court in determination of the cause, sufficiently shows that such facts constitute all the evidence given in the cause. Gates *v.* Haw, 150 Ind. 370, 50 N. E. 299.

74. *California.*— Todd *v.* Winants, 36 Cal. 129; McQuade *v.* Whaley, 29 Cal. 612.

Illinois.— Stitt *v.* Brendel, 66 Ill. 343; Miller *v.* Whittaker, 33 Ill. 386.

Indiana.— Seager *v.* Aughe, 97 Ind. 285; McCardle *v.* McGinley, 86 Ind. 538, 44 Am. Rep. 343; Sumner *v.* Goings, 74 Ind. 293; Chicago, etc., R. Co. *v.* Rader, 10 Ind. App. 607, 38 N. E. 341.

Kansas.— Sanford *v.* Weeks, 50 Kan. 335, 31 Pac. 1087; Mastin *v.* Graham, 20 Kan. 304; Ort *v.* Patrick, 18 Kan. 382.

Kentucky.— Bowman *v.* Holloway, 14 Bush (Ky.) 426.

Pennsylvania.—Walter *v.* Sun Fire Office, 165 Pa. St. 381, 30 Atl. 945.

See 3 Cent. Dig. tit. "Appeal and Error," § 2910.

75. As to instructions as part of record see *supra*, XIII, B, 1, g [2 Cyc. 1066].

As to necessity of record showing objections to instructions see *supra*, XIII, A, 7, a, (IV) [2 Cyc. 1046].

As to presumptions as to instructions see *infra*, XVII, E, 2, d, (V).

76. *Alabama.*—Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612.

Arizona.— Billups *v.* Utah Canal Enlargement, etc., Co., (Ariz. 1901) 63 Pac. 713.

Arkansas.— Duggins *v.* Watson, 15 Ark. 118, 60 Am. Rep. 560.

California.— Frost *v.* Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929.

Colorado.— Kelly *v.* Doyle, 12 Colo. App. 38, 54 Pac. 394.

Connecticut.— Parsons *v.* Camp, 11 Conn. 525.

District of Columbia.— Oliver *v.* Cameron, MacArthur & M. (D. C.) 237.

Florida.— Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59.

Georgia.— Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

Illinois.— Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941 [*affirming* 44 Ill. App. 115].

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

Indian Territory.— Noyes *v.* Tootle, (Indian Terr. 1899) 48 S. W. 1031.

Iowa.— Jerolman *v.* Chicago Great Western R. Co., 108 Iowa 177, 78 N. W. 855.

Kansas.— Missouri Pac. R. Co. *v.* Preston, (Kan. 1901) 63 Pac. 444.

Kentucky.— Beaven *v.* Phillips, 83 Ky. 88.

Maine.— Toole *v.* Bearce, 91 Me. 209, 39 Atl. 558.

Maryland.—Reynolds *v.* Juliet, 14 Md. 118.

Massachusetts.— Saunders *v.* Whitcomb, 177 Mass. 457, 59 N. E. 192.

Michigan.— Martin *v.* Curtis, 119 Mich. 169, 77 N. W. 690.

Minnesota.— Anderson *v.* Morrison, 22 Minn. 274.

Mississippi.—Davis *v.* Brown, 27 Miss. 265.

Missouri.— Stern *v.* Foltz, 152 Mo. 552, 54 S. W. 451.

Montana.— Territory *v.* Bell, 5 Mont. 562, 6 Pac. 60.

Nebraska.— Reynolds *v.* McCandless, 50 Nebr. 225, 69 N. W. 760.

New Hampshire.— Rowell *v.* Chase, 61 N. H. 135.

New Mexico.— Lincoln Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

New York.— Griffiths *v.* Potter, 65 N. Y. Suppl. 689.

North Carolina.— Pickett *v.* Pickett, 14 N. C. 15.

Ohio.— Bain *v.* Wilson, 10 Ohio St. 14.

Oklahoma.— Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Oregon.— Parker *v.* Monteith, 7 Oreg. 277.

Pennsylvania.—Bradley *v.* Vernon, 166 Pa. St. 603, 31 Atl. 330.

South Dakota.— Haggarty *v.* Strong, 10 S. D. 585, 74 N. W. 1037.

Tennessee.— Porter *v.* Woods, 3 Humphr. (Tenn.) 56, 39 Am. Dec. 153.

Texas.— Burgher *v.* City Nat. Bank, (Tex. 1892) 18 S. W. 575.

Virginia.— Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 300, 62 Am. Dec. 653.

West Virginia.— Kinsley *v.* County Ct., 31 W. Va. 464, 7 S. E. 445.

Wisconsin.— Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388.

United States.— New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 8 S. Ct. 246, 31 L. ed. 258.

given which would be erroneous under any conceivable state of facts, such instruction may be reviewed, even though the evidence does not appear of record.[77]

(11) *Showing That Evidence Is Set Out.* The record should also purport to contain all the evidence, or so much, at least, as is essential to determine the correctness of the rulings of the trial court in giving or refusing an instruction.[78] It has been held, however, that, where a ruling of the trial court is erroneous on the evidence set forth, regardless of what other evidence might have been introduced, it is of no consequence that the record does not purport to set out all the evidence.[79] It has also been held that, although a bill of exceptions does not purport to contain all the evidence, the appellate court will review a refusal to give an instruction if sufficient evidence upon which to base such instruction appears.[80]

b. **Necessity of Setting Out Instructions Given or Refused.** Objections to instructions, given or refused, will not be considered on appeal where such instructions do not appear of record.[81]

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2933, 2934.

77. Frost *v.* Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929.

78. *Alabama.*— Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854.

Arkansas.— Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602.

Illinois.— Sidwell *v.* Lobly, 27 Ill. 438.

Indiana.— Huston *v.* McCloskey, 76 Ind. 38; Evansville, etc., R. Co. *v.* Lavender, (Ind. App. 1893) 34 N. E. 109.

Iowa.— Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

Kentucky.— Gross *v.* Lexington Plumbing Co., 9 Ky. L. Rep. 107.

Michigan.— Saunders *v.* Closs, 117 Mich. 130, 75 N. W. 295.

Ohio.—Eclipse Ins. Co. *v.* Schoemer, 2 Cinc. Super. Ct. (Ohio) 474.

Wisconsin.— Roberts *v.* McGrath, 38 Wis. 52; O'Malley *v.* Dorn, 7 Wis. 236, 73 Am. Dec. 403.

See 3 Cent. Dig. tit. "Appeal and Error," § 2935.

Sufficiency of showing.— A recital in a bill of exceptions that, "The foregoing evidence being before the jury," the court gave certain charges therein set out, shows with sufficient certainty that the evidence recited was, in substance, all that was introduced on the trial. Alexander *v.* Wheeler, 69 Ala. 332.

79. McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

80. Sidwell *v.* Lobly, 27 Ill. 438; Roberts *v.* McGrath, 38 Wis. 52.

The rule that the bill of exceptions must contain all the evidence, in order to enable an appellate court to pass upon the correctness of an instruction directing a verdict for one of the parties, will not be applied where the reason for it fails — as where the bill, though not purporting to contain all the evidence, contains a statement of evidence on behalf of plaintiff sufficient on every issue to have justified a verdict in his favor, and the action of the court was evidently the result of a misapprehension of the bearing of such evidence. Leslie *v.* Standard Sewing-Mach. Co., 98 Fed. 827, 39 C. C. A. 314.

81. *Arkansas.*— Little Rock, etc., R. Co. *v.* Atkins, 46 Ark. 423.

California.— Braverman *v.* Fresno Canal, etc., Co., 101 Cal. 644, 36 Pac. 386.

Colorado.—Lewis *v.* Dodge, 3 Colo. App. 59, 31 Pac. 1022.

Georgia.— Thomas *v.* Parker, 69 Ga. 283.

Illinois.— City Electric R. Co. *v.* Jones, 161 Ill. 47, 43 N. E. 613.

Indiana.— Clore *v.* McIntire, 120 Ind. 262, 22 N. E. 128.

Iowa.— Marshall Dental Mfg. Co. *v.* Harkenson, 84 Iowa 117, 50 N. W. 559.

Kansas.— Ritchie *v.* Schenck, 7 Kan. 170.

Kentucky.— Blades *v.* Robbins, 9 Ky. L. Rep. 197.

Maryland.— Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

Massachusetts.— Townsend *v.* Hargraves, 118 Mass. 325.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Mississippi.— Field *v.* Weir, 28 Miss. 56.

Missouri.— Spurlock *v.* Missouri Pac. R. Co., 125 Mo. 404, 28 S. W. 634.

Montana.— Missoula Electric Light Co. *v.* Morgan, 13 Mont. 394, 34 Pac. 488.

Nebraska.—Schneider *v.* Tombling, 34 Nebr. 661, 52 N. W. 283.

New York.— Flannery *v.* Van Tassell, 9 N. Y. Suppl. 871, 32 N. Y. St. 350.

North Carolina.— McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Pennsylvania.— Arthurs *v.* Smathers, 38 Pa. St. 40.

South Carolina.— Sullivan *v.* Sullivan, 20 S. C. 509.

Tennessee.— Sampson *v.* Marr, 7 Baxt. (Tenn.) 486.

Texas.— James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

Vermont.— McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316.

Washington.— Liebenthal *v.* Price, 8 Wash. 206, 35 Pac. 1078.

United States.—Andrews *v.* U. S., 162 U. S. 420, 6 S. Ct. 798, 40 L. ed. 1023.

See 3 Cent. Dig. tit. "Appeal and Error," § 2930.

c. Necessity of Setting Out Entire Charge. It is a further essential to a review of an assignment of error based on the giving or refusal of an instruction that the entire charge of the trial court appear of record,[82] unless the instruction complained of is so erroneous that it could not have been cured by another proper instruction.[83]

d. Necessity of Setting Out Pleadings. It is also an essential to a review of an instruction that the record disclose the pleadings, or the issues joined by the pleadings.[84]

e. Necessity of Showing Request For Instruction. An assignment of error that the court below failed to instruct will not be considered on appeal unless it affirmatively appears from the record that a request therefor was made in apt time.[85]

82. *Florida.*— Thomas *v.* State, 37 Fla. 378, 20 So. 529.

Georgia.—Mickleberry *v.* O'Neal, 98 Ga. 42, 25 S. E. 933.

Idaho.— Hopkins *v.* Utah Northern R. Co., 2 Ida. 277, 13 Pac. 343.

Illinois.— Roodhouse *v.* Christian, 158 Ill. 137, 41 N. E. 748.

Indiana.— Treager *v.* Jackson Coal, etc., Co., 142 Ind. 164, 40 N. E. 907.

Indian Territory.—Shear *v.* McAlester, (Indian Terr. 1899) 53 S. W. 321.

Iowa.—Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Kansas.—Davis *v.* McCarthy, 52 Kan. 116, 34 Pac. 399.

Kentucky.— Louisville Southern R. Co. *v.* Lewis, 101 Ky. 296, 19 Ky. L. Rep. 570, 41 S. W. 3.

Maine.— Hearn *v.* Shaw, 72 Me. 187.

Massachusetts.—Whitney Electrical Instrument Co. *v.* Anderson, 172 Mass. 1, 51 N. E. 182.

Michigan.— Dann *v.* Cudney, 13 Mich. 239, 87 Am. Dec. 755.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

Mississippi.— Yazoo, etc., R. Co. *v.* Williams, 67 Miss. 18, 7 So. 279.

Missouri.— Haegele *v.* Western Stove Mfg. Co., 29 Mo. App. 486.

Montana.— Renshaw *v.* Switzer, 6 Mont. 464, 13 Pac. 127.

Nebraska.— Conger *v.* Dodd, 45 Nebr. 36, 63 N. W. 125.

New Jersey.— Conover *v.* Middletown Tp., 42 N. J. L. 382.

New York.— New York *v.* Exchange F. Ins. Co., 9 Bosw. (N. Y.) 424.

Ohio.— Bean *v.* Green, 33 Ohio St. 444.

Oregon.— Druck *v.* Nicolai, 16 Oreg. 512, 19 Pac. 650.

Pennsylvania.— Long *v.* Shull, 7 Pa. Super. Ct. 476.

Tennessee.— Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339.

Texas.— Christian *v.* Austin, 36 Tex. 540.

Utah.— Flint *v.* Nelson, 10 Utah 261, 37 Pac. 479.

Washington.— Oregon R., etc., Co. *v.* Galliher, 2 Wash. Terr. 70, 3 Pac. 615.

Wyoming.— Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162.

United States.— Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2937, 2938.

Loss of instruction.— Where instructions given by the court are not set out in the record, error cannot be predicated upon the refusal of the court to give certain instructions, although the instructions given were lost. Malcom *v.* Hanson, 32 Nebr. 50, 48 N. W. 883.

83. Meyer *v.* Temme, 72 Ill. 574; Illinois Cent. R. Co. *v.* Sanders, 58 Ill. App. 117; Treager *v.* Jackson Coal, etc., Co., 142 Ind. 164, 40 N. E. 907; Vancleave *v.* Clark, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240; Weeks *v.* Widgeon, 23 Ind. App. 405, 55 N. E. 487.

84. *Alabama.*— Campbell *v.* Green, Minor (Ala.) 30.

Colorado.— Hammond *v.* Herdman, 3 Colo. App. 379, 33 Pac. 933.

Illinois.— Germantown *v.* Goodner, 56 Ill. App. 598; Joliet St. R. Co. *v.* McCarthy, 42 Ill. App. 49.

Indiana.—Anderson *v.* Kramer, 93 Ind. 170.

Iowa.— Holland *v.* Union County, 68 Iowa 56, 25 N. W. 927.

Kentucky.— Licking Rolling Mill Co. *v.* Fischer, 88 Ky. 176, 10 Ky. L. Rep. 763, 11 S. W. 305.

Texas.— Arnold *v.* Peoples, 13 Tex. Civ. App. 26, 34 S. W. 755; Missouri Pac. R. Co. *v.* Shipman, 1 Tex. Civ. App. 407, 20 S. W. 952.

See 3 Cent. Dig. tit. "Appeal and Error," § 2932.

85. *Alabama.*— Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413.

Arkansas.— Robins *v.* Fowler, 2 Ark. 133.

California.— Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664.

Illinois.— Neufeld *v.* Rodiminski, 41 Ill. App. 144.

Indiana.— Morris *v.* Morris, 119 Ind. 341, 21 N. E. 918; Ireland *v.* Emmerson, 93 Ind. 1, 47 Am. Rep. 364; Lofland *v.* Gohen, 16 Ind. App. 67, 44 N. E. 553, 651.

Massachusetts.— Corrigan *v.* Connecticut F. Ins. Co., 122 Mass. 298.

New York.— Grant *v.* Riley, 15 N. Y. App. Div. 190, 44 N. Y. Suppl. 238; Law *v.* Merrills, 6 Wend. (N. Y.) 268.

North Carolina.— Wilson *v.* Winston-Salem R., etc., Co., 120 N. C. 531, 27 S. E. 46; State

14. VERDICT. An objection that a verdict is contrary to the instructions of the trial court cannot be considered if the instructions are not set out in the record.[86]

15. FINDINGS BY COURT — a. In General. Findings by the trial court cannot be reviewed on appeal where they do not appear in the record.[87]

b. Necessity of Setting Out Evidence. Where the evidence is not before the court on appeal, the correctness of the findings will not be questioned except in so far as they are contradictory or conflicting.[88] It has been held, however, that

v. Whitmire, 110 N. C. 367, 15 S. E. 3; Hall *v.* Castleberry, 101 N. C. 153, 7 S. E. 706.

South Carolina.— Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431; Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204.

Tennessee.— Oliver *v.* Nashville, 106 Tenn. 273, 61 S. W. 89; Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300; Hayes *v.* Cheatham, 6 Lea (Tenn.) 1.

Texas.— Hill *v.* Crownover, 4 Tex. 8; San Antonio, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1899) 52 S. W. 89.

United States.— Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. ed. 78.

See also *supra*, XIII, A, 7, a, (IV) [2 Cyc. 1046]; and 3 Cent. Dig. tit. "Appeal and Error," § 2929.

As to presumptions as to request for instructions see *infra*, XVII, E, 2, d, (V).

Request in writing.— In Alabama alleged error in refusing instructions is not available on appeal unless the abstract shows that the instructions were requested in writing. Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413.

86. *Alabama.*— Larkin *v.* Baty, 111 Ala. 303, 18 So. 666.

Georgia.— Grice *v.* Graham, 28 Ga. 186.

Iowa.— Howell *v.* Snyder, 39 Iowa 610; Caffrey *v.* Groome, 10 Iowa 548; Briggs *v.* Hartman, 10 Iowa 63.

Kentucky.— Mobile, etc., R. Co. *v.* Gillis, 8 Ky. L. Rep. 430.

Tennessee.— McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479.

See 3 Cent. Dig. tit. "Appeal and Error," § 2940.

As to presumptions as to verdict see *infra*, XVII, E, 2, e.

As to review of verdict, generally, see *infra*, XVII, G, 3.

As to verdict as part of record see *supra*, XIII, B, 1, i [2 Cyc. 1068].

Conflict in findings.— An appellate court may, without a bill of evidence, ascertain and determine whether the several findings of the jury are conflicting. Quaid *v.* Cornwall, 13 Bush (Ky.) 601.

Necessity of setting out verdict.— An objection to a verdict cannot be considered upon a record in which the verdict does not appear. Witteman *v.* Ludden, etc., Southern Music House, 88 Ga. 223, 14 S. E. 211; Hiatt *v.* Kinkaid, 40 Nebr. 178, 58 N. W. 700. See also Consolidated Stone Co. *v.* Williams, (Ind. App. 1900) 57 N. E. 558.

87. *Alabama.*— Williams *v.* Woodward Iron Co., 106 Ala. 254, 17 So. 517.

Illinois.— Everett *v.* Collinsville Zinc Co., 41 Ill. App. 552.

Indiana.— Moreland *v.* Thorn, 143 Ind. 211, 42 N. E. 639.

Oregon.— Balfour *v.* Day, 32 Oreg. 503, 52 Pac. 510.

Texas.— McCoy *v.* Mayer, (Tex. Civ. App. 1893) 21 S. W. 1015.

Washington.— Lewis *v.* McDougall, 19 Wash. 388, 53 Pac. 664.

See 3 Cent. Dig. tit. "Appeal and Error," § 2941.

As to findings of fact as part of record see *supra*, XIII, A, 3, g [2 Cyc. 1037]; XIII, B, 1, j [2 Cyc. 1069].

As to presumptions as to findings see *infra*, XVII, E, 2, d, (V), (E).

As to review of findings by court, generally, see *infra*, XVII, G, 4.

88. *Arkansas.*— Irby *v.* Southern Bldg., etc., Assoc., 67 Ark. 287, 54 S. W. 744.

California.— Pacific Paving Co. *v.* Mowhray, 127 Cal. 1, 59 Pac. 205; Cummings *v.* O'Brien, 122 Cal. 204, 54 Pac. 742; Eastlick *v.* Wright, 121 Cal. 309, 53 Pac. 654.

Colorado.— Gutheil Suburban Invest. Co. *v.* Fahey, 12 Colo. App. 487, 55 Pac. 946.

Indiana.—Kline *v.* Huntington County, 152 Ind. 321, 51 N. E. 476.

Kansas.— Repstine *v.* Nettleton, 6 Kan. App. 919, 49 Pac. 617.

Minnesota.— Mickleson *v.* Duluth Bldg., etc., Assoc., 68 Minn. 535, 71 N. W. 703.

Missouri.— Nichols *v.* Carter, 49 Mo. App. 401.

Nebraska.— Arlington *v.* Barothy, 56 Nebr. 656, 77 N. W. 52.

Ohio.— Case *v.* Johnson, 19 Ohio Cir. Ct. 636.

Oregon.— Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55.

Utah.— Culmer *v.* Hooper-Caine, 22 Utah 216, 61 Pac. 1008.

Washington.—Rathbun *v.* Thurston County, 2 Wash. 564, 27 Pac. 448.

Wyoming.— Groves *v.* Groves, (Wyo. 1900) 61 Pac. 866.

United States.— Flagler *v.* Kidd, 78 Fed. 341, 45 U. S. App. 461, 24 C. C. A. 123.

See 3 Cent. Dig. tit. "Appeal and Error," § 2941.

Showing that evidence is set out.— Where the certificate of the trial court simply recites that the statement contained all the evidence "considered and proceedings had," findings of fact proposed and refused below cannot be inquired into. Edmonson *v.* White, 8 N. D. 72, 76 N. W. 986.

Where a former adjudication between the same parties is set up in defense of an action and found against defendant, and the finding

where the only error complained of is that the conclusions of law are not sustained by the findings of fact, and the record fully presents that question, the question may be reviewed although the evidence is not preserved in the record.[89] It has also been held that, where the court has tried the facts, and a conclusion of law drawn by the court could not have been authorized by any evidence, the appellate court will reverse for the error although the bill of exceptions does not purport to contain all the evidence.[90]

c. Necessity of Setting Out Pleadings. Since findings of fact and conclusions of law can be measured only in the light of the issues submitted to the trial court, exceptions to conclusions of law will not be considered on appeal in the absence of the pleadings from the record.[91]

16. Amount of Recovery. An appellate court will not consider assignments of error, based on the amount of damages awarded below, where the evidence is not contained in the record.[92]

17. Judgment — a. In General — (1) *Necessity of Setting Out Evidence.* An assignment of error that the court erred in rendering judgment against appellant does not present a question which, in the absence of the evidence, can be reviewed.[93] It is not, however, necessary to bring up the evidence where the objection to the judgment is that it is not consistent with the pleadings,[94] or that

in this respect is alone sought to be reviewed, the bill of exceptions will be sufficient if it contains all the evidence relating to the former suit, although it may not purport to contain all the evidence given on the trial. Howell *v.* Goodrich, 69 Ill. 556.

89. Kansas City, etc., Cement Co. *v.* Reese, 3 Kan. App. 135, 42 Pac. 832; Stoddard *v.* Whiting, 46 N. Y. 627; Beard *v.* Sinnott, 35 N. Y. Super. Ct. 51; Dainese *v.* Allen, 14 Abb. Pr. N. S. (N. Y.) 363, 45 How. Pr. (N. Y.) 430.

90. Heaverin *v.* Otter, 5 Ky. L. Rep. 180.

91. Davis *v.* Talbot, 149 Ind. 80, 47 N. E. 829. See also Brookover *v.* Esterly, 12 Kan. 149.

92. *Arkansas.*— Williams *v.* State, 10 Ark. 256; Dyer *v.* Hatch, 1 Ark. 339.

Colorado.— Marlow *v.* Kuhlenbeck, 2 Colo. 602; Loveland *v.* Sears, 1 Colo. 433.

Connecticut.—Pettibone *v.* Pettibone, 5 Day (Conn.) 324.

Illinois.— Brennan *v.* Shinkle, 89 Ill. 604; Edwards *v.* Irons, 73 Ill. 583.

Indiana.— Harness *v.* State, 143 Ind. 420, 42 N. E. 813; Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414.

Iowa.— John V. Farwell Co. *v.* Zenor, 100 Iowa 640, 65 N. W. 317, 69 N. W. 1030; Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227.

Kentucky.—Wickliffe *v.* Carroll, 14 B. Mon. (Ky.) 137; Vanzant *v.* Jones, 3 Dana (Ky.) 464.

Massachusetts.— Miles *v.* Barrows, 122 Mass. 579; McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690.

Minnesota.— Davis *v.* Tribune Job-Printing Co., 70 Minn. 95, 72 N. W. 808; Bowers *v.* Mississippi, etc., Boom Co., 64 Minn. 474, 67 N. W. 362.

Mississippi.— Hathcock *v.* Gwen, 44 Miss. 799; Womack *v.* Nichols, 39 Miss. 320.

Missouri.— St. Louis, etc., R. Co. *v.* Russell, 150 Mo. 453, 51 S. W. 1030.

Nebraska.— Nowotny *v.* Blair, 32 Nebr. 175, 49 N. W. 357; Zimmerman *v.* Klingeman, 31 Nebr. 495, 48 N. W. 268.

North Carolina.— See Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994.

Ohio.— Taylor *v.* Hunt, 9 Ohio Cir. Ct. 421, 3 Ohio Dec. 110.

Tennessee.— Williams *v.* State Bank, 1 Coldw. (Tenn.) 43; Brient *v.* Waterfield, 5 Sneed (Tenn.) 536.

Texas.— Western Union Tel. Co. *v.* Henry, (Tex. Civ. App. 1894) 25 S. W. 1097.

Wisconsin.— Smeaton *v.* Austin, 82 Wis. 76, 51 N. W. 1090; Cunningham *v.* Gallagher, 61 Wis. 170, 20 N. E. 925.

United States.— Liggett *v.* Glenn, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

See 3 Cent. Dig. tit. "Appeal and Error," § 2943.

93. State *v.* Brewer, 70 Iowa 384, 30 N. W. 646. See also Houghton *v.* Trumbo, 103 Cal. 239, 37 Pac. 152, wherein it was held that the fact that a judgment assumes a partnership between the parties inconsistent with allegations in the complaint is not ground for reversal in the absence of the evidence and a history of the trial.

See 3 Cent. Dig. tit. "Appeal and Error," § 2942.

As to judgment as part of record see *supra*, XIII, B, 1, m [2 Cyc. 1071].

As to presumptions as to judgment see *infra*, XVII, E, 2, g.

The action of the court in entering judgment nunc pro tunc, at a term subsequent to that at which it was rendered, after hearing evidence, will not be reviewed where the evidence is not brought up. Missouri Pac. R. Co. *v.* James, (Tex. 1888) 10 S. W. 332.

A motion to modify a judgment by striking out an order requiring defendant to pay into court a certain sum of money, and by taxing the costs of a certain receivership to plaintiff, cannot be reviewed in the absence of the evidence. Chicago, etc., R. Co. *v.* Cason, 151 Ind. 329, 50 N. E. 569.

94. Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188. See also Patterson *v.* Sharp, 41 Cal. 133, wherein it was held that whether a judgment rendered on facts

it is not supported by the findings of fact,[95] or by the verdict rendered in the cause.[96]

(II) *Necessity of Setting Out Judgment.* The sufficiency of a judgment which is not found in the record before the reviewing court cannot be determined on appeal.[97]

(III) *Necessity of Setting Out Pleadings.* Where the case on appeal contains no copy of the pleadings, an objection that the trial judge went beyond the scope of the pleadings in rendering his decree will not be considered.[98]

b. Arrest of Judgment. A ruling on a motion in arrest of judgment will not be considered on appeal unless the record contains the motion, and the grounds thereof.[99]

c. Vacating or Setting Aside Judgment — (I) *In General.* An order of the trial court, granting or refusing an application to open, vacate, or set aside a judgment, will not be reviewed on appeal in the absence of the evidence before the trial court.[1]

(II) *Judgment by Default.* An appeal from an order denying a motion to open a default will not be considered when the pleadings and the evidence before the trial court do not appear in the record.[2]

alleged in the complaint, and not denied in the answer, ordered the taking of too large a sum of money is a question to be determined on the judgment alone, without bringing up the evidence.

On an appeal from a decree, without preserving the evidence, the only question for consideration is the conformity of the decree to the allegations and prayer of the bill. Portland Steamship Co. *v.* Dana, 172 Mass. 447, 52 N. E. 524.

95. Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105. See also Martin *v.* Hawkins, 62 Ark. 421, 35 S. W. 1104, wherein it was held that, where the findings and judgment of the trial court show that the judgment is not in accord, or is not consistent with, the facts found, the judgment will be reversed if the error be a reversible one — that is, material.

96. Dotterer *v.* Harden, 88 Ga. 145, 13 S. E. 971.

97. Watkins *v.* Crenshaw, 59 Mo. App. 183.

Insertion of previous decree referred to.— A decree that a claim against a railroad in process of foreclosure was within the terms of a previous decree for the preferment of certain classes of claims, and ordering its payment, cannot be reviewed where such previous decree is not in the record. St. Louis, etc., R. Co. *v.* Stark, 55 Fed. 758, 12 U. S. App. 227, 5 C. C. A. 264.

Setting out findings of fact.— In Texas, if the record on appeal does not contain the findings of fact and conclusions of law of the trial court, the judgment will be affirmed if, by an application of the law to any state of facts which may be legitimately adduced from the evidence in the record, that decision can be sustained. McCoy *v.* Mayer, (Tex. Civ. App. 1893) 21 S. W. 1015.

98. Burnett *v.* Burnett, 17 S. C. 545. See also Van Meter *v.* Lovis, 29 Ill. 488.

99. Prilliman *v.* Mendenhall, 120 Ind. 279, 22 N. E. 247; Vandever *v.* Garshwiler, 63 Ind. 185; McCoy *v.* Hill, 2 Litt. (Ky.) 372; Young *v.* Downey, 150 Mo. 317, 51 S. W. 751.

Time of filing.—A motion in arrest of judgment will not be considered on appeal where the record does not show when it was filed. Young *v.* Downey, 150 Mo. 317, 51 S. W. 751. See also Johnson *v.* Greenleaf, 73 Mo. 671.

1. *California.*— Angell *v.* Delmas, 60 Cal. 254.

Georgia.— Powell *v.* Boring, 44 Ga. 169.

Illinois.—Wheeler Chemical Works *v.* Alexander, 30 Ill. App. 502; Johnson *v.* Crane, 22 Ill. App. 366.

Indiana.—Weaver *v.* Kennedy, 142 Ind. 440, 41 N. E. 810; Tomlinson *v.* Beard, 69 Ind. 309.

Iowa.— Read *v.* Divilbliss, 77 Iowa 88, 41 N. W. 580.

Mississippi.— Bryant *v.* Rosenbaum, 62 Miss. 191.

Ohio.— Taylor *v.* Fitch, 12 Ohio St. 169.

New York.— Lewis *v.* Graham, 16 Abb. Pr. (N. Y.) 126.

See 3 Cent. Dig. tit. "Appeal and Error," § 2949.

As to motion to vacate judgment as part of record see *supra*, XIII, B, 1, m, (III), (B) [2 Cyc. 1072].

Setting forth facts found.— In North Carolina, upon appeal from an order vacating, or refusing to vacate, a judgment, the record should present the facts found, and not merely the evidence bearing on the facts. Oldham *v.* Sneed, 80 N. C. 11; Clegg *v.* New York White Soap Stone Co., 66 N. C. 391; Cardwell *v.* Cardwell, 64 N. C. 621.

2. Wheeler Chemical Works *v.* Alexander, 30 Ill. App. 502; Weaver *v.* Kennedy, 142 Ind. 440, 41 N. E. 810; Tomlinson *v.* Beard, 69 Ind. 309; Buehler *v.* New York, 54 N. Y. Super. Ct. 507.

As to motion to set aside default as part of record see *supra*, XIII, B, 1, m, (III), (C) [2 Cyc. 1073].

Omission of proposed answer.—A refusal to open a default cannot be reviewed when the record does not contain the proposed answer. Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267.

18. Costs. The action of the trial court, upon motions to tax or retax costs, or to grant extra allowances, will not be reviewed upon appeal unless the evidence before the trial court appears upon the record.[3]

19. New Trial[4] — a. Necessity of Setting Out Evidence — (I) *Evidence at Trial.* An appellate court will not consider an assignment of error, that the trial court erred in its ruling on a motion for a new trial, if the evidence given on the trial is not set out in the record.[5]

(II) *Evidence on Hearing of Motion.* The evidence offered on the hearing of the motion must also be before the appellate court.[6]

3. *Alabama.*— Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422.

California.— Gates *v.* Buckingham, 4 Cal. 286.

Indiana.— Whisler *v.* Lawrence, 112 Ind. 229, 13 N. E. 576; Mackison *v.* Clegg, 95 Ind. 373; Nelson *v.* Robertson, 7 Ind. 531.

Indian Territory.—Shapleigh Hardware Co. *v.* Brittain, (Indian Terr. 1899) 48 S. W. 1067.

Iowa.— McNider *v.* Sirrine, 84 Iowa 58, 50 N. W. 200.

Kentucky.— Mitchell *v.* Tyler, 20 Ky. L. Rep. 1249, 49 S. W. 422.

Louisiana.—Whitney Iron Works Co. *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

Montana.— Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 440, 17 Pac. 113.

New Hampshire.— Mudgett *v.* Melvin, 66 N. H. 402, 34 Atl. 158.

New York.— Meyer Rubber Co. *v.* Lester Shoe Co., 86 Hun (N. Y.) 473, 33 N. Y. Suppl. 888, 67 N. Y. St. 636; Gori *v.* Smith, 3 Abb. Pr. N. S. (N. Y.) 51; Palmer *v.* Ranken, 56 How. Pr. (N. Y.) 354.

Ohio.— Goldsmith *v.* State, 30 Ohio St. 208.

Texas.— Crow *v.* Jackson, (Tex. Civ. App. 1899) 49 S. W. 920.

See, generally, Costs; and 3 Cent. Dig. tit. "Appeal and Error," § 2949.

As to review of discretion of trial court in allowance of costs see *infra*, XVII, F, 2, k.

Bill of costs complained of.—An objection to the taxation of costs will not be considered in the supreme court when the bill of costs complained of was not made a part of the record. Beattie *v.* Qua, 15 Barb. (N. Y.) 132.

Grounds of motion and exception of ruling. — The ruling on a motion to tax costs is not subject to review where the bill of exceptions does not show the grounds of the motion, and the exception to the ruling thereon. Gallimore *v.* Blankenship, 99 Ind. 390.

4. As to necessity of record showing: Notice of motion, see *supra*, XIII, A, 7, c, (III) [2 Cyc. 1051]. Time of filing motion, see *supra*, XIII, A, 7, c, (IV) [2 Cyc. 1052]. Decision on motion, see *supra*, XIII, A, 7, c, (V) [2 Cyc. 1052].

As to proceedings on motion for new trial as part of record see *supra*, XIII, B, 1, l [2 Cyc. 1070].

As to review of discretion of trial court in granting new trial see *infra*, XVII, F, 2, l.

5. *Arkansas.*— Collins *v.* McPeak, 10 Ark. 556.

California.— Matter of Yoakam, 103 Cal. 503, 37 Pac. 485.

Florida.— Mountain *v.* Roche, 13 Fla. 581.

Georgia.— Johnson *v.* Willingham, 110 Ga. 307, 35 S. E. 117.

Illinois.— Chicago, etc., R. Co. *v.* Marseilles, 107 Ill. 313.

Indiana.— Clapp *v.* Allen, 20 Ind. App. 263, 50 N. E. 587.

Iowa.— State *v.* Harty, 80 Iowa 769, 45 N. W. 903.

Kansas.— Casner *v.* Abel, 5 Kan. App. 881, 49 Pac. 325.

Kentucky.— Specht *v.* Louisville, etc., R. Co., 20 Ky. L. Rep. 335, 46 S. W. 10.

Louisiana.— State *v.* Spooner, 41 La. Ann. 780, 6 So. 879.

Massachusetts.— Spaulding *v.* Knight, 118 Mass. 528.

Michigan.— McDonald *v.* Born, 121 Mich. 595, 80 N. W. 575.

Minnesota.— Scofield *v.* Walrath, 35 Minn. 356, 28 N. W. 926.

Mississippi.— Phipps *v.* Morton, 33 Miss. 211.

Missouri.— McAntire *v.* Hewitt, 75 Mo. App. 304.

Montana.— Wood *v.* Gleim, 19 Mont. 22, 47 Pac. 5.

Nebraska.— Western Gravel Co. *v.* Gauer, 48 Nebr. 246, 67 N. W. 150.

New York.— Haebler *v.* Luttgen, 158 N. Y. 693, 53 N. E. 1125; West *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 522.

Ohio.— Hoyt Dry Goods Co. *v.* Thomas, 19 Ohio Cir. Ct. 638, 10 Ohio Cir. Dec. 341.

Pennsylvania.— Com. *v.* Duff, 7 Pa. Super. Ct. 415.

South Carolina.— Potts *v.* Bonds, 10 S. C. 498.

Texas.—Salinas *v.* State, (Tex. Crim. 1898) 45 S. W. 900.

Virginia.— Mallory *v.* Taylor, 90 Va. 348, 18 S. E. 438.

Washington.—Linder *v.* Newman, 18 Wash. 481, 51 Pac. 1039.

West Virginia.— Zumbro *v.* Stump, 38 W. Va. 325, 18 S. E. 443.

Wisconsin.— Carroll *v.* Hangartner, 66 Wis. 511, 29 N. W. 210.

See 3 Cent. Dig. tit. "Appeal and Error," § 2947.

6. *Arkansas.*— Matthews *v.* Lanier, 33 Ark. 91.

California.— Pereira *v.* City Sav. Bank, 128 Cal. 45, 60 Pac. 524.

Colorado.— Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103.

Georgia.— Hyfield *v.* Sims, 87 Ga. 280, 13 S. E. 554.

Illinois.— Rabberman *v.* Peirce, 66 Ill. App. 391.

b. Necessity of Setting Out Grounds of Decision. The grounds of the ruling of the trial court on the motion must appear of record.[7]

c. Necessity of Setting Out Motion, and Grounds Thereof. It is a further essential to a review of the action of the trial court upon a motion for a new trial that the record contain the motion, and the grounds on which it was based.[8]

M. Matters Not Apparent of Record — 1. In General. It is a rule of wide application that an appellate court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record.[9] The sole

Indiana.— Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529.

Iowa.— Wagner *v.* Condron, 73 Iowa 753, 33 N. W. 159.

Mississippi.—Ross *v.* Garey, 7 How. (Miss.) 47.

Montana.— Raymond *v.* Thexton, 7 Mont. 313, 17 Pac. 260.

Nebraska.— National Lumber Co. *v.* Ashby, 41 Nebr. 292, 59 N. W. 913.

Nevada.— Leete *v.* Sutherland, 20 Nev. 71, 15 Pac. 472.

Ohio.— Hoyt Dry Goods Co. *v.* Thomas, 19 Ohio Cir. Ct. 638, 10 Ohio Cir. Dec. 341.

Texas.— Spencer *v.* James, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556.

Wisconsin.— Hoffman *v.* Chicago, etc., R. Co., 86 Wis. 471, 56 N. W. 1093.

See 3 Cent. Dig. tit. "Appeal and Error," § 2946.

7. *California.*— Byxbee *v.* Dewey, 128 Cal. 322, 60 Pac. 847; Tibbetts *v.* Bower, 121 Cal. 7, 53 Pac. 359.

Kansas.— Smith *v.* Freeman, (Kan. 1898) 52 Pac. 865; Robinson, etc., Mach. Works *v.* Wichita, etc., R. Co., 9 Kan. App. 890, 58 Pac. 1034.

Massachusetts.—Holt *v.* Roberts, 175 Mass. 558, 56 N. E. 702; Coffing *v.* Dodge, 169 Mass. 459, 48 N. E. 840.

Michigan.— Griffin *v.* McKnight, 116 Mich. 468, 74 N. W. 650; McRae *v.* Garth Lumber Co., 102 Mich. 488, 60 N. W. 967.

Missouri.— State *v.* Edwards, 35 Mo. App. 680.

New York.— Courtney *v.* Baker, 60 N. Y. 1; McDermott *v.* Conley, 11 N. Y. Suppl. 403, 33 N. Y. St. 560.

South Carolina.— Sprouse *v.* Littlejohn, 22 S. C. 358.

West Virginia.— Shrewsbury *v.* Miller, 10 W. Va. 115.

Wisconsin.— J., etc., Clasgens Co. *v.* Silber, 87 Wis. 357, 58 N. W. 756; Bowen *v.* Malbon, 20 Wis. 491.

See also *supra*, XIII, A, 7, c, (v), (c) [2 Cyc. 1052].

8. *Alabama.*— Manly *v.* Sperry, 115 Ala. 524, 22 So. 870.

California.— Byxbee *v.* Dewey, 128 Cal. 322, 60 Pac. 847.

Georgia.— Davitte *v.* Southern R. Co., 108 Ga. 665, 34 S. E. 327.

Indiana.— State *v.* Friedley, 151 Ind. 404, 51 N. E. 473.

Kansas.— Gossett *v.* Missouri, etc., R. Co., (Kan. 1899) 56 Pac. 78.

Kentucky.— Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 49.

Minnesota.— Spencer *v.* Stanley, 74 Minn. 35, 76 N. W. 953.

Missouri.— Lloyd *v.* Thurman, 69 Mo. App. 145.

Nebraska.— Muchow *v.* Reid, 57 Nebr. 585, 78 N. W. 263.

New York.—McDermott *v.* Conley, 11 N. Y. Suppl. 403, 33 N. Y. St. 560.

North Carolina.— Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

South Dakota.— D. S. B. Johnston Land-Mortg. Co. *v.* Case, 13 S. D. 28, 82 N. W. 90.

Tennessee.— Equitable F. Ins. Co. *v.* Trustees C. P. Church, 91 Tenn. 135, 18 S. W. 121.

Texas.— Texas Farm, etc., Co. *v.* Story, (Tex. Civ. App. 1898) 43 S. W. 933.

Wisconsin.— Cottrill *v.* Cramer, 46 Wis. 488, 1 N. W. 106.

Wyoming.—Groves *v.* Groves, (Wyo. 1900) 61 Pac. 866.

See also *supra*, XIII, A, 7, c [2 Cyc. 1050]; and 3 Cent. Dig. tit. "Appeal and Error," § 2945.

9. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Seals *v.* Pheiffer, 84 Ala. 359, 4 So. 207.

Arkansas.— Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

Colorado.— Strassheim *v.* Cole, (Colo. App. 1899) 59 Pac. 479.

Connecticut.— Brewster *v.* Cowen, 55 Conn. 152, 10 Atl. 509.

Delaware.— Layton *v.* Trustees of Poor, 6 Houst. (Del.) 13.

Florida.— Merchants Nat. Bank *v.* Gruntal, 38 Fla. 93, 20 So. 809.

Georgia.— Warren *v.* Oliver, 111 Ga. 808, 35 S. E. 673.

Illinois.— Ellsworth *v.* Varney, 83 Ill. App. 94.

Indiana.— Weaver *v.* Weaver, (Ind. App. 1899) 53 N. E. 1071.

Iowa.— Odden *v.* Lewis, 104 Iowa 747, 73 N. W. 863.

Kansas.— Buckland *v.* McBride, 5 Kan. App. 882, 48 Pac. 1001.

Kentucky.— Gunn *v.* Strong, 20 Ky. L. Rep. 650, 47 S. W. 339.

Louisiana.— New Orleans City R. Co. *v.* Crescent City R. Co., 33 La. Ann. 1273.

Maine.— Lewiston Steam Mill Co. *v.* Merrill, 78 Me. 107, 2 Atl. 882.

Maryland.— Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Massachusetts.— Riley *v.* Waugh, 8 Cush. (Mass.) 220.

question which such court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion from the premises which the record contains.[10] If, however, error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner.[11]

2. Matters Appearing Otherwise Than by Record — a. Admissions or Statements of Counsel. Admissions or statements of counsel,[12] either in briefs,[13] in

Michigan.— American Merchants' Union Express Co. *v.* Phillips, 29 Mich. 515.

Mississippi.— Simmons *v.* Ormond, (Miss. 1898) 22 So. 875.

Missouri.— Ingraham *v.* Dyer, 125 Mo. 491, 28 S. W. 840.

Nebraska.— Renard *v.* Wyckoff, (Nebr. 1900) 84 N. W. 410.

Nevada.— Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

New Jersey.— Boswell *v.* Green, 25 N. J. L. 390.

New York.— Wilson *v.* Harter, 57 N. Y. App. Div. 484, 68 N. Y. Suppl. 116.

North Carolina.— Presnell *v.* Garrison, 122 N. C. 595, 29 S. E. 839.

North Dakota.— Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188.

Ohio.— Gill *v.* Sells, 17 Ohio St. 195.

Oklahoma.— Richardson *v.* Penny, 6 Okla. 328, 50 Pac. 231.

Oregon.— Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638.

Pennsylvania.— McBride's Appeal, 152 Pa. St. 201, 31 Wkly. Notes Cas. (Pa.) 333, 25 Atl. 513.

South Carolina.— Sherard *v.* Richmond, etc., R. Co., 35 S. C. 467, 14 S. E. 952.

South Dakota.— John A. Tolman Co. *v.* Savage, 5 S. D. 496, 59 N. W. 882.

Tennessee.— Baugh *v.* Nashville, etc., R. Co., 98 Tenn. 119, 38 S. W. 433.

Texas.— Herbert *v.* Harbert, (Tex. Civ. App. 1900) 59 S. W. 594.

Utah.— Whittaker *v.* Greenwood, 17 Utah 33, 53 Pac. 736.

Vermont.— Allen *v.* Thrall, 10 Vt. 255.

Virginia.— Florance *v.* Morien, 98 Va. 26, 34 S. E. 890.

Washington.— Downs *v.* Seattle, etc., R. Co., 5 Wash. 778, 32 Pac. 745, 33 Pac. 973.

West Virginia.— Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

Wisconsin.— Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703.

United States.— Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966.

See 3 Cent. Dig. tit. "Appeal and Error," § 2951.

As to effect of striking bill of exceptions from files see *supra*, XIII, D, 8, c.

As to lost or destroyed record see *supra*, XIII, B, 5 [2 Cyc. 1075].

As to presumptions in absence of complete record see *infra*, XVII, E.

As to questions presented for review by record see *supra*, XIII, L.

As to scope and contents of record proper see *supra*, XIII, B [2 Cyc. 1053].

10. Rogers *v.* Tennant, 45 Cal. 184; Kanouse *v.* Martin, 3 Sandf. (N. Y.) 593; Armendiaz *v.* De la Serna, 40 Tex. 291; Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684.

11. *Mississippi.*— Commercial Bank *v.* Yazoo County, 6 How. (Miss.) 530, 38 Am. Dec. 447.

Missouri.— Pendergast *v.* Hodge, 21 Mo. App. 138.

New York.— Bodine *v.* Andrews, 47 N. Y. App. Div. 495, 62 N. Y. Suppl. 385.

North Dakota.— McHenry *v.* Roper, 7 N. D. 584, 75 N. W. 903.

Wisconsin.— Cavenaugh *v.* Titus, 5 Wis. 143.

United States.— Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978.

Where want of jurisdiction appears on the face of the record it is not necessary that a bill of exceptions should be preserved, nor that anything which finds its appropriate place outside of the record proper should be made to appear. Redfern *v.* Botham, 70 Ill. App. 253.

12. Rio Grande County *v.* Phye, 27 Colo. 107, 59 Pac. 55; Cooney *v.* Cooney, 18 Ohio Cir. Ct. 874, 9 Ohio Cir. Dec. 272; Timmony *v.* Burns, (Tex. Civ. App. 1897) 42 S. W. 133; Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703. See 3 Cent. Dig. tit. "Appeal and Error," § 2962.

While the uncontradicted statements of counsel cannot be taken as part of the record, they may be referred to as tending to show that an inference drawn from a record which does not profess to disclose all the facts is not unfounded. Hood *v.* Hamilton, 33 Cal. 698.

13. *Illinois.*— Myers *v.* Field, 50 Ill. App. 152.

Massachusetts.— Lee *v.* Kilburn, 3 Gray (Mass.) 594.

South Carolina.— Hornesby *v.* Burdell, 9 S. C. 303.

Texas.—Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co., (Tex. Civ. App. 1895) 32 S. W. 378.

Washington.— State *v.* McQuade, 12 Wash. 554, 41 Pac. 897. *Compare* Pettygrove *v.* Rothschild, 2 Wash. 6, 25 Pac. 907.

Where the judgment-roll does not show when the action was commenced, but the brief of one of the parties states, without contradiction by the other, that it was commenced at a certain time, the statement will be considered as true. Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364.

argument,[14] at the trial below,[15] or in a motion for a new trial,[16] as to matters which do not otherwise appear will not be considered by the appellate court.

b. Evidence Dehors the Record. Numerous decisions support the doctrine that evidence *dehors* the record, whether by affidavit or otherwise, will not be entertained by the appellate court.[17] There are decisions, however, which hold that evidence *dehors* the record is competent to show the fictitious character of the suit,[18] the amount in controversy,[19] the entry of the appeal,[20] the proper

14. *Iowa.*— Laverenz *v.* Chicago, etc., R. Co., 53 Iowa 321, 5 N. W. 156.

Louisiana.— Stillwell *v.* Bobb, 2 Rob. (La.) 327.

Maine.— Allen *v.* Lawrence, 64 Me. 175.

South Carolina.— Turpin *v.* Sudduth, 53 S. C. 295, 31 S. E. 245, 306; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305; Scott *v.* Alexander, 23 S. C. 120.

Texas.— *Compare* Burford *v.* Rosenfield, 37 Tex. 42.

Wisconsin.— Adams *v.* Allen, 44 Wis. 93; Burhop *v.* Roosevelt, 20 Wis. 338.

United States.—Colorado Cent. Consol. Min. Co. *v.* Turck, 54 Fed. 262, 12 U. S. App. 85, 4 C. C. A. 313.

15. Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690 Parsell *v.* State, 30 N. J. L. 530; King *v.* Masonic L. Assoc., 87 Hun (N. Y.) 591, 34 N. Y. Suppl. 563, 68 N. Y. St. 520; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305.

16. Hodde *v.* Susan, 63 Tex. 307.

17. *Alabama.*— Pearce *v.* Clements, 73 Ala. 256; Powers *v.* David, 6 Ala. 9.

California.— Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297.

Connecticut.— Beach *v.* Baldwin, 9 Conn. 476.

Illinois.— Mutual Bldg., etc., Assoc. *v.* Tascott, 143 Ill. 305, 32 N. E. 376; Hayes *v.* Hambel, 62 Ill. App. 654.

Indiana.— Lewis *v.* Prenatt, 24 Ind. 98, 87 Am. Dec. 321; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

Iowa.— Frank *v.* Davenport, 105 Iowa 588, 75 N. W. 480; Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895.

Kentucky.— Georgetown Water Co. *v.* Central Thompson-Houston Co., 18 Ky. L. Rep. 711, 38 S. W. 137; Louisville, etc., R. Co. *v.* Mayfield, 18 Ky. L. Rep. 224, 35 S. W. 924.

Louisiana.— *Compare* Fuselier *v.* Babineau, 11 La. Ann. 393, wherein it was held that testimony, although not referred to in the minutes of the evidence, if used by counsel on both sides and referred to in their briefs, will be considered.

Massachusetts.— Spaulding *v.* Alford, 1 Pick. (Mass.) 33.

Michigan.— Peabody *v.* McAvoy, 23 Mich. 526; Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

Nebraska.— Nelson *v.* Keith, 52 Nebr. 549, 72 N. W. 859; Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740.

Pennsylvania.— Elmes *v.* Elmes, 9 Pa. St. 166.

South Carolina.— State Bank *v.* Rose, 2 Strobh. Eq. (S. C.) 90.

Tennessee.—Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.

Texas.— Griffin *v.* Brown, 1 Tex. App. Civ. Cas. § 1099.

Wisconsin.— Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; Newcomb *v.* Trempealeau, 24 Wis. 459.

Wyoming.—Groves *v.* Groves, (Wyo. 1900) 61 Pac. 866; Rock Springs Nat. Bank *v.* Luman, (Wyo. 1896) 43 Pac. 514.

United States.— Thornton *v.* Carson, 7 Cranch (U. S.) 596, 3 L. ed. 451.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2964, 2965.

As to certiorari to complete record see *supra*, XIII, J, 4.

In New York an appellate tribunal may permit a record to be produced on argument in the appellate court. Dunham *v.* Townshend, 118 N. Y. 286, 23 N. E. 367, 28 N. Y. St. 864; Day *v.* New Lots, 107 N. Y. 148, 13 N. E. 915; Porter *v.* Waring, 69 N. Y. 250; Stilwell *v.* Carpenter, 62 N. Y. 639, 2 Abb. N. Cas. (N. Y.) 238; Harlem Bridge, etc., R. Co. *v.* Westchester, 87 Hun (N. Y.) 276, 33 N. Y. Suppl. 808, 67 N. Y. St. 436; Jarvis *v.* Sewall, 40 Barb. (N. Y.) 449. See also Charleston Bank *v.* Emeric, 2 Sandf. (N. Y.) 718.

18. Ward *v.* Alsup, 100 Tenn. 619, 46 S. W. 573.

In determining a question of jurisdiction in the lower court, the appellate court is not bound by, nor restricted to, the facts stated in the record brought up, but may look at the evidence bearing on those matters. Whitney *v.* San Francisco Fire Dept., 14 Cal. 479. See also McArthur *v.* Starrett, 43 Me. 345; Bradford *v.* Knowles, 11 Tex. Civ. App. 572, 33 S. W. 149.

19. McLaughlin *v.* Darlington, 6 Kan. App. 212, 50 Pac. 507; Heaton *v.* Norton County State Bank, 5 Kan. App. 498, 47 Pac. 576. See also *supra*, III, C, 4, f [2 Cyc. 558].

20. Garrison *v.* Parsons, (Fla. 1899) 25 So. 336.

Evidence of the provisions of a parol prayer for an appeal may be taken in the appellate court, where such evidence does not contradict the recitals in the bond and transcript. White Water Valley Canal Co. *v.* Henderson, 8 Blackf. (Ind.) 528.

Probate appeal.— Under a statute providing that all persons aggrieved by any decree of a court of probate, who were present or who were notified to be present, shall appeal, if at all, to the next term of the superior court, it is not necessary that the record of the decree should show whether a party in interest was present or was notified to be

service, signing, and settlement of the case-made,[21] or a waiver of the right of appeal.[22]

c. Matters Judicially Noticed — (I) *In General.* Matters of which an appellate court may take judicial notice need not be incorporated in the record in order to be considered.[23] But rules of the trial court,[24] statutes of a foreign state,[25] municipal ordinances,[26] or a roll of attorneys,[27] unless offered in evidence in the court below and made part of the record, cannot be considered by the appellate court.

(II) *Records.* An appellate court will take notice of its own records, when properly suggested,[28] but will not take notice, in deciding one case, of what may

present. The fact may be shown by parol evidence. Hiscox's Appeal, 29 Conn. 561.

21. Roser *v.* Wichita Fourth Nat. Bank, 56 Kan. 129, 42 Pac. 341; Jones *v.* Kellogg, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278; Continental Ins. Co. *v.* Maxwell, (Kan. App. 1899) 57 Pac. 1057; Haseltine *v.* Gilleland, 2 Kan. App. 456, 43 Pac. 88; Claflin Bank *v.* Rowlinson, 2 Kan. App. 82, 43 Pac. 304.

Extension of time.— Extrinsic facts, which deprive the trial court of jurisdiction to grant an order extending the time within which a case-made may be prepared and served, the record being indefinite and uncertain upon the question, may be shown in the appellate court. Sigman *v.* Poole, 5 Okla. 677, 49 Pac. 944.

22. Bolen *v.* Cumby, 53 Ark. 514, 14 S. W. 926; Ehrman *v.* Astoria R. Co., 26 Oreg. 377, 38 Pac. 306. See also Austin *v.* Bainter, 40 Ill. 82, wherein it was held that acts *in pais*, occurring either before or after the rendition of the decree, which would make it fraudulent in either party to seek a reversal of the decree, may be pleaded in bar of the writ.

Compromise.— Where, after rendition of a judgment sought to be reversed, it has been compromised, evidence outside the record may be admitted to prove the compromise. New Orleans *v.* Metropolitan Bank, 44 La. Ann. 698, 11 So. 146; Dakota County *v.* Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. ed. 981. *Compare* Winboum *v.* Winboum, 7 Ky. L. Rep. 216.

A release of errors, not being in the transcript, may be brought before the court by evidence *dehors* the record. Elwell *v.* Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. ed. 998.

23. *Alabama.*— Walker *v.* Hunter, 34 Ala. 204.

Georgia.— Ragland *v.* Barringer, 41 Ga. 114.

Montana.— Fredericks *v.* Davis, 6 Mont. 460, 13 Pac. 125.

New York.— Wood *v.* North Western Ins. Co., 46 N. Y. 421.

Tennessee.— Bagwell *v.* McTighe, 85 Tenn. 616, 4 S. W. 46.

Virginia.— Somerville *v.* Wimbish, 7 Gratt. (Va.) 205.

West Virginia.— Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

See 3 Cent. Dig. tit. "Appeal and Error," § 2959.

As to matters of which judicial notice may be taken, generally, see EVIDENCE.

24. Rout *v.* Ninde, 118 Ind. 123, 20 N. E. 704; Magee *v.* Hartzell, 7 Kan. App. 489, 54 Pac. 129; Dours *v.* Cazentre, McGloin (La.) 251; Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95; Scott *v.* Scott, 17 Md. 78; Cherry *v.* Baker, 17 Md. 75.

25. *Alabama.*— Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

Arkansas.— Ewell *v.* Tidwell, 20 Ark. 136.

Massachusetts.— Murphy *v.* Collins, 121 Mass. 6; Haines *v.* Hanrahan, 105 Mass. 480; Knapp *v.* Abell, 10 Allen (Mass.) 485.

New York.— Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631; Munroe *v.* Guilleaume, 3 Abb. Dec. (N. Y.) 334.

Ohio.— Evans *v.* Reynolds, 32 Ohio St. 163; Barr *v.* Closterman, 2 Ohio Cir. Ct. 387.

Pennsylvania.— *Compare* Bock *v.* Lauman, 24 Pa. St. 435.

Tennessee.— See Bagwell *v.* McTighe, 85 Tenn. 616, 4 S. W. 46.

Texas.— Western Union Tel. Co. *v.* Russell, 12 Tex. Civ. App. 82, 33 S. W. 708.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

United States.— Leland *v.* Wilkinson, 6 Pet. (U. S.) 317, 8 L. ed. 412.

As to judicial notice of foreign laws, generally, see EVIDENCE.

26. McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679; Porter *v.* Waring, 69 N. Y. 250.

As to judicial notice of municipal ordinances, generally, see EVIDENCE.

27. Lyon *v.* Boilvin, 7 Ill. 629.

28. Schneider *v.* Hesse, 9 Ky. L. Rep. 814, wherein it was held that the appellate court takes judicial notice of its own records so far as they pertain to the case under consideration, and therefore it judicially knows that the judgment appealed from was affirmed upon a former appeal to which all the parties to the present appeal were parties, and that such judgment is consequently a bar to the prosecution of the present appeal; Thornton *v.* Webb, 13 Minn. 498, wherein it was held that, in a subsequent action in which the pendency of a former action was pleaded as a defense, the supreme court, on appeal, for the purpose of upholding the determination of the court below, would take notice of the fact, appearing by its own records, that an order of dismissal had been entered in the appeal in the previous action before the commencement of the second action.

Attorneys.— Where an appearance is entered in the inferior court and never withdrawn, an appeal taken, the judgment below

be contained in the record of another and distinct case, unless it be brought to the attention of the court by being made a part of the record of the case under consideration.[29]

d. Official Certificates or Statements. The record on appeal cannot be varied, added to, or explained by, a statement or certificate of the judge before whom the case was tried,[30] the stenographer who took the evidence on the trial,[31] or the clerk who made the record.[32]

e. Stipulations and Agreements. The parties to a cause cannot, by agreeing to a change of the record on appeal,[33] or by stipulation,[34] present for consideration a question different from that which appears by the record to have been decided in the court below.

reversed, the cause remanded, and, after proceedings there, another appeal is taken, the appellate court will judicially know what attorneys have appeared in the cause. Symmes *v.* Major, 21 Ind. 443.

Records of former appeal.— An appellate court will take judicial notice of its own record in the same cause on a former appeal. Dawson *v.* Dawson, 29 Mo. App. 521.

29. *Arkansas.*— Fry *v.* Chicot County, 37 Ark. 117.

Illinois.— See Magloughlin *v.* Clark, 35 Ill. App. 251.

Iowa.— Garretson *v.* Ferrall, 92 Iowa 728, 61 N. W. 251; Enix *v.* Miller, 54 Iowa 551, 6 N. W. 722.

Kansas.— Thomas *v.* Chicago, etc., R. Co., (Kan. 1897) 48 Pac. 11; Central Branch Union Pac. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213.

Kentucky.— National Bank *v.* Bryant, 13 Bush (Ky.) 419. See also Ecton *v.* Louisville, 13 Ky. L. Rep. 428; Best *v.* Kirk, 2 Ky. L. Rep. 434.

Minnesota.— Caldwell *v.* Bruggerman, 8 Minn. 286.

Missouri.— See Banks *v.* Burnam, 61 Mo. 76, wherein it was held that, in the absence of evidence to that effect, the supreme court cannot take judicial notice that a case before the court had connection with one formerly decided by it.

Tennessee.— Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.

See 3 Cent. Dig. tit. "Appeal and Error," § 2960.

A state appellate court is not required, on a writ of error, to examine a transcript of the record of a federal circuit court, which was no part of the record in the trial court, for the purpose of showing that the cause was in fact removed to the federal court before the trial. Pennsylvania Co. *v.* Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441 [*distinguishing* Kanouse *v.* Martin, 15 How. (U. S.) 198, 14 L. ed. 660].

30. *Georgia.*— Gay *v.* Sanders, 101 Ga. 601, 28 S. E. 1019.

Louisiana.— Wood *v.* Lewis, 1 Mart. N. S. (La.) 594.

New York.— Routenberg *v.* Schweitzer, 29 Misc. (N. Y.) 653, 61 N. Y. Suppl. 84.

Texas.— Schneider *v.* Stephens, 60 Tex. 419; Slaven *v.* Wheeler, 58 Tex. 23.

Wisconsin.— Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

See 3 Cent. Dig. tit. "Appeal and Error," § 2963.

The certified statement of a court commissioner as to facts appearing before him in a garnishee suit cannot be considered upon an appeal from an order of the circuit court vacating such suit, where that order was not based upon such statement, but only upon the papers upon file in plaintiff's action against the principal debtor, and in a pending action by such debtor against the garnishee. Barber *v.* Walker, 26 Wis. 44.

31. Thompson *v.* Ridelsperger, 144 Pa. St. 416, 28 Wkly. Notes Cas. (Pa.) 444, 22 Atl. 826; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

32. *California.*— Campbell *v.* Coburn, 77 Cal. 36, 18 Pac. 860.

Idaho.— Moore *v.* Koubly, 1 Ida. 55.

Illinois.— Lusk *v.* Parsons, 39 Ill. App. 380.

Indiana.—McClain *v.* Sullivan, 85 Ind. 174.

Iowa.— State *v.* Jones, 11 Iowa 11.

Kansas.— Ferree *v.* Walker, 54 Kan. 49, 36 Pac. 738.

Maryland.— Main *v.* Kinzer, 91 Md. 760, 46 Atl. 1070.

Michigan.—Dooley *v.* Eilbert, 47 Mich. 615, 11 N. W. 408.

Nebraska.— Omaha L. & T. Co. *v.* Hogeboom, 47 Nebr. 7, 66 N. W. 14.

Oklahoma.— Kingfisher *v.* Pratt, 4 Okla. 284, 43 Pac. 1068.

Tennessee.— Kennedy *v.* Kennedy, 16 Lea (Tenn.) 736; Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535.

Texas.— Massie *v.* State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797.

Virginia.— Offtendinger *v.* Ford, 86 Va. 917, 12 S. E. 1; Cunningham *v.* Mitchell, 4 Rand. (Va.) 189.

See 3 Cent. Dig. tit. "Appeal and Error," § 2963.

33. Whitman *v.* Weller, 39 Ind. 515.

34. *Colorado.*—Kelley *v.* Union Pac. R. Co., 16 Colo. 455, 27 Pac. 1058; McKenzie *v.* Ballard, 14 Colo. 426, 24 Pac. 1.

Florida.— Lawyers' Co-operative Pub. Co. *v.* Bennett, 34 Fla. 302, 16 So. 185; Jacksonville *v.* Lawson, 16 Fla. 321.

Illinois.— Harding *v.* Brophy, 133 Ill. 39, 24 N. E. 558; Charles *v.* Remick, 50 Ill. App. 534; O'Connor *v.* Shabbona, 49 Ill. App. 619.

Louisiana.— Tannert *v.* Merchants' Mut. Ins. Co., 32 La. Ann. 663.

Missouri.— St. Louis *v.* Missouri R. Co., 12 Mo. App. 576.

3. Matters Improperly Included — a. In General. Matters which have improperly been included in the record will be disregarded by the appellate court.[35]

b. Matters Which Should Be in Record Proper. So, matters which belong to the record proper will not be considered when presented only in the bill of exceptions.[36]

4. Opinion of Trial Court. An appellate court cannot look to the opinion of the lower court in the determination of a question presented for review,[37] as such

Nebraska.— Bowen *v.* State, 46 Nebr. 23, 64 N. W. 353.

United States.— Ft. Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 14 S. Ct. 339, 38 L. ed. 167; Chicago Tyre, etc., Co. *v.* Spalding, 116 U. S. 541, 6 S. Ct. 498, 29 L. ed. 720.

See 3 Cent. Dig. tit. "Appeal and Error," § 2961.

As to stipulation as to: Contents of record see *supra*, XIII, B, 4 [2 Cyc. 1075]. Settlement of bill of exceptions see *supra*, XIII, D, 6, a, (VI).

35. *Alabama.*—Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 13 So. 423; Armstrong *v.* Robertson, 2 Ala. 164.

Colorado.— Sargent *v.* Chapman, 12 Colo. App. 529, 56 Pac. 194.

Florida.— Patrick *v.* Young, 18 Fla. 50.

Idaho.— Graham *v.* Linehan, 1 Ida. 780.

Illinois.— Browder *v.* Johnson, 1 Ill. 96.

Kentucky.— Barger *v.* Orton, 21 Ky. L. Rep. 1385, 55 S. W. 208.

Maine.— McArthur *v.* Starrett, 43 Me. 345.

Michigan.— Watson *v.* Kane, 31 Mich. 61.

Mississippi.—Marshal *v.* Hamilton, 41 Miss. 229.

Nebraska.— Omaha L. & T. Co. *v.* Hogeboom, 47 Nebr. 7, 66 N. W. 14.

North Carolina.— Isler *v.* Murphy, 71 N. C. 436.

Ohio.— Smith *v.* Board of Education, 27 Ohio St. 44.

Pennsylvania.— Calhoun *v.* Logan, 22 Pa. St. 46.

Tennessee.— Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535.

Utah.— Whipple *v.* Preece, 18 Utah 454, 56 Pac. 296.

Washington.— Chapin *v.* Bokee, 4 Wash. 1, 29 Pac. 936.

See 3 Cent. Dig. tit. "Appeal and Error," § 2956.

As to matters to be shown by record see *supra*, XIII, A [2 Cyc. 1025].

A memorandum made by a party upon the papers of a cause which had been dismissed, after the adjournment of court, consenting to reinstate it, cannot be regarded as a part of the record. Britt *v.* Burk, 7 Ala. 588.

36. *Alabama.*— Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Efurd *v.* Loeb, 82 Ala. 429, 3 So. 3; Sternau *v.* Marx, 58 Ala. 608.

Arkansas.— Randolph *v.* McCain, 34 Ark. 696; Gibbs *v.* Dickson, 33 Ark. 107.

Indiana.— Home Electric Light, etc., Co. *v.* Globe Tissue-Paper Co., 146 Ind. 673, 45 N. E. 1108; Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109.

Kansas.— *Compare* Lauer *v.* Livings, 24 Kan. 273.

Maryland.— Davis *v.* Carroll, 71 Md. 568, 18 Atl. 965.

Mississippi.— Smith *v.* Calcote, 41 Miss. 656; Porter *v.* Porter, 41 Miss. 116.

New Jersey.— Belton *v.* Gibbon, 12 N. J. L. 76.

Wisconsin.— Taylor *v.* Lucas, 43 Wis. 155.

See 3 Cent. Dig. tit. "Appeal and Error," § 2957.

As to scope and contents of record proper see *supra*, XIII, B [2 Cyc. 1053].

If an affidavit for attachment is made by plaintiff's agent, it should so appear upon its face or be shown by the record proper. It is not sufficient that it thus appears by testimony embodied in the bill of exceptions. Mackey *v.* Hyatt, 42 Mo. App. 443.

The judgment must appear by the record itself and cannot be supplied by a bill of exceptions. Vanhorne *v.* Henderson, 37 Fla. 354, 19 So. 659; Anderson *v.* Gainesville Presb. Church, 13 Fla. 592; Traynham *v.* Perry, 57 Ga. 529; Safford *v.* Vail, 22 Ill. 326; McKnight *v.* Dozier, 44 Miss. 606; Whitfield *v.* Westbrook, 40 Miss. 311. See also *supra*, XIII, B, 1, m, (II) [2 Cyc. 1072].

37. *Illinois.*— Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.

Iowa.— Kinser *v.* Soap Creek Coal Co., 85 Iowa 26, 51 N. W. 1151.

Louisiana.—Lee *v.* Bennett, 3 La. Ann. 218.

Minnesota.— Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690.

Nevada.— State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

New York.— Randall *v.* New York El. R. Co., 149 N. Y. 211, 43 N. E. 540; Brooks *v.* Mexican Nat. Constr. Co., 93 N. Y. 647; Clarke *v.* Lourie, 82 N. Y. 580; Townsend *v.* Nebenzhal, 81 N. Y. 644; Fisher *v.* Gould, 81 N. Y. 228; Titus *v.* Orvis, 16 N. Y. 617; McGregor *v.* Buell, 3 Abb. Dec. (N. Y.) 86, 33 How. Pr. (N. Y.) 450; Tannenbaum *v.* Armeny, 81 Hun (N. Y.) 581, 31 N. Y. Suppl. 55, 63 N. Y. St. 348; Manning *v.* West, 19 Misc. (N. Y.) 481, 43 N. Y. Suppl. 1070; Prignitz *v.* McTiernan, 18 Misc. (N. Y.) 481, 43 N. Y. Suppl. 974.

South Carolina.— Drayton *v.* Wells, Nott & M. (S. C.) 409, 9 Am. Dec. 718.

United States.— Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529.

See 3 Cent. Dig. tit. "Appeal and Error," § 2967.

As to opinion of intermediate appellate court see *infra*, XVII, J, 2, c.

Where a cause is removed from a state court to the United States supreme court by

opinion forms no part of the record,[38] even though copied therein.[39] Facts which appear only from the trial court's opinion will not be considered.[40]

XIV. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

A. Power to Order Dismissal—1. IN GENERAL. An appellate court, on grounds hereinafter indicated, has power to dismiss an appeal or writ or error either on motion or on its own motion.[41]

2. POWER OF LOWER COURT. After the jurisdiction of the appellate court over an appeal has attached, the trial court is without power to dismiss an appeal allowed by it.[42]

B. Dismissal by Court Sua Sponte. Want of jurisdiction,[43] defects going

writ of error, the opinion of the state court cannot be resorted to for the purpose of showing that a question of federal cognizance was decided by such court. It must appear in the record. Gibson *v.* Chouteau, 8 Wall. (U. S.) 314, 19 L. ed. 317. *Compare* Cousin *v.* Labatut, 19 How. (U. S.) 202, 15 L. ed. 601.

Where the terms of an order refer to the opinion of the court, the appellate court may look beyond the order to the opinion to ascertain the ground of the judgment. Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353; Snyder *v.* Snyder, 5 N. Y. Civ. Proc. 267.

38. Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798; Randall *v.* New York El. R. Co., 149 N. Y. 211, 43 N. E. 540.

39. Cox *v.* Garven, 6 Ark. 431; Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.

40. *Louisiana.*—Lee *v.* Bennett, 3 La. Ann. 218; Destrehan *v.* Garcia, 2 Rob. (La.) 291; Broussard *v.* Broussard, 19 La. 355; Tait *v.* De Ende, 18 La. 33; Childress *v.* Allin, 15 La. 500.

Minnesota.— Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690.

Nevada.— State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

New York.— Richards *v.* Moore, 14 N. Y. Suppl. 851, 37 N. Y. St. 953; Savage *v.* Murphy, 8 Bosw. (N. Y.) 75.

Pennsylvania.— Ætna F. Ins. Co. *v.* Reading, 119 Pa. St. 417, 13 Atl. 451; Buckley *v.* Duff, 111 Pa. St. 223, 3 Atl. 823.

South Carolina.— Drayton *v.* Wells, Nott & M. (S. C.) 409, 9 Am. Dec. 718.

United States.— Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529.

41. See *infra*, XIV, B, E.

Dismissal of part of appeal.— An appellate court may sustain an appeal in part, and dismiss it in part, on the ground that, as to such part, the case could not be brought up on appeal. Westcott *v.* Bradford, 4 Wash. C. C. (U. S.) 492, 29 Fed. Cas. No. 17,429.

Where the court is divided in opinion on a motion to dismiss an appeal, the motion cannot be granted. Hatton *v.* Weems, 12 Gill & J. (Md.) 83. See also Strader *v.* Sussex County, 15 N. J. L. 433.

42. James *v.* Fellowes, 23 La. Ann. 37; Lake Shore, etc., R. Co. *v.* Chambers, 89 Mich. 5, 50 N. W. 741; Powell *v.* Schenck, 6 N. Y. App. Div. 130, 39 N. Y. Suppl. 877; Howey *v.* Lake Shore, etc., R. Co., 15 Misc. (N. Y.) 526, 37 N. Y. Suppl. 88, 72 N. Y. St. 120; Du Bois *v.* Brown, 1 Dem. Surr. (N. Y.) 317; Stern *v.* U. S., 6 Ct. Cl. 280. But if appellant fails to send up transcript to appellate court, the trial court may adjudge appeal abandoned and proceed. Cline *v.* Bryson City Mfg. Co., 116 N. C. 837, 21 S. E. 791; Avery *v.* Pritchard, 93 N. C. 266.

See 3 Cent. Dig. tit. "Appeal and Error," § 3114.

As to proceedings in lower court after transfer of cause see *supra*, X [2 Cyc. 965].

In New York a motion made to dismiss an appeal from a decision of the special term cannot be heard at special term. Brooker *v.* Filkins, 7 Misc. (N. Y.) 390, 27 N. Y. Suppl. 918, 57 N. Y. St. 564; Harris *v.* Clark, 10 How. Pr. (N. Y.) 415; Barnum *v.* Seneca County Bank, 6 How. Pr. (N. Y.) 82; Bradley *v.* Van Zandt, 3 Code Rep. (N. Y.) 217. But see Spotts *v.* Dumesnil, 12 Abb. Pr. N. S. (N. Y.) 117.

Dismissal in trial court.—An appellant may properly dismiss his appeal in the lower court before the transcript of the record reaches the court of appeals. Evans *v.* Humphreys, 9 App. Cas. (D. C.) 392.

43. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Gunter *v.* Mason, 125 Ala. 644, 27 So. 843.

California.— Bienenfeld *v.* Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113.

Connecticut.—Sweet *v.* Dow, 1 Root (Conn.) 409.

Illinois.— Doyle *v.* Wilkinson, 120 Ill. 430, 11 N. E. 890; Hartzell *v.* Warren, 77 Ill. App. 274; Rohn *v.* Harris, 31 Ill. App. 26; Hart *v.* Burch, 31 Ill. App. 22 [*affirmed* in 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371].

Iowa.— Sperry *v.* Kretchmer, (Iowa 1884) 19 N. W. 807; Groves *v.* Richmond, 58 Iowa 54, 12 N. W. 80.

Kansas.— Sipple *v.* Parsons, (Kan. 1898) 52 Pac. 95; Winkler *v.* Miami County, 6 Kan. App. 519, 50 Pac. 946; Vandemark *v.* Jones, 4 Kan. App. 666, 46 Pac. 53; Thrall *v.* Fairbrother, 1 Kan. App. 482, 40 Pac. 815.

Louisiana.— Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64; Murray *v.* Kimbro, 49 La. Ann. 351, 21 So. 261; Naghten *v.* Naghten, 48 La. Ann. 799, 19 So. 762; *In re* Genella, 45 La. Ann. 1377, 14 So. 302.

Minnesota.— U. S. Savings, etc., Co. *v.* Ahrens, 50 Minn. 332, 52 N. W. 898.

to the jurisdiction,[44] defects in the proceedings for review,[45] or want of an actual controversy,[46] will warrant an appellate court in dismissing an appeal or writ of error of its own motion.

C. Dismissal on Consent. An appeal will be dismissed, where both appellants and respondents so request or agree, if the rights of persons not parties to the record will not be affected, and the action is not one in which the public can be considered a party.[47]

New York.— Garczynski *v.* Russell, 75 Hun (N. Y.) 512, 27 N. Y. Suppl. 461, 57 N. Y. St. 669.

North Carolina.— Ladd *v.* Ladd, 121 N. C. 118, 28 S. E. 190; Sutton *v.* Walters, 118 N. C. 495, 24 S. E. 357.

Vermont.— Wilcox *v.* Wilcox, 63 Vt. 137, 21 Atl. 423.

Wisconsin.— Henk *v.* Baumann, 100 Wis. 28, 75 N. W. 313.

See 3 Cent. Dig. tit. "Appeal and Error," § 3138.

As to want of jurisdiction as ground for motion to dismiss see *infra*, XIV, E, 5.

44. *Alabama.*—Richardson *v.* Gadsden First Nat. Bank, 119 Ala. 286, 24 So. 54; Barclay *v.* Spragins, 80 Ala. 357; Morgan *v.* Jones, 48 Ala. 250; Johnston *v.* Shaw, 31 Ala. 592.

Indiana.— Midland R. Co. *v.* St. Clair, 144 Ind. 363, 42 N. E. 214.

Iowa.— Hawkeye Ins. Co. *v.* Erlandson, 84 Iowa 193, 50 N. W. 881; Green *v.* Ronen, 59 Iowa 83, 12 N. W. 765.

Louisiana.— Martin *v.* Taylor, 21 La. Ann. 303; Tupery *v.* Lafitte, 19 La. Ann. 296; Belleville Iron Works Co. *v.* Its Creditors, 16 La. Ann. 77; Déjean *v.* Stilly, 13 La. Ann. 565; Condon *v.* Samory, 12 La. Ann. 801; Simmons *v.* His Creditors, 12 La. Ann. 755; Robert *v.* Ride, 11 La. Ann. 409; Swearingen *v.* McDaniel, 12 Rob. (La.) 203; Flagg *v.* Roberts, McGloin (La.) 238.

North Carolina.—Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963.

Texas.— Carlton *v.* Ashworth, (Tex. Civ. App. 1898) 45 S. W. 203.

United States.— Estes *v.* Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. ed. 437.

See 3 Cent. Dig. tit. "Appeal and Error," § 3140.

45. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.—Holtzclaw *v.* Ware, 34 Ala. 307.

Arizona.— Town *v.* Wilson, 7 Ark. 386.

California.— Matter of Pearsons, 119 Cal. 27, 50 Pac. 929; Bullock *v.* Taylor, 112 Cal. 147, 44 Pac. 457.

Colorado.— *In re* Barker, (Colo. 1901) 64 Pac. 188; Getty *v.* Miller, 10 Colo. App. 331, 51 Pac. 166.

Idaho.— Clyne *v.* Bingham County, (Ida. 1900) 60 Pac. 76.

Illinois.— Phœnix Ins. Co. *v.* Hedrick, 69 Ill. App. 184.

Indiana.— Abshire *v.* Williamson, 149 Ind. 248, 48 N. E. 1027; South Bend *v.* Thompson, 19 Ind. App. 19, 49 N. E. 38.

Iowa.— McManus *v.* Swift, 76 Iowa 576, 41 N. W. 364.

Kansas.— Talbott *v.* Davis, 6 Kan. App. 640, 58 Pac. 1028.

Kentucky.— Castleman *v.* Homes, 7 T. B. Mon. (Ky.) 591; Spradlin *v.* Pieratt, 7 Ky. L. Rep. 286; Wade *v.* Elizabethtown, 6 Ky. L. Rep. 214.

Louisiana.—Short's Succession, 47 La. Ann. 142, 16 So. 771; Samuels *v.* Brownlee, 38 La. Ann. 34; State *v.* Jumel, 35 La. Ann. 980.

New York.—Matter of Hall, 7 N. Y. Suppl. 595, 27 N. Y. St. 133.

Pennsylvania.—Dietrich *v.* Addams, 9 Wkly. Notes Cas. (Pa.) 492.

South Dakota.— McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435.

Texas.— Smith *v.* Parks, 55 Tex. 82; Converse *v.* Trapp, (Tex. Civ. App. 1895) 29 S. W. 415; Wichita Valley R. Co. *v.* Peery, (Tex. Civ. App. 1894) 27 S. W. 751; Garce *v.* Buffington, (Tex. Civ. App. 1894) 25 S. W. 317.

Utah.— Anderson Pressed-Brick Co. *v.* Dubois, 10 Utah 60, 37 Pac. 90.

Wisconsin.— Lloyd *v.* Frank, 30 Wis. 158; Shewey *v.* Manning, 14 Wis. 448.

United States.— Hilton *v.* Dickinson, 108 U. S. 165, 2 S. Ct. 424, 27 L. ed. 688; Edmonson *v.* Bloomshire, 7 Wall. (U. S.) 306, 19 L. ed. 91; Ayres *v.* Polsdorfer, 105 Fed. 737, 45 C. C. A. 24.

See 3 Cent. Dig. tit. "Appeal and Error," § 3141.

As to defects in proceedings for review as ground for dismissal on motion see *infra*, XIV, E, 1.

46. *Illinois.*— McAdam *v.* People, 179 Ill. 316, 53 N. E. 1102.

Louisiana.— American Freehold Land, etc., Co. *v.* Williams, 47 La. Ann. 1380, 17 So. 847; Block *v.* Barton, 27 La. Ann. 89.

Mississippi.— Ames *v.* Williams, 73 Miss. 772, 19 So. 673.

North Carolina.— Blake *v.* Askew, 76 N. C. 325.

Pennsylvania.— Berks County *v.* Jones, 21 Pa. St. 413.

United States.—East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 125 U. S. 695, 8 S. Ct. 1391, 31 L. ed. 853; Benner *v.* Hayes, 80 Fed. 953, 53 U. S. App. 376, 26 C. C. A. 271.

As to necessity of actual controversy to give jurisdiction see *supra*, II, A [2 Cyc. 533].

47. *Kentucky.*— Mitchell *v.* Maupin, 3 T. B. Mon. (Ky.) 185.

Louisiana.— Walz *v.* New Orleans, etc., R. Co., 35 La. Ann. 628.

Michigan.—See Carmichael *v.* Lathrop, 112 Mich. 301, 70 N. W. 575.

New York.— Saratoga Gas, etc., Co. *v.*

D. Voluntary Dismissal or Withdrawal—1. In General. An appellant will, as a rule, be permitted to dismiss or withdraw his appeal.[48] One appellant may withdraw as to himself,[49] but not as to his co-appellants.[50]

2. Leave of Court or Consent of Appellee. An appeal cannot be dismissed but upon leave of court,[51] and sometimes the consent of appellee is also necessary.[52]

Town, 67 Hun (N. Y.) 645, 22 N. Y. Suppl. 342, 51 N. Y. St. 229.

Washington.—Hood *v.* California Wine Co., 4 Wash. 88, 29 Pac. 768.

Wisconsin.—Nightingale *v.* Barens, 40 Wis. 236.

United States.— Addington *v.* Adams, 125 U. S. 693, 8 S. Ct. 1391, 31 L. ed. 853.

See 3 Cent. Dig. tit. "Appeal and Error," § 3120.

Dismissal as to one party.— Though one notice of appeal was directed to both appellees, and one bond was given to both as joint obligees, dismissal of the appeal as to one, by stipulation, does not affect the validity of the bond as to the other, or entitle him to dismissal. Taake *v.* Seattle, 16 Wash. 90, 47 Pac. 220.

48. *Arkansas.*— Yell *v.* Outlaw, 14 Ark. 164.

Connecticut.— *In re* Breisen, (Conn. 1898) 41 Atl. 774; Lake's Appeal, 32 Conn. 331.

Georgia.— Collins Park, etc., R. Co. *v.* Short Electric R. Co., 95 Ga. 570, 20 S. E. 495; State Bank *v.* Citizens' Bank, 66 Ga. 752.

Illinois.— Adkinson *v.* Gahan, 114 Ill. 21, 28 N. E. 380; Bacon *v.* Lawrence, 26 Ill. 53; Hancock County *v.* Marsh, 3 Ill. 491.

Iowa.— Simonson *v.* Chicago, etc., R. Co., 48 Iowa 19; Goodenow *v.* Perry, 12 Iowa 350; Harper *v.* Albee, 10 Iowa 389.

Kentucky.— See Sweeney *v.* Coulter, (Ky. 1900) 58 S. W. 784; Ragland *v.* Wickware, 4 J. J. Marsh. (Ky.) 530.

Maine.— Lancaster *v.* Kennebec Log Driving Co., 62 Me. 272.

Maryland.— Newson *v.* Douglass, 7 Harr. & J. (Md.) 417, 16 Am. Dec. 317; Diffenderffer *v.* Hughes, 7 Harr. & J. (Md.) 3.

Massachusetts.— Derick *v.* Taylor, 171 Mass. 444, 50 N. E. 1038.

Michigan.— Birch *v.* Brown, 5 Mich. 31.

Missouri.— Lindell Glass Co. *v.* Hanneman, 46 Mo. App. 614.

Nebraska.— Tuttle *v.* Omaha, 55 Nebr. 55, 75 N. W. 50.

New Hampshire.— Hood *v.* Marshall, 69 N. H. 605, 45 Atl. 574; Simpson *v.* Gafney, 66 N. H. 477, 30 Atl. 1120.

New Jersey.—Vandyke *v.* Tenbroke, 1 N. J. L. 144.

New York.— Lawlor *v.* Magnolia Metal Co., 158 N. Y. 743, 53 N. E. 537; Rector, etc., Holy Trinity Church *v.* Rector, etc., Church of St. Stephen, 128 N. Y. 604, 27 N. E. 1017, 38 N. Y. St. 919; Warren *v.* Eddy, 32 Barb. (N. Y.) 664, 13 Abb. Pr. (N. Y.) 28; Brown *v.* Simmons, 14 Daly (N. Y.) 456, 15 N. Y. St. 370; Vernon *v.* Palmer, 5 N. Y. Civ. Proc. 233; Powell *v.* Waters, 8 Cow. (N. Y.) 755; Law *v.* Jackson, 8 Cow. (N. Y.) 746.

Ohio.— Cleveland Gas Light, etc., Co. *v.* Duffy, 22 Ohio St. 206.

Texas.— International Bldg., etc., Assoc. *v.* Snodgrass, (Tex. Civ. App. 1894) 26 S. W. 309.

Washington.— Tacoma Lumber, etc., Co. *v.* Wolff, 4 Wash. 260, 29 Pac. 936.

West Virginia.— Colman *v.* West Virginia Oil, etc., Co., 25 W. Va. 148.

Wisconsin.— Oelberman *v.* Newman, 83 Wis. 212, 53 N. W. 451; Helden *v.* Helden, 9 Wis. 557.

United States.— Latham *v.* U. S., 9 Wall. (U. S.) 145, 19 L. ed. 771; U. S. *v.* Minnesota, etc., R. Co., 18 How. (U. S.) 241, 15 L. ed. 347.

See 3 Cent. Dig. tit. "Appeal and Error," § 3115.

As to abandonment of appeal see *infra*, XIV, I.

As to right to second appeal on voluntary dismissal see *supra*, I, F, 2 [2 Cyc. 527].

Part of appeal.— On appeal from a judgment sustaining both a mortgage and a deed of assignment, so much of the appeal as relates to the mortgage may be dismissed by appellant, without affecting the appeal as to the assignment. *In re* Weber, 91 Iowa 122, 58 N. W. 1079. See also Dwight *v.* Brashear, 12 La. Ann. 860.

The state has the same right that any other appellant has to ask that an appeal which it has taken from an order of the lower court be dismissed, provided it appears that appellee will not be injured or prejudiced thereby. State *v.* Moriarty, 20 Iowa 595.

49. Thorp *v.* Thorp, 40 Ill. 113.

50. Hyde *v.* Tracy, 2 Day (Conn.) 491. See also McPherson *v.* Storch, 49 Kan. 313, 30 Pac. 480, wherein it was held that, where a joint judgment against several defendants is brought up for review and plaintiff waives error and dismisses the proceedings as to one defendant, if the judgment is such that it cannot be disturbed without affecting all the defendants, it is a dismissal as to all.

51. Trouilly's Succession, 52 La. Ann. 276, 26 So. 851; State *v.* Judge Eighth Dist. Ct., 24 La. Ann. 598; Andrews' Succession, 16 La. Ann. 340; Merrill *v.* Dearing, 24 Minn. 179. See also Matter of Folts St., 29 N. Y. App. Div. 69, 51 N. Y. Suppl. 390.

See 3 Cent. Dig. tit. "Appeal and Error," § 3117.

Order of court.— To effectuate the withdrawal of an appeal an order of court is necessary. Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Weinman *v.* Dilger, 46 N. Y. Super. Ct. 101; Burnett *v.* Harkness, 4 How. Pr. (N. Y.) 158.

52. Trouilly's Succession, 52 La. Ann. 276, 26 So. 851; Wolfe *v.* Poirier, 19 La. Ann.

3. Payment of Costs. An appellant dismissing or withdrawing his appeal should be charged with the costs.[53]

E. Grounds For Dismissal on Motion — 1. Defects in Proceedings For Review. Defects in the proceedings for review[54] — such as failure to obtain order allowing appeal,[55] failure to bring the appeal within the time prescribed by statute,[56] failure to give notice of appeal,[57] failure to bring up all the parties in

103; Monongahela Nav. Co. *v.* Blair, 20 Pa. St. 71.

In Wisconsin appellants will not be allowed to dismiss their appeals except by consent or upon notice to respondents. Loucheine *v.* Strouse, 46 Wis. 487, 50 N. W. 595.

Consent of interveners.—On an appeal from a judgment of the district court, which has been filed in the supreme court, the appeal cannot be withdrawn, by the consent of plaintiff and defendant in the suit, where interveners have joined with defendant in the appeal. Perkins *v.* Perkins, 20 La. Ann. 257.

53. *Arkansas.*— Yell *v.* Outlaw, 14 Ark. 164.

Iowa.— Goodenow *v.* Perry, 12 Iowa 350; Harper *v.* Albee, 10 Iowa 389.

Kentucky.— Maxwell *v.* Bryant, 10 Ky. L. Rep. 174, 10 S. W. 279.

Michigan.— Birch *v.* Brown, 5 Mich. 31.

New York.— Mackay *v.* Lewis, 73 N. Y. 382; Brown *v.* Simmons, 14 Daly (N. Y.) 456, 15 N. Y. St. 370; Vernon *v.* Palmer, 5 N. Y. Civ. Proc. 233; Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28; Burnett *v.* Harkness, 4 How. Pr. (N. Y.) 158, 2 Code Rep. (N. Y.) 100; Powell *v.* Waters, 8 Cow. (N. Y.) 755; Law *v.* Jackson, 8 Cow. (N. Y.) 746.

Wisconsin.— Helden *v.* Helden, 9 Wis. 557.

But see Sueterlee *v.* Sir, 25 Wis. 357, wherein it was held that where, through inadvertence, the evidence of due service of summons by publication was not filed before appeal taken from the judgment, and the trial court allows it to be filed as of the day judgment was entered, appellant will be allowed to dismiss without costs.

See 3 Cent. Dig. tit. "Appeal and Error," § 3118.

54. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Reid *v.* Owen, 9 Port. (Ala.) 435.

Florida.— Merchants Nat. Bank *v.* Grunthal, 38 Fla. 93, 20 So. 809.

Illinois.— Merkel *v.* William Schmidt Baking Co., 72 Ill. App. 239; Shroeder *v.* Clarke, 71 Ill. App. 74.

Indiana.—Richardson *v.* State, 16 Ind. 412; Harrod *v.* State, (Ind. App. 1899) 53 N. E. 777; Otis *v.* Weiss, 22 Ind. App. 161, 53 N. E. 428; Wheeler *v.* Barr, 6 Ind. App. 530, 33 N. E. 975.

Iowa.— Beiter *v.* Shadle, (Iowa 1897) 70 N. W. 722.

Louisiana.— Louisiana State Bank *v.* Barrow, 24 La. Ann. 276.

Maine.— Morrill *v.* Buker, 92 Me. 389, 42 Atl. 796.

Missouri.— Stanton *v.* Slabaugh, (Mo. 1889) 11 S. W. 577; La Belle Sav. Bank *v.* Critchlow, 38 Mo. App. 424.

Nevada.— Irwin *v.* Samson, 10 Nev. 282.

New Hampshire.— Field *v.* Smith, 62 N. H. 698.

New Jersey.— Harwood *v.* Smethurst, 31 N. J. L. 502.

New York.— Horn *v.* Terry, 22 N. Y. Civ. Proc. 431, 19 N. Y. Suppl. 233, 46 N. Y. St. 881.

North Carolina.— Allen *v.* Hammond, 122 N. C. 754, 30 S. E. 16; Cross *v.* Williams, 91 N. C. 496; Officers of Ct. *v.* Bland, 91 N. C. 1; Harshaw *v.* McDowell, 89 N. C. 181.

Oklahoma.— Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

Pennsylvania.— Mauk's Estate, 195 Pa. St. 483, 46 Atl. 142; Philadelphia *v.* West Philadelphia Institute, 177 Pa. St. 37, 33 Atl. 1012.

Texas.— Legon *v.* Withee, 25 Tex. 350.

Washington.— Fisher *v.* Kirschberg, 17 Wash. 290, 49 Pac. 488.

Wisconsin.— Punch *v.* New Berlin, 20 Wis. 189.

United States.— Hecker *v.* Fowler, 1 Black (U. S.) 95, 17 L. ed. 45; Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493.

See 3 Cent. Dig. tit. "Appeal and Error," § 3126.

As to defects in proceedings for review as ground for dismissal by court *sua sponte* see *supra*, XIV, B.

55. Allen *v.* Britton, 141 Mo. 173, 42 S. W. 819.

As to necessity of order allowing appeal, generally, see *supra*, VII, B [2 Cyc. 806].

56. *California.*— Sutter County *v.* Tisdale, 128 Cal. 180, 60 Pac. 757.

Colorado.— Willoughby *v.* George, 5 Colo. 80.

Florida.— Spencer *v.* Travelers' Ins. Co., 39 Fla. 677, 23 So. 442.

Illinois.— Swafford *v.* Rosenbloom, 189 Ill. 392, 59 N. E. 790; Disney *v.* Chicago, 183 Ill. 439, 56 N. E. 170.

Montana.—Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129.

Nebraska.— French *v.* English, 7 Nebr. 124.

New York.— Goetz *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 365, 66 N. Y. Suppl. 666.

As to time of taking appeal, generally, see *supra*, VII, A [2 Cyc. 789].

57. *Indiana.*— Cole *v.* Franks, 147 Ind. 281, 46 N. E. 532.

Iowa.— Roe *v.* McCaughan, (Iowa 1901) 85 N. W. 21; Wernimont *v.* Aultman, (Iowa 1898) 76 N. W. 827; Lemley *v.* Rea, (Iowa 1898) 74 N. W. 748.

North Carolina.— Rose *v.* Baker, 99 N. C. 323, 5 S. E. 919; Clark's Code Civ. Proc.

interest,[58] failure to give sufficient bond,[59] failure to file the record or abstracts thereof within the time prescribed,[60] failure to authenticate the transcript,[61] fail-

N. C. (1900), pp. 755, 756, and cases there cited.

Ohio.— Mathers *v.* Bull, 18 Ohio Cir. Ct. 196.

Oregon.— Conrad *v.* Pacific Packing Co., 34 Oreg. 337, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021.

Texas.— Evans *v.* Smith, 22 Tex. Civ. App. 472, 54 S. W. 1050.

Washington.— See Kasch *v.* Nelson, 20 Wash. 315, 55 Pac. 118.

As to necessity, requisites, and sufficiency of notice of appeal, generally, see *supra*, VII, E [2 Cyc. 852].

Error in date of entry of judgment.— The fact that the notice of appeal incorrectly states the date of entry of the judgment is not ground for dismissing the appeal. McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435.

58. *Alabama.*— Vaughan *v.* Higgins, 68 Ala. 546.

Georgia.— U. S. Leather Co. *v.* Gainesville First Nat. Bank, 107 Ga. 263, 33 S. E. 31; White *v.* Bleckley, 105 Ga. 173, 31 S. E. 147; Augusta Nat. Bank *v.* Merchants, etc., Bank, 104 Ga. 857, 31 S. E. 433.

Indiana.— National Home Bldg. Assoc. *v.* Huntsinger, 150 Ind. 702, 50 N. E. 381.

Kansas.— Landers *v.* Dunn, 9 Kan. App. 884, 59 Pac. 664; Challiss *v.* Woodburn, 9 Kan. App. 883, 57 Pac. 1054; Lewis *v.* Larkin, 9 Kan. App. 881, 57 Pac. 239. *Compare* Kansas City *v.* Hart, 60 Kan. 684, 57 Pac. 938.

Ohio.— Ervin *v.* Mathers, 18 Ohio Cir. Ct. 199; Tennessee Lumber Co. *v.* Marcy, 14 Ohio Cir. Ct. 612, 7 Ohio Cir. Dec. 444.

United States.— *Compare* Day *v.* Washburn, 23 How. (U. S.) 309, 16 L. ed. 551.

As to necessary and proper parties on appeal, generally, see *supra*, VI [2 Cyc. 756].

Fictitious defendants.— An appeal from a judgment sustaining a demurrer to bill in equity will not be dismissed on the ground that fictitious defendants named in the bill have not been served with notice of the appeal. Benson *v.* Bunting, 127 Cal. 532, 59 Pac. 991.

59. *California.*— De Jarnatt *v.* Marquez, 127 Cal. 558, 60 Pac. 45; McRae *v.* Argonaut Land, etc., Co., (Cal. 1898) 54 Pac. 743.

Idaho.— Wilson *v.* Wilson, (Ida. 1899) 57 Pac. 708; Holcomb *v.* Reed, (Ida. 1896) 46 Pac. 1019.

Indiana.— Michigan Cent. R. Co. *v.* Northern Indiana R. Co., 3 Ind. 239.

Kentucky.— Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Louisiana.— Stewart *v.* Cattle Co., 50 La. Ann. 845, 24 So. 273.

Montana.— Baker *v.* Butte City Water Co., 24 Mont. 113, 60 Pac. 817.

Nebraska.—Bazzo *v.* Wallace, 16 Nebr. 293, 20 N. W. 314.

Ohio.— Trader *v.* Sale, 18 Ohio Cir. Ct. 814.

South Dakota.— McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435.

Texas.— Evertson *v.* Frier, (Tex. Civ. App. 1898) 45 S. W. 201.

Washington.—Ritchey *v.* Cedar Mill Co., 22 Wash. 511, 61 Pac. 160; Kasch *v.* Nelson, 20 Wash. 315, 55 Pac. 118.

As to necessity, requisites, and sufficiency of bond on appeal, generally, see *supra*, VII, D [2 Cyc. 818].

60. *Alabama.*— See Birmingham R., etc., Co. *v.* Birmingham Traction Co., 122 Ala. 349, 25 So. 192.

Colorado.— Wilson *v.* People, 25 Colo. 375, 55 Pac. 721; Catholic Cemetery Assoc. *v.* Denver, 24 Colo. 500, 52 Pac. 669; Sutton *v.* Jones, 9 Colo. App. 36, 47 Pac. 400.

Florida.— Strickland *v.* Louisville, etc., R. Co., (Fla. 1900) 29 So. 420; American Contract, etc., Co. *v.* Perrine, 40 Fla. 412, 24 So. 484; Savannah, etc., R. Co. *v.* Sessoms, 40 Fla. 390, 25 So. 63.

Georgia.— Brunswick Book Co. *v.* Charles H. Torsch Co., 112 Ga. 537, 37 S. E. 737; Strong *v.* Atlanta Consol. St. R. Co., 97 Ga. 693, 25 S. E. 379.

Indiana.— Wiesman *v.* Green, 20 Ind. App. 699, 50 N. E. 46.

Indian Territory.— Miami Town Co. *v.* McNeill, (Indian Terr. 1898) 46 S. W. 184.

Iowa.— Newbury *v.* Getchell, etc., Lumber, etc., Co., 106 Iowa 140, 76 N. W. 514; Cord *v.* Barry, 102 Iowa 309, 71 N. W. 228; Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236.

Kansas.— State *v.* Thomas, (Kan. 1897) 48 Pac. 918.

Louisiana.— Hake *v.* Lee, 104 La. 123, 28 So. 1003; Levy *v.* Levy, 52 La. Ann. 1920, 28 So. 246.

Maryland.— Steiner *v.* Harding, 88 Md. 343, 41 Atl. 799.

Missouri.— Western Storage, etc., Co. *v.* Glasner, 150 Mo. 426, 52 S. W. 237; Foster *v.* Vernon County, 150 Mo. 316, 51 S. W. 725; Ramsey *v.* Shannon, 140 Mo. 281, 41 S. W. 732.

New York.— Gamble *v.* Lennon, 9 N. Y. App. Div. 407, 41 N. Y. Suppl. 277, 75 N. Y. St. 689; People *v.* Flack, 15 Daly (N. Y.) 442, 9 N. Y. Suppl. 27, 29 N. Y. St. 1000.

North Carolina.— Norwood *v.* Pratt, 124 N. C. 745, 32 S. E. 979; Causey *v.* Snow, 116 N. C. 497, 21 S. E. 179; Porter *v.* Western North Carolina R. Co., 106 N. C. 478, 11 S. E. 515.

South Carolina.— Barwick *v.* Barwick, 59 S. C. 200, 37 S. E. 774.

South Dakota.— See King *v.* Waite, 10 S. D. 1, 70 N. W. 1056.

Utah.— Howell *v.* Clark, 16 Utah 410, 52 Pac. 631.

Washington.— Ocosta *v.* Redfield, 10 Wash. 691, 38 Pac. 997; Edison Electric Illuminating Co. *v.* Needham, 2 Wash. 450, 27 Pac. 271.

61. Western Union Tel. Co. *v.* Todd, 22 Ind. App. 701, 54 N. E. 446; Burr *v.* Henry, 59 Nebr. 301, 80 N. W. 900; Melcher *v.* Haley,

ure to settle case within the prescribed time,[62] failure to give notice of the time and place of settlement of case-made,[63] failure to specify errors,[64] or failure to file and serve briefs or points and authorities[65] — is, in many jurisdictions, ground for dismissing an appeal or writ or error, on motion, in the absence of a sufficient excuse therefor or a waiver thereof. But failure to file or to give notice of, or serve a statement on, a motion for a new trial,[66] failure to pay or secure clerk's fees,[67] failure to notice the appeal for argument or place it on the calendar,[68] failure of the surety in the appeal bond to state in his affidavit that he is worth the required amount over and above his liabilities,[69] a clerical error or fault or neglect of the clerk or judge not attributable to appellant,[70] the fact that an order was

58 Nebr. 729, 79 N. W. 707; Einspahr *v.* Exchange Nat. Bank, 49 Nebr. 557, 68 N. W. 933.

As to necessity and sufficiency of authentication of transcript, generally, see *supra*, XIII, H.

62. Fenaughty *v.* Loob, (Kan. 1901) 63 Pac. 427; Steele *v.* McMulin, 8 Kan. App. 861, 54 Pac. 925; Schweitzer *v.* Wichita, 8 Kan. App. 859, 54 Pac. 321; Waterman *v.* Bailey, 111 Mich. 571, 69 N. W. 1109.

As to settlement of case, generally, see *supra*, XIII, E.

In North Carolina the absence of a case on appeal does not entitle appellee to a dismissal, because there may be error on the face of the record proper. If none, judgment will be affirmed. Barrus *v.* Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187; Hicks *v.* Westbrook, 121 N. C. 131, 28 S. E. 188; and numerous cases cited in Clark's Code Civ. Proc. N. C. (1900), pp. 769, 770.

63. Case *v.* Richards, (Kan. 1897) 49 Pac. 662; Shepard *v.* Doty, (Kan. App. 1900) 61 Pac. 870.

64. *Kansas.*— Robinson *v.* Miles, 5 Kan. App. 880, 47 Pac. 553.

Michigan.— McKinnon *v.* Atkins, 60 Mich. 418, 27 N. W. 564.

Pennsylvania.— North *v.* Pantall, 197 Pa. St. 303, 47 Atl. 610.

South Dakota.— Neilson *v.* Holstein, 13 S. D. 459, 83 N. W. 581.

United States.— Benites *v.* Hampton, 123 U. S. 519, 8 S. Ct. 254, 31 L. ed. 260.

As to necessity, requisites, and sufficiency of assignments of error, generally, see *supra*, XI [2 Cyc. 980].

65. *California.*— Pilger *v.* Strassman, 119 Cal. 691, 52 Pac. 40.

Colorado.— Wilson *v.* People, 25 Colo. 375, 55 Pac. 721; Catholic Cemetery Assoc. *v.* Denver, 24 Colo. 500, 52 Pac. 669; Sutton *v.* Jones, 9 Colo. App. 36, 47 Pac. 400.

Indiana.— Myers *v.* Jeffersonville, 144 Ind. 567, 40 N. E. 796; Babcock *v.* Johnson, 22 Ind. App. 97, 53 N. E. 241.

Indian Territory.— Waite *v.* Gulf, etc., R. Co., (Indian Terr. 1898) 47 S. W. 302.

Kentucky.— Brashears *v.* Venters, 19 Ky. L. Rep. 1285, 43 S. W. 405.

Minnesota.— See Plymouth Clothing House *v.* Seymour, 74 Minn. 425, 77 N. W. 239.

Oklahoma.— Sauers *v.* Tate, 7 Okla. 211, 54 Pac. 452; Richmond *v.* Frazier, 7 Okla. 172, 54 Pac. 441.

South Dakota.—See King *v.* Waite, 10 S. D. 1, 70 N. W. 1056.

Texas.— Paris, etc., R. Co. *v.* Killingsworth, (Tex. Civ. App. 1898) 43 S. W. 1046. *Compare* State *v.* Scholl, (Tex. Civ. App. 1899) 50 S. W. 205.

Washington.— Northwestern, etc., Hypotheek Bank *v.* Griffitts, 18 Wash. 69, 50 Pac. 591; Ocosta *v.* Redfield, 10 Wash. 691, 38 Pac. 997; Edison Electric Illuminating Co. *v.* Needham, 2 Wash. 450, 27 Pac. 271.

As to necessity, requisites, and sufficiency of briefs, generally, see *supra*, XII [2 Cyc. 1013].

Objectionable brief.— Where an appellant, filing a brief violating a rule of the appellate court, filed a reply brief as objectionable as the first, after having his attention called to the matter by respondent's brief, the appeal will be dismissed. Von Schrader *v.* Welcher, 19 Wash. 349, 53 Pac. 368.

66. *California.*— Sutter County *v.* Tisdale, 128 Cal. 180, 60 Pac. 757; Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; Gumpel *v.* Castagnetto, 97 Cal. 15, 31 Pac. 898; Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Dore *v.* Dougherty, (Cal. 1884) 4 Pac. 1067.

Idaho.— *Compare* Fox *v.* Rogers, (Ida. 1899) 59 Pac. 538.

Kansas.— Moses *v.* White, (Kan. App. 1897) 51 Pac. 622.

Louisiana.— Lafrance *v.* Martin, 17 La. Ann. 77.

Montana.—Taney *v.* Vollenweider, 24 Mont. 367, 62 Pac. 413.

Nebraska.—Rhea *v.* State, (Nebr. 1900) 84 N. W. 414; Slobodisky *v.* Curtis, 58 Nebr. 211, 78 N. W. 522; Baldwin *v.* Foss, 14 Nebr. 455, 16 N. W. 480; Hollenbeck *v.* Tarkington, 14 Nebr. 430, 16 N. W. 472.

As to necessity, requisites, and sufficiency of motion for new trial see NEW TRIAL.

67. Harrison *v.* Palo Alto County, 104 Iowa 383, 73 N. W. 872.

68. Nichols *v.* MacLean, 98 N. Y. 458.

As to time of arguing cause and placing same on calendar see *infra*, XV.

69. Horton *v.* Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435 [*distinguishing* Northern Counties Invest. Trust *v.* Hender, 12 Wash. 559, 41 Pac. 913].

70. St. Louis, etc., R. Co. *v.* Blakely, 6 Kan. App. 814, 49 Pac. 752; Immanuel Presb. Church *v.* Riedy, 104 La. 314, 29 So. 149; Pearce *v.* State, 49 La. Ann. 643, 21 So. 737; Pasley *v.* McConnell, 40 La. Ann. 609, 4 So.

made by the lower court without having before it the necessary parties,[71] the fact that an action triable *de novo* is appealed upon errors alone,[72] the fact that an appeal was taken before entry of record of an order denying a motion for a new trial,[73] the fact that the transcript was filed before the appeal was perfected,[74] the fact that the appeal bond runs to the wroug parties,[75] the fact that appellant's attorney became surety on the appeal bond, in violation of a court rule,[76] or perjury committed by the surety in the appeal bond, in making oath to his property,[77] has been held not to be ground for dismissal.

2. ERROR NOT SHOWN. An appeal regularly taken and docketed should not be dismissed on the ground that there is no error apparent of record, but the judgment below should be affirmed.[78] Where, however, the failure of the record to show error is due to defects or irregularities in the proceedings for review, it is the practice, in many jurisdictions, to dismiss.[79]

3. PROCEEDINGS FRIVOLOUS OR FOR DELAY. Though an appellate court may have the power to dismiss an appeal which is manifestly and palpably frivolous and without merit,[80] it will not, as a rule, dismiss on such ground, but will affirm the judgment below.[81]

4. REVIEW UNNECESSARY OR INEFFECTUAL. An appeal or writ of error may be dismissed if, pending it, an event occurs which makes a determination of it unnecessary, or renders it impossible for the appellate court to grant effectual relief.[82]

501; State *v.* Judges Ct. Appeals, 37 La. Ann. 395; State *v.* Cole, 12 La. Ann. 471; Oulliber *v.* Joublanc, 12 La. Ann. 237; Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775; Kalamazoo *v.* Kalamazoo Heat, etc., Co., 122 Mich. 489, 81 N. W. 426.

Failure of clerk to collect tax.— While it is the duty of the clerk to require the tax to be paid before granting an appeal or filing the record, his failure to do so is no ground for dismissing the appeal. Emerson *v.* Dye, 81 Ky. 660, 5 Ky. L. Rep. 734.

71. Matter of Bullard, 114 Cal. 462, 46 Pac. 297.

72. Sherwood *v.* Sherwood, 44 Iowa 192.

73. Hughes *v.* Stearns, 13 S. D. 627, 84 N. W. 196.

74. Nottingham *v.* McKendrick, (Oreg. 1899) 57 Pac. 195.

75. Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723.

76. De Jarnatt *v.* Marquez, 127 Cal. 558, 60 Pac. 45.

77. Baines *v.* Kelly, 73 Ill. 181.

78. Hecker *v.* Fowler, 1 Black (U. S.) 95, 17 L. ed. 45.

As to error not shown as ground for affirmance see *infra*, XVIII, C, 2, a.

79. See cases cited *supra*, notes 54–78.

80. Johnson *v.* St. Paul City R. Co., 68 Minn. 408, 71 N. W. 619.

In Florida, by statute, the court may quash proceedings in error taken for delay. Holland *v.* Webster, (Fla. 1901) 29 So. 625.

81. *California.*— Nevills *v.* Shortridge, 129 Cal. 575, 62 Pac. 120; Randall *v.* Duff, 104 Cal. 126, 37 Pac. 803, 43 Am. St. Rep. 79; Langan *v.* Langan, 86 Cal. 132, 24 Pac. 852; Swascy *v.* Adair, 83 Cal. 136, 23 Pac. 284.

Louisiana.— Reiners *v.* St. Ceran, 27 La. Ann. 112.

Mississippi.— Adams *v.* Munson, 3 How. (Miss.) 77.

New York.— Bachrach *v.* Manhattan R. Co., 154 N. Y. 178, 47 N. E. 1087; Dey *v.* Walton, 2 Hill (N. Y.) 403; Craig *v.* Scott, 1 Wend. (N. Y.) 35.

Ohio.— Edwards *v.* Griffiths, 48 Ohio St. 664, 31 N. E. 742.

South Carolina.— Seegers *v.* McCreery, 41 S. C. 548, 19 S. E. 696.

United States.— Amory *v.* Amory, 91 U. S. 356, 23 L. ed. 436.

See 3 Cent. Dig. tit. "Appeal and Error," § 3128.

As to affirmance, on motion, of proceedings frivolous or for delay, see *infra*, XVIII, C, 1, a, (II).

82. *California.*—Mitchell *v.* Madden, (Cal. 1900) 62 Pac. 483; San Jose Safe Deposit Sav. Bank *v.* Madera Bank, 121 Cal. 543, 54 Pac. 85; Horton *v.* Los Angeles, 119 Cal. 602, 51 Pac. 956; Foster *v.* Smith, 115 Cal. 611, 47 Pac. 591.

Colorado.— Floyd *v.* Cochran, 24 Colo. 489, 52 Pac. 676.

Florida.— Jacksonville Terminal Co. *v.* State, (Fla. 1900) 29 So. 441.

Georgia.— Gallaher *v.* Schneider, 110 Ga. 322, 35 S. E. 321; Henderson *v.* Hoppe, 103 Ga. 684, 30 S. E. 653; Sutcliffe *v.* McSweeney, 102 Ga. 807, 30 S. E. 268.

Illinois.— People *v.* Rose, 81 Ill. App. 387.

Indiana.— Rowe *v.* Bateman, 153 Ind. 633, 54 N. E. 1065, 55 N. E. 754.

Iowa.— Moller *v.* Gottsch, 107 Iowa 238, 77 N. W. 859; Linn County *v.* Hewitt, 55 Iowa 505, 8 N. W. 340.

Kansas.— Lombard Invest. Co. *v.* Barker, 5 Kan. App. 879, 48 Pac. 869.

Kentucky.— Bailey *v.* Kelly, (Ky. 1900) 59 S. W. 504.

Louisiana.— State *v.* Board of Election Supervisors, 49 La. Ann. 578, 21 So. 731; Parker *v.* Bilgery, 47 La. Ann. 1348, 17 So. 846.

An appellate court may, however, entertain an appeal where the question involved is of public interest, though it is no longer a practical one.[83]

5. Want of Jurisdiction. Want of jurisdiction in the appellate court, if it is patent, or can be readily ascertained by an examination of the record, warrants the dismissal, on motion, of the appeal or writ of error.[84] But want of jurisdiction in the trial court is not ground for dismissing an appeal. In such case the appellate court will hear the appeal on its merits, and dismiss the action.[85]

Montana.— Hoskins *v.* McGirl, 12 Mont. 246, 29 Pac. 1120; Fratt *v.* Walk, 8 Mont. 291, 20 Pac. 641.

Nebraska.— Edgerton *v.* State, 50 Nebr. 72, 69 N. W. 302. *Compare* Boldt *v.* West Point First Nat. Bank, 59 Nebr. 283, 80 N. W. 905.

New York.— Matter of Norton, 158 N. Y. 130, 52 N. E. 723; Matter of Strauss, 157 N. Y. 720, 52 N. E. 646; People *v.* Clark, 70 N. Y. 518; Ellison *v.* Sun Printing, etc., Assoc., 41 N. Y. App. Div. 594, 59 N. Y. Suppl. 970; Duryea *v.* Rayner, 21 Misc. (N. Y.) 536, 47 N. Y. Suppl. 1112; Schmohl *v.* Fusco, 16 N. Y. Suppl. 862, 42 N. Y. St. 463; Hodgman *v.* Barker, 16 N. Y. Suppl. 76, 40 N. Y. St. 773; Hoag *v.* Hatch, 5 N. Y. Suppl. 524, 24 N. Y. St. 91.

North Carolina.—Taylor *v.* Vann, 127 N. C. 243, 37 S. E. 263.

North Dakota.— *In re* Kaeppler, 7 N. D. 307, 75 N. W. 253.

Ohio.— Durfee *v.* MacNeil, 58 Ohio St. 292, 50 N. E. 909.

Oklahoma.— Price *v.* Pawnee County, 8 Okla. 121, 56 Pac. 959.

Oregon.— Moores *v.* Moores, 36 Oreg. 261, 59 Pac. 327.

Washington.— Sether *v.* Clark, (Wash. 1901) 63 Pac. 1106; State *v.* Meacham, 17 Wash. 429, 50 Pac. 52; State *v.* Prosser, 16 Wash. 608, 48 Pac. 262; Hice *v.* Orr, 16 Wash. 163, 47 Pac. 424; State *v.* Wickersham, 16 Wash. 161, 47 Pac. 421. *Compare* Fenton *v.* Morgan, 16 Wash. 30, 47 Pac. 214.

West Virginia.— Taylor *v.* Maynor, 46 W. Va. 588, 33 S. E. 260. See also Bond *v.* Davis, (W. Va. 1900) 35 S. E. 889.

Wisconsin.— Hogan *v.* La Crosse, 104 Wis. 106, 80 N. W. 105; Markwell *v.* Pereles, 95 Wis. 424, 69 N. W. 984.

United States.— Mills *v.* Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293; South Spring Hill Gold Min. Co. *v.* Amador Medean Gold Min. Co., 145 U. S. 300, 12 S. Ct. 921, 36 L. ed. 712; Singer Mfg. Co. *v.* Wright, 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906; Washington Market Co. *v.* District of Columbia, 137 U. S. 62, 11 S. Ct. 4, 34 L. ed. 572; Little *v.* Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016; Elwell *v.* Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. ed. 998; East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 125 U. S. 695, 8 S. Ct. 1391, 31 L. ed. 853; San Mateo County *v.* Southern Pac. R. Co., 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589; Dakota County *v.* Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. ed. 981; U. S. *v.* Ayres, 9 Wall. (U. S.) 608, 19 L. ed. 625; American Wood Paper Co. *v.* Heft, 8 Wall. (U. S.) 333, 19 L. ed. 379; Chamberlain *v.* Cleveland, 1 Black (U. S.) 419, 17 L. ed. 93; Lord *v.* Veazie, 8 How. (U. S.) 251, 12 L. ed. 1067; Katz *v.* San Antonio, 91 Fed. 566, 63 U. S. App. 452, 34 C. C. A. 10; U. S. *v.* McCrory, 91 Fed. 295, 63 U. S. App. 359, 33 C. C. A. 515; Lansing *v.* Hesing, 81 Fed. 242, 53 U. S. App. 289, 26 C. C. A. 382.

As to affirmance in case reversal would be ineffectual see *infra,* XVIII, C, 2, b.

As to review of abstract questions see *supra,* II, A, 2 [2 Cyc. 533].

Destruction of subject-matter.—Where the appellate court refuses to entertain an appeal by reason of the destruction of the subject-matter, the proper practice is to dismiss the case and not the appeal, the effect being to annul the judgment below. Southwestern Tel., etc., Co. *v.* Galveston County, (Tex. Civ. App. 1900) 59 S. W. 589.

83. People *v.* General Committee Republican Party, 25 N. Y. App. Div. 339, 49 N. Y. Suppl. 723.

84. *Colorado.*— Bartels *v.* Hoey, 3 Colo. 279.

Indiana.— Louisville, etc., R. Co. *v.* Jackson, 64 Ind. 398.

Louisiana.— Wisner *v.* Rohnert, 46 La. Ann. 1234, 15 So. 637.

Michigan.— Atty.-Gen. *v.* Moliter, 26 Mich. 444.

New Hampshire.— Robbins *v.* Cutler, 26 N. H. 173.

New York.— Bullion *v.* Bullion, 73 Hun (N. Y.) 437, 26 N. Y. Suppl. 337, 56 N. Y. St. 24.

South Dakota.— Issenhuth *v.* Baum, 10 S. D. 340, 73 N. W. 96.

Texas.— Gregory *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 272, 48 S. W. 888.

United States.— Winter *v.* Montgomery, 156 U. S. 385, 15 S. Ct. 649, 39 L. ed. 460; Eustis *v.* Bolles, 150 U. S. 361, 14 S. Ct. 131, 37 L. ed. 1111; The Schooner Lucy *v.* U. S., 8 Wall. (U. S.) 307, 19 L. ed. 394; Semple *v.* Hager, 4 Wall. (U. S.) 431, 18 L. ed. 402; Hecker *v.* Fowler, 1 Black (U. S.) 95, 17 L. ed. 45; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587; Agnew *v.* Dorman, Taney (U. S.) 386, 1 Fed. Cas. No. 100.

See 3 Cent. Dig. tit. "Appeal and Error," § 3123.

As to dismissal by court *sua sponte* for want of jurisdiction see *supra,* XIV, B.

As to necessity of record affirmatively showing jurisdiction see *supra,* XIII, A, 1, 2 [2 Cyc. 1025].

85. Halliburton *v.* Sumner, 26 Ark. 659; Barnhart *v.* Fulkerth, 92 Cal. 155, 28 Pac. 221; Hatch *v.* Allen, 27 Me. 85; Canter *v.* American Ins. Co., 2 Pet. (U. S.) 554, 7 L.

6. Want of Prosecution. In many jurisdictions a failure to prosecute an appeal or writ of error within the time prescribed by statute or rule of court is ground for dismissal, on motion, in the absence of a sufficient excuse for such failure.[86] An appeal will not be dismissed, however, for want of prosecution, where the attorneys have agreed to postpone the case for the term.[87]

7. Want of Revival on Death of Party. Where necessary parties in error have died, and no proceedings to revive or substitute are had within the time prescribed by statute, the petition in error may be dismissed.[88]

ed. 517; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 51 Fed. 929, 5 U. S. App. 97, 2 C. C. A. 542. See also Ryder *v.* Holt, 128 U. S. 525, 9 S. Ct. 145, 32 L. ed. 529.

As to jurisdiction of appellate court in case the trial court is without jurisdiction see *supra*, II, C [2 Cyc. 537].

Jurisdiction of parties.— That the court below had no jurisdiction of the parties cannot be made the basis of a motion to dismiss an appeal. Pike *v.* Gregory, 94 Fed. 373, 36 C. C. A. 299.

86. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Koin *v.* McIlvaine, 1 Port. (Ala.) 285.

California.— Tripp *v.* Duane, 86 Cal. 149, 24 Pac. 867.

Colorado.— Sutton *v.* Jones, 9 Colo. App. 36, 47 Pac. 400.

Florida.— Florida, etc., R. Co. *v.* Foxworth, 31 Fla. 589, 12 So. 211.

Georgia.— Fannin County *v.* Dorsey, (Ga. 1901) 38 S. E. 408; Bridges *v.* Banks, 62 Ga. 653.

Idaho.— Day *v.* Gridley, (Ida. 1899) 56 Pac. 77.

Illinois.— Lawler *v.* Gordon, 91 Ill. 602; Allen *v.* Monmouth, 37 Ill. 372.

Indiana.— O'Mara *v.* Wabash R. Co., 150 Ind. 648, 50 N. E. 821; John V. Farwell Co. *v.* Newman, 17 Ind. App. 649, 47 N. E. 234.

Kentucky.— Lee *v.* Russell, (Ky. 1901) 60 S. W. 376; Spires *v.* Langford, 15 Ky. L. Rep. 792, 25 S. W. 597.

Massachusetts.— Cobb *v.* Rice, 128 Mass. 11.

Michigan.— Durand *v.* Gage, 76 Mich. 624, 43 N. W. 583; Webster *v.* Fisk, 9 Mich. 250.

Missouri.— L. M. Rumsey Mfg. Co. *v.* Baker, 33 Mo. App. 239.

Nebraska.— School Dist. No. 20 *v.* O'Shea, 21 Nebr. 449, 32 N. W. 210.

New York.— Sayer *v.* Kirchhof, 3 Misc. (N. Y.) 245, 22 N. Y. Suppl. 773, 51 N. Y. St. 910; Horton *v.* Boyle, 16 N. Y. Suppl. 941, 42 N. Y. St. 29; Bissell *v.* Dennison, 14 Johns. (N. Y.) 483.

North Carolina.— Cox *v.* Jones, 113 N. C. 276, 18 S. E. 199; Wiseman *v.* Mitchell County, 104 N. C. 330, 10 S. E. 481; Collins *v.* Faribault, 92 N. C. 310; Brantly *v.* Jordan, 92 N. C. 291.

South Carolina.— Manuel *v.* Loveless, 54 S. C. 346, 32 S. E. 421; Davis *v.* Days, 40 S. C. 548, 18 S. E. 886; State *v.* Crenshaw, 30 S. C. 607, 10 S. E. 390; Varn *v.* Williams, 30 S. C. 608, 10 S. E. 390.

South Dakota.— Garvin *v.* Pettee, 13 S. D. 239, 83 N. W. 251; Smith *v.* Chicago, etc., R. Co., 4 S. D. 30, 54 N. W. 931, 28 L. R. A. 573; Himebaugh *v.* Crouch, 3 S. D. 409, 53 N. W. 862; State *v.* Sioux Falls Brewing Co., 2 S. D. 363, 50 N. W. 629.

Texas.— Wooldridge *v.* Gregg, 35 Tex. 63. *Compare* Houston Tap, etc., R. Co. *v.* Milburn, 34 Tex. 224.

Virginia.— Meek *v.* Baine, 1 Hen. & M. (Va.) 339.

Washington.— Wheeler *v.* Commercial Invest. Co., 22 Wash. 546, 61 Pac. 715.

Wisconsin.— Cook *v.* McDonnell, 70 Wis. 329, 35 N. W. 556; Haner *v.* Polk, 6 Wis. 350.

United States.—Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354; Randolph *v.* Barbour, 6 Wheat. (U. S.) 128, 5 L. ed. 223; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 93 Fed. 765, 35 C. C. A. 590; Janes *v.* May, Hempst. (U. S.) 288, 13 Fed. Cas. No. 7,206c.

See 3 Cent. Dig. tit. "Appeal and Error," § 3129.

87. State *v.* Kitchen, 41 N. J. L. 229.

Failure of appellee to enter appearance.— In a case in which the appeal bond only has been filed, and appellee has entered no appearance, it is error to dismiss the appeal for want of prosecution, when reached on the docket, on motion of appellee. Sheridan *v.* Beardsley, 89 Ill. 477.

Failure of joint defendant to prosecute.— Where a writ of error is sued out by one of two defendants in the names of both, and the judgment is sufficiently identified, and the defendant not joining files his election not to prosecute the writ, it will not be dismissed, but the defendant suing out the writ will be allowed to proceed. Spencer *v.* Fish, 43 Mich. 226, 4 N. W. 168, 287, 5 N. W. 95.

Failure to notice cause for hearing.— An application to dismiss a writ of error for want of prosecution will be denied where neither party has noticed the case for hearing. Leland *v.* Blair Tp., 97 Mich. 612, 55 N. W. 444.

88. Kent *v.* National Bank of Commerce, 8 Kan. App. 640, 56 Pac. 511; Larkin *v.* Lane, 4 Kan. App. 774, 46 Pac. 997. See also Hinks *v.* Barnett, (Kan. 1897) 48 Pac. 915. wherein it was held that where a successor to an administrator was appointed after action brought, and judgment was rendered without revivor, and plaintiff brings error, the proceeding will be dismissed, as plaintiff's powers have ceased. For abatement by repeal of statute see Wikel *v.* Jackson County, 120 N. C. 451, 27 S. E. 117.

8. Want of Right to Appeal. The objection that one who has appealed has no right to the appeal because not aggrieved by the decision may, in some jurisdictions, be taken by motion to dismiss the appeal.[89]

9. Waiver of Grounds. Treating an appeal as valid,[90] and proceeding without preliminary objection to defects and irregularities not going to the jurisdiction, is, in many states, deemed a waiver of the right to have the appeal dismissed for such defects and irregularities.[91] But an appearance in a collateral proceeding to have a receiver appointed pending the appeal is not a waiver of the right to have the appeal dismissed for non-joinder of necessary parties appellant.[92]

F. Motion to Dismiss—1. Who May Make. Adverse parties, who have not been served with notice of appeal, may move for its dismissal.[93] But an appellant alleging his own error,[94] one of several appellees in a joint judgment in favor

As to revival on death of party or transfer of interest, generally, see *supra*, VI, D, F [2 Cyc. 769].

89. Amory *v.* Amory, 26 Wis. 152. See also Albaugh *v.* Litho-Marble Decorating Co., 14 App. Cas. (D. C.) 113; Cosson *v.* Packer, 8 Kan. App. 859, 56 Pac. 136.

As to persons entitled to appeal, generally, see *supra*, IV [2 Cyc. 626].

Appeal prosecuted without authority.— An appeal will be dismissed when it is shown that it was taken and is being prosecuted without authority, and against the desire and wish of appellant. Dalbkermeyer *v.* Scholtes, 3 S. D. 124, 52 N. W. 261. *Compare* Woodbury *v.* Nevada Southern R. Co., 120 Cal. 367, 52 Pac. 650.

90. The Native, 14 Blatchf. (U. S.) 34, 17 Fed. Cas. No. 10,054.

91. *Alabama.*— Robinson *v.* Murphy, 69 Ala. 543; Alexander *v.* Nelson, 42 Ala. 462.

California.— McLeran *v.* Shartzer, 5 Cal. 70, 63 Am. Dec. 844.

Colorado.— Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27.

Idaho.— Moore *v.* Koubly, 1 Ida. 55.

Illinois.— Robinson *v.* Magarity, 28 Ill. 423; Hodson *v.* McConnel, 12 Ill. 170.

Indiana.— Schmidt *v.* Wright, 88 Ind. 56.

Iowa.— Wilgus *v.* Gettings, 19 Iowa 82.

Michigan.—Durfee *v.* McClurg, 5 Mich. 532.

Nebraska.— Biart *v.* Myers, 59 Nebr. 711, 82 N. W. 7.

New York.— Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407, 35 How. Pr. (N. Y.) 193.

Washington.— The Steamship City of Panama *v.* Phelps, (Wash. Terr. 1880) 3 Pac. 204; Yesler *v.* Oglesbee, 1 Wash. Terr. 604.

West Virginia.—Henry *v.* Davis, 13 W. Va. 230.

United States.— Freeman *v.* Clay, 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115.

See 3 Cent. Dig. tit. "Appeal and Error," § 3133.

As to effect of appearance as waiver see *supra*, VII, G, 2, b [2 Cyc. 882].

As to waiver by failure to move to dismiss in time see *infra*, XIV, F, 4, c.

As to waiver of objections to assignments of error see *supra*, XI, I [2 Cyc. 1006]. To briefs see *supra*, XII [2 Cyc. 1023]. To parties see *supra*, VI, H, 7 [2 Cyc. 788]. To record see *supra*, XIII, K, 3. To security see *supra*, VII, D, 11 [2 Cyc. 850]. To time of taking appeal see *supra*, VII, A [2 Cyc. 803].

Both parties at fault.— An appeal will not be dismissed, on appellee's motion, for an omission of appellant when appellee was in fault as well in not following the rule of practice. Barbee *v.* Green, 91 N. C. 158.

92. Midland R. Co. *v.* St. Clair, 144 Ind. 363, 42 N. E. 214.

93. Bullock *v.* Taylor, 112 Cal. 147, 44 Pac. 457.

One who has purchased the interest of one of the appellees in the judgment may join the other appellee in a motion to dismiss the appeal. Suman *v.* Archibald, 116 Cal. 41, 47 Pac. 865.

If, after the death of appellant and the discharge of his executrix, plaintiff will not accept a continuance in order to have appellant's estate represented and the representative made a party, the court may dismiss the case on motion of counsel representing the surety on appeal. Planters', etc., Bank *v.* Hudgins, 84 Ga. 108, 10 S. E. 501. See also McDonogh *v.* De Gruys, 10 La. Ann. 75.

Substituted attorney.— While an order of substitution of attorneys should be made only by the court of appeals after the returns are filed in that court, a motion to dismiss an appeal, made by one substituted as attorney by an order of the court below after such filing of returns in the appellate court, will be considered. Squire *v.* McDonald, 138 N. Y. 554, 34 N. E. 398, 53 N. Y. St. 269.

Where the record in an action to enjoin a liquor nuisance shows that the person who instituted the action, as attorney for the state, is a citizen of the county where the nuisance exists, and that the notice of an appeal by defendants was directed to, and served on, him as such attorney, he is a person authorized to move that the appeal be dismissed. State *v.* Sioux Falls Brewing Co., 2 S. D. 363, 50 N. W. 629.

Where judgment-defendants unsuccessfully attempt to perfect an appeal after plaintiff's death and before any substitution is made in the trial court, the appellate court will not refuse to dismiss the appeal because there has been no substitution in such court, and the motion does not purport to be made on behalf of any interested party. Pedlar *v.* Stroud, 116 Cal. 461, 48 Pac. 371. See also Whartenby *v.* Reay, 92 Cal. 74, 28 Pac. 56.

94. Marr *v.* Bell, 1 Overt. (Tenn.) 368. See also Reynolds *v.* Neal, 91 Ga. 609, 18 S. E. 530, wherein it was held that where an appel-

of all the appellees,[95] an executor or administrator appointed in another state,[96] one who has been improperly made a party to the appeal,[97] or a stranger to the decree,[98] cannot ask that the appeal be dismissed.

2. Who May Oppose. One who might have been made a party defendant in the court below may be heard in the appellate court to oppose a motion to dismiss.[99]

3. Notice — a. Necessity. No notice of a motion to dismiss, where jurisdiction is involved, is necessary.[1] But in some states a motion to dismiss for defects or irregularities in the proceedings for review must be on notice to the adverse party.[2]

lee recognizes an appeal as duly taken, and raises no question touching the validity of the judgment below, appellant cannot urge, for the purpose of having the appeal dismissed, that it was taken too late or was taken from a void judgment. But see Goodwin *v.* Burney, 6 Rob. (La.) 151, wherein it was held that, where the amount really in dispute is under the jurisdictional amount, the appeal must be dismissed, though at the instance of a party who, by a fictitious claim for interest, attempted to bring the case within the jurisdiction of the appellate court.

An appellant who is not himself ready to proceed with his case is not entitled to demand a dismissal of his adversary's suit. Smith *v.* Wilson, 26 Ill. 186; Hooper *v.* Smith, 19 Ill. 53.

95. State *v.* Cunningham, 101 Ind. 461. But see Thomas *v.* Wooldridge, 23 Wall. (U. S.) 283, 23 L. ed. 135, wherein it was held that a motion to dismiss an appeal in equity may properly be made by one of several appellees where he is the only one who has any interest in the suit, and the only one who filed an answer below. *Compare* Marsh *v.* Nichols, 120 U. S. 598, 7 S. Ct. 704, 30 L. ed. 796.

96. Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28, 32 Barb. (N. Y.) 664.

97. Boutte *v.* Boutte, 30 La. Ann. 177.

98. Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438, wherein it was held that where the trustees or directors of a corporation have appealed from a decree, and directed their counsel to prosecute the appeal, the appellate court will not dismiss it on the motion of strangers to the decree, who, since it was rendered, have become the owners of a majority of the stock of the corporation. See also Blanc *v.* Rodgers, 47 Cal. 606, wherein it was held that a defendant who appeared separately in an action in which there were several defendants, and who was not served with notice of appeal, nor made a party to any proceedings subsequent to the judgment, cannot move to dismiss an appeal taken by one of the other defendants. And see Gilbert *v.* Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316, wherein it was held that where, in an equity cause, an intervening petitioner is made a party, but no service of process is had upon any of the parties, a motion made by the petitioner in the court of appeals to dismiss an appeal taken by one of the original parties will not be considered.

99. Anheier *v.* Signor, 8 N. D. 499, 79 N. W. 983, a *pendente lite* purchaser.

Manner of hearing.— The party opposing a motion to quash proceedings in error because taken for delay may be heard orally or by brief. Holland *v.* Webster, (Fla. 1901) 29 So. 625.

1. Seliger *v.* Coker, 105 Ga. 512, 31 S. E. 185; Marvel *v.* White, 5 Okla. 736, 50 Pac. 87. But see Davidson *v.* Lanier, 131 U. S. lxxii, appendix, 16 L. ed. 796, wherein it was held that the opposing counsel, on motion to dismiss for want of jurisdiction, is entitled to a reasonable notice, regard being had to the distance of his residence from the court and to the time necessary to enable him to attend at the hearing.

As to dismissal by court *sua sponte* for want of jurisdiction see *supra*, XIV, B.

As to want of jurisdiction as ground for dismissal on motion see *supra*, XIV, E, 5.

2. *California.*— Sneath *v.* Waterman, (Cal. 1892) 28 Pac. 1061.

Colorado.— Cates *v.* Mack, 6 Colo. 401.

Florida.— Enterprise *v.* State, 24 Fla. 152, 4 So. 17.

Georgia.— A writ of error will be dismissed for insufficient service of bill of exceptions, though no notice of motion to dismiss was given plaintiff in error. Whitley Grocery Co. *v.* Walker, 111 Ga. 846, 36 S. E. 426.

Illinois.— No notice is required. Smith *v.* The Propeller Niagara, 40 Ill. 112.

Indiana.— Dick *v.* Mullins, 128 Ind. 365, 27 N. E. 741.

Iowa.—Morrison *v.* Springfield Engine, etc., Co., 84 Iowa 637, 51 N. W. 183.

Kentucky.—Landsown *v.* Landsown, 12 Ky. L. Rep. 509; Empire Coal, etc., Co. *v.* McIntosh, 5 Ky. L. Rep. 599; Kemper *v.* Kemper, 5 Ky. L. Rep. 600. *Compare* Sandy River Canal Co. *v.* Candell, 21 Ky. L. Rep. 1647, 56 S. W. 18.

Michigan.— Hill *v.* Bowers, 21 Mich. 303; Scribner *v.* Doseman, 5 Mich. 283.

Minnesota.— Commonwealth Ins. Co. *v.* Pierro, 6 Minn. 569.

Nebraska.— Rockford Ins. Co. *v.* Maxwell, etc., Co., 38 Nebr. 362, 56 N. W. 1029; Omaha F. Ins. Co. *v.* Maxwell, etc., Co., 38 Nebr. 358, 56 N. W. 1028.

New Jersey.—National Bank *v.* Sprague, 21 N. J. Eq. 458.

b. Requisites and Sufficiency. A notice of motion, where such notice is required, should set out the grounds on which the motion is based,[3] and specify the time at which the motion will be made.[4]

c. Service. Notice of a motion to dismiss an appeal may be served on one of a firm of attorneys representing appellant.[5]

d. Waiver. Appearance on motion to dismiss constitutes a waiver of want of notice of the motion.[6]

4. Time of Making — a. In General. A motion to dismiss an appeal or writ of error will not lie, until after the jurisdiction of the appellate court has attached, by the performance of the conditions made requisite by statute or rule of court to the perfection of the appeal or writ of error.[7]

New York.— Fuechsel *v.* Bellesheim, 111 N. Y. 682, 21 N. E. 97, 19 N. Y. St. 930; Jewell *v.* Schouten, 1 N. Y. 241; Hand *v.* Callaghan, 12 Misc. (N. Y.) 88, 33 N. Y. Suppl. 176, 66 N. Y. St. 863; Kenney *v.* Sumner, 12 Misc. (N. Y.) 86, 33 N. Y. Suppl. 95, 66 N. Y. St. 696; Suffern *v.* Lawrence, 4 How. Pr. (N. Y.) 129, 2 Code Rep. (N. Y.) 69; Webb *v.* Brown, 19 Johns. (N. Y.) 453; Vreedenburgh *v.* Calf, 7 Paige (N. Y.) 419.

North Carolina.— Notice of motion is only required where dismissal is sought for irregularity in the appeal bond or failure of the sureties to justify. Jones *v.* Asheville, 114 N. C. 620, 19 S. E. 631; Johnston *v.* Whitehead, 109 N. C. 207, 13 S. E. 731; McGee *v.* Fox, 107 N. C. 766, 12 S. E. 369; Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338; Harmon *v.* Herndon, 99 N. C. 477, 6 S. E. 411; Bowen *v.* Fox, 98 N. C. 396, 4 S. E. 200.

South Carolina.— Hayes *v.* Sease, 49 S. C. 388, 27 S. E. 406; Hargrove *v.* Washington, 32 S. C. 584, 10 S. E. 616; Fripp *v.* Williams, 14 S. C. 505.

Washington.— Cochrane *v.* Gunderson, 10 Wash. 326, 38 Pac. 997.

Wisconsin.— Where the record shows that an appeal has not been regularly taken, no notice of motion to dismiss is necessary, but the appeal will be dismissed on oral motion, or without motion. Olinger *v.* Liddle, 55 Wis. 621, 13 N. W. 703.

See 3 Cent. Dig. tit. "Appeal and Error," § 3155.

3. Dyer *v.* Bradley, 88 Cal. 590, 26 Pac. 511; Wilson *v.* Wetmore, 1 Hill (N. Y.) 216. But see Browne *v.* Taylor, 69 N. Y. 627, wherein it was held that a notice of motion to dismiss an appeal to the court of appeals is not fatally defective because of an omission to specify therein upon what papers the motion will be made, when the nature of the motion apprises appellant that it is based upon the record. See also Garvin *v.* Pettee, 13 S. D. 239, 83 N. W. 251, wherein it was held that a notice that a motion to dismiss an appeal will be made in the supreme court at a time and place stated is sufficient to entitle the moving party to a hearing, although the motion is not entitled as being made in that court.

See 3 Cent. Dig. tit. "Appeal and Error," § 3156.

4. Glenny *v.* Langdon, 94 U. S. 604, 24 L. ed. 237.

5. Ashe *v.* Glenn, 33 S. C. 606, 12 S. E. 423.

By whom served.— In Florida it is not necessary that the notice of a motion to dismiss an appeal, on account of not filing a transcript of the record, should be served by the sheriff, or by any officer. Williams *v.* La Penotiere, 25 Fla. 473, 6 So. 167.

Service on non-judicial day.— An objection to a motion to dismiss an appeal, on the ground that the notice of the motion was not duly served because served on the day of a general election, cannot be urged where the return and admitted service, signed by appellants' attorneys, appear to have taken place on a subsequent day. State *v.* Sioux Falls Brewing Co., 2 S. D. 363, 50 N. W. 629.

Sufficiency of service.— Where the affidavit of service on the adverse attorney of a notice of motion to dismiss an appeal does not show that any attempt was made to serve him at his office between the hours of eight o'clock A. M. and six o'clock P. M. of the day when the notice was left at his residence, the motion to dismiss will be denied. Sneath *v.* Waterman, (Cal. 1892) 28 Pac. 1061.

Time of service.— A motion to dismiss an appeal, on the ground that appellant has drawn from the clerk of the district court the money awarded him by the decree, will be heard notwithstanding notice of the motion was not served on appellant until after the time prescribed for serving briefs, when it appears appellee did not know the facts on which the motion was based before the briefs were due. Harte *v.* Castetter, 38 Nebr. 571, 57 N. W. 381.

6. Smith *v.* Hawley, 11 S. D. 399, 78 N. W. 355; Smith *v.* Fisher, 3 Utah 24, 5 Pac. 545. See also Burr *v.* Navarro Mill Co., (Cal. 1894) 35 Pac. 990, wherein it was held that an appeal may be dismissed, though no notice of the motion to dismiss was served on appellant's assignee in insolvency, where it appears that he had knowledge of the service of such notice on appellant's attorneys. And see Judson *v.* Love, 35 Cal. 463, wherein it was held that the rule requiring five days' notice of a motion to dismiss an appeal is merely to avoid surprise; and an objection that it was not complied with will be considered as waived if not made at the time of the motion.

7. *California.*— Reay *v.* Butler, (Cal. 1891) 25 Pac. 685; Bellegarde *v.* San Francisco Bridge Co., 80 Cal. 61, 22 Pac. 57; Reed *v.* Kimball, 52 Cal. 325; Foscalina *v.* Doyle, 48 Cal. 151.

b. For Defects Going to Jurisdiction. A motion to dismiss for want of jurisdiction over the subject-matter in controversy,[8] or for jurisdictional defects,[9] may be made at any stage of the proceedings.

c. For Defects in Proceedings For Review. A motion to dismiss an appeal or writ of error for defects or irregularities in the proceedings for review, not going to the jurisdiction, should be made at a preliminary stage, or the defects or irregularities will be deemed waived.[10] Such a motion, made after joinder in

Colorado.— Breed *v.* Central First Nat. Bank, 3 Colo. 470. *Compare* Hamill *v.* Clear Creek County Bank, 7 Colo. App. 472, 43 Pac. 903.

District of Columbia.— *In re* Clarke, 21 D. C. 99.

Florida.— Bracey *v.* Starke, 22 Fla. 576.

Illinois.— Baines *v.* Kelly, 73 Ill. 181; Blackerby *v.* People, 10 Ill. 266.

Louisiana.— Kuntz's Succession, 33 La. Ann. 30; Bank of America *v.* Fortier, 27 La. Ann. 243; Brand *v.* West, 14 La. Ann. 187.

Michigan.— Robertson *v.* Little, 10 Mich. 371.

Mississippi.— Snodgrass *v.* Nolan, 71 Miss. 857, 15 So. 801; Merrill *v.* Hunt, 52 Miss. 774.

New York.— Stevens *v.* Glover, 83 N. Y. 611; Benedict, etc., Mfg. Co. *v.* Thayer, 82 N. Y. 610; Carling *v.* Purcell, 3 Misc. (N. Y.) 55, 22 N. Y. Suppl. 558, 23 N. Y. Civ. Proc. 140, 29 Abb. N. Cas. (N. Y.) 478; Keefer *v.* Keefer, 2 How. Pr. (N. Y.) 29.

North Carolina.—Watson *v.* Wright, 3 N. C 7.

South Dakota.— Hughes *v.* Stearns, 13 S. D. 627, 84 N. W. 196.

United States.— Stafford *v.* Union Bank, 16 How. (U. S.) 135, 14 L. ed. 876.

See 3 Cent. Dig. tit. "Appeal and Error," § 3113.

8. *Connecticut.*— Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120.

Illinois.—Woodside *v.* Woodside, 21 Ill. 207.

Louisiana.—James *v.* Fellowes, 23 La. Ann. 37.

Massachusetts.— Ashuelot Bank *v.* Pearson, 14 Gray (Mass.) 521.

New York.— People *v.* Clerk New York Marine Ct., 3 Abb. Pr. (N. Y.) 309.

South Carolina.— State *v.* Levelle, 36 S. C. 600. 15 S. E. 380; State *v.* Merriman, 34 S. C. 576, 13 S. E. 898; Clayton *v.* Mitchell, 33 S. C. 599, 11 S. E. 634.

Virginia.— Clarke *v.* Conn, 1 Munf. (Va.) 160.

United States.— Clark *v.* Hancock, 94 U. S. 493, 24 L. ed. 146.

See 3 Cent. Dig. tit. "Appeal and Error," § 3150.

As to dismissal by court of its own motion for want of jurisdiction see *supra*, XIV, B.

Want of actual controversy.— Laches cannot be urged against a motion to dismiss a writ of error on the ground that there is no actual controversy between the parties. Little *v.* Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016. See also *supra*, XIV, B.

9. Michigan Mut. L. Ins. Co. *v.* Frankel, 151 Ind. 534, 50 N. E. 304; Tupery *v.* Lafitte, 19 La. Ann. 296; Simmons *v.* His Creditors, 12 La. Ann. 755; Chinnock *v.* Stevens, 23 Wis. 396; Estes *v.* Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. ed. 437; Wilson *v.* New York L., etc., Ins. Co., 12 Pet. (U. S.) 140, 9 L. ed. 1032; Hook *v.* Mercantile Trust Co., 95 Fed. 41, 36 C. C. A. 645.

As to non-joinder of necessary parties see *supra*, VI, H, 3 [2 Cyc. 784].

10. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Street *v.* Street, 113 Ala. 333, 21 So. 138; Webb *v.* Robbins, 77 Ala. 176.

California.— Lamet *v.* Miller, 68 Cal. 521, 9 Pac. 669.

Colorado.— Henry *v.* Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

Georgia.—Kinsey *v.* Sensbough, 17 Ga. 540.

Illinois.— Roberts *v.* Fahs, 32 Ill. 474.

Indiana.—Jones *v.* Henderson, 149 Ind. 458, 49 N. E. 443; State *v.* Madison County, 92 Ind. 133.

Iowa.— McDermott *v.* Hacker, 109 Iowa 239, 80 N. W. 338; Tiffany *v.* Tiffany, 84 Iowa 122, 50 N. W. 554.

Kansas.— Moss *v.* Patterson, 40 Kan. 720, 20 Pac. 454.

Kentucky.— Welch *v.* National Cash Register Co., 103 Ky. 192, 19 Ky. L. Rep. 1857, 44 S. W. 640; McGerty *v.* McGerty, 21 Ky. L. Rep. 593, 52 S. W. 823.

Louisiana.— Dufossat *v.* Labranche, 27 La. Ann. 283; New Orleans *v.* Mascaro, 11 La. Ann. 733.

Maine.— Rines *v.* Portland, 93 Me. 227, 44 Atl. 925.

Michigan.— Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905; Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837.

Mississippi.— Houston *v.* Witherspoon, 68 Miss. 188, 8 So. 515; Robertson *v.* Johnson, 40 Miss. 500.

Nebraska.— Asch *v.* Wiley, 16 Nebr. 41, 20 N. W. 21.

New York.— Allen *v.* Allen, 149 N. Y. 280, 43 N. E. 626; Woodruff *v.* Austin, 15 Misc. (N. Y.) 450, 37 N. Y. Suppl. 22.

North Carolina.—Johnson *v.* Murchison, 60 N. C. 83; Atty.-Gen. *v.* Allen, 59 N. C. 144.

Ohio.— Hubble *v.* Renick, 1 Ohio St. 171.

Pennsylvania.— Craig *v.* Brown, 48 Pa. St. 202; Henney *v.* Ralph, 11 Pa. Co. Ct. 624.

Tennessee.— Davis *v.* Wilson, 85 Tenn. 383, 5 S. W. 285; Snyder *v.* Summers, 1 Lea (Tenn.) 481.

Texas.— Ricker *v.* Collins, 81 Tex. 662, 17 S. W. 378; Evans *v.* Pigg, 28 Tex. 586.

Virginia.— Virginia F. & M. Ins. Co. *v.* New York Carousal Mfg. Co., 95 Va. 515, 28 S. E. 888, 40 L. R. A. 237.

error[11] or a submission on the merits, is, ordinarily, too late.[12] Of course, if a statute or rule of court prescribes a time at or within which such a motion must be made, it must be made at or within such time.[13]

d. Reaching Cause on Calendar. In some courts a motion to dismiss an appeal or writ of error which has been regularly brought and placed upon the calendar, and is within the jurisdiction of the court, will not be entertained before the cause is reached in its regular order on the calendar.[14]

5. Requisites and Sufficiency — a. In General. A motion to dismiss should

Wisconsin.— Gage *v.* Allen, 89 Wis. 98, 61 N. W. 361.

United States.—Sparrow *v.* Strong, 3 Wall. (U. S.) 97, 18 L. ed. 49.

See 3 Cent. Dig. tit. "Appeal and Error," § 3151.

11. *Alabama.*— Killam *v.* Costley, 52 Ala. 32; Myers *v.* Segars, 41 Ala. 383; Turnly *v.* Stinson, 1 Ala. 456; Hallett *v.* Allaire, Minor (Ala.) 360. *Compare* Roberts *v.* Taylor, 4 Port. (Ala.) 421.

Illinois.— Brockway *v.* Rowley, 66 Ill. 99; McCall *v.* Lesher, 7 Ill. 46; Bonner *v.* People, 40 Ill. App. 628; Kane *v.* People, 13 Ill. App. 382. *Compare* Ball *v.* Peck, 40 Ill. 105.

Indiana.—Dillman *v.* Dillman, 90 Ind. 585; Easter *v.* Acklemire, 81 Ind. 163.

Louisiana.— Shall *v.* Banks, 8 Rob. (La.) 168; Grand Gulf R., etc., Co. *v.* Douglass, 3 Rob. (La.) 169.

Missouri.— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371.

United States. — McDonough *v.* Millaudon, 3 How. (U. S.) 693, 11 L. ed. 787.

12. *California.*— *Compare* Lynch *v.* Dunn, 34 Cal. 518.

Colorado.— Fairbanks *v.* Macleod, 8 Colo. App. 190, 45 Pac. 282.

Florida.—Anderson *v.* Webster, 30 Fla. 220, 11 So. 546.

Georgia.— Hardin *v.* Lovelace, 79 Ga. 209, 5 S. E. 493.

Illinois.— Ruckman *v.* Allwood, 40 Ill. 128; Truesdale *v.* Ford, 40 Ill. 80; U. S. Express Co. *v.* Bedbury, 40 Ill. 60. *Compare* Lang *v.* Max, 50 Ill. App. 465.

Indiana.— Burk *v.* Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304; Thompson *v.* Deprez, 96 Ind. 67; Pedrick *v.* Post, 85 Ind. 255; Etter *v.* Anderson, 84 Ind. 333; Wilson *v.* Hefflin, 81 Ind. 35; West *v.* Cavins, 74 Ind. 265; Critchell *v.* Brown, 72 Ind. 539; Peoples Sav. Bank *v.* Finney, 63 Ind. 460; Moon *v.* Cline, 11 Ind. App. 460, 39 N. E. 432.

Iowa.—Parker *v.* Des Moines L. Assoc., 108 Iowa 117, 78 N. W. 826; French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300.

Kansas.— Scheble *v.* Jordan, 30 Kan. 353, 1 Pac. 121.

Kentucky.—Nickell *v.* Citizens' Bank, (Ky. 1901) 60 S. W. 408; Bixler *v.* Parker, 3 Bush (Ky.) 166.

Louisiana.— Toups *v.* Meegel, 28 La. Ann. 111; O'Donald *v.* Lobdell, 2 La. 299.

Missouri.— St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664.

Nebraska.— Moore *v.* McCollum, 43 Nebr. 617, 62 N. W. 41; Dietrich *v.* Lincoln, etc., R. Co., 13 Nebr. 500, 14 N. W. 528.

New York.—Courtney *v.* Baker, 60 N. Y. 1; How *v.* Gilbert, 1 How. Pr. (N. Y.) 107.

North Carolina.— Yancey *v.* Greenlee, 90 N. C. 317.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Texas.— Curlin *v.* Canadian, etc., Mortg., etc., Co., 90 Tex. 376, 38 S. W. 766.

Wisconsin.— White *v.* Polleys, 20 Wis. 503, 91 Am. Dec. 432.

13. Street *v.* Street, 113 Ala. 333, 21 So. 138; Brown *v.* Pontchartrain Land Co., 49 La. Ann. 1779, 23 So. 292; Long *v.* Kee, 44 La. Ann. 309, 10 So. 854; Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423; Burton *v.* Hicks, 27 La. Ann. 507; Walker *v.* Sauvinet, 27 La. Ann. 314; Francis *v.* Lavine, 26 La. Ann. 311; Boutte *v.* Maillard, 19 La. Ann. 276; Armour Packing Co. *v.* Williams, 122 N. C. 406, 29 S. E. 366; Smith *v.* Montague, 121 N. C. 92, 28 S. E. 137; Triplett *v.* Foster, 113 N. C. 389, 18 S. E. 714; Hutchison *v.* Rumfelt, 82 N. C. 425.

Premature motion.— Under a statute providing for the dismissal of an appeal, if neither party bring it to a hearing before the end of the second term, a motion made before the end of the second term is premature. Webster *v.* School Dist. No. 4, 16 Wis. 316.

14. Wheeler *v.* Harris, 12 Wall. (U. S.) 136, 20 L. ed. 278; Lem Hing Dun *v.* U. S., 49 Fed. 145, 7 U. S. App. 18, 1 C. C. A. 209.

In Illinois a motion to dismiss an appeal improperly taken may be allowed before the term to which the appeal would take the case. Howe *v.* Forman, 68 Ill. App. 398.

In South Carolina the supreme court may, at any time during term, entertain a motion to dismiss an appeal although the case, in regular course, will not be entered on the docket until a succeeding term. Levy *v.* Williams, 9 S. C. 153.

In South Dakota a motion to dismiss an appeal may be made in the supreme court before the cause appears upon the calendar. Garvin *v.* Pettee, 13 S. D. 239, 83 N. W. 251. See also Murray *v.* Whitmore, 9 S. D. 288, 68 N. W. 745.

In Washington a motion to dismiss for want of a record cannot be made orally at the time the appeal is called. Cochrane *v.* Gunderson, 10 Wash. 326, 38 Pac. 997.

Preliminary call.— An appeal will not be dismissed on the preliminary call unless such dismissal is authorized by a rule of court. Bessey *v.* Ruhland, 33 Ill. App. 73.

set out the facts on which it is based, and point out the specific defects or errors complained of. General allegations of defects and errors, not accompanied by brief or argument, are insufficient.[15]

b. Conformity to Rules of Court. A motion to dismiss must show that the moving party has complied with the rules of the appellate court relative to such motions.[16] A certificate of the clerk and affidavit must, of course, accompany the motion when required by the rules.[17]

6. Hearing and Determination — a. In General. An appeal will be dismissed only where appellee shows himself clearly entitled to that relief.[18] Where the

15. *California.*— De la Cuesta *v.* Calkins, (Cal. 1895) 41 Pac. 1098, wherein it was held that a motion to dismiss cannot be considered where it is uncertain to which of two notices of appeal it is directed.

Colorado.— Denver First Nat. Bank *v.* Montrose County, 27 Colo. 312, 61 Pac. 226.

Illinois.— Scholfield *v.* Pope, 103 Ill. 138.

Iowa.—Schoonover *v.* Osborne, (Iowa 1899) 79 N. W. 372. But see Alexander *v.* McGrew, 57 Iowa 287, 8 N. W. 347, 10 N. W. 666.

Kansas.— Parkhurst *v.* Sharp, (Kan. App. 1900) 61 Pac. 531.

Louisiana.— Edson *v.* McGraw, 37 La. Ann. 294, wherein it was held that the dismissal of an appeal is not justified by an unverified charge that the transcript is defective by fault of appellant.

Missouri.— Garrett *v.* Kansas City Gold Min. Co., 111 Mo. 279, 20 S. W. 25.

New York.— People *v.* Stevens, 1 How. Pr. (N. Y.) 241.

Oregon.— State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25; Hermann *v.* Hutcheson, 33 Oreg. 239, 53 Pac. 489.

South Carolina.— Archer *v.* Long, 35 S. C. 585, 14 S. E. 24.

Texas.— Cason *v.* Laney, 82 Tex. 317, 18 S. W. 667.

Washington.— Payne *v.* Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054; Healy *v.* Seward, 5 Wash. 319, 31 Pac. 874.

United States.— Power *v.* Baker, 112 U. S. 710, 5 S. Ct. 361, 28 L. ed. 825.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3142, 3143.

Motion in open court.— An appeal will not be dismissed for failure to file the transcript in time where no motion therefor is made in open court, before the case is submitted, a mere statement of counsel in his brief that he moves to dismiss the appeal not being sufficient. Bailey *v.* Louisville, etc., R. Co., 19 Ky. L. Rep. 1617, 44 S. W. 105.

16. Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863; Ware *v.* Miller, 9 S. C. 13; Murchison *v.* Holly, 40 Tex. 439.

A mere suggestion of a prior affirmance of the judgment will not authorize the court to dismiss a writ of error, nor to institute proceedings against the clerk for issuing the writ; but a rule may be had for plaintiff in error to show cause why the writ should not be dismissed. McRae *v.* Columbus Bank, 1 Ala. 578.

A paper filed in the appellate court for the dismissal of an appeal, on the ground of limitations, though called a motion, is sufficient where it amounts substantially to a plea of limitations, to which appellant can reply. Duff *v.* Duff, 103 Ky. 348, 20 Ky. L. Rep. 52, 45 S. W. 102.

A paper, found inclosed in the transcript, purporting to be a motion to dismiss the appeal, but not marked "Filed" nor found on the motion docket, will not be considered. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.

Necessity of writing.— The motion must be in writing when so required by the rules of court. Chicago, etc., R. Co. *v.* Binkopski, 72 Ill. App. 22; Schoonover *v.* Osborne, (Iowa 1899) 79 N. W. 372; Brafford *v.* Reed, 124 N. C. 345, 32 S. E. 726. See also Cochrane *v.* Gunderson, 10 Wash. 326, 38 Pac. 997. But a motion to dismiss an appeal for want of jurisdiction will be entertained even upon an oral suggestion at the time of trial. Hall *v.* Skavdale, 21 Wash. 203, 57 Pac. 807. And after an appeal has been entered, and appellant has failed to bring up the proper papers in time, appellee may have the appeal dismissed on oral motion, without filing a written complaint. Hunter *v.* Cole, 49 Me. 556.

17. *California.*—Pio *v.* Aigeltinger, 97 Cal. 81, 31 Pac. 805; *In re* Sweet, (Cal. 1892) 29 Pac. 249; Carpentier *v.* Bartlett, 62 Cal. 561; Bennett *v.* Bennett, 42 Cal. 629.

Idaho.— Dunniway *v.* Lawson, 2 Ida. 600, 23 Pac. 78.

Illinois.— People *v.* Gallatin County, 9 Ill. 139.

New York.— Gouraud *v.* Trust, 17 Hun (N. Y.) 578.

South Carolina.—Lamb *v.* Padgett, 45 S. C. 534, 23 S. E. 628; Dial Hardware Co. *v.* Levy, 38 S. C. 552, 16 S. E. 838.

United States.— Smith *v.* Clark, 12 How. (U. S.) 21, 13 L. ed. 875; Holliday *v.* Batson, 4 How. (U. S.) 645, 11 L. ed. 1140.

Entitling papers.—In New York it has been held that affidavits on a motion to dismiss an appeal from the surrogate, for failure to file the petition in the appellate court, should be entitled in the same manner as the papers in the proceedings before the surrogate. Foster *v.* Foster, 7 Paige (N. Y.) 48; Gardner *v.* Gardner, 5 Paige (N. Y.) 170. See also Clickman *v.* Clickman, 1 N. Y. 611.

18. Gilmore *v.* Brenham, 1 La. Ann. 414; Smith *v.* Vanhille, 11 La. 380. See also Cerro Gordo County *v.* Wright County, 59 Iowa 485, 13 N. W. 645, wherein it was held that where

facts on which the motion is based are controverted, it is a common practice to overrule it.[19]

b. Time of Hearing. Rules of court usually prescribe the time at which motions to dismiss may be heard.[20]

c. Evidence. As a rule a motion to dismiss a writ of error does not lie when, to support or resist it, proof is necessary *dehors* the writ.[21] It has been held, however, that extrinsic evidence is competent to show that the controversy has ceased to exist.[22] It has also been held that it may be shown that an appeal was taken before the judgment or order appealed from was entered, and this may be done by affidavit, or by the certificate of the clerk, though outside of the record.[23]

d. Matters Determinable. On a motion to dismiss, the appellate court will not pass on the merits of the appeal.[24] And in case that, in passing on a motion

appellant shows that the ground on which a motion to dismiss is based is not true, such motion should be overruled. In Kirk *v.* Barnhart, 74 N. C. 653, it was held that, where an affidavit was filed and uncontradicted that all the requirements as to making and serving the case were complied with in the court below, a motion to dismiss because it did not appear that such requirements had been complied with would not be granted. If averment is contradicted the question should be submitted to the court below to find the facts. McDaniel *v.* Scurlock, 115 N. C. 295, 20 S. E. 451; Cummings *v.* Hoffman, 113 N. C. 267, 18 S. E. 170; Walker *v.* Scott, 102 N. C. 487, 9 S. E. 488.

Part of appeal well taken.— A motion to dismiss an appeal as a whole, which is well taken in part, should be denied. Kelsey *v.* Sargent, 104 N. Y. 663, 10 N. E. 269.

19. *California.*—Coonan *v.* Loewenthal, 122 Cal. 72, 54 Pac. 388; Woodbury *v.* Nevada Southern R. Co., 120 Cal. 367, 52 Pac. 650.

Florida.— See Holland *v.* Webster, (Fla. 1901) 29 So. 625.

Indiana.— Seiberling *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38.

Iowa.— Long *v.* Smith, 67 Iowa 22, 24 N. W. 574.

Louisiana.— Evans *v.* Etheridge, 29 La. Ann. 576.

United States.— St. Louis Nat. Bank *v.* U. S. Insurance Co., 100 U. S. 43, 25 L. ed. 547.

See 3 Cent. Dig. tit. "Appeal and Error," § 3163.

Contradictory evidence of waiver of irregularity.— When a motion to dismiss an appeal for failure to serve a statement of the case is resisted on the ground that the irregularity has been waived, the court cannot consider contradictory evidence on the fact of waiver, but must grant the motion, if the waiver is denied, unless it can be established from the moving papers. Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534; State *v.* Price, 110 N. C. 599, 15 S. E. 116; Adams *v.* Reeves, 74 N. C. 106.

Reference to determine facts.—In Missouri, on motion to dismiss an appeal for the reason that since taking it appellant had enforced the judgment by execution, and ratified the judgment, the appellate court may refer the case to determine the facts; but where they are easily determined, and the evidence is mainly of record, the appellate court will hear and pass on the facts. Waddingham *v.* Waddingham, 27 Mo. App. 596.

20. State *v.* Sioux Falls Brewing Co., 2 S. D. 363, 50 N. W. 629.

Motion out of regular order.— A motion to dismiss an appeal for frivolousness, made out of its regular order and involving legal questions the determination of which depends on the consideration of the pleadings and proofs, should be denied as against the rules for the orderly disposition of causes. Hooper *v.* Beecher, 109 N. Y. 609, 15 N. E. 742, 14 N. Y. St. 16. See also Standard Oil Co. *v.* Bell, 82 Fed. 113, 52 U. S. App. 392, 27 C. C. A. 72. So a motion to dismiss, noticed for hearing on a certain day and term, and then called up, cannot be taken up on any subsequent day and term except by consent, unless it has been ordered to stand over to such subsequent day. Ireland *v.* Spalding, 11 Mich. 455.

Order of hearing.— A motion to dismiss, on the ground that the order appealed from is not appealable, cannot be sustained pending a motion to dismiss on the ground that the appeal has not been perfected. Centerville, etc., Irrigation Ditch Co. *v.* Bachtold, 109 Cal. 111, 41 Pac. 813. A motion to dismiss takes precedence of one to remove the cause to a federal court. Edgarton *v.* Webb, 41 Ga. 417. But a suggestion of diminution of the record on appeal has precedence of a motion to dismiss where both suggestion and motion are made at the same time. Davis *v.* Bennett, 72 Ga. 762.

21. Coffee *v.* Newsom, 2 Ga. 439; Hunter *v.* Heath, 76 Me. 219; Hannon *v.* State, 9 Gill (Md.) 440.

22. Franklin *v.* Peers, 95 Va. 602, 29 S. E. 321; Hice *v.* Orr, 16 Wash. 163, 47 Pac. 424. *Compare* Chicago, etc., Rapid Transit R. Co. *v.* Northern Trust Co., 90 Ill. App. 460; Merriam *v.* Victory Placer Min. Co., 37 Oreg. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

23. Smith *v.* Hawley, 11 S. D. 399, 78 N. W. 355.

24. *California.*— Nevills *v.* Shortridge, 129 Cal. 575, 62 Pac. 120; Leonis *v.* Leffingwell, (Cal. 1899) 55 Pac. 897; Ohlandt *v.* Joost, (Cal. 1898) 53 Pac. 213; *In re* Williams, (Cal. 1894) 36 Pac. 6.

to dismiss, the court would be required to examine the entire record, the motion will not be considered until final submission on the merits.[25]

e. Curing Defects. An appellate court may refuse to dismiss for defects and irregularities in the proceedings for review when such defects and irregularities have been subsequently cured.[26]

f. Rehearing. The court may grant a rehearing of an overruled motion to dismiss an appeal.[27]

7. Amendment. A motion to dismiss may be amended by the addition of another ground for dismissal.[28]

8. Successive Motions. A second motion to dismiss an appeal, based on the same grounds as a former motion, or on grounds existing at the time of such former motion, will, as a general rule, be denied.[29]

Colorado.— Monash *v.* Rhodes, 26 Colo. 321, 57 Pac. 728.

Montana.— Ryan *v.* Maxey, 15 Mont. 100, 38 Pac. 228.

Oregon.— Corder *v.* Speake, 37 Oreg. 105, 51 Pac. 647.

Tennessee.— Patrick *v.* Nelson, 2 Head (Tenn.) 506.

United States.— Lynch *v.* De Bernal, 131 U. S. xciv, appendix, 19 L. ed. 395; Hecker *v.* Fowler, 1 Black (U. S.) 95, 17 L. ed. 45; Day *v.* Washburn, 23 How. (U. S.) 309, 16 L. ed. 551.

See 3 Cent. Dig. tit. "Appeal and Error," § 3162.

Appealability of order.— On motion to dismiss an appeal for non-compliance with statute, the appealability of the order appealed from cannot be considered. Matter of Heydenfeldt, 119 Cal. 346, 51 Pac. 543.

The plea of res adjudicata must be referred to the merits, and will not be considered on a motion to dismiss. Beebe *v.* Guinault, 29 La. Ann. 795. See also Tower *v.* Detroit, etc., R. Co., 7 Mich. 10.

The sufficiency of the pleadings is not brought in question by a motion to dismiss the appeal. Dodsworth *v.* Hopple, 33 Ohio St. 16. See also Rush *v.* Rush, 29 Ohio St. 440.

25. Jarman *v.* Rea, 129 Cal. 157, 61 Pac. 790; Leonis *v.* Leffingwell, (Cal. 1899) 55 Pac. 897; Hibernia Sav., etc., Soc. *v.* Behnke, 118 Cal. 498, 50 Pac. 666; Burge *v.* Kelchner, 6 Kan. App. 919, 49 Pac. 675; State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210; Merriam *v.* Victory Placer Min. Co., 37 Oreg. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

26. Numerous authorities sustain the text, among which may be cited the following cases:

California.—Stratton's Estate, 112 Cal. 513, 44 Pac. 1028; Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986.

Florida.— Pittman *v.* Myrick, 16 Fla. 401.

Georgia.— Ruffin *v.* Paris, 75 Ga. 653.

Illinois.— Shipley *v.* Spencer, 40 Ill. 105.

Indiana.— Smith *v.* State, 137 Ind. 198, 36 N. E. 708.

Kansas.— Pierce *v.* Myers, 28 Kan. 364.

Kentucky.— Trapp *v.* Fidelity Nat. Bank, 19 Ky. L. Rep. 1114, 41 S. W. 577, 43 S. W. 470.

Louisiana.— State *v.* Rightor, 50 La. Ann. 113, 23 So. 200; Harvey *v.* Harvey, 44 La. Ann. 80, 10 So. 410.

Michigan.—Woodmansie *v.* Hollon, 16 Mich. 379; Covell *v.* Mosely, 15 Mich. 514.

Missouri.— Dickerson *v.* Apperson, 19 Mo. 319.

Montana.— Nolan *v.* Montana Cent. R. Co., 24 Mont. 327, 61 Pac. 880.

Nebraska.— Pickle Marble, etc., Co. *v.* McClay, 54 Nebr. 661, 74 N. W. 1062.

North Carolina.— Rollins *v.* Love, 97 N. C. 210, 2 S. E. 166.

Oregon.— Fleischner *v.* McMinnville Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345.

South Carolina.— See Dial *v.* Dial, 33 S. C. 607, 12 S. E. 474; Hill *v.* Salinas, 33 S. C. 606, 12 S. E. 475.

Washington.—Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571; Gustin *v.* Jose, 10 Wash. 217, 38 Pac. 1008.

Wisconsin.—Hundhausen *v.* Atkins, 36 Wis. 250.

United States.— Gates *v.* Goodloe, 101 U. S. 612, 25 L. ed. 895.

See 3 Cent. Dig. tit. "Appeal and Error," § 3165.

As to curing defects in assignments of error see *supra*, XI, H, 1, J [2 Cyc. 1005]. In record see *supra*, XIII, J. In security on appeal see *supra*, VII, D, 10 [2 Cyc. 847].

27. Frankfort *v.* Farmers Bank, 20 Ky. L. Rep. 1635, 49 S. W. 811.

28. Wheeler *v.* State, 8 Tex. 228.

29. *Arkansas.*—Ross *v.* Davis, 13 Ark. 293.

California.— Hellings *v.* Duvall, 131 Cal. 618, 63 Pac. 1017; Tyrrell *v.* Baldwin, 78 Cal. 470, 21 Pac. 116. See also Dorn *v.* Baker, 92 Cal. 194, 28 Pac. 225.

Colorado.— *Compare* Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985.

Illinois.— Bingham *v.* Brumback, 24 Ill. App. 332.

Louisiana.— Edwards' Succession, 34 La. Ann. 216.

New York.— Ferguson *v.* Bruckman, 164 N. Y. 481, 58 N. E. 661.

Texas.— Horton *v.* Wheeler, 17 Tex. 52.

Utah.— Stevens *v.* Higgenbotham, 6 Utah 341, 23 Pac. 757.

Wisconsin.—Pettit *v.* Hamlyn, 42 Wis. 434.

United States.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 51 Fed. 929, 5 U. S. App. 97, 2 C. C. A. 542.

See 3 Cent. Dig. tit. "Appeal and Error," § 3145.

But see King *v.* Pony Gold Min. Co., 24

9. WAIVER OF MOTION. Appellee, by filing a brief to the merits before a decision on his previously-interposed motion to dismiss has been made, waives such motion.[30] But the right to have a writ of error dismissed, on objection accompanying the brief, is not waived by the filing of a brief on the merits.[31]

G. Order of Dismissal. An order of the appellate court dismissing an appeal is a judgment of the court within the meaning of a statute providing that the clerk, on the rendition of judgment in the appellate court, should remit the proceedings to the court below.[32]

H. Effect of Dismissal[33]—1. IN GENERAL. When an appeal or writ of error is dismissed, whether on motion or for other cause, the whole case is out of court.[34] Consequently, the appellate court is without power, on dismissal, to

Mont. 470, 62 Pac. 783, wherein it was held that, though a second motion to dismiss an appeal on grounds existing at the time of the first motion should ordinarily not be heard, it will be heard if the first motion was denied, with leave to move anew, on grounds not stated in the first motion, without restriction as to presentation of matters occurring after the filing of the first motion.

A motion to dismiss, founded on an imperfect record, is no bar to a like motion upon an amended and perfect record. Seacrest *v.* Newman, 19 Iowa 323.

First motion premature.— Where appellee prematurely made a motion to dismiss for want of proper citation, he may afterward, at the proper time, renew his motion. Lecat *v.* Salle, 1 Port. (Ala.) 287.

30. Loucheim *v.* Seeley, 151 Ind. 665, 43 N. E. 646; Hazleton *v.* De Priest, 143 Ind. 368, 42 N. E. 751; Jacobs *v.* Yale, 39 La. Ann. 359, 1 So. 822; Jones *v.* Shreveport, 28 La. Ann. 835; White *v.* Gaines, 27 La. Ann. 75; Bossier Parish *v.* Steele, 13 La. Ann. 433; Valansart's Succession, 12 La. Ann. 848; Hoffman *v.* Atkins, 11 La. Ann. 172; Shall *v.* Banks, 8 Rob. (La.) 168; Grand Gulf, etc., R. Co. *v.* Douglass, 3 Rob. (La.) 169.

Asserting other grounds for dismissal.— Irregularities in bringing up appeal and citing appellee are none of them waived by filing, at the same time, other grounds of dismissal. Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 14 Colo. 438, 24 Pac. 548; Schmitt *v.* Drouet, 42 La. Ann. 716, 7 So. 746; Ward *v.* Bowmar, 12 La. 571.

31. Guy *v.* Mayes, 141 Mo. 441, 44 S. W. 253.

32. Langley *v.* Warner, 2 Code Rep. (N. Y.) 97 [*distinguishing* McFarlan *v.* Watson, 4 How. Pr. (N. Y.) 128].

As to necessity of order of court on withdrawal of appeal see *supra*, XIV, D, 2.

Dismissal without prejudice.—When an appeal is dismissed on appellant's motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice. Donallan *v.* Tannage Patent Co., 79 Fed. 385, 50 U. S. App. 1, 24 C. C. A. 647.

Entry of order.— An order of the district court, entered on its minutes by the clerk, directing the dismissal of an appeal taken to that court from a judgment of the county court, does not accomplish the dismissal without the entry of a judgment in the district court upon such order, whether or not the motion to dismiss was made by appellant. Field *v.* Great Western Elevator Co., 5 N. D. 400, 67 N. W. 147; *In re* Weber, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 621.

Imposing conditions.— In New York it has been held that, upon motion to dismiss an appeal from a decree of a surrogate for the reason that no bond was filed as required, the court has no power to annex conditions to the dismissal. Matter of Dumesnil, 47 N. Y. 677.

Vacation of order.— Where an order dismissing an appeal is irregularly entered, or entered on a false affidavit, the court may grant relief by vacating the order. Newton *v.* Harris, Code Rep. N. S. (N. Y.) 191.

33. As to effect of dismissal on right to second appeal see *supra*, I, F. 2 [2 Cyc. 527].

34. *Georgia.*—Johnson *v.* Ford, 92 Ga. 751, 19 S. E. 712.

Illinois.— Furthman *v.* McNulta, 182 Ill. 310, 55 N. E. 371.

Indiana.—Huntington County *v.* Brown, 14 Ind. 191.

Kentucky.— Crawford *v.* Bashford, 16 B. Mon. (Ky.) 3.

Maine.— Gray *v.* Gardner, 81 Me. 554, 18 Atl. 286.

North Carolina.— Taylor *v.* Vann, 127 N. C. 243, 37 S. E. 263.

United States.— Maxwell *v.* Williams, Hempst. (U. S.) 172, 16 Fed. Cas. No. 9,324*a*.

As to effect of abandonment of appeal see *infra*, XIV, I.

Certiorari to amend defects in the record will not be awarded after the dismissal of the cause. Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685.

The dismissal of a suspensive appeal does not prejudice whatever right the party may have to a devolutive appeal. Woodville *v.* Klasing, 51 La. Ann. 1057, 25 So. 635.

Orders made in appellate court.— Where an order substituting a party was made in the appellate court, in a case supposed to be pending there, though in fact the appeal was abortive, the order of substitution will fall with the dismissal of the appeal. Home for Care Inebriates *v.* Kaplan, 84 Cal. 486, 24 Pac. 119.

Rights of third persons.— An abatement of a suit in the appellate court works no abatement as respects the rights of third persons acquired under the judgments or decrees of

affirm, modify, or reverse the judgment of the lower court,[35] or to direct the entry of judgment.[36]

2. As Affirmance of Judgment. The rule obtains in many states that the dismissal of an appeal by the appellate court operates as an affirmance of the judgment of the trial court.[37] It has been held, however, that the dismissal of an appeal because prematurely taken,[38] for failure of appellant to file the record within the time required,[39] for defects in the undertaking,[40] or, in some states, for want of prosecution,[41] does not so operate.

3. In Lower Court. On the dismissal of an appeal the cause stands in the trial court as if no appeal had ever been taken.[42] But if appellee, plaintiff below,

the inferior tribunal, which were acquiesced in and not appealed from. Gilchrist *v.* Cannon, 1 Coldw. (Tenn.) 581. See also Woodman *v.* M. E. Church Missionary Soc., 124 U. S. 161, 8 S. Ct. 416, 31 L. ed. 352. So, the dismissal of an appeal as to a guardian does not dismiss as to the ward, but simply leaves the case without proper parties, which defect may be cured by amendment. Miller *v.* Cabell, 81 Ky. 178.

35. Gray *v.* Gardner, 81 Me. 554, 18 Atl. 286.

36. Manier *v.* Lindsey, 3 Bush (Ky.) 94; McMillan *v.* Felcher, 100 Mich. 341, 58 N. W. 1114; Chunn *v.* Jones, 34 N. C. 251.

Dismissal of cross-appeal.— Where appellee took an appeal from that part of the decree which gave appellant affirmative relief, but that appeal has been dismissed for want of prosecution, the case stands in the appellate court as though no such appeal had been taken, and appellee can, therefore, only be heard in support of the decree as it stands. Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed. 923.

37. *California.*— Garibaldi *v.* Garr, 97 Cal. 253, 32 Pac. 170; Chase *v.* Beraud, 29 Cal. 138; Rowland *v.* Kreyenhagen, 24 Cal. 52; Chamberlain *v.* Reed, 16 Cal. 207; Karth *v.* Light, 15 Cal. 324.

Colorado.— Long *v.* Sullivan, 21 Colo. 109, 40 Pac. 359; Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61; Hax *v.* Leis, 1 Colo. 187.

Georgia.— Price *v.* Lathrop, 66 Ga. 545; Rice *v.* Carey, 4 Ga. 558.

Illinois.— Sutherland *v.* Phelps, 22 Ill. 92; McConnel *v.* Swailes, 3 Ill. 571.

Kentucky.— Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375.

Nebraska.— Dunterman *v.* Storey, 40 Nebr. 447, 58 N. W. 949.

New York.— *Compare* Drummond *v.* Husson, 14 N. Y. 60.

Ohio.— Cohen *v.* Cover, 8 Ohio Cir. Ct. 678.

Oregon. — Simpson *v.* Prather, 5 Oreg. 86.

Virginia.— Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596; Alvey *v.* Cahoon, 86 Va. 173, 9 S. E. 994; Beecher *v.* Lewis, 84 Va. 630, 6 S. E. 367; Woodson *v.* Leyburn, 83 Va. 843, 3 S. E. 873.

Wisconsin.— Haner *v.* Polk, 6 Wis. 350.

See 3 Cent. Dig. tit. "Appeal and Error," § 3171.

As to effect of dismissal on liability of surety on appeal bond see *supra*, IX, B [2 Cyc. 939].

38. Matter of Kennedy, 129 Cal. 384, 62 Pac. 64.

39. U. S. *v.* Gomez, 23 How. (U. S.) 326, 341, 16 L. ed. 552, 587.

40. State *v.* McKinnon, 8 Oreg. 485.

41. Ashley *v.* Brasil, 1 Ark. 144; Monti *v.* Bishop, 3 Colo. 605; Freas *v.* Engelbrecht, 3 Colo. 377; Drummond *v.* Husson, 14 N. Y. 60. *Contra*, Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375; Clark's Code Civ. Proc. N. C. (1900), § 554.

42. *Arkansas.*— Ashley *v.* Brasil, 1 Ark. 144.

Colorado.— Pueblo, etc., Lumber Co. *v.* Danziger, 7 Colo. App. 149, 42 Pac. 683.

Georgia.— Hardee *v.* Stovall, 1 Ga. 92.

Illinois.— Hancock County *v.* Marsh, 3 Ill. 491.

Indiana.— Rowe *v.* Bateman, 153 Ind. 633, 55 N. E. 754.

Kentucky.— Manier *v.* Lindsey, 3 Bush (Ky.) 94; Helm *v.* Boone, 6 J. J. Marsh. (Ky.) 351, 22 Am. Dec. 75.

Maryland.— Lee *v.* Pindle, 12 Gill & J. (Md.) 288.

Massachusetts.— Cleveland *v.* Quilty, 128 Mass. 578.

Nebraska.— Eden Musee Co. *v.* Yohe, 37 Nebr. 452, 55 N. W. 866.

Pennsylvania.— Ayres *v.* Novinger, 8 Pa. St. 412.

Tennessee.— Furher *v.* Carter, 2 Sneed (Tenn.) 1.

Wisconsin.— Falvey *v.* O'Brien, 17 Wis. 188; Haner *v.* Polk, 6 Wis. 350; Muckey *v.* Pierce, 3 Wis. 307.

See 3 Cent. Dig. tit. "Appeal and Error," § 3172.

Hearing on merits.— Where interveners apply for a supersedeas, which is denied as premature, and consent that their appeal from the order be dismissed, they are entitled to a hearing on the merits of their intervention in the court below. Dorn *v.* Crank, 96 Cal. 381, 31 Pac. 528.

New trial.— When a writ of error is dismissed without a hearing on the merits, plaintiff in error is not precluded from moving, in the court below, for a new trial on any sufficient ground not specified in the original bill of exceptions. Perry *v.* Gunby, 42 Ga. 41. And where the appellate court dismisses an unperfected appeal, and issues a procedendo, if the lower court has in the meanwhile granted a new trial or set aside the judgment, the action of the appellate court does not set

dismisses his suit in the appellate court, in which the trial is *de novo*, he thereby destroys the force of his judgment in the lower court.[43]

I. Abandonment —1. **What Amounts to.** An appeal will be considered as abandoned where appellant fails to perfect or prosecute it within the time prescribed by statute or rule of court,[44] or does an act inconsistent with a prosecution of it.[45]

2. **Effect.** One who has abandoned his appeal cannot afterward prosecute it, as the appellate court, by the abandonment, loses jurisdiction.[46] The lower court in such case may proceed in the cause as if no appeal had been taken.[47]

3. **Order Declaring Proceedings Abandoned.** In New York an order declaring an appeal abandoned could not be made by a special term.[48]

aside the new trial or reinstate the judgment. Loomis *v.* McKenzie, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298.

Reargument of appeal.—The jurisdiction of the circuit court to make orders in a case after appeals therein have been dismissed by the court of appeals is not ousted by the pendency in the latter court of a motion for reargument of said appeals. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984.

43. Davis *v.* Slaughter, 4 Ky. L. Rep. 999. In Pueblo, etc., Lumber Co. *v.* Danziger, 7 Colo. App. 149, 42 Pac. 683, it was held that where the plaintiff appealed from the county to the district court, on a judgment in his favor, the fact that the trial was *de novo* did not render the dismissal of the appeal an annulment of the judgment.

44. *California.*—Depeaux's Estate, 118 Cal. 522, 50 Pac. 682; Keating *v.* Edgar, (Cal. 1883) 1 Pac. 155.

Louisiana.— Coudroy *v.* Pecot, 51 La. Ann. 495, 25 So. 270; Mutual Loan, etc., Assoc. *v.* First African Baptist Church, 49 La. Ann. 880, 21 So. 517; Sterling *v.* Sterling, 35 La. Ann. 840.

Montana.—Killhonic *v.* Nuss, 24 Mont. 292, 61 Pac. 648.

New York.— Vandenbergh *v.* Mathews, 7 N. Y. Annot. Cas. 484, 65 N. Y. Suppl. 365.

North Carolina.—Wilson *v.* Seagle, 84 N. C. 110.

Oklahoma.— Richmond *v.* Frazier, 7 Okla. 172, 54 Pac. 441.

South Carolina.— Livingston *v.* Exum, 19 S. C. 223; *Ex p.* Thompson, 2 Bailey (S. C.) 116.

South Dakota.— Giles *v.* Hawkeye Gold Min. Co., 11 S. D. 222, 76 N. W. 928; Benedict *v.* Smith, 10 S. D. 35, 71 N. W. 139.

Tennessee.—See Cherry *v.* York, (Tenn. Ch. 1898) 47 S. W. 184.

See 3 Cent. Dig. tit. "Appeal and Error," § 3174.

45. *California.*— Dehail *v.* Los Angeles, (Cal. 1897) 51 Pac. 27.

Indiana.— Whisenand *v.* Belle, 154 Ind. 38, 55 N. E. 950.

Louisiana.— Deuil *v.* Martel, 10 La. Ann. 643, wherein it was held that the filing of a stipulation fixing the amount of judgment, the amounts of payment thereon, and the balance due, amounts to an abandonment of the appeal.

Nebraska.— Slohodisky *v.* Curtis, 58 Nebr. 211, 78 N. W. 522; Burke *v.* Cunningham, 42 Nebr. 645, 60 N. W. 903.

New York.— Grosvenor *v.* Hunt, 11 How. Pr. (N. Y.) 355.

46. Pitkin *v.* Peet, 87 Iowa 268, 54 N. W. 215; Dewey *v.* Pierce, 69 Iowa 81, 28 N. W. 445; Pierce *v.* Cushing, 33 La. Ann. 809; Brickell *v.* Conner, 10 La. Ann. 235; Jenkins *v.* Bonds, 3 La. Ann. 339; Roberts *v.* Benton, 1 Rob. (La.) 100. See also Guilleaume *v.* Miller, 14 Rich. (S. C.) 118, wherein it was held that the efficacy of an order on circuit setting aside a writ is not suspended, so as to restore the pendency of the action, by a mere notice of appeal, where the appeal is afterward abandoned. And see Barber *v.* Sabine, etc., R. Co., 9 Tex. Civ. App. 93, 28 S. W. 270.

See 3 Cent. Dig. tit. "Appeal and Error," § 3175.

As to effect of dismissal see *supra*, XIV, H.

As to right to another appeal after abandonment see *supra*, I, F, 3 [2 Cyc. 529].

By one co-defendant.—The fact that one of several co-defendants abandoned an appeal does not conclude either of his co-defendants, who were not parties to the appellate proceedings, from prosecuting their appeals. Adamson *v.* Peerce, 9 W. Va. 249.

Dismissal.— In Kentucky, if appellant, after superseding the judgment in the lower court, abandons his appeal, the appellee, on motion in the court of appeals, is entitled to have the appeal dismissed, with damages. Bowling Green *v.* Elrod, 14 Bush (Ky.) 216.

47. Alexander *v.* Nelson, 42 Ala. 462; Champomier *v.* Washington, 2 La. Ann. 1013; Noonan *v.* New York, etc., R. Co., 63 Hun (N. Y.) 600, 18 N. Y. Suppl. 374, 45 N. Y. St. 464; Mauro *v.* Ritchie, 3 Cranch C. C. (U. S.) 147, 16 Fed. Cas. No. 9,312. See also Fairfax *v.* Muse, 4 Munf. (Va.) 124, wherein it was held that if appellant, in a court below, moves the court to amend its order for the sale of land, but never prosecutes his appeal, but stands by and permits the sale, he is precluded from relying on the pendency thereof. In Cline *v.* Bryson City Mfg. Co., 116 N. C. 837, 21 S. E. 791; Fisher *v.* Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055; Avery *v.* Pritchard, 93 N. C. 266 — it was held that, if appellant neglects to docket the transcript, it may be adjudged by the court below, after notice, that the appeal has been abandoned, and proceedings may be had accordingly.

48. True *v.* Sibley, 29 N. Y. Suppl. 704, 61 N. Y. St. 200.

In North Carolina appeals are dismissed if not prosecuted, if not docketed in prescribed

J. Reinstatement —1. **Power to Reinstate.** A court may, in its discretion, on good cause shown, reinstate an appeal dismissed by it.[49]

2. **Motion to Reinstate**[50] — **a. Who May Make.** After an appeal has been dismissed by consent of appellant, an order reinstating such appeal will not be made for the benefit of parties who did not join in the appeal.[51]

b. Notice. Notice of a motion to reinstate an appeal should be given the adverse party.[52]

c. Time of Making. If a rule of court prescribes a time for a motion to reinstate an appeal, the motion must, of course, be made within such time.[53]

time, if transcript is not printed, and for other causes. Clark's Code Civ. Proc. N. C. (1900), pp. 910-914, 917, 927, 928, 938, and cases there collected.

In South Carolina, on affidavit showing that appellant's attorney has failed to file the agreed case on appeal within ten days after it had been agreed upon and settled, the supreme court will, on motion of respondents' attorney, with consent of appellant's attorney, declare the appeal abandoned. Fincken *v.* King, 36 S. C. 603, 15 S. E. 553.

49. Numerous authorities sustain the text, among which may be cited the following cases:

Arkansas.— Whittaker *v.* Tracy, 41 Ark. 259.

Florida.— Williams *v.* Jacksonville, etc., R. Co., 25 Fla. 359, 5 So. 847; Allen *v.* Tison, 18 Fla. 628.

Georgia.— Moore *v.* Brown, 81 Ga. 10, 6 S. E. 833; Brooks *v.* State, 72 Ga. 899.

Illinois.— Panton *v.* Manley, 89 Ill. 458; Combs *v.* Steele, 80 Ill. 101.

Indiana.— Egan *v.* Ohio, etc., R. Co., 138 Ind. 274, 37 N. E. 1014; Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109.

Louisiana.— Browne *v.* Clarke, 35 La. Ann. 290; Flash *v.* Schwabacker, 32 La. Ann. 356.

Massachusetts.— Cross *v.* Cross, 7 Metc. (Mass.) 211.

Michigan.— Scott *v.* Scott, 5 Mich. 106.

Minnesota.— Baldwin *v.* Rogers, 28 Minn. 68, 9 N. W. 79.

Mississippi.— Gardner *v.* New Orleans, etc., R. Co., (Miss. 1901) 29 So. 469.

Missouri.— Bullock *v.* Cook, 28 Mo. App. 222.

Montana.— Orr *v.* Harding, 1 Mont. 387.

Nebraska.— State *v.* Gaslin, 25 Nebr. 71, 40 N. W. 601.

New Jersey.— State *v.* Foster, 44 N. J. L. 378; Engle *v.* Cromlin, 21 N. J. L. 561.

New Mexico.—Martin *v.* Terry, 6 N. M. 491, 30 Pac. 951.

New York.— Schenck *v.* Bengler, 105 N. Y. 630, 11 N. E. 382.

North Carolina.— Martin *v.* Chambers, 116 N. C. 673, 21 S. E. 402; Carter *v.* Long, 116 N. C. 46, 20 S. E. 1013; Paine *v.* Cureton, 114 N. C. 606, 19 S. E. 631.

Ohio.— Litch *v.* Martin, 1 Ohio Dec. (Reprint) 585.

South Carolina.— Hayes *v.* Sease, 49 S. C. 388, 27 S. E. 406; Tribble *v.* Poore, 28 S. C. 565, 6 S. E. 577.

Texas.— Daniels *v.* Larendon, 49 Tex. 216; San Antonio, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1895) 31 S. W. 72.

Virginia.— Thornton *v.* Corbin, 3 Call (Va.) 232.

Wisconsin.— Main *v.* McLaughlin, 78 Wis. 449, 47 N. W. 938.

Wyoming.— Gramm *v.* Fisher, 4 Wyo. 1, 31 Pac. 767; Cronkhite *v.* Bothwell, 3 Wyo. 736, 30 Pac. 492.

United States.— James *v.* McCormack, 105 U. S. 265, 26 L. ed. 1044; Alviso *v.* U. S., 6 Wall. (U. S.) 457, 18 L. ed. 721.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3177–3180.

50. Mode of proceeding.— In Nebraska the proper practice to reinstate an appeal from the county court, dismissed in the district court, is by motion to reinstate; but, an action having been instituted, the court may properly treat it as a motion. Republican Valley R. Co. *v.* McPherson, 12 Nebr. 480, 11 N. W. 739.

51. Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273. See also Frank *v.* Tatum, (Tex. Civ. App. 1892) 20 S. W. 869, wherein it was held that, where an appeal has been dismissed by the court of its own motion for a defect in the record, one who has not appealed or assigned errors is not entitled, after perfecting the record, to a reinstatement of the appeal, against the will of appellant, who does not desire its further prosecution. And see Watertown Nat. Bank *v.* Holabird School Tp., 2 S. D. 224, 49 N. W. 98, wherein it was held that where an appeal was dismissed by one of appellant's attorneys, without the consent of other attorneys for appellant, whose compensation was dependent, by contract, on the success of appellant's defense, the court will not reinstate the appeal on the motion of the nonconsenting attorneys, they having merely an unsecured claim against appellant, resting upon its personal responsibility, the right to enforce which was not affected by dismissal of the appeal.

See 3 Cent. Dig. tit. "Appeal and Error," § 3182.

52. Smith *v.* Wilson, 26 Ill. 186; People *v.* Central Cross-Town R. Co., 21 Hun (N. Y.) 476; Cropper *v.* West, 4 Munf. (Va.) 299. See 3 Cent. Dig. tit. "Appeal and Error," § 3184.

53. Pipkin *v.* Green, 112 N. C. 355, 17 S. E. 534; Johnston *v.* Whitehead, 109 N. C. 207, 13 S. E. 731.

In Louisiana delay for application for rehearing being fixed by law at three judicial

In the absence of a rule of court due diligence is required of the moving party or the delay will be fatal.[54]

d. Requisites and Sufficiency. A motion to reinstate should set out the grounds therefor,[55] and show apparent merit in the appeal.[56]

3. Mandamus to Compel Reinstatement. Though there are decisions which seem to hold that mandamus will lie to compel an intermediate appellate court to reinstate an appeal improperly dismissed by it,[57] the weight of authority and the better reason is to the contrary. The remedy in such case is by appeal from the order of dismissal.[58]

XV. Dockets, Calendars,[59] and Proceedings Preliminary to Hearing.

A. In General. It has already been shown that, before a cause can regularly come before the appellate court for a hearing, such cause must be entered on the docket or placed upon the calendar of the appellate court,[60] and that the prescribed method of so docketing or placing the cause on the calendar should be substantially followed.[61] The cause should be placed upon the proper calendar or

days, no longer time should be allowed within which to move to reinstate an appeal dismissed under a rule of court. Rayne *v.* O'Brien, 12 La. Ann. 400.

In Wisconsin the supreme court retains jurisdiction of the case for the purpose of a motion to vacate an order dismissing the appeal, and to reinstate the appeal, in the nature of a motion for rehearing, made more than thirty days after the decision dismissing the appeal, though a motion for rehearing should be made within thirty days after the decision. Patten Paper Co. *v.* Green Bay, etc., Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.

54. Ellair *v.* Wayne Cir. Judge, 46 Mich. 496, 9 N. W. 533; Jones *v.* Anderson, 71 N. Y. 599; Johnson *v.* Wilkins, 118 U. S. 228, 6 S. Ct. 1048, 30 L. ed. 210; Deming *v.* U. S., 10 Wall. (U. S.) 251, 19 L. ed. 893. See 3 Cent. Dig. tit. "Appeal and Error," § 3183.

At subsequent term.— The court will not vacate, at a subsequent term, an order dismissing an appeal at a prior term. Bleyer *v.* Old Hickory Distillery Co., 70 Ga. 724; Davies *v.* Coryell, 37 Ill. App. 505; Harper *v.* Lowry, 6 How. (Miss.) 268. But see The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531, wherein it was held that an appeal will be reinstated at a subsequent term if it were dismissed upon a mistake as to fact, by reason of a misprision of the clerk of the trial court in transmitting an imperfect record.

55. Taylor *v.* State, 82 Ga. 578, 9 S. E. 783.

In South Carolina an appeal dismissed for failure to serve copies of the case or brief will not be restored to the docket where appellant does not serve a copy of any affidavit in support of the motion. Stokes *v.* Greenville, 14 S. C. 629.

56. Hagar *v.* Mead, 25 Cal. 598; Jacobs *v.* Shenon, (Ida. 1895) 39 Pac. 193.

Readiness to proceed.— A party moving to reinstate an appealed cause, dismissed at a former term for want of prosecution, should show himself prepared to proceed at once to a hearing in case his motion should be granted. Bingham *v.* Parsons, 9 Mich. 144.

57. State *v.* First Judicial Dist. Ct., 13 Mont. 370, 34 Pac. 298; *Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 708, 33 L. ed. 123, 120 U. S. 737, 7 S. Ct. 767, 30 L. ed. 818.

58. *Illinois.*— People *v.* Garnett, 130 Ill. 340, 23 N. E. 331.

Kentucky.— Goheen *v.* Myers, 18 B. Mon. (Ky.) 423.

Louisiana.— State *v.* Hudspeth, 38 La. Ann. 97; State *v.* Rightor, 36 La. Ann. 200.

Nevada.— State *v.* Wright, 4 Nev. 119.

New York.—*Ex p.* Ostrander, 1 Den. (N. Y.) 679; People *v.* Judges Dutchess C. Pl., 20 Wend. (N. Y.) 658. *Compare* People *v.* Clinton County Judge, 13 How. Pr. (N. Y.) 277.

See, generally, Mandamus; and 3 Cent. Dig. tit. "Appeal and Error," § 3188.

See also Lewis *v.* Weir, 14 N. J. L. 353, wherein it was held that a mandamus will not issue to the common pleas to reinstate an appeal dismissed for a wrong reason, if it appears that it must ultimately be dismissed for irregularity.

In Missouri the supreme court has no appellate jurisdiction over the Kansas City court of appeals, but the constitution gives it "superintending control over the courts of appeals by mandamus, prohibition, and certiorari." Accordingly, mandamus will lie to compel the Kansas City court of appeals to reinstate and hear an appeal wrongfully dismissed. State *v.* Philips, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476.

59. For matters relating to dockets and calendars in trial courts in civil cases see, generally, Trial; in criminal cases, see, generally, Criminal Law.

60. See *supra*, VII, F, 1 [2 Cyc. 876]; and Walton *v.* McKesson, 101 N. C. 428, 7 S. E. 566. But see Fore *v.* Western North Carolina R. Co., 101 N. C. 526, 8 S. E. 335, as to the necessity of an actual entry on the docket.

For definition of calendar see Calendar.

61. See *supra*, VII, F, 2 [2 Cyc. 876]. See also the following cases:

California.— Plant *v.* Smythe, 43 Cal. 42, holding that, where a motion is made to place a cause on the calendar in accordance with a stipulation, it must be shown that the tran-

docket,[62] and in the order prescribed by statute[63] or rule of court, to entitle it to consideration.[64]

B. Advancement of Causes on Calendar — 1. Power of Court to Advance. While the statutes of some states expressly give to the courts the power to grant a preference when they deem it advisable,[65] it has been held that, even regardless of statute, a court of last resort has inherent discretionary power to advance a cause for hearing.[66]

script and the briefs, or points and authorities, of both parties have been filed.

Maine.— Day *v.* Chandler, 65 Me. 366, where the case was prematurely placed upon the calendar.

New York.— Reformed Protestant Dutch Church *v.* Brown, 24 How. Pr. (N. Y.) 89, to the effect that the appeal cannot be docketed or placed on the calendar until the return is filed in the appellate court.

North Carolina.— Boykin *v.* Wright, 113 N. C. 283, 18 S. E. 212; State *v.* James, 108 N. C. 792, 13 S. E. 112; Porter *v.* Western North Carolina R. Co., 106 N. C. 478, 11 S. E. 515; Walker *v.* Scott, 102 N. C. 487, 9 S. E. 488; Hughes *v.* Boone, 100 N. C. 347, 5 S. E. 192; Pittman *v.* Kimberly, 92 N. C. 562; Barbee *v.* Green, 91 N. C. 158 — relating to time of docketing.

Pennsylvania.— Keller *v.* Cunningham, 6 Pa. St. 376, holding that the cause cannot be placed on the trial list during the term at which a motion to quash the appeal is on the argument list.

South Carolina.—Coleman *v.* Keels, 31 S. C. 601, 9 S. E. 735.

United States.— Caillot *v.* Deetken, 113 U. S. 215, 5 S. Ct. 432, 28 L. ed. 983; Good Intent Tow-Boat Co. *v.* Atlantic Mut. Ins. Co., 109 U. S. 110, 3 S. Ct. 78, 27 L. ed. 874; Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354; The Steamer Virginia *v.* West, 19 How. (U. S.) 182, 15 L. ed. 594 — relating to time of docketing.

See 3 Cent. Dig. tit. "Appeal and Error," § 3189.

Leave will be given to docket cause after the term, when the transcript has been filed in time, although, through inadvertence, a fee bond has not been given, and in the meantime there has not been a motion to docket and dismiss. Edwards *v.* U. S., 102 U. S. 575, 26 L. ed. 293.

Record delayed without fault of appellant. — It has been held that where an appeal has been admitted to be docketed, for good cause shown, after the time within which the record ought to have been sent up, and appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket. Johnson *v.* Johnson, 2 Munf. (Va.) 304.

62. Mocquot *v.* Meadows, 97 Ky. 543, 31 S. W. 129; Fuller *v.* Starbuck, 5 Cush. (Mass.) 493; American Sav., etc., Assoc. *v.* Burghardt, 17 Mont. 545, 43 Pac. 923, holding that, where a rule of court provides that cases may be placed on the short-cause docket on certain stipulations of counsel, such stipulations must comply with the provisions of the rule.

Clerk should inspect the bill of exceptions filed in his office, in order to determine how to docket each case. Gordon *v.* Gordon, 109 Ga. 262, 34 S. E. 324.

Correction of calendar.—Where a bill of exceptions is entered by the clerk of the supreme court as a fast writ of error, and it is determined by the court to be otherwise, it will be transferred to the docket of the next term, and not dismissed, because of the error of such clerk. Gordon *v.* Gordon, 109 Ga. 262, 34 S. E. 324.

63. Parker *v.* State, 132 Ind. 419, 31 N. E. 1114; Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235; State *v.* Bradley, 29 Mo. App. 366; Gould *v.* Chapin, 5 How Pr. (N. Y.) 358, Code Rep. N. S. (N. Y.) 74; Anonymous, 2 Code Rep. (N. Y.) 41.

64. Rich *v.* State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; Gould *v.* Chapin, 5 How. Pr. (N. Y.) 358, Code Rep. N. S. (N. Y.) 74; Belknap *v.* Tremble, 2 Paige (N. Y.) 277.

65. Parker *v.* State, 132 Ind. 419, 31 N. E. 1114; Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235; Godchaux *v.* Bauman, 44 La. Ann. 253, 10 So. 674; Phoenix F. Ins. Co. *v.* Cain, (Tex. Civ. App. 1893) 21 S. W. 709.

In Louisiana *v.* New Orleans, 103 U. S. 521, 26 L. ed. 306, it is held that a case which does not present questions which entitle it to be advanced will not he advanced to be heard with another cause which has precedence on the docket, if objection is made to such advancement.

66. Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235; Lynn *v.* Polk, 8 Lea (Tenn.) 328, holding that even where a statute provides for the advancement of certain cases, it does not affect the exercise of the inherent power of the court as to causes other than those named. See also Chicago, etc., R. Co. *v.* Bailey, (Kan. App. 1898) 52 Pac. 916; Forbes *v.* Dehon, Speers Eq. (S. C.) 45; Ward *v.* Maryland, 12 Wall. (U. S.) 163, 20 L. ed. 260. See 3 Cent. Dig. tit "Appeal and Error," § 3191 *et seq.*

Not granted as of course though both parties concur. Miller *v.* New York, 12 Wall. (U. S.) 159, 20 L. ed. 259.

This inherent power should not, however, be exercised capriciously, in reference to the rights of other litigants, if there is nothing in the cause proposed to be advanced to distinguish it in character from other cases. Lynn *v.* Polk, 8 Lea (Tenn.) 328. See also Brodie *v.* Fitzgerald, 55 Ark. 460, 18 S. W. 632; Vaught *v.* Green, 51 Ark. 378, 11 S. W. 587. After a case has been called and placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases of great public importance have already been assigned for

2. Grounds For Advancing — a. In General. In some states the statutes expressly designate certain causes for which cases on appeal shall be entitled to preference on the calendar.[67]

b. Frivolous Appeals. It has often been held that a case which plainly appears to be frivolous, and entered for the purpose of delay, may be taken up out of its regular order on the docket.[68] Decisions are not wanting, however, to the effect that an appeal cannot be brought on out of its order on the calendar merely upon the ground that it is frivolous[69] or is without merit.[70]

c. Questions of Public Importance. While grave public consideration may sometimes justify the court in advancing important cases,[71] as a general rule the mere fact that the questions involved in a cause are of public importance will not necessarily entitle the parties to an advancement of such cause to a hearing in preference to others.[72]

d. Where State Is Interested — (i) *As a Party.* Under statutes and rules of court, in some jurisdictions, it is held that causes to which a state is a party, including criminal cases, are entitled to a preference over other causes,[73] but the state must be not only a party in name, but must also be materially interested.[74]

what may be the remainder of the term. Barry *v.* Mercein, 4 How. (U. S.) 574, 11 L. ed. 1108.

67. Louisiana.— Polk *v.* Duplantier, 2 Mart. (La.) 114, relating to cases where "Defense" is not indorsed on the answer to a petition for an appeal.

New York.— Coxhead *v.* Johnson, 160 N. Y. 369, 54 N. E. 780 (relating to appeals from judgments of unanimous affirmance); Colton *v.* New York, etc., R. Co., 151 N. Y. 266, 45 N. E. 546 (relating to cases in which parties die pending the action; also, to cases in which the executor or administrator is the sole plaintiff or defendant); Nichols *v.* Scranton Steel Co., 135 N. Y. 634, 32 N. E. 75, 48 N. Y. St. 461 (relating to cases where the property of a defendant is held under attachment; also, to causes entitled to preference by general rules of practice); Bartlett *v.* Musliner, 92 N. Y. 646 (relating to actions for dower); Attica Bank *v.* Metropolitan Nat. Bank, 91 N. Y. 239 (relating to actions against a corporation or joint-stock association issuing bank-notes or any kind of paper credits to circulate as money); Peyser *v.* Wendt, 84 N. Y. 642 (relating to actions for the construction of, or adjudication upon, wills).

Texas.— Wright *v.* McNatt, 49 Tex. 425, relating to administration cases.

See 3 Cent. Dig. tit. "Appeal and Error," § 3191.

Necessity for new affidavit of merits to present claim of reference see Aikin *v.* Morris, 2 Barb. Ch. (N. Y.) 140.

68. Chafin *v.* McFadden, 44 Ark. 523; Coppage *v.* Hall, 9 Sm. & M. (Miss.) 360 (holding that, since the passage of the law which provides for the keeping of three dockets — one for each judicial district of the high court of errors and appeals — cases cannot be submitted as "delay" cases unless they are in the docket of the district under consideration); Forbes *v.* Dehon, Speers Eq. (S. C.) 45 (assigning as a reason for this rule the fact that such cases ought not to be allowed to encumber the docket and delay litigants); Fox *v.* Govan, 4 Hen. & M. (Va.) 156; Garland *v.* Bugg, 1 Hen. & M. (Va.) 374; Buchanan *v.* Leeright, 1 Hen. & M. (Va.) 211; Armistead *v.* Butler, 1 Hen. & M. (Va.) 176. See 3 Cent. Dig. tit. "Appeal and Error," § 3193.

The absence of error should be apparent upon a short and cursory investigation of the record in order to justify a motion to advance a cause upon the docket on the ground that the appeal is prosecuted for delay only. Vaught *v.* Green, 51 Ark. 378, 11 S. W. 587.

Where there is any doubt as to the frivolous nature of the case the motion to advance should be denied. Fox *v.* Govan, 4 Hen. & M. (Va.) 156.

69. Dzialynski *v.* Jacksonville Bank, 23 Fla. 44, 1 So. 338; Wilder *v.* Lane, 12 Abb. Pr. (N. Y.) 351, 34 Barb. (N. Y.) 54; Rogers *v.* Hosack, 5 Hill (N. Y.) 521. See also Gregory *v.* Keating, (Cal. 1888) 18 Pac. 389.

70. Randall *v.* Duff, 105 Cal. 271, 38 Pac. 739; Amory *v.* Amory, 91 U. S. 356, 23 L. ed. 436.

71. Olympia *v.* Moore, 7 Wash. 236, 34 Pac. 930. See also Spratt *v.* Jacksonville, 29 Fla. 171, 10 So. 734.

72. Spratt *v.* Jacksonville, 29 Fla. 171, 10 So. 734; Poindexter *v.* Greenhow, 109 U. S. 63, 3 S. Ct. 8, 27 L. ed. 860. See 3 Cent. Dig. tit. "Appeal and Error," § 3192.

73. Spratt *v.* Jacksonville, 29 Fla. 171, 10 So. 734; People *v.* Kinney, 92 N. Y. 647; Hoge *v.* Richmond, etc., R. Co., 93 U. S. 1, 23 L. ed. 781; Ward *v.* Maryland, 12 Wall. (U. S.) 163, 20 L. ed. 260; Miller *v.* New York, 12 Wall. (U. S.) 159, 20 L. ed. 259. See also Poindexter *v.* Greenhow, 109 U. S. 63, 3 S. Ct. 8, 27 L. ed. 860. See 3 Cent. Dig. tit. "Appeal and Error," § 3192.

Discretion of court in criminal cases.— In Ward *v.* Maryland, 12 Wall. (U. S.) 163, 20 L. ed. 260, it is held that, under a rule of court, relating to the advancement of criminal cases by leave of court on motion, such motion is addressed to the discretion of the court, and that where the defendant is not in jail the motion will be denied.

74. Spratt *v.* Jacksonville, 29 Fla. 171, 10 So. 734. Thus, a suit in the name of the state

(II) *NOT AS A PARTY.* Another class of cases to which preference is usually accorded are those in which the questions in dispute may embarrass the government or state while such questions remain unsettled.[75]

e. Where Title to Public Office Is Involved. In some states all cases where the title or right to a public office is involved are entitled to be heard without delay.[76]

3. PROCEEDINGS TO PROCURE ADVANCEMENT — a. Application. The usual method of procuring the advancement of cases upon the docket or calendar is by motion.[77] The application should show the grounds upon which it is based, without reference to the record.[78]

b. Notice of Application. It has been held that, in the case of a motion to

on the relation of an individual is not within a statute providing that causes wherein a state is a party shall have priority over other causes. Miller *v.* New York, 12 Wall. (U. S.) 159, 20 L. ed. 259.

75. Brodie *v.* Fitzgerald, 55 Ark. 460, 18 S. W. 632; Vaught *v.* Green, 51 Ark. 378, 11 S. W. 587; Spratt *v.* Jacksonville, 29 Fla. 171, 10 So. 734; Lanier *v.* Gallatas, 13 La. Ann. 175; Hoge *v.* Richmond, etc., R. Co., 93 U. S. 1, 23 L. ed. 781 [*followed* in Kentucky Cent. R. Co. *v.* Bourbon County, 116 U. S. 538, 6 S. Ct. 601, 29 L. ed. 725]; U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185.

A suit against a tax-collector, for alleged wrongs done while he was engaged in the collection of taxes due the state, and in which suit he is not restrained from discharging any of his official duties, is not entitled to a preference in being heard. Poindexter *v.* Greenhow, 109 U. S. 63, 3 S. Ct. 8, 27 L. ed. 860.

76. Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159.

In North Carolina, if an action involving title to public office is begun after the term of the supreme court, and, by observing the statutory regulations, has come to such term of the supreme court after the call of the district to which the cause belongs, the court can, under N. C. Supreme Ct. Rules, No. 13 [27 S. E. vi], set the same down for argument, though it was not entitled to be heard as of right. Caldwell *v.* Wilson, 121 N. C. 423, 28 S. E. 363.

77. *Arkansas.*— Vaught *v.* Green, 51 Ark. 378, 11 S. W. 587; Chafin *v.* McFadden, 44 Ark. 523.

Colorado.— Dickinson *v.* Freed, 24 Colo. 483, 52 Pac. 209.

Indiana.— Parker *v.* State, 132 Ind. 419, 31 N. E. 1114; Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235.

Kansas.— Chicago, etc., R. Co. *v.* Bailey, (Kan. App. 1898) 52 Pac. 916.

New Mexico.— Cunningham *v.* Conklin, 7 N. M. 127, 34 Pac. 43.

New York.— Coxhead *v.* Johnson, 160 N. Y. 369, 54 N. E. 780; Colton *v.* New York El. R. Co., 151 N. Y. 266, 45 N. E. 546; Bartlett *v.* Musliner, 92 N. Y. 646; Taylor *v.* Wing, 83 N. Y. 527, 1 N. Y. Civ. Proc. 43.

Texas.— Texas Land Co. *v.* Williams, 48 Tex. 602.

Vermont.—Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630.

United States.— Kentucky Cent. R. Co. *v.* Bourbon County, 116 U. S. 538, 6 S. Ct. 601, 29 L. ed. 725; Call *v.* Palmer, 106 U. S. 39, 1 S. Ct. 2, 27 L. ed. 61; Miller *v.* New York, 12 Wall. (U. S.) 159, 20 L. ed. 259.

See 3 Cent. Dig. tit. "Appeal and Error," § 3195.

Time of making application.— In some jurisdictions, where, as a matter of right, or for good cause shown, a case may be advanced, it is the practice not to entertain an application until the abstract and all the briefs have been filed, and the case is ready for submission. Dickinson *v.* Freed, 24 Colo. 483, 52 Pac. 209; Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235; Texas Land Co. *v.* Williams, 48 Tex. 602; and cases cited *supra*, note 76.

78. *Indiana.*— Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235, to the effect that the facts upon which the application is based should be fully stated, and verified by affidavit.

Kansas.— Chicago, etc., R. Co. *v.* Bailey, (Kan. App. 1898) 52 Pac. 916, holding that the reasons assigned for advancement must be shown to be existing at the time of presenting the application.

New York.— Nichols *v.* Scranton Steel Co., 135 N. Y. 634, 32 N. E. 75, 48 N. Y. St. 461, holding that, to obtain a preference in a case not designated, by statute or rule of court, as one entitled to advancement, the application for advancement must be addressed to the discretion of the court, and must show such facts as may be deemed to render a preference proper in the interests of justice.

Vermont.— Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630, in which it is said that the supreme court will not favor motions to advance cases unless the alleged errors are specifically pointed out in the motion for advancement.

United States.— Call *v.* Palmer, 106 U. S. 39, 1 S. Ct. 2, 27 L. ed. 61, holding that the motion to advance under the rule of court should be accompanied by an agreed statement of the case, or of such extracts from the record as will show that the case is one to which the rule for advancement is applicable.

Necessity for statement of claim in notice of argument.— In New York it has been held that, notwithstanding statutory provisions giving preferences among civil causes, one claiming a preference in the court of appeals

advance, unlike that of an application for an oral argument, written notice must be given to the adverse party or his attorney.[79]

c. Order. It is expressly provided, in some jurisdictions, that, where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court or a judge thereof, upon notice to the opposite party.[80]

d. Fast Writs of Error. In Georgia it is provided by statute that, upon the receipt of a fast writ of error by the clerk of the supreme court, it is his duty to place it immediately on the docket of the circuit court to which it belongs; but, at the request of either party, the judges shall hear said case without delay, and without respect to the order of circuits or its order in its own circuit.[81]

C. Striking Cause From Calendar[82] — **1. Grounds.** Upon proper application, a case, under certain circumstances, may be stricken from the docket or calendar of the appellate court.[83] Thus, it has been held that such application should be granted where it does not appear of record that an appeal has been taken or a writ of error has been issued,[84] that the bill of exceptions, case, statement, or record on appeal has been made, settled, filed, or served,[85] or

must comply with the rule requiring him to state such claim in his notice of argument, and the grounds of the preference. Taylor *v.* Wing, 83 N. Y. 527, 1 N. Y. Civ. Proc. 43. See also People *v.* Kinney, 92 N. Y. 647.

79. Stout *v.* Harlem, (Ind. App. 1897) 48 N. E. 235, wherein it is held, however, that there may be an express consent or waiver of notice, or an united application of both parties.

80. Bartlett *v.* Musliner, 92 N. Y. 646 (holding, however, that the order in a case embraced in subdivision 6 of the statute may be made *ex parte*, and is conclusive); Attica Bank *v.* Metropolitan Nat. Bank, 91 N. Y. 239 (holding that it is no excuse, for a failure to procure the order, that there was no term of the court at which a motion for the order could be made; as such a motion may be made on notice before any judge of the court, at his residence or office, or at any place which the judge, on application of the moving party, may name).

A copy of such order should be served with or before the notice of trial or argument. Bartlett *v.* Musliner, 92 N. Y. 646.

81. Gordon *v.* Gordon, 109 Ga. 262, 34 S. E. 324; Kaufman *v.* Ferst, 55 Ga. 350. See also Jones *v.* Warnock, 67 Ga. 484.

A decree sustaining a demurrer to a bill for an injunction and the appointment of a receiver cannot be brought to the supreme court by a fast writ of error. Smith *v.* Willis, 107 Ga. 792, 33 S. E. 667; Stewart *v.* Stewart, 89 Ga. 138, 15 S. E. 23; Jordan *v.* Kelly, 63 Ga. 437.

A writ of error on denial of a motion to dissolve an injunction cannot be heard in the supreme court in the speedy manner provided by Ga. Code, §§ 3213, 3214. Proceedings contemplated by these sections relate to the granting or refusing of injunctions, receiverships, and other extraordinary remedies in equity, and not to dissolving injunctions, vacating receiverships, or setting aside orders on subsequent motions. Kaufman *v.* Ferst, 55 Ga. 350.

82. For dismissal, withdrawal, or abandonment of appeals see *supra*, XIV.

83. Com. *v.* Robinson, 5 Ky. L. Rep. 600; Com. *v.* Miller, 4 Ky. L. Rep. 818; Archer *v.* Long, 36 S. C. 602, 15 S. E. 380, in which last case the cause was improperly stricken from the docket. See *infra*, notes 84 *et seq.* See also 3 Cent. Dig. tit. "Appeal and Error," § 3195.

84. Orange County High School *v.* Sanford, 17 Fla. 120; State *v.* Kanooster, 12 Mo. App. 589; Lynch *v.* Kelley, 6 Mo. App. 601.

Appeal void for want of bond or undertaking.— Orange County High School *v.* Sanford, 17 Fla. 120; People *v.* Adams, 13 Colo. 550, 22 Pac. 826; Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117 (in the last two cases the bond being considered a nullity because not perfected within the prescribed time); Raymond *v.* Richmond, 76 N. Y. 106 (bond void because not conforming to the statutory requirements). But mere defects in an appeal bond will not be considered on a motion to strike. Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Failure to take an appeal during the term at which the judgment was rendered has been held to be sufficient ground to strike the case from the docket. State *v.* Rhodes, 86 Mo. 635.

Failure to file motion for new trial, however, has been held not to be a sufficient ground to sustain a motion to strike a proceeding in error from the files. Shickle, etc., Iron Co. *v.* Kent, 34 Nebr. 568, 52 N. W. 286 (assigning as a reason for this rule the fact that material defects in the pleading may be taken advantage of without such a motion); Cheney *v.* Wagner, 30 Nebr. 262, 46 N. W. 427.

85. Hersperger *v.* Smith, 15 Ky. L. Rep. 605; Ratcliff *v.* Farnnin, 5 Ky. L. Rep. 601; Crump *v.* Moore, 5 Ky. L. Rep. 250; Shotwell *v.* State, 37 Mo. 359; St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 15 Mo. App. 590; Reid *v.* New York, 21 N. Y. Suppl. 719, 50 N. Y. St. 758 (where the case on appeal did not contain a judgment rule, or such an index as was required); Carraher *v.* Carraher, 33

that there has been any service of summons or citation, or any appearance entered;[86] where an order has been entered declaring the appeal abandoned and appellant has taken no steps to be relieved from the order, or to have the appeal heard on the judgment-roll alone;[87] where the case has been prematurely placed upon the calendar;[88] or where the cause has been improperly or insufficiently noticed for argument.[89]

2. Application. Application to strike an appeal from the docket is usually made by motion.[90]

D. Notice of Hearing or Argument — 1. Necessity of. In some jurisdic-

N. Y. Super. Ct. 502; Phelps *v.* Swan, 2 Sweeny (N. Y.) 696; Canzi *v.* Conner, 4 Abb. N. Cas. (N. Y.) 148; Shumate *v.* Powell, 5 S. C. 286 (where the record failed to show the character of the action, the mode in which it was tried, or whether any error was committed on the trial).

Affirmation without motion to strike.— In Oeters *v.* Groupe, 15 Abb. Pr. (N. Y.) 263, it was held that, where an appeal was taken and no case was made and served, respondent might, when the case was regularly called, appellant being in default, take a judgment of affirmation instead of seeking the relief by motion to dismiss or strike from the calendar.

86. Smith *v.* Justices Inferior Ct., 4 Ga. 156; Gage *v.* Arndt, 114 Ill. 318, 29 N. E. 505; Bowen *v.* Bowen, 36 Ohio St. 312; Poole *v.* Mueller, (Tex. Civ. App. 1894) 26 S. W. 739; Morriss *v.* Grapevine, (Tex. Civ. App. 1894) 25 S. W. 60.

87. Heins *v.* Manhattan R. Co., 8 Misc. (N. Y.) 686, 28 N. Y. Suppl. 780, 60 N. Y. St. 60.

88. Carroll *v.* Hutton, 90 Md. 636, 45 Atl. 886; Cunningham *v.* Conklin, 7 N. M. 127, 34 Pac. 43.

89. English *v.* Maxwell, 25 Mich. 462; Brushaber *v.* Stegemann, 22 Mich. 199; Corey *v.* Hiliker, 15 Mich. 314; People *v.* Pratt, 14 Mich. 333; Stockton *v.* Garland, 14 Mich. 333; Franklin *v.* Mansfield, 8 Mich. 99; Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327.

Where a cause is prematurely noticed for argument, it may be stricken from the calendar. Reynolds *v.* Steamboat Favorite, 9 Minn. 148; Eaton *v.* Tallmadge, 23 Wis. 442.

90. *Colorado.*— People *v.* Adam, 13 Colo. 550, 22 Pac. 826.

Connecticut.— Halliday *v.* Collins Co., (Conn. 1900) 47 Atl. 321; Saunders *v.* Denison, 20 Conn. 521.

Florida.— Orange County High School *v.* Sanford, 17 Fla. 120.

Kentucky.—Newman *v.* Long, 5 Ky. L. Rep. 926; Crump *v.* Moore, 5 Ky. L. Rep. 250; Philpot *v.* Benge, 4 Ky. L. Rep. 732; Allen *v.* Marchand, 4 Ky. L. Rep. 410.

Maryland.— Carroll *v.* Hutton, 90 Md. 636, 45 Atl. 886.

Michigan.—Crane *v.* Sumner, 31 Mich. 199; English *v.* Maxwell, 25 Mich. 462.

Minnesota.— Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327; Reynolds *v.* Steamboat Favorite, 9 Minn. 148.

Nebraska.— Carlson *v.* Beckman, 35 Nebr. 392, 53 N. W. 203; Mewis *v.* Johnson Harvester Co., 5 Nebr. 217.

New Mexico.— Cunningham *v.* Conklin, 7 N. M. 127, 34 Pac. 43.

New York.— Raymond *v.* Richmond, 76 N. Y. 106; Phelps *v.* Swan, 2 Sweeny (N. Y.) 696; Heins *v.* Manhattan R. Co., 8 Misc. (N. Y.) 686, 28 N. Y. Suppl. 780, 60 N. Y. St. 60; Oeters *v.* Groupe, 15 Abb. Pr. (N. Y.) 263.

Ohio.— Bowen *v.* Bowen, 36 Ohio St. 312.

Pennsylvania.— Seymour *v.* Herbert, 2 Wkly. Notes Cas. (Pa.) 363; Calvert *v.* Row, 1 Browne (Pa.) 256.

Washington.— Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868.

Wisconsin.— Eaton *v.* Tallmadge, 23 Wis. 442.

See 3 Cent. Dig. tit. "Appeal and Error," § 3195.

In Connecticut it has been held that the superior court will not, on motion, erase a case from the docket unless the grounds for the erasure appear on the record. Saunders *v.* Denison, 20 Conn. 521 [*citing* Wickwire *v.* State, 19 Conn. 477; Amidown *v.* Peck, 11 Metc. (Mass.) 467]. And in Halliday *v.* Collins Co., (Conn. 1900) 47 Atl. 321, it was held that a motion to erase, not filed within the time required by law, should be denied where the matters relied on in the motion did not appear on the face of the appeal process.

Time of application.— In Calvert *v.* Row, 1 Browne, (Pa.) 256, it was held that a motion to strike should not be made until the first day of the term to which the appeal is entered.

Quashing causes.— In Nebraska and Pennsylvania a motion to quash the cause, instead of a motion to dismiss or strike from the docket, is the proper remedy in some cases (Carlson *v.* Beckman, 35 Nebr. 392, 53 N. W. 203; Seymour *v.* Herbert, 2 Wkly. Notes Cas. (Pa.) 363), as where the objection is that what purports to be a bill of exceptions is not such in fact (Mewis *v.* Johnson Harvester Co., 5 Nebr. 217. See also Hollenbeck *v.* Tarkinson, 14 Nebr. 430, 16 N. W. 472), or where the objection is that the bill of exceptions was not properly signed (Carlson *v.* Beckman, 35 Nebr. 392, 53 N. W. 203). In Seymour *v.* Herbert, 2 Wkly. Notes Cas. (Pa.) 363, it was held that a motion to quash a writ of error to a judgment entered on a bond, with warrant of attorney, in a case which released all errors, could not be heard until the cause had reached its regular place on the list.

tions it is required that an appeal be noticed for hearing or argument in the appellate court.[91] In such jurisdictions it is held that the appeal should be noticed by the party designated,[92] at the time prescribed,[93] for the length of time

91. *Iowa.*— Byington *v.* Robinson, 16 Iowa 591, holding that additional notice to appellee is necessary where appellant has allowed four years to elapse between the taking of the appeal and the filing of the transcript, and appellee does not make an appearance.

Michigan.— English *v.* Maxwell, 25 Mich. 462; Brushaber *v.* Stegemann, 22 Mich. 199; Torrent *v.* Muskegon Booming Co., 21 Mich. 1; Corey *v.* Hiliker, 15 Mich. 314; People *v.* Pratt, 14 Mich. 333.

Minnesota.— Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327; Reynolds *v.* Steamboat Favorite, 9 Minn. 148; Commonwealth Ins. Co. *v.* Pierro, 6 Minn. 569.

Nebraska.— It has, however, been held in this state that the rules of the district court as to noticing causes for trial do not require that a notice must be filed in cases for hearing on error, before the same can be heard. The petition in error is the only pleading required in such cases, and the issues are formed as soon as it is filed. Lehnoff *v.* Fisher, 32 Nebr. 107, 48 N. W. 821.

New Jersey.— Harwood *v.* Smethurst, 31 N. J. L. 502, holding that, where a rule is obtained to bring a cause to a hearing, a copy thereof must be served upon the opposite party, although the motion for the rule was made in his presence.

New York.— Bellony *v.* Alexander, 1 Sandf. (N. Y.) 734; White *v.* Boice, 1 N. Y. St. 570; Walsh *v.* Gregory, 19 Abb. Pr. (N. Y.) 363.

See 3 Cent. Dig. tit. "Appeal and Error," § 3196.

Causes not noticed will be placed at foot of calendar, without regard to the date of their issues. Anonymous, Col. & C. Cas. (N. Y.) 160.

Effect of addition of questions after case reserved has been noticed.— Where, after a case reserved for the opinion of the supreme court has been noticed for hearing, an addition of specific questions is made to it by the circuit judge without the consent of one party, such party will not be required to go to a hearing of the case upon the notice previously given. Farrand *v.* Collins Iron Co., 8 Mich. 136.

Necessity for noticing new issue.— Where, after a case on appeal is noticed for hearing, a new issue is raised by plea in bar to the writ, the new issue must also be noticed for hearing. Crane *v.* Sumner, 31 Mich. 199.

Renoticing of causes not brought on.— Causes which have been noticed for argument, and duly entered by the clerk, if not brought on, are to be renoticed to the clerk for him to reënter, as they will not be, of course, carried over to the next term of the calendar. Livingston *v.* Rogers, Col. & C. Cas. (N. Y.) 303.

The fact that the bill of exceptions has been removed from the files for amendment, by order of the court, and that the amendments are not completed nor the bill of exceptions returned, does not prevent noticing the case for hearing. Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 44.

Countermand of notice.— An attorney for the plaintiff in error who has noticed a cause for hearing may countermand such notice. Willey *v.* Kilduff, 25 Mich. 161.

92. **By whom noticed.**— In some jurisdictions the case may be noticed for hearing or argument by respondent or defendant in error, as well as by appellant or plaintiff in error. Frost *v.* Lawler, 34 Mich. 235 (holding that a notice by defendant in error constitutes a waiver of any right to complain of failure to serve upon him a copy of the assignment of errors); English *v.* Maxwell, 25 Mich. 462 (relating to causes noticed by solicitors); Willey *v.* Kilduff, 25 Mich. 161 (wherein the motion of defendant in error was denied on account of his failure to notice a case for hearing); Durfee *v.* McClurg, 5 Mich. 532 (to the effect that a notice of hearing given by appellee in a chancery case constitutes a waiver of irregularity in taking the appeal); Harwood *v.* Smethurst, 31 N. J. L. 502 (to the effect that either party may notice the cause for argument); Hoyt *v.* Campbell, Col. & C. Cas. (N. Y.) 129 (holding that, where a party on appeal entitled to open or begin the argument has delayed for a term to notice the cause for argument, the opposite party may regularly proceed, by a notice of motion in the nature of a rule, to set the cause down for argument); Anderson *v.* Dickie, 26 How. Pr. (N. Y.) 199 (holding that, where a case or exceptions are filed but not made a part of the judgment-roll, respondent may notice a case for argument and put it on the calendar of the general term before the expiration of the time for filing the case or exceptions after settlement); Hand *v.* Callaghan, 12 Misc. (N. Y.) 88, 33 N. Y. Suppl. 176, 66 N. Y. St. 863 (holding that respondent, having given notice of argument, should have placed the cause on the general term calendar and brought the appeal to a hearing, and not have applied for a dismissal on account of appellant's failure to serve notice of argument); Cutler *v.* Ainsworth, 20 Wis. 651 (holding that the party not noticing a cause for argument cannot demand a hearing where his opponent asks for a continuance).

93. **Time of notice.**—A cause cannot be noticed for argument in the supreme court until after the return is filed. Torrent *v.* Muskegon Booming Co., 21 Mich. 1; Stockton *v.* Garland, 14 Mich. 333; Reynolds *v.* Steamboat Favorite, 9 Minn. 148; Commonwealth Ins. Co. *v.* Pierro, 6 Minn. 569; Eaton *v.* Tallmadge, 23 Wis. 442.

It is irregular to notice an appeal in chan-

prescribed,[94] and in the manner provided, by the particular statute or rule of court.[95]

2. Service of. Service of notice may be served on the attorney of the opposite party.[96]

XVI. Hearing and Rehearing.

A. Hearing[97]**— 1. Arguments — a. In General.** Argument by counsel before an appellate tribunal is governed largely by rules of court, to which reference should be had to determine matters relating thereto.[98]

cery before the expiration of the time for filing the transcript. Torrent *v.* Muskegon Booming Co., 21 Mich. 1.

94. Length of notice.— Usually, the notice must be of a prescribed length. Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327; White *v.* Boice, 1 N. Y. St. 570. But the party entitled to such notice may waive the length of time by admitting due service of the notice. Stubbs *v.* Stubbs, 11 N. Y. Wkly. Dig. 244; White *v.* Boice, 1 N. Y. St. 570, wherein it was held, however, that where respondent retained a notice of argument served on December 10th until December 14th, he did not waive the regular eight days' notice required in such cases. But see Gibbs *v.* Blackwell, 40 Ill. 51, where the court held that, on neglect of plaintiff in error to have a scire facias issued or served in proper time, defendant in error might join in the error, and have the cause heard at the current term, without giving ten days' notice, as required by rule.

Computation of time.— In Michigan, when Sunday is an intervening day, it has been held that it should be included in computing the time of such notices. Corey *v.* Hiliker, 15 Mich. 314; Anderson *v.* Baughman, 6 Mich. 298. But in Minnesota, in giving the ten days' notice of argument required by the rules of the supreme court, it has been held that both the day of service and the first day of the term should be excluded. Greve *v.* St. Paul, etc., R. Co., 25 Minn. 327.

95. For forms of notice held sufficient see Brushaber *v.* Stegemann, 22 Mich. 199; Franklin *v.* Mansfield, 8 Mich. 99.

Notice without date, setting forth "that the cause will be brought on for hearing at the next term of said court." is good in form. Brushaber *v.* Stegemann, 22 Mich. 199.

Effect of irregular, defective, or improper notice, when duly served.— Though a notice of a motion to set a cause on appeal for argument may be irregular or defective, or in any other respect improper, yet, if there has been a due service of it, the party on whom it has been served must appear to oppose the motion, or his consent to it, or a renunciation of his right to oppose it, will be presumed from his absence or silence equally as if the notice had been perfect and the motion proper in the case. Hoyt *v.* Campbell, Col. & C. Cas. (N. Y.) 129.

96. Roskopp *v.* Canfield, 97 Mich. 628, 56 N. W. 940, holding that where the attorneys of record for plaintiff in attachment defend a proceeding to dissolve the writ, and one of them makes an affidavit of appeal from the order of dissolution, in which affidavit he states that he is one of the attorneys for appellant, notice of trial of the appeal is properly served on such attorneys.

On the death of appellee, notice of argument cannot be served on his attorney, who has received no authority to represent the estate. Warren *v.* Eddy, 32 Barb. (N. Y.) 664, 13 Abb. Pr. (N. Y.) 28.

Motion for affirmance, after service of notice.—Where notice of the rule for defendant to join in error has been served, the plaintiff should apply for affirmance for defendant's failure to join, at the term after service of the rule. Seely *v.* Shattuck, Col. & C. Cas. (N. Y.) 127, in which case notice of the rule for defendants to join in error in eight days, or plaintiff would be heard *ex parte,* having been served in April vacation, 1798, it was held that it was too late for plaintiff to move for affirmance at the October term, 1800, for failure of defendant to join error, since plaintiff should have applied to the term after service of the rule.

97. As to determination and disposition of cause see *infra,* XVIII.

As to order and time of hearing of causes see *supra,* XV.

98. See the rules of court of the several states, and the following cases:

California.— Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Illinois.—Purington *v.* Akhurst, 74 Ill. 490; Comstock *v.* Hitt, 40 Ill. 121.

Iowa.— McKern *v.* Albia, 69 Iowa 447, 29 N. W. 421.

Maine.— Thorn *v.* Mosher, 60 Me. 463.

Vermont.— Cutler *v.* Thomas, 24 Vt. 647.

See 3 Cent. Dig. tit. "Appeal and Error," § 3204.

As to necessity of briefs see *supra,* XII, B [2 Cyc. 1013].

Improper argument.— In Sax *v.* Drake, 69 Iowa 760, 28 N. W. 423, defendants' counsel were severely censured for remarking in opening argument that "it is proper to state that J. B. Sax and Charles Sax [plaintiffs] are the sharpest clothing dealers among the Jewish merchants of Ottumwa." See also Paine *v.* Frost, 67 Iowa 282, 25 N. W. 243.

In some courts an oral argument is allowed upon the final hearing only upon the interposition of a timely request therefor. Butler *v.* Rockwell, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611; De Votie *v.* McGerr, 14 Colo. 577, 23 Pac. 980; Rownd *v.* State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395. In some courts an oral argument is not allowed on motions to dismiss appeals, or writs of error. Merriam *v.* St. Louis, etc., R. Co., 126 Mo. 445, 29

b. Opening and Closing. The right to open and close the argument is, generally, given to appellant.[99] If both plaintiff and defendant appeal, plaintiff will be allowed to open and close.[1]

c. Submission Without Argument. It has been held that stipulations of counsel to submit a case under rule of court, on printed argument alone, cannot be withdrawn by either party without the consent of the other, except by leave of the court upon cause shown.[2]

2. Consideration of Cause as a Whole. A cause will be considered and determined in the appellate court as a whole,[3] and part of it will not be heard in advance of the regular hearing.[4]

3. Consolidation of Causes. Where all the questions involved in two cases on appeal have grown out of the same transaction and depend upon the same facts, the cases may be argued together.[5]

4. Continuance of Hearing. An appellate court may, for good cause, continue or postpone the hearing of an appeal.[6]

S. W. 152; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. ed. 1041.

99. Deering *v.* Adams, 34 Me. 41 (wherein it was held that appellants from a decree of a judge of probate, having the burden of showing that the case was rightly before the supreme court, have the right to open and close); Tarbel *v.* White River Bank, 24 Vt. 655. See 3 Cent. Dig. tit. "Appeal and Error," § 3206. *Compare* State Treasurer *v.* Merrill, 14 Vt. 557.

1. Shand *v.* Central Nat. Bank, (S. C. 1890) 11 S. E. 389; McFarland *v.* Stone, 16 Vt. 145. See also Lampson *v.* Hobart, 27 Vt. 784, wherein it was held that where exceptions are taken in two cases, brought by the same plaintiff against the same defendant, one of which was decided for, and the other against, plaintiff, plaintiff should open and close. But see Peters *v.* Farnsworth, 15 Vt. 786, wherein it was held that, where exceptions were taken by defendant, involving the right of recovery, and by plaintiff as to the rule of damages, defendant should open and close. *Compare* Sellew's Appeal, 36 Conn. 186; Adams *v.* Lewis, 31 Conn. 501.

2. Aurrecoechea *v.* Bangs, 110 U. S. 217, 3 S. Ct. 639, 28 L. ed. 125; Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921; Muller *v.* Dows, 94 U. S. 277, 24 L. ed. 76. But see Glenn *v.* Fant, 124 U. S. 123, 8 S. Ct. 398, 31 L. ed. 352, wherein it was held that where the parties enter into a stipulation to submit a cause without oral argument, and without reference to any particular time, or to a rule which permits submission of printed arguments within the first ninety days of the term, that rule will not be applied on suggestion of one party against the protest of the other, since the terms will be fulfilled if the submission is made when the case is reached in its order.

See 3 Cent. Dig. tit. "Appeal and Error," § 3207.

3. Jones *v.* Jones, 58 Ga. 184; Morrill *v.* Kittredge, 19 Vt. 528. See 3 Cent. Dig. tit. "Appeal and Error," § 3202.

Motion to dismiss.— The court will not, in advance of a hearing on the merits, decide a motion to dismiss for want of service of notice of appeal on all the adverse parties, where the determination as to who are adverse parties necessitates an investigation of the whole case. Latham *v.* Los Angeles, 83 Cal. 564, 23 Pac. 1116.

4. *In re* Williams, (Cal. 1894) 36 Pac. 6; Christian *v.* Clark, 10 Lea (Tenn.) 291; Smith *v.* Onion, 19 Vt. 432.

5. *Georgia.*— Bentley *v.* Gay, 67 Ga. 667.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Young *v.* Rutan, 69 Ill. App. 513.

Indiana.— Jamieson *v.* Cass County, 56 Ind. 466; Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221.

Iowa.— King *v.* Glass, 73 Iowa 205, 34 N. W. 820.

Massachusetts.— Tansey *v.* McDonnell, 142 Mass. 220, 8 N. E. 49.

Michigan.— People *v.* Wayne Cir. Judge, 39 Mich. 198.

Tennessee.— *Compare* Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 674.

Texas.— Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., 89 Tex. 331, 34 S. W. 737.

Virginia.—Anthony *v.* Oldacre, 4 Call (Va.) 489.

United States.—Ableman *v.* Booth, 18 How. (U. S.) 470, 15 L. ed. 465.

See 3 Cent. Dig. tit. "Appeal and Error," § 3197.

As to separate appeals by one party see *supra*, VI, B, 2 [2 Cyc. 758].

Discretion of court.— Consolidation is a matter within the discretion of the court. Bentley *v.* Gay, 67 Ga. 667.

Where cross-appeals are taken, or where each party reserves a bill of exceptions and sues out a writ of error, both appeals or both writs should be heard at the same time. L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 93 Fed. 765, 35 C. C. A. 590. See also Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., 89 Tex. 331, 34 S. W. 737.

Where a writ is prosecuted on a judgment alone, and there is annexed a decree in chancery, the two cases cannot be so combined as to make one case for any purpose. McGill *v.* Hammond, 8 Port. (Ala.) 296.

6. *Alabama.*— Hollingsworth *v.* Chapman, 50 Ala. 23.

5. Setting Aside Submission. The submission of a cause on appeal may be set aside for good cause shown.[7]

B. Rehearing[8] — **1. Power to Grant.** An appellate court has power, by virtue of its appellate jurisdiction, to grant a rehearing at any time before the remittitur has been filed with the clerk of the court below.[9]

2. Nature of Right to Rehearing. Except in cases provided for by statute, a rehearing is not a matter of right, but a privilege given by the appellate court, and governed and limited by its rules.[10]

3. Purpose of Rehearing. The object of a petition for rehearing is to point

California.— Wetmore *v.* San Francisco, 43 Cal. 37.

Florida.— Megin *v.* Filor, 4 Fla. 203.

Georgia.— Ward *v.* State, 87 Ga. 160, 13 S. E. 711.

Illinois.— Queenan *v.* Palmer, 117 Ill. 62, 7 N. E. 470, 613; Kelsey *v.* Berry, 40 Ill. 69.

Kentucky.— Stafford *v.* Cain, 12 Ky. L. Rep. 503.

New Hampshire.— Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

New Jersey.— Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525.

North Carolina.— Dibbrell *v.* Georgia Home Ins. Co., 109 N. C. 314, 13 S. E. 739.

South Carolina.— Archer *v.* Long, 35 S. C. 588, 14 S. E. 26; Tarrant *v.* Gilletson, 14 S. C. 620.

Texas.— Thorn *v.* Lawson, 6 Tex. 240.

Vermont.— Meech *v.* Meech, 37 Vt. 414.

United States.— Brown *v.* Swann, 8 Pet. (U. S.) 435, 8 L. ed. 1001; Hunter *v.* Fairfax, 3 Dall. (U. S.) 305, 1 L. ed. 613.

See 3 Cent. Dig. tit. "Appeal and Error," § 3199.

In New York a justice of the supreme court at chambers has no power to stay the argument of an appeal pending in the general term, and a stay so granted by inadvertence will be disregarded by the general term. St. Lawrence Wholesale Grocery Co. *v.* Hobson, 63 Hun (N. Y.) 458, 19 N. Y. Suppl. 418, 44 N. Y. St. 738.

Amendment of writ of error.— The court will not continue the cause until the succeeding term to allow a party to amend his writ of error. Carey *v.* Rice, 2 Ga. 408.

Certificate of importance.— A continuance will not be allowed in order to enable appellant to obtain from an intermediate appellate court a certificate of importance, where the court would not have jurisdiction without such certificate. Wilson *v.* Scoville, 127 Ill. 393, 20 N. E. 88.

That counsel for one of the parties is engaged in another court is not sufficient ground for putting off the argument. Starr *v.* Benedict, 19 Johns. (N. Y.) 455.

7. Burkam *v.* McElfresh, 88 Ind. 223 (wherein it was held that a submission without notice of the appeal to appellees interested will be set aside); Texas, etc., Coal Co. *v.* Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919. See 3 Cent. Dig. tit. "Appeal and Error," § 3208. But see Noble *v.* Cullom, 44 Ala. 554, wherein it was held that, after assignment, and joinder in error and submission, a motion to set aside the submission by one of the parties will not be granted when it might work injustice to the other. See also Thomas *v.* State, 91 Ala. 59, 8 So. 753, wherein it was held that the submission of a cause on appeal will not be set aside, in order to enable appellant to move the trial court to correct the bill of exceptions, where it is evident that the evidence as shown by the bill of exceptions so corrected would be such as to show that appellant was not entitled to the charge whose refusal was the only error assigned.

As to rehearing of appeal see *infra*, XVI, B.

Where one of the justices has not heard the argument and it is deemed important that all the justices should participate in the decision, a submission of the appeal will be set aside, with leave to counsel to stipulate to resubmit the case on the briefs and printed arguments already on file. Fair *v.* Angus, (Cal. 1899) 57 Pac. 385.

8. As to amendment or correction of judgment of appellate court see *infra*, XVIII, F, 3.

9. *California.*— Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Mateer *v.* Brown, 1 Cal. 231.

Indiana.— Terrell *v.* Butterfield, 92 Ind. 1.

New Hampshire.—Russell *v.* Dyer, 43 N. H. 396.

New York.— Slocum *v.* Fairchild, 7 Hill (N. Y.) 292.

North Carolina.— State *v.* Council, (N. C. 1901) 39 S. E. 814.

United States.— U. S. *v.* Moorehead, 1 Black (U. S.) 488, 17 L. ed. 80.

See 3 Cent. Dig. tit. "Appeal and Error," § 3212.

10. *California.*— Hanson *v.* McCue, 43 Cal. 178.

Montana.— Columbia Min. Co. *v.* Holter, 1 Mont. 429.

New York.— Land *v.* Wickham, 1 Paige (N. Y.) 256.

North Carolina.— State *v.* Council, (N. C. 1901) 39 S. E. 814; Solomon *v.* Bates, 118 N. C. 321, 24 S. E. 746; Herndon *v.* Imperial F. Ins. Co. 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547.

United States.— Brown *v.* Aspden, 14 How. (U. S.) 25, 14 L. ed. 311; Gregory *v.* Pike, 67 Fed. 837, 21 U. S. App. 658, 15 C. C. A. 33.

See 3 Cent. Dig. tit. "Appeal and Error," § 3229.

out mistakes of law or fact, or both, which it is claimed the court has made in reaching its conclusion.[11]

4. Grounds For Rehearing — a. In General. To entitle a party to a rehearing there must be manifest error in the opinion.[12] If no material fact or principle of law has been overlooked or disregarded,[13] or if it is clear that no other conclusion than that already reached is possible, a rehearing will be denied.[14]

b. Change in Personnel of Court. A change in the *personnel* of the court furnishes, of itself, no ground for a rehearing.[15]

11. People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Petitions for rehearing are permitted for the purpose of correcting any error which the court may have made in its opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision. San Francisco *v.* Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835.

The granting of a rehearing does not necessarily imply that the court is convinced that it has fallen into error. Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

12. *Arizona.*— Arizona Prince Copper Co. *v.* Copper Queen Copper Co., (Ariz. 1886) 11 Pac. 396.

Kansas.— Topeka *v.* Tuttle, 5 Kan. 425.

Minnesota.—Woodbury *v.* Dorman, 15 Minn. 341; Bradley *v.* Gamelle, 7 Minn. 331.

New York.— Atlantic, etc., Tel. Co. *v.* Barnes, 39 N. Y. Super. Ct. 357; Sadlier *v.* Riggs, 15 Daly (N. Y.) 522, 8 N. Y. Suppl. 473, 29 N. Y. St. 151, 9 N. Y. Suppl. 509, 30 N. Y. St. 429.

North Carolina.— Capehart *v.* Burrus, 124 N. C. 48, 32 S. E. 378; Lewis *v.* Rountree, 81 N. C. 14.

Tennessee.—In re Henderson, (Tenn. 1890) 14 S. W. 488.

Wisconsin.— Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

See 3 Cent. Dig. tit. "Appeal and Error," § 3215.

Additional briefs.— A rehearing will not be granted in order that either party may file additional briefs or ask for an oral argument. Rownd *v.* State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395.

Preliminary orders.— A petition for rehearing will not lie in case of preliminary or interlocutory orders made by the appellate court. Prout *v.* Mounce, (Ida. 1899) 57 Pac. 307.

Surprise of counsel.— That counsel for the unsuccessful party was surprised at the result of the original hearing constitutes no grounds for reopening the cause. People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850.

Unconstitutionality of court.— A petition for a rehearing, on the ground of the unconstitutionality of the court, being inappropriate, will be dismissed without prejudice to petitioner's right to move to set aside the judgment. Williams *v.* Benet, 35 S. C. 598, 14 S. E. 288.

In some jurisdictions no reargument will be granted unless some member of the court who concurred in the judgment doubts the correctness of his opinion and desires a further argument on the subject, and not then unless the proposition receives the support of a majority of the judges who heard the case. Roman *v.* Mali, 42 Md. 513; Johns *v.* Johns, 20 Md. 58; Kent *v.* Waters, 18 Md. 53; Brown *v.* Aspden, 14 How. (U. S.) 25, 14 L. ed. 311; Fendall *v.* U. S., 12 Ct. Cl. 305.

13. Moore *v.* Beaman, 112 N. C. 558, 17 S. E. 676; Emry *v.* Raleigh, etc., R. Co., 105 N. C. 44, 11 S. E. 162; Neal *v.* Suber, (S. C. 1899) 34 S. E. 411; Sloan *v.* Latimer, 41 S. C. 217, 19 S. E. 491, 691; Witte *v.* Weinberg, 40 S. C. 545, 18 S. E. 886; Munro *v.* Long, 35 S. C. 615, 15 S. E. 553; Andrews *v.* Crenshaw, 4 Heisk. (Tenn.) 151; Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512; *In re* McKnight, 4 Utah 237, 9 Pac. 299.

14. *California.*— People *v.* Moran, (Cal. 1892) 31 Pac. 853.

Indiana.— Anderson *v.* Anderson, 141 Ind. 567, 40 N. E. 131, 1082.

Kansas.— Chicago, etc., R. Co. *v.* Abilene Town-Site Co., 42 Kan. 97, 21 Pac. 1112.

Maryland.— Dorsey *v.* Gary, 37 Md. 64, 11 Am. Rep. 528; Paine *v.* France, 26 Md. 46.

Michigan.—Cobbs *v.* Philadelphia F. Assoc., 68 Mich. 465, 36 N. W. 788; Taylor *v.* Boardman, 24 Mich. 287.

Nebraska.— Tecumseh Nat. Bank *v.* Saunders, 51 Nebr. 801, 71 N. W. 779.

New Hampshire.—Russell *v.* Dyer, 43 N. H. 396.

New York.— Kessler *v.* Levy, 12 Misc. (N. Y.) 116, 33 N. Y. Suppl. 54, 66 N. Y. St. 697; Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 478.

Wisconsin.— Tallman *v.* Ely, 8 Wis. 218.

See 3 Cent. Dig. tit. "Appeal and Error," § 3226.

An erroneous reason for a right conclusion is no ground for a rehearing. Wilson *v.* Vance, 55 Ind. 584. See also Earp *v.* Richardson, 81 N. C. 4; Blackwell *v.* Wright, 74 N. C. 733.

15. Peoples *v.* Evening News Assoc., 51 Mich. 11, 16 N. W. 185, 691; Ayer *v.* Stewart, 16 Minn. 89; Woodbury *v.* Dorman, 15 Minn. 341; Stearns *v.* Hemmens, 3 N. Y. Suppl. 16, 22 N. Y. St. 24; Weisel *v.* Cobb, 122 N. C. 67, 30 S. E. 312; Devereux *v.* Devereux, 81 N. C. 8. See 3 Cent. Dig. tit. "Appeal and Error," § 3224.

c. Defects or Errors in Record. A rehearing will not be granted because of defects or errors in the record.[16]

d. Failure to Set Out Reasons For Opinion. The fact that the appellate court did not in its opinion detail the evidence and circumstances, showing the process by which it reached its conclusion, is not ground for reargument.[17]

e. Failure to Sufficiently Present Cause. The failure of counsel to sufficiently present the cause for the determination of the appellate court furnishes no ground for a rehearing.[18]

f. Important Questions Involved. A rehearing will not be granted solely because questions of great importance are involved.[19]

g. Inaccuracy of Statement. A rehearing will not be granted because of inaccuracy of statement in the opinion filed, where such inaccuracy is wholly immaterial to the conclusion therein reached.[20]

h. Matters Not in Record. A rehearing will not be granted on account of matters not in the record when the case was decided.[21]

i. Matters Not Urged at First Hearing. A party asking for a rehearing will

The death of a member of the court and the qualification of his successor does not render necessary a reargument of a case, argued and submitted prior thereto, where the surviving judges, constituting a majority of the court, are agreed as to its disposition. State *v.* Sioux Falls Brewing Co., 5 S. D. 360, 58 N. W. 928, 26 L. R. A. 138. See also Aultman *v.* Utsey, 35 S. C. 596, 14 S. E. 289, wherein it was held that an objection that the court had no authority to hear a case, because at the time of the hearing the chief justice was dead and no successor had been appointed, is not appropriate to a petition for a rehearing.

Hearing before partial bench.— An objection made after the decision of a cause that a full court was not present at the hearing comes too late, a majority of the court having been present and concurring in the judgment. Hubbard *v.* Fravell, 12 Lea (Tenn.) 304.

16. *Alabama.*— See Godwin *v.* Hooper, 45 Ala. 613.

Illinois.—McPherson *v.* Nelson, 44 Ill. 124; Boynton *v.* Champlin, 40 Ill. 63. *Compare* Pearl *v.* Wellman, 9 Ill. 395.

Indiana.— Miller *v.* Evansville, etc., R. Co., 143 Ind. 570, 41 N. E. 801, 42 N. E. 806; Mansur *v.* Churchman, 84 Ind. 573; Merrifield *v.* Weston, 68 Ind. 70; Smith *v.* Goetz, 20 Ind. App. 142, 49 N. E. 386, 50 N. E. 397.

Kansas.— See Topeka *v.* Myers, 35 Kan. 554, 12 Pac. 487.

Kentucky.—Christopher *v.* Searcy, 12 Bush (Ky.) 171; Owingsville, etc., Turnpike Road Co. *v.* Hamilton, 21 Ky. L. Rep. 1150, 54 S. W. 175; Long *v.* Kerrigan, 13 Ky. L. Rep. 433, 16 S. W. 708, 17 S. W. 441; Gwinn *v.* Duvall, 9 Ky. L. Rep. 684. *Compare* Doty *v.* Berea College, 12 Ky. L. Rep. 964, 15 S. W. 1063, 16 S. W. 268.

Missouri.— Schaeffer *v.* Farrar, 6 Mo. App. 572. *Compare* Linahan *v.* Barley, 124 Mo. 560, 28 S. W. 84.

New York.— See Krakowski *v.* North New York Co-operative Bldg., etc., Assoc., 4 Misc. (N. Y.) 601, 24 N. Y. Suppl. 1138, 54 N. Y. St. 119.

South Dakota.—Harrison *v.* Chicago, etc., R. Co., 6 S. D. 572, 62 N. W. 376.

Tennessee.— Chesapeake, etc., R. Co. *v.* Hendricks, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488.

Texas.— Ross *v.* McGowen, 58 Tex. 603; McMickle *v.* Texarkana Nat. Bank, 4 Tex. Civ. App. 210, 23 S. W. 428.

Wisconsin.—*Compare* Allerding *v.* Cross, 15 Wis. 530.

See 3 Cent. Dig. tit. "Appeal and Error," § 3222.

As to amendment and correction of record, generally, see *supra*, XIII, J, 2.

17. Edgerley *v.* Long Island R. Co., 46 N. Y. App. Div. 284, 61 N. Y. Suppl. 677.

18. *Georgia.*— See Maddox *v.* Bramlett, 84 Ga. 89, 11 S. E. 129.

Minnesota.— Derby *v.* Gallup, 5 Minn. 119.

Mississippi.— Ramsey *v.* Barbaro, 12 Sm. & M. (Miss.) 293.

Nevada.— State *v.* Woodbury, 17 Nev. 337, 30 Pac. 1006.

New York.— Rogers *v.* Laytin, 81 N. Y. 642; Drucker *v.* Patterson, 2 Hilt. (N. Y.) 135.

See 3 Cent. Dig. tit. "Appeal and Error," § 3219.

19. Butler *v.* Walker, 80 Ill. 345; Camfield *v.* U. S., 67 Fed. 17, 32 U. S. App. 123, 14 C. C. A. 228. See 3 Cent. Dig. tit. "Appeal and Error," § 3216.

Questions of public importance.— It is no ground for exception to the rule that a rehearing will not be granted, though the court was equally divided, unless some material fact or principle has been overlooked or disregarded, that the question involved is of grave public importance, involving the interests of the public, generally, as well as of the parties, and that the question arises out of the construction of a written instrument in its relation to a statute. Newton *v.* Woodley, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1. *Compare* Spofford *v.* Rowan, 6 N. Y. St. 273.

20. Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

21. Martin *v.* Royse, 21 Ky. L. Rep. 1353, 54 S. W. 177; New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332.

not be permitted to set up new and different grounds in support of his petition from those urged by him in the original hearing.[22] It has, however, been held that after a rehearing has been granted and the cause has been argued on the rehearing, and a manifest error is shown, it should be corrected, though it was not pointed out or discovered in the former hearing, or was then considered, and was erroneously decided.[23]

j. Newly-Discovered Evidence. A rehearing will not be granted on the ground of after-discovered evidence.[24]

k. Points or Authorities Overlooked. A rehearing will be granted if the court has overlooked material points or decisive authorities duly submitted by counsel.[25] But the fact that a point presented on the argument is not discussed

As to effect of change in state of facts pending appeal see *infra*, XVIII, B.

22. *Alabama.*—Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604; Henderson *v.* Huey, 45 Ala. 275.

California.—San Francisco *v.* Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835; Kellogg *v.* Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104.

Colorado.— Durango *v.* Chapman, 27 Colo. 169, 60 Pac. 635; Lamar Canal Co. *v.* Amity Land, etc., Co., 26 Colo. 370, 58 Pac. 600, 77 Am. St. Rep. 261; Nix *v.* Miller, 26 Colo. 203, 57 Pac. 1084.

Florida.— Sauls *v.* Freeman, 24 Fla. 225, 4 So. 577; Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

Illinois.—Ellis *v.* Sisson, 96 Ill. 105; Davis *v.* Gibson, 70 Ill. App. 273; West Chicago Park Com'rs *v.* Kincade, 64 Ill. App. 113.

Indiana.— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728, 734; State *v.* Halter, (Ind. 1898) 49 N. E. 7; Lake Erie, etc., R. Co. *v.* Griffin, (Ind. App. 1900) 57 N. E. 722.

Iowa.— Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86.

Kansas.— Western News Co. *v.* Wilmarth, 34 Kan. 254, 8 Pac. 104; Headley *v.* Challiss, 15 Kan. 602.

Louisiana.— Broom's Succession, 14 La. Ann. 67; Sorbe *v.* Merchants' Ins. Co., 6 La. 185.

Michigan.— Ryerson *v.* Eldred, 18 Mich. 490.

Mississippi.— Hatto *v.* Brooks, 33 Miss. 575.

Montana.—Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

Nevada.— Beck *v.* Thompson, 22 Nev. 419, 41 Pac. 1.

New York.— People *v.* Supervisor, 91 Hun (N. Y.) 206, 36 N. Y. Suppl. 348, 71 N. Y. St. 185.

North Carolina.— Weathersbee *v.* Farrar, 98 N. C. 255, 3 S. E. 482; McDonald *v.* Carson, 95 N. C. 377.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Oregon.— Coulter *v.* Portland Trust Co., 20 Oreg. 469, 26 Pac. 565, 27 Pac. 266.

South Carolina.— Chamberlain *v.* Northeastern R. Co., 41 S. C. 399, 19 S. E. 743, 996, 44 Am. St. Rep. 717, 25 L. R. A. 139; Knox *v.* South Carolina R. Co., 5 S. C. 73.

South Dakota.— John A. Tolman Co. *v.* Bowerman, 6 S. D. 206, 60 N. W. 751.

Utah.— Farrell *v.* Pingree, 5 Utah 530, 17 Pac. 453.

Washington.— Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029.

United States.— Gregory *v.* Pike, 67 Fed. 837, 21 U. S. App. 658, 15 C. C. A. 33; U. S. *v.* Hall, 63 Fed. 472, 21 U. S. App. 402, 426, 11 C. C. A. 294.

See 3 Cent. Dig. tit. "Appeal and Error," § 3221.

23. Hodgin *v.* Peoples Nat. Bank, 125 N. C. 503, 34 S. E. 709, 712. See also Groth *v.* Kersting, 23 Colo. 213, 47 Pac. 393, wherein it was held that a manifest error, not called to the court's attention in the oral argument, or in the briefs filed prior to the writing of the decision, may be corrected on a rehearing. And see Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 169 Mass. 157, 47 N. E. 606, wherein it was said that while it is not the practice of the supreme court to rehear or pass upon questions that have been once argued and decided or waived or abandoned at a former hearing, the court may do so in its discretion.

24. Zuver *v.* Lyons, 40 Iowa 510; Nessley *v.* Ladd, 30 Oreg. 564, 48 Pac. 420; Cutler *v.* The Steamship Columbia, 1 Oreg. 101; Reid *v.* Wells, (S. C. 1900) 34 S. E. 939; International, etc., R. Co. *v.* Anderson County, 59 Tex. 654. See also Case *v.* Case, 26 Mich. 484, wherein it was held that proceedings will not be stayed to permit an application for a rehearing on the ground of newly-discovered evidence, where the statement of the proposed new evidence is vague and indicates nothing more than cumulative testimony.

25. *Michigan.*— Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

New York.— Fosdick *v.* Hempstead, 126 N. Y. 651, 27 N. E. 382, 37 N. Y. St. 130; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Mount *v.* Mitchell, 32 N. Y. 702; Hand *v.* Rogers, 16 Misc. (N. Y.) 364, 38 N. Y. Suppl. 2, 74 N. Y. St. 370; Taggart *v.* Rogers, 3 N. Y. Suppl. 322, 21 N. Y. St. 320.

North Carolina.— Hodgin *v.* Peoples Nat. Bank, 125 N. C. 503, 34 S. E. 709, 712; Weathers *v.* Borders, 124 N. C. 610, 32 S. E. 881; Hudson *v.* Jordan, 110 N. C. 250, 14 S. E. 741; Fry *v.* Currie, 103 N. C. 203, 9 S. E. 393; Haywood *v.* Daves, 81 N. C. 6.

Pennsylvania.— Lefevre's Estate, 193 Pa.

by the court in its opinion gives rise to no inference that the court has overlooked such point.[26]

1. Want of Necessary Parties. An objection for want of necessary parties, taken on a motion for a rehearing, will prevail only where it appears that an indispensable party is wanting.[27]

5. Application For Rehearing — a. Who May Make. One who is not a party to the record has no right to file a petition for rehearing, without the consent of the record parties.[28]

b. Manner of Application. An application for a rehearing must be made in the manner indicated by statute or rule of court.[29]

c. Requisites and Sufficiency of Application. An application for a rehearing should set forth plainly and concisely the grounds on which the application is based.[30] Any ground which is not included in the application will be

St. 225, 44 Wkly. Notes Cas. (Pa.) 553, 44 Atl. 272.

South Carolina.—Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423.

South Dakota.— Kirby *v.* Western Union Tel. Co., 4 S. D. 439, 57 N. W. 199, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

See 3 Cent. Dig. tit. "Appeal and Error," § 3220.

Failure to notice all authorities cited.—The fact that all the authorities cited are not noticed in the opinion is no ground for a rehearing. Moore *v.* Beaman, 112 N. C. 558, 17 S. E. 676.

Neglect to call court's attention to points. — The failure of the court, on appeal, to notice and pass on points in the record to which counsel have neglected to call the court's attention is no ground for a rehearing. Whitby *v.* Rowell, 82 Cal. 635, 23 Pac. 40, 382. See also Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

26. Colonial City Traction Co. *v.* Kingston City R. Co., 154 N. Y. 493, 48 N. E. 900. See also Dammert *v.* Osborn, 141 N. Y. 564, 35 N. E. 1088, 60 N. Y. St. 337.

Points necessarily determined.— A rehearing will not be granted where the questions which it is alleged the court has omitted to decide are necessarily determined, though not in express terms. State *v.* Barnes, 25 Fla. 86, 5 So. 703; Meinhard *v.* Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771.

27. Weightman *v.* Washington Critic Co., 4 App. Cas. (D. C.) 136.

As to parties on appeal, generally, see *supra*, VI [2 Cyc. 756].

28. Charleston *v.* Cadle, 167 Ill. 647, 49 N. E. 192; Apple *v.* Atkinson, 34 Ind. 518; Louisville, etc., R. Co. *v.* Com., 20 Ky. L. Rep. 1102, 47 S. W. 210; Life Assoc. of America *v.* Hall, 33 La. Ann. 49. See 3 Cent. Dig. tit. "Appeal and Error," § 3230.

Attorney-general as amicus curiæ.— Where a suit pending in the supreme court is of such character as to affect the entire people of the state, so as to require the services of the attorney-general, and he is ordered by the court to appear in behalf of the people, he is not a party to the suit, and is therefore not entitled to petition for a rehearing, his relation being that of an *amicus curiæ*. Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567. See also Amicus Curiæ, IV [2 Cyc. 283.]

Cross-errors.— A judgment will not be reversed upon cross-errors, on rehearing where appellee insists upon an affirmance of the judgment. Thomas *v.* Simmons, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381. See also Dudley *v.* Goddard, 11 Ky. L. Rep. 480, 12 S. W. 302, 382.

Failure to make argument.— A rehearing will not be granted upon the petition of a party who fails to make an argument when the cause is submitted. Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533.

A receiver is not entitled to file a petition for a rehearing on an appeal from the order appointing him, he not being aggrieved by the judgment. People *v.* Union Bldg., etc., Assoc., 127 Cal. 400, 59 Pac. 692.

29. Willson *v.* Broder, 24 Cal. 190 (wherein it was held that a cause cannot be reheard on application of counsel, except upon petition filed); Adams *v.* McPherson, (Ida. 1894) 35 Pac. 690; Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709 (wherein it was held that a rehearing must be applied for by petition in writing). See 3 Cent. Dig. tit. "Appeal and Error," § 3231.

In North Carolina a rehearing will not be granted on a summary motion to modify the judgment of the appellate court. Ruffin *v.* Harrison, 91 N. C. 398. Nor can a rehearing be allowed in any criminal action. State *v.* Council, (N. C. 1901) 39 S. E. 814; State *v.* Jones, 69 N. C. 16.

In Tennessee an application for a rehearing should be made by petition. It is irregular to make such application by motion supported by *ex parte* affidavits. Taylor *v.* Boyd, 6 Heisk. (Tenn.) 611.

30. *Florida.*— Sauls *v.* Freeman, 24 Fla. 225, 4 So. 577; Jones *v.* Fox, 23 Fla. 462, 2 So. 853; Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

Indiana.— Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Finley *v.* Cathcart, (Ind. 1898) 49 N. E. 381; Reed *v.* Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466.

Louisiana.—Lacroix *v.* Camors, 34 La. Ann. 639.

regarded by the appellate court as waived, and consequently will not receive consideration.[31]

d. Time of Application — (i) *In General.* An application for a rehearing must be made within the time limited by statute or rule of court.[32] An application made after such time will not be considered in the absence of a sufficient excuse for the delay.[33]

Maryland.— Colvin *v.* Warford, 18 Md. 273.

Massachusetts.—Winchester *v.* Winchester, 121 Mass. 127.

Montana.— See Wells *v.* Clarkson, 2 Mont. 379.

Nebraska.— Crawford Co. *v.* Hathaway, (Nebr. 1901) 85 N. W. 303; Spencer *v.* Thistle, 14 Nebr. 21, 14 N. W. 550.

North Carolina.— Weathers *v.* Borders, 124 N. C. 610, 32 S. E. 881.

Texas.— Hurt *v.* Evans, 49 Tex. 311.

Washington.— Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

United States.— The Dago, 63 Fed. 182, 8 U. S. App. 651, 11 C. C. A. 117.

See 3 Cent. Dig. tit. "Appeal and Error," § 3234.

Certificate of counsel.— An application for a rehearing should be supported by certificate of counsel, when so required by rule of court. Hinds *v.* Keith, 57 Fed. 10, 13 U. S. App. 222, 314, 6 C. C. A. 231. See also Winchester *v.* Winchester, 121 Mass. 127.

Certificate of judge.— There must also be the certificate of a judge, who did not dissent on the former hearing, that it is a proper case for rehearing. Clark's Code Civ. Proc. N. C. (1900), p. 943.

Filing papers with petition.— No papers can be filed except the petition itself, in the form prescribed by rule of court. Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665; Smith *v.* Croom, 7 Fla. 180; Gregory *v.* Pike, 67 Fed. 837, 21 U. S. App. 658, 15 C. C. A. 33. See also Maverick *v.* Routh, 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008, wherein it was held that the filing of affidavits in support of a motion for rehearing, amendatory of the facts, is not permissible.

Form of application for rehearing is set out in People *v.* Pearson, 4 Ill. 406.

31. Willson *v.* Broder, 24 Cal. 190. See also Alvord *v.* Waggoner, (Tex. Civ. App. 1895) 29 S. W. 797.

Discourteous application.— A petition for a rehearing which is discourteous will be stricken from the files. Horton *v.* Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435. See also Foulkes *v.* Howes, 11 La. Ann. 448.

As to discourteous briefs see *supra*, XII, C, 7 [2 Cyc. 1017].

32. *California.*— Durgin *v.* Neal, 82 Cal. 595, 23 Pac. 375; Hanson *v.* McCue, 43 Cal. 178.

District of Columbia.—Adriaans *v.* Lyon, 8 App. Cas. (D. C.) 532.

Illinois.— Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 613, 48 N. E. 828; People *v.* Pearson, 4 Ill. 406.

Indiana.— Hutts *v.* Bowers, 77 Ind. 211; Fairbanks *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452, 30 N. E. 930.

Nebraska.— Barnesville First Nat. Bank *v.* Yocum, 12 Nebr. 208, 10 N. W. 706.

North Carolina.— Strickland *v.* Draughan, 91 N. C. 103.

South Dakota.—Wright *v.* Sherman, 3 S. D. 367, 53 N. W. 425, 17 L. R. A. 792.

Texas.— Baldridge *v.* Scott, 48 Tex. 178.

Wisconsin.— Gough *v.* Root, 73 Wis. 32, 40 N. W. 647, 41 N. W. 622.

Wyoming.— Chadron Bank *v.* Anderson, (Wyo. 1897) 49 Pac. 406.

United States.— Crabtree *v.* McCurtain, 66 Fed. 1, 27 U. S. App. 730, 13 C. C. A. 275.

See 3 Cent. Dig. tit. "Appeal and Error," § 3232.

In New York a motion for reargument, on appeal to the city court, must be made to the general term at no later period than the next succeeding term after the decision. Fraser *v.* Alpha Combined Heating, etc., Mfg. Co., 30 Misc. (N. Y.) 206, 61 N. Y. Suppl. 1129.

In North Carolina a petition for a rehearing is filed when first received by the clerk, and is docketed when he enters it on the record at the order of the justice granting the rehearing. Bird *v.* Gilliam, 123 N. C. 63, 31 S. E. 267.

After adjournment.— Under a rule of court requiring a motion for a rehearing to be filed within ten days after the filing of the opinion in the cause, a petition filed within ten days, but after the adjournment of court for the term, is not in time. Hughes *v.* Woodard, (Tenn. Ch. 1900) 63 S. W. 191.

Computation of time.— A rule of court that petitions to rehear must be filed within ten days means ten days from the delivering of the decision, and not ten days from the entering of a decree thereon. Patterson *v.* Greenville First Nat. Bank, (Tenn. 1898) 48 S. W. 225. And where, owing to the transcript being temporarily misplaced by the clerk after an opinion is filed, and the adjournment of the court for the holidays, before it is found, it is, without fault of counsel, impossible to make an application for a rehearing within the time prescribed by a rule of court, the appellate court, in computing such time, will count only the days in which the court is in session. Major *v.* Stone's River Nat. Bank, (Tenn. Ch. 1899) 64 S. W. 352. The first day of the period allowed is to be excluded, and the last day, also, when it falls on Sunday. Barcroft *v.* Roberts, 92 N. C. 249.

33. Brant *v.* Gallup, 117 Ill. 640, 7 N. E. 63; Pearl *v.* Wellman, 9 Ill. 395; McArthur

(II) *At Subsequent Term.* An application for a rehearing, made at a term subsequent to that at which the judgment in the case was rendered by the appellate court, will not be entertained.[34]

(III) *Extension of Time.* The court may, under special circumstances, extend the time for filing the application.[35]

e. Service of Application. A copy of an application for a rehearing should be served on the opposite party when so required to be done by rule of court.[36]

f. Answer. In Illinois the court will not permit an answer to be filed to a petition for a rehearing.[37]

g. Second Application. A second application for the rehearing of a cause, by the same party and upon the same grounds as a former application that has been considered and denied, will not be entertained.[38]

v. Henry, 34 Tex. 143; Houston, etc., R. Co. *v.* Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496; Kneeland *v.* Miles, (Tex. Civ. App. 1894) 25 S. W. 486.

Additional suggestions in respect to the grounds of an application for rehearing, proposed to be made after the time prescribed by the rules for the filing of the petition, will not be received as of course, but only upon proper cause shown. Hawley *v.* Simmons, 101 Ill. 654.

It is not sufficient excuse for failure to file a motion for rehearing in time that counsel, immediately on receiving notice of the decision, requested associate counsel, who resided in the city in which the court sat, to file such motion, and that such associate counsel was then sick, and, by reason thereof, failed to respond promptly to the request. Cowen *v.* Bloomberg, 15 Tex. Civ. App. 364, 39 S. W. 947.

34. *Dakota.*— Roberts *v.* Haggert, 4 Dak. 210, 29 N. W. 656.

Georgia.— Cooper *v.* Robert Portner Brewing Co., 113 Ga. 1, 38 S. E. 347.

Illinois.— People *v.* Pearson, 4 Ill. 406.

Iowa.— Emerson *v.* Tomlinson, 4 Greene (Iowa) 398.

Kansas.— See J. M. W. Jones Stationery, etc., Co. *v.* Hentig, 31 Kan. 317, 1 Pac. 529.

Louisiana.— Brooks *v.* Dolard, McGloin (La.) 279.

Maryland.— Dorsey *v.* Gary, 37 Md. 64, 11 Am. Rep. 528.

Mississippi.— *Compare* Roberts *v.* Edmundson, 4 Sm. & M. (Miss.) 730.

Tennessee.— Overton *v.* Bigelow, 10 Yerg. (Tenn.) 48.

Virginia.—Griffin *v.* Cunningham, 20 Gratt. (Va.) 31; Hodges *v.* Davis, 4 Hen. & M. (Va.) 400.

West Virginia.— Hall *v.* Virginia Bank, 15 W. Va. 323.

United States.— Bushnell *v.* Crooke Min., etc., Co., 150 U. S. 82, 14 S. Ct. 22, 37 L. ed. 1007; Brooks *v.* Burlington, etc., R. Co., 102 U. S. 107, 26 L. ed. 91; Hudson *v.* Guestier, 7 Cranch (U. S.) 1, 3 L. ed. 249.

See 3 Cent. Dig. tit. "Appeal and Error," § 3232.

In Illinois it has been held that where the opinion of the court is filed after the close of the term, or so late in the term that counsel have not time to prepare a petition for a rehearing before the final adjournment, the application may be made at the succeeding term. Selby *v.* Hutchinson, 10 Ill. 261.

In North Carolina, the petition may be filed during the term, or in vacation, or during the first twenty days of the next. Clark's Code Civ. Proc. N. C. (1900), p. 942.

35. Mills *v.* Lockwood, 40 Ill. 130; Louisville, etc., R. Co. *v.* Turner, 5 Ky. L. Rep. 647; Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399. But see Ogilvie *v.* Richardson, 14 Wis. 157, wherein it was held that after the time within which a motion for the rehearing of a cause has expired, and the papers have been remitted to the court below, an order cannot be granted extending the time for filing such motion. See also Hanson *v.* McCue, 43 Cal. 178; Coyote Gold, etc., Min. Co. *v.* Ruble, 9 Oreg. 121.

The employment of new counsel is no ground for extending the time prescribed by the rules of court for applying for a rehearing. Ferris *v.* Coover, 10 Cal. 589.

Stipulation of parties.— A rule of court, relating to the time for applying for a rehearing, cannot be waived by stipulation of the parties. Bernhard *v.* Brown, 31 Ill. App. 385.

36. Anstin *v.* Wilson, 52 Iowa 731, 3 N. W. 130, holding that the application should be served and proof of such service filed with the clerk. See also Adams *v.* Sharon, 89 Tenn. 335, 17 S. W. 1037; Wynn *v.* Wyatt, 11 Leigh (Va.) 612. See 3 Cent. Dig. tit. "Appeal and Error," § 3233.

37. Anonymous, 40 Ill. 130. But see Webster County *v.* Hutchinson, 60 Iowa 721, 9 N. W. 901, 12 N. W. 534, wherein it was held that, on rehearing, the petition therefor stands as the argument of the petitioner, and, if the court so indicates, the opposite party may file a reply to the petition.

38. Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685; Smith *v.* Dennison, 101 Ill. 657; Garrick *v.* Chamberlain, 100 Ill. 476; Williams *v.* Conger, 131 U. S. 390, 9 S. Ct. 793, 33 L. ed. 201. See also Coates *v.* Cunningham, 100 Ill. 463, wherein it was held that a motion to vacate an order, entered at a preceding term, denying a petition for the rehearing of a cause, will not be entertained. *Compare* Fallass *v.* Pierce, 30 Wis. 443.

See 3 Cent. Dig. tit. "Appeal and Error," § 3214.

h. Striking Out Application. A motion to strike out a petition for a rehearing must be made on notice.[39]

6. Scope and Conduct of Rehearing — a. In General. Where a rehearing is granted, generally, the cause is before the court for examination and decision as though it had never been considered and decided;[40] but, under an order granting a rehearing as to certain questions therein specified, no other questions will be considered.[41]

b. Continuance. If a rehearing is ordered on an *ex parte* application, the other side may be allowed a continuance for preparation.[42] But the court will not postpone a decision, upon an application for rehearing, in order that arguments and authorities, made and presented in another case, may be considered.[43]

c. Equal Division of Court. Equal division of the court on a motion for the rehearing of a judgment of reversal, previously rendered, leaves that judgment in force, and does not result in affirming the judgment of the lower court.[44]

d. Oral Arguments. Counsel will not be permitted to argue an application for a rehearing orally, if, by statute, the application is made the argument therefor.[45]

e. Use of Affidavits. On an application for a rehearing, affidavits outside the record will not be considered by the court.[46]

7. Effect of Granting Rehearing. When a rehearing is ordered, the first opinion is suspended and ceases to have any effect, excepting as incorporated in, or approved by, the opinion which is filed on rehearing.[47]

39. Chadron Bank *v.* Anderson, (Wyo. 1897) 49 Pac. 406.

40. Gilbert *v.* Southern Indiana Coal, etc., Co., 62 Ind. 522; Booher *v.* Goldsborough, 44 Ind. 490. See 3 Cent. Dig. tit. "Appeal and Error," § 3241.

Second rehearing.— If, after a rehearing has been granted and the cause again decided, the same party may file a second petition for a rehearing, it can only reach questions upon which the first rehearing was granted. Crawfordsville *v.* Johnson, 51 Ind. 397.

41. Gatling *v.* Newell, 12 Ind. 116; Hopkins *v.* Laplace, 14 La. 145; Weisel *v.* Cobb, 122 N. C. 67, 30 S. E. 312. See also Arizona Prince Copper Co. *v.* Copper Queen Copper Co., (Ariz. 1886) 11 Pac. 396.

Points decided at the former hearing will not be reopened unless the subject-matter of the mistake, omission, or other cause for which the rehearing was granted enters into, and materially affects, such points. Christy *v.* Burch, 25 Fla. 978, 6 So. 857.

42. Zeigler *v.* Vance, 3 Iowa 528.

43. Furlong *v.* Riley, 104 Ill. 97, wherein it was said that "this would but be indirectly permitting additional arguments or suggestions in support of the petition for rehearing after the time prescribed by the rules for the filing thereof."

44. Carmichael *v.* Eberle, 177 U. S. 63, 20 S. Ct. 571, 44 L. ed. 672. But see Richards *v.* Burden, 59 Iowa 723, 7 N. W. 17, 13 N. W. 90, wherein it was held that, where the court on the rehearing of a cause is equally divided as to whether the judgment of the lower court should be affirmed, that judgment stands affirmed by operation of law, regardless of the fact that the court, in its first opinion, may have thought that the judgment should be reversed.

45. Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

46. *Michigan.*— Vanneter *v.* Crossman, 39 Mich. 610.

Minnesota.— Smith *v.* St. Paul, 69 Minn. 276, 72 N. W. 104, 210.

Nebraska.— Morrill *v.* Taylor, 6 Nebr. 236.

Texas.— Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 37 S. W. 26. See also Maverick *v.* Routh, 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008.

Wisconsin.— Weld *v.* Johnson Mfg. Co., 84 Wis. 537, 54 N. W. 335, 998.

An exhibit not filed in court, but merely attached to the petition for rehearing, will not be considered. Flaugher *v.* Yates, (Ky. 1900) 57 S. W. 244.

A nunc pro tunc order, filing a bill of exceptions entered in the lower court after the affirmance of a judgment on appeal, will not be considered on a petition for a rehearing. Louisville Bridge Co. *v.* Neafus, (Ky. 1901) 63 S. W. 600.

47. Argenti *v.* San Francisco, 16 Cal. 255; Pitkin *v.* Peet, 96 Iowa 748, 64 N. W. 793; Stewart *v.* Stewart, 96 Iowa 620, 65 N. W. 976. See 3 Cent. Dig. tit. "Appeal and Error," § 3213.

Effect as supersedeas.— A motion for a rehearing in an equity cause does not, *per se*, operate as a supersedeas or stay of remittitur. Columbia Min. Co. *v.* Holter, 1 Mont. 429. But see Turner *v.* Booker, 2 Dana (Ky.) 334, wherein it was held that a petition for a rehearing has the effect of suspending the judgment until the petition is disposed of.

As to supersedeas on appeal, generally, see *supra*, VIII [2 Cyc. 885].

To entitle a party to an injunction pending a rehearing, he ought to present a *prima facie* case — such a state of facts or of cir-

XVII. REVIEW.[48]

A. Scope and Extent of Review — 1. In General. The power of appellate courts is limited and defined by constitutions and statutes made in pursuance thereof. Save where expressly conferred, they have no original jurisdiction, and in the exercise of their appellate jurisdiction are limited to a review of the actual proceedings of the lower court, and can consider no original matter not connected with those proceedings and acted upon below. Where, however, an appellate court has once obtained jurisdiction of a cause, it obtains it for all purposes, and may give judgment upon all points properly presented for decision.[49]

2. Appeal From Part of Judgment. In case of an appeal from a part of a judgment or decree, the appellate court will not review the whole judgment or decree.[50]

cumstances as, if true, would entitle him to a reversal of the decree. Luckett *v.* White, 10 Gill & J. (Md.) 480.

Vacation of judgment.— The granting of a rehearing without restriction operates to vacate the judgment of the appellate court, so that thereafter the cause stands as if no judgment had been entered. Hook *v.* Mercantile Trust Co., 95 Fed. 41, 36 C. C. A. 645. See also Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

48. As to decisions reviewable see *supra*, III [2 Cyc. 538].

As to law by which appeals are governed see *supra*, I, C, 2, g [2 Cyc. 520]; *infra*, XVIII, B, 4.

As to necessity of: Jurisdiction in lower court see *supra*, II, C [2 Cyc. 537]. Record showing jurisdiction in lower court see *supra*, XIII, A, 2 [2 Cyc. 1032].

As to persons entitled to review see *supra*, IV, A [2 Cyc. 626].

As to presentation and reservation in lower court of grounds of review see *supra*, V [2 Cyc. 660].

As to review in federal courts see Courts.

As to time of taking proceedings for review see *supra*, VII, A [2 Cyc. 789].

As to sufficiency of record to present questions for review see *supra*, XIII, L.

49. *Alabama.*—Randolph *v.* Rosser, 7 Port. (Ala.) 249.

Colorado.— People *v.* Court of Appeals, 24 Colo. 186, 49 Pac. 36.

Connecticut.— Smedley *v.* Fair Haven, etc., R. Co., 73 Conn. 410, 47 Atl. 652.

District of Columbia.— Stone *v.* Chesapeake, etc., Invest. Co., 15 App. Cas. (D. C.) 585.

Indiana.— Benson *v.* Christian, 120 Ind. 535, 29 N. E. 26; Feder *v.* Field, 117 Ind. 386, 20 N. E. 129.

Iowa.— Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120; Doolittle *v.* Shelton, 1 Greene (Iowa) 271.

Kansas.— Alexandria, etc., R. Co. *v.* Johnson, 61 Kan. 417, 59 Pac. 1063.

Kentucky.— Pittman *v.* Wakefield, 90 Ky. 171, 13 S. W. 525; Hahn *v.* Henry, 8 Ky. L. Rep. 349, 1 S. W. 486.

Louisiana.— Zollicoffer *v.* Briggs, 3 Rob. (La.) 236; Bauduc *v.* Domingon, 8 Mart. N. S. (La.) 434; Miller *v.* Mercier, 3 Mart. N. S. (La.) 229.

Maine.— Head *v.* Merrill, 34 Me. 586.

Maryland.— Stanley *v.* Safe Deposit, etc., Co., 87 Md. 450, 40 Atl. 53; Handy *v.* Hopkins, 59 Md. 157.

Michigan.— Fletcher *v.* Moore, 42 Mich. 577, 4 N. W. 295.

Missouri.— Leavenworth Terminal R., etc., Co. *v.* Atchison, 137 Mo. 218, 37 S. W. 913; State *v.* Francis, 95 Mo. 44, 8 S. W. 1.

New York.— Barker *v.* Wing, 58 Barb. (N. Y.) 73; Matter of Livingston, 32 How. Pr. (N. Y.) 20.

Tennessee.— Clariday *v.* Reed, (Tenn. Ch. 1898) 53 S. W. 302.

West Virginia.— Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184.

Wisconsin.— Hubbell *v.* McCourt, 44 Wis. 584.

United States.— Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481.

See 3 Cent. Dig. tit. "Appeal and Error," § 3247.

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Per Marshall, C. J., in Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

The power of appellate courts is limited to the judgments and orders of courts. Orders made by judges or other officers, out of court, cannot be the subject of review therein in the first instance. Hubbell *v.* McCourt, 44 Wis. 584.

Indicating opinion on question not in case. — In People *v.* San Francisco Fire Dept., 14 Cal. 479, the court refused to decide questions not properly before it, though requested so to do by all parties; but, as the question was one which much concerned the public to have speedily settled, the court indicated an opinion upon it, though saying that the opinion was binding upon no one.

50. *California.*—*In re* Burdick, (Cal. 1895) 40 Pac. 35; Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

3. Errors Committed in Other Suits. On appeal in one suit errors committed in another and distinct suit cannot be considered.[51]

4. Grounds of Decision of Lower Court — a. In General. An appellate court is not confined to the grounds assigned by the court below for its decision, but may sustain a judgment on grounds other than those assigned by the lower court.[52]

b. Correct Decision Based on Erroneous Grounds. Where a judgment or order is correct, it will not be reversed on appeal because the trial court has based its decision on erroneous or insufficient grounds, or has stated no reasons therefor.[53] The ground on which the court below proceeded is not a subject of

Connecticut.— Scutt's Appeal, 46 Conn. 38.
Kentucky.— Leavison *v.* Harris, 12 Ky. L. Rep. 488, 14 S. W. 343.
Louisiana.— Ikerd *v.* Postlewhaite, 34 La. Ann. 1235.
Maine.— Emery *v.* Bradley, 88 Me. 357, 34 Atl. 167.
Massachusetts.— Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288.
Nevada.— Meadow Valley Min. Co. *v.* Dodds, 6 Nev. 261.
New York.—Robertson *v.* Bullions, 11 N. Y. 243; Kelsey *v.* Western, 2 N. Y. 500. *Compare* Hamilton *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 491, 8 N. Y. Suppl. 546, 29 N. Y. St. 28, 24 Abb. N. Cas. (N. Y.) 156, 18 N. Y. Civ. Proc. 164.
Washington.— Le May *v.* Baxter, 11 Wash. 649, 40 Pac. 122.
Wisconsin.— Mœrchen *v.* Stoll, 48 Wis. 307, 4 N. W. 352.
United States.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 21 U. S. App. 50, 9 C. C. A. 468.
See 3 Cent. Dig. tit. "Appeal and Error," § 3293.
But see Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24, in which it was held that, upon an appeal from part of a decree which adjusts the respective rights of various creditors of an insolvent, the entire record is brought before the supreme court, since the determination of the claim of any creditor necessarily affects the rights of all.

51. Adoue *v.* Jemison, 65 Tex. 680.
Review in action at law of errors in equitable proceedings.— An appellate court cannot, upon review of an action at law, consider errors alleged to have been committed in equitable proceedings, though the two cases are between the same parties and refer to the same subject-matter. Oatman *v.* Epps, 15 Oreg. 437, 15 Pac. 709; Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628.

52. *Alabama.*— Humphreys *v.* Burleson, 72 Ala. 1; Smith *v.* Phillips, 54 Ala. 8.
California.— Nally *v.* McDonald, 77 Cal. 284, 19 Pac. 418.
Iowa.— Stuber *v.* Gannon, 98 Iowa 228, 67 N. W. 105.
Kansas.— McCreary *v.* Cockrill, 3 Kan. 37.
Michigan.— Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.
Minnesota.— Morrow *v.* St. Paul City R. Co., 65 Minn. 382, 67 N. W. 1002.
Missouri.— Millar *v.* Madison Car Co., 130 Mo. 517, 31 S. W. 574; Hewitt *v.* Steele, 118 Mo. 463, 24 S. W. 440.
New York.— People *v.* Lyman, 157 N. Y. 368, 52 N. E. 132; People *v.* Essex County, 70 N. Y. 228; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; People *v.* Green, 1 Hun (N. Y.) 1.
Pennsylvania.— Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491.
South Carolina.— State *v.* Beaufort, 39 S. C. 5, 17 S. E. 355; Weinges *v.* Cash, 15 S. C. 44; Coleman *v.* Chester, 14 S. C. 286; Southern Porcelain Mfg. Co. *v.* Thew, 5 S. C. 5.
Vermont.— Hawley *v.* Soper, 18 Vt. 320.
See 3 Cent. Dig. tit. "Appeal and Error," § 3406.

53. *Alabama.*— Stiles *v.* Lightfoot, 26 Ala. 443; Cave *v.* Webb, 22 Ala. 583.
Arkansas.— Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; Gibson *v.* Williams, 22 Ark. 224.
California.— Matter of Martin, 113 Cal. 479, 45 Pac. 813; Groome *v.* Almstead, 101 Cal. 425, 35 Pac. 1021.
Colorado.— Home Ins. Co. *v.* Atchison, etc., R. Co., 19 Colo. 46, 34 Pac. 281; Hall *v.* Rockwell, 8 Colo. 103, 6 Pac. 927.
Connecticut.— Chase *v.* Benedict, 72 Conn. 322, 44 Atl. 507; Thresher *v.* Stonington Sav. Bank, 68 Conn. 201, 36 Atl. 38.
District of Columbia.— Howes *v.* District of Columbia, 2 App. Cas. (D. C.) 188.
Florida.— Smith *v.* Croom, 7 Fla. 180.
Georgia.— Whitehead *v.* Patterson, 88 Ga. 748, 16 S. E. 66; Collins *v.* State, 78 Ga. 87.
Illinois.— *In re* Grossman, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23.
Indiana.— Blanchard *v.* Wilbur, 153 Ind. 387, 55 N. E. 99; Ohio, etc., R. Co. *v.* Shultz, 31 Ind. 150.
Iowa.— McConn *v.* Root, 52 Iowa 727, 3 N. W. 143; Jamison *v.* Perry, 38 Iowa 14.
Kansas.— Kallman *v.* U. S. Express Co., 3 Kan. 205; Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.
Kentucky.— Ireland *v.* Berryman, 3 Bush (Ky.) 356; Poor *v.* Robinson, 13 Bush (Ky.) 290.
Louisiana.— State *v.* Judges Ct. Appeals, 37 La. Ann. 582; Seyburn *v.* Deyris, 25 La. Ann. 483.
Maine.— Prescott *v.* Hobbs, 30 Me. 345; Warren *v.* Walker, 23 Me. 453.

inquiry in the appellate court.[54] Thus, the assignment of an erroneous reason for a ruling on the pleadings,[55] on the admission or rejection of evidence,[56] or on the granting of a new trial,[57] is not sufficient to authorize a reversal of the judgment,

Maryland.— Friend *v.* Hamill, 34 Md. 298; Ellicott *v.* Turner, 4 Md. 476.

Massachusetts.— Prescott *v.* Prescott, 175 Mass. 64, 55 N. E. 805; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042.

Michigan.— Bowersox *v.* Bowersox, 115 Mich. 24, 72 N. W. 986; Garn *v.* Lockard, 108 Mich. 196, 65 N. W. 764.

Minnesota.—McCord *v.* Knowlton, 76 Minn. 391, 79 N. W. 397; Wieland *v.* Shillock, 23 Minn. 227.

Mississippi.— Torrey *v.* Fisk, 10 Sm. & M. (Miss.) 590.

Missouri.— Green *v.* St. Louis, 106 Mo. 454, 17 S. W. 496; Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720.

Montana.— Menard *v.* Montana Cent. R. Co., 22 Mont. 340, 56 Pac. 592; Thorp *v.* Freed, 1 Mont. 651.

Nebraska.— State *v.* Dickinson, 59 Nebr. 753, 82 N. W. 16.

Nevada.— Gaudette *v.* Travis, 11 Nev. 149; Conley *v.* Chedic, 6 Nev. 222.

New Jersey.— State *v.* Demarest, 32 N. J. L. 528.

New Mexico.— Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336.

New York.— Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657; Ballard *v.* Burgett, 40 N. Y. 314.

North Carolina.— Bell *v.* Cunningham, 81 N. C. 61.

North Dakota.— Tribune Printing, etc., Co. *v.* Barnes, 7 N. D. 591, 75 N. W. 904.

Ohio.— Franks *v.* State, 12 Ohio St. 1; McClintock *v.* Inskip, 13 Ohio 21.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90; Young's Estate, 65 Pa. St. 101.

South Carolina.— Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

South Dakota.—Bradley *v.* Interstate Land, etc., Co., 12 S. D. 28, 80 N. W. 141.

Tennessee.— Terrell *v.* Murray, 2 Yerg. (Tenn.) 384.

Texas.— Blethen *v.* Bonner, 93 Tex. 141, 53 S. W. 1016; Avery *v.* Popper, 92 Tex. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

Virginia.— Wilson *v.* Spencer, 11 Leigh (Va.) 271.

Washington.— Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 141, 31 Pac. 25.

West Virginia.—Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

United States.— Pennsylvania R. Co. *v.* Wabash, etc., R. Co., 157 U. S. 225, 15 S. Ct. 576, 39 L. ed. 682; Moffat *v.* Smith, 101 Fed. 771, 41 C. C. A. 671.

See 3 Cent. Dig. tit. "Appeal and Error," § 3402 *et seq.*

54. Clark *v.* Schipman, 24 S. C. 597; McClung *v.* Silliman, 6 Wheat. (U. S.) 598, 5 L. ed. 340.

55. East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493; Gillespie *v.* Torrance, 4 Bosw. (N. Y.) 36; Lockwood *v.* Reese, 76 Wis. 404, 45 N. W. 313; Krall *v.* Libbey, 53 Wis. 292, 10 N. W. 386. See 3 Cent. Dig. tit. "Appeal and Error," § 3411.

A correct ruling on a demurrer will be upheld though based on an erroneous ground. Tatum *v.* Tatum, 111 Ala. 209, 20 So. 341; Sechrist *v.* Rialto Irrigation Dist., 129 Cal. 640, 62 Pac. 261; Wilkins *v.* McGuire, 2 App. Cas. (D. C.) 448; Hunt *v.* Lane, 9 Ind. 248. See 3 Cent. Dig. tit. "Appeal and Error," § 3412.

56. *California.*— Miller *v.* Van Tassel, 24 Cal. 458.

Connecticut.— Osborne *v.* Taylor, 58 Conn. 439, 20 Atl. 605.

Illinois.— Morrison *v.* Hinton, 5 Ill. 457.

Indiana.— Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Baldwin *v.* Threlkeld, 8 Ind. App. 312, 35 N. E. 841.

Kansas.— Reed *v.* Arnold, 10 Kan. 102.

Kentucky.— Peck *v.* Inlow, 8 Dana (Ky.) 192. But see Lemon *v.* Johnson, 6 Dana (Ky.) 399.

Maryland.—Parker *v.* Sedwick, 4 Gill (Md.) 318.

Massachusetts.— Bean *v.* Hubbard, 4 Cush. (Mass.) 85.

Michigan.— Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375.

Mississippi.— Torrey *v.* Fisk, 10 Sm. & M. (Miss.) 590.

Missouri.— State *v.* Finn, 100 Mo. 429, 13 S. W. 712.

Ohio.— Westerhaven *v.* Clive, 5 Ohio 136; Ludlow *v.* Park, 4 Ohio 5.

Pennsylvania.— McCulloch *v.* Norris, 5 Pa. St. 285.

Tennessee.— Currier *v.* Louisville Bank, 5 Coldw. (Tenn.) 460.

Texas.— Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; Eppstein *v.* Wolfe, (Tex. Civ. App. 1896) 35 S. W. 52.

Virginia.— Wilson *v.* Spencer, 11 Leigh (Va.) 271.

Wisconsin.— Schwalm *v.* McIntyre, 17 Wis. 232.

United States.— Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394.

See 3 Cent. Dig. tit. "Appeal and Error," § 3413.

57. *California.*—Churchill *v.* Flournoy, 127 Cal. 355, 59 Pac. 791; Townley *v.* Adams, 118 Cal. 382, 50 Pac. 550; Shanklin *v.* Hall, 100 Cal. 26, 34 Pac. 636.

Kentucky.— Siller *v.* Cooper, 4 Bibb (Ky.) 90.

Minnesota.— Langan *v.* Iverson, 78 Minn. 299, 80 N. W. 1051.

Missouri.— Jegglin *v.* Roeder, 79 Mo. App. 428.

West Virginia.— Shrewsbury *v.* Miller, 10 W. Va. 115.

if such ruling can be upheld on other grounds. So, a decision based on several grounds will not be reversed, even though some of the grounds are erroneous.[58]

5. Matters Not Included in Reasons For Appeal. An appellate court will, as a rule, investigate only such questions as come within some of the reasons assigned for the appeal.[59]

6. Matters Not Necessary to Decision. Questions not directly involved in an appeal, and not necessary to the final determination of the cause, will not be considered by an appellate court.[60] And, where a judgment is reversed on one

See 3 Cent. Dig. tit. "Appeal and Error," § 3423.

58. *Alabama.*— McCreary *v.* Jones, 96 Ala. 592, 11 So. 600.

California.— Sherwood *v.* Kyle, 125 Cal. 652, 58 Pac. 270.

Georgia.— Crittenden *v.* Southern Home Bldg., etc., Assoc., 111 Ga. 266, 36 S. E. 643; Baker *v.* State, 90 Ga. 153, 15 S. E. 788.

Illinois.— Chicago First Nat. Bank *v.* Baker, 161 Ill. 281, 43 N. E. 1074.

Iowa.— Dungan *v.* Iowa Cent. R. Co., 96 Iowa 161, 64 N. W. 762.

Kentucky.— Gray *v.* Craig, 2 Bibb. (Ky.) 312; Trimble *v.* Lewis, 14 Ky. L. Rep. 527.

Missouri.— Hinchey *v.* Koch, 42 Mo. App. 230.

New York.— Ostrander *v.* Hart, 130 N. Y. 406, 29 N. E. 744, 42 N. Y. St. 513; Coleman *v.* Second Ave. R. Co., 38 N. Y. 201.

South Carolina.— Gee *v.* Humphries, 28 S. C. 606, 5 S. E. 615.

Texas.—Minor *v.* Lumpkin, (Tex. Civ. App. 1895) 29 S. W. 799.

See 3 Cent. Dig. tit. "Appeal and Error," § 3410.

59. Dodge *v.* Stickney, 60 N. H. 461; French *v.* Currier, 47 N. H. 88; Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305; Collins *v.* Hoxie, 9 Paige (N. Y.) 81; Boyce *v.* Boyce, 6 Rich. Eq. (S. C.) 302; High *v.* Coyne, 178 U. S. 111, 20 S. Ct. 747, 44 L. ed. 997. See 3 Cent. Dig. tit. "Appeal and Error," § 3282.

On appeal from a decree from a probate court, the appellate court, in some jurisdictions, acquires jurisdiction of the entire subject-matter of the decree, and may reverse for errors not assigned in the petition of appeal. Davis' Appeal, 39 Conn. 395; Watkins *v.* Bevans, 6 Md. 489; Waterman *v.* Ball, 64 How. Pr. (N. Y.) 368; Morse *v.* Low, 44 Vt. 561; Harvey *v.* Richards, 2 Gall. (U. S.) 216, 11 Fed. Cas. No 6,182. In others the rule stated in the text prevails. Wilkinson *v.* Ward, 42 Ill. App. 541; Murphy *v.* Walker, 131 Mass. 341; Slack *v.* Slack, 123 Mass. 443; Boynton *v.* Dyer, 18 Pick. (Mass.) 1; Dodge *v.* Stickney, 60 N. H. 461; Caswell *v.* Hill, 47 N. H. 407; Patrick *v.* Cowles, 45 N. H. 553; Clancey *v.* Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168. But the whole record is open to appellee, and any errors which he may point out will be corrected. Simmons *v.* Goodell, 63 N. H. 458, 2 Atl. 897; Caswell *v.* Hill, 47 N. H. 407; Twitchell *v.* Smith, 35 N. H. 48.

Reasons assigned in notice of appeal.—Under statutes requiring that the notice of an appeal must state the grounds upon which the appeal is taken, it is held that only the grounds specified in the notice can be considered in the appellate court. Matter of Davis, 149 N. Y. 539, 44 N. E. 185 [*affirming* 91 Hun (N. Y.) 53, 36 N. Y. Suppl. 822, 71 N. Y. St. 625]; Shook *v.* Colohan, 12 Oreg. 239, 6 Pac. 503.

Reasons assigned for new trial.— Where an unsuccessful party specifies the grounds of his motion for a new trial, he will be confined in the appellate court to such grounds, and be considered as having waived all other causes for a new trial. Frame *v.* Murphy, 56 Ill. App. 555; Gray *v.* Gwinn, 30 Ind. 409.

60. *California.*— Grant *v.* Dreyfus, (Cal. 1898) 52 Pac. 1074; Matter of Pearsons, 98 Cal. 603, 33 Pac. 451.

Florida.— Doe *v.* Willey, 6 Fla. 482.

Georgia.— Barclay *v.* Graves, 69 Ga. 769.

Idaho.— Crocheron *v.* Shea, (Ida. 1899) 57 Pac. 707.

Illinois.— Johnson *v.* Huling, 127 Ill. 14, 18 N. E. 786; English *v.* Leman, (Ill. 1888) 17 N. E. 758.

Indiana.— Consolidated Stone Co. *v.* Summit, 152 Ind. 297, 53 N. E. 235; Carmel Natural Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

Kansas.— Davis *v.* Wilson, 11 Kan. 74.

Kentucky.— Cincinnati, etc., R. Co. *v.* Woodford, 7 Ky. L. Rep. 101.

Louisiana.— New Orleans *v.* Board of Fire Com'rs, 50 La. Ann. 1000, 23 So. 906.

Maryland.—Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 46 Atl. 328, 1063; Marriott *v.* Handy, 8 Gill (Md.) 31.

Michigan.— Phillips *v.* Kalamazoo, 53 Mich. 33, 18 N. W. 547; Brownell *v.* Groesbeck, 36 Mich. 501.

Minnesota.— Gray *v.* Minnesota Tribune Co., 81 Minn. 333, 84 N. W. 113.

Missouri.— Thompson *v.* Metropolitan St. R. Co., 140 Mo. 125, 41 S. W. 454; Bradbury *v.* Cole, 62 Mo. App. 263.

Ohio.— Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463.

Oregon.— Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

Pennsylvania.— Philadelphia *v.* Philadelphia, etc., R. Co., 3 Wkly. Notes Cas. (Pa.) 492.

South Carolina.— Foote *v.* Van Ranst, 1 Hill Eq. (S. C.) 185.

Tennessee.— Clarksville, etc., Turnpike Co. *v.* Clarksville, (Tenn. Ch. 1896) 36 S. W. 979.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Smith *v.* Gans, 4 Tex. 72.

Utah.— Hague *v.* Nephi Irrigation Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 634, 41 L. R. A. 311; Wright *v.* Southern Pac. Co., 15 Utah 421, 49 Pac. 309.

ground, other grounds of error assigned will not, ordinarily, be passed on, as the same questions may not arise on a subsequent appeal.[61]

7. Stipulation as to Matters Reviewed. The parties may bind themselves by stipulation respecting the matters to be reviewed, and the disposition of the cause subsequent to decision.[62] The court, however, will not consider matters outside of the record stipulated to by the parties.[63]

B. Of Interlocutory, Collateral, and Supplementary Proceedings — 1. On Appeal From Final Judgment — a. Previous Orders or Decrees — (I) *In General.* As has already been pointed out,[64] previous or interlocutory orders[65] can be reviewed, in the absence of a permissive statute,[66] only on appeal from or

Vermont.— Clark *v.* Clark, 21 Vt. 490.

Wisconsin.— Saveland *v.* Green, 36 Wis. 612; Dressler *v.* Davis, 7 Wis. 527.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 57 Fed. 441.

See 3 Cent. Dig. tit. "Appeal and Error," § 3331 *et seq.*

Objections by appellee will not be considered when the judgment is affirmed. Paul *v.* Magee, 18 Cal. 698; Kammerling *v.* Armington, 58 Ind. 384; Marshall *v.* Harwood, 7 Md. 466; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

Where no jurisdiction exists in the appellate court to hear the case, it will not examine into and decide questions raised upon the appeal. Stough *v.* Chicago, etc., R. Co., 71 Iowa 641, 33 N. W. 149; Atty.-Gen. *v.* Lake County, 33 Mich. 289; Mills *v.* Brown, 16 Pet. (U. S.) 525, 10 L. ed. 1055.

61. *Indiana.*— Headrick *v.* Wisehart, 48 Ind. 144.

Iowa.— Donahue *v.* Wagner, 68 Iowa 358, 27 N. W. 274; Gilman *v.* Donovan, 59 Iowa 76, 12 N. W. 779.

Maryland.— Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457.

Michigan.— Fessenden *v.* Hill, 6 Mich. 242.

Mississippi.— McDowell *v.* Brooks, (Miss. 1895) 18 So. 657.

New York.— Baird *v.* Daly, 68 N. Y. 547; Duffany *v.* Ferguson, 66 N. Y. 482; Matter of Moss, 29 N. Y. Suppl. 421, 60 N. Y. St. 857.

North Carolina.— Caroon *v.* Rogers, 51 N. C. 240.

Ohio.— McNutt *v.* Kaufman, 26 Ohio St. 127.

Oregon.— Macintosh *v.* Henrici, 23 Oreg. 143, 31 Pac. 201.

Pennsylvania.— Woodrow *v.* Blythe, 4 Pennyp. (Pa.) 196.

Texas.— Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Allen *v.* Foster, 45 Tex. 9; Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652.

West Virginia.— Hess *v.* Johnson, 3 W. Va. 645; Thompson *v.* Updegraff, 3 W. Va. 629.

United States.— Jones *v.* Randolph, 104 U. S. 108, 26 L. ed. 671.

See 3 Cent. Dig. tit. "Appeal and Error," § 3338.

On affirmance of an order granting a new trial because the verdict was contrary to the evidence, other grounds, not affecting the merits of the case, will be left open for reëxamination, should they again arise on the new trial. Jarrell *v.* King, 84 Ga. 308, 10 S. E. 627.

62. Bloomfield R. Co. *v.* Grace, 112 Ind. 128, 13 N. E. 680; Favrot *v.* Bates, McGloin (La.) 130; Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 34 N. Y. St. 465, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183, 25 N. Y. St. 800]. See 3 Cent. Dig. tit. "Appeal and Error," § 3253.

As to conferring jurisdiction by consent see *supra*, II, B [2 Cyc. 536].

Legal effect of instrument.— An appellate court will not undertake to construe a contract upon mere stipulations of counsel as to its legal effect. American Ins. Co. *v.* Reed, 40 Mich. 622.

63. Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60; Schley *v.* Pullman's Palace Car Co., 120 U. S. 575, 7 S. Ct. 730, 30 L. ed. 789.

As to stipulation as to contents of record see *supra*, XIII, B, 4 [2 Cyc. 1075].

New matter, brought into the case by stipulation after decision by the lower court, cannot be considered on appeal. People *v.* Dewey, 128 N. Y. 606, 27 N. E. 1017, 38 N. Y. St. 885.

64. See *supra*, III, D, 1, a [2 Cyc. 586].

65. Definition.— An interlocutory order is one given, in the progress of a cause, upon some plea, proceeding, or default which is intermediate only, and does not finally determine or complete the suit. Bouvier L. Dict. [*citing* 3 Bl. Comm. 396]; Fox *v.* Matthiessen, 155 N. Y. 177, 49 N. E. 673 [*reversing* 84 Hun (N. Y.) 396, 32 N. Y. Suppl. 356, 65 N. Y. St. 554, 24 N. Y. Civ. Proc. 285]; Hymes *v.* Van Cleef, 15 N. Y. Suppl. 341, 39 N. Y. St. 810.

66. In some jurisdictions, by statute, interlocutory orders may be reviewed on appeal from a final judgment, even though such orders may be reviewed by separate appeal. Wright *v.* Chapin, 74 Hun (N. Y.) 521, 26 N. Y. Suppl. 825, 56 N. Y. St. 718. See also *supra*, III, D, 2 [2 Cyc. 591].

But if the order has been already appealed from, it will not be considered on an appeal from the final judgment. Wiener *v.* Morange, 7 Daly (N. Y.) 446; Zunz *v.* Heroy, 3 Misc. (N. Y.) 614, 23 N. Y. Suppl. 15, 52 N. Y. St. 123. This rule, however, is said not to apply where the separate appeal, though it has been taken, has not been prosecuted. Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121; Hyatt *v.* McBurney, 17 S. C. 143. The dismissal of

error brought on the final judgment rendered in the cause.[67] The interlocutory judgments and intermediate orders which may be considered on review of the final judgment are frequently designated by statute, usually being specified as orders which necessarily affect the final judgment itself, or involve the merits of such judgments; and this rule has been applied, among other orders and rulings,[68] to rulings upon demurrers determined adversely to the party appealing

an appeal from an interlocutory order on the ground that it is premature does not affect the right of the appellate court to review such order on appeal from the final judgment. Morgan *v.* Smith, 59 S. C. 49, 37 S. E. 43.

67. *Connecticut.*— **Wallace *v.* Middlebrook,** 28 Conn. 464.

District of Columbia.— **Parson *v.* Parker,** 3 MacArthur (D. C.) 9.

Iowa.— Jones *v.* Chicago, etc., R. Co., 36 Iowa 68.

Kentucky.— But see Bedford *v.* Duly, 1 A. K. Marsh. (Ky.) 220, where it was held that a final decree, otherwise correct, would not be reversed for error in an interlocutory decree. See also Pollard *v.* Rogers, 1 Bibb (Ky.) 473, where the error in an interlocutory judgment had been corrected by the final judgment, and it was held that there could not properly be an assignment of errors.

Louisiana.— Aurich *v.* Wolf, 30 La. Ann. 375.

Maryland.—Barton *v.* Higgins, 41 Md. 539; Bull *v.* Pyle, 41 Md. 419 (construing the phrase, "all previous orders," used in Md. Code, art. 5, § 22); Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

Michigan.— Yawkey *v.* Richardson, 9 Mich. 529, 81 Am. Dec. 769; Morris *v.* Morris, 5 Mich. 171.

New York.— Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; Chamberlain *v.* Dempsey, 36 N. Y. 144; Hoe *v.* Sanborn, 36 N. Y. 93, 3 Abb. Pr. N. S. (N. Y.) 189, 35 How. Pr. (N. Y.) 197; Kerr *v.* Dildine, 60 Hun (N. Y.) 315, 15 N. Y. Suppl. 58, 38 N. Y. St. 1005, 20 N. Y. Civ. Proc. 366.

North Carolina.— Harding *v.* Hart, 118 N. C. 839, 24 S. E. 668; Shields *v.* McNeill, 118 N. C. 590, 24 S. E. 413; Warren *v.* Stancill, 117 N. C. 112, 23 S. E. 216; Bruce *v.* Crabtree, 116 N. C. 528, 21 S. E. 194; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

South Carolina.— Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732; Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Thatcher *v.* Massey, 20 S. C. 542.

Tennessee.— Baugh *v.* Nashville, etc., R. Co., 98 Tenn. 119, 38 S. W. 433; Joslyn *v.* Sappington, 1 Overt. (Tenn.) 222.

United States.— Salter *v.* Allen, 1 Hayw. & H. (U. S.) 182.

England.— Samuel *v.* Judin, 6 East 333.

See 3 Cent. Dig. tit. "Appeal and Error," § 3487 *et seq.*; and *supra*, III, D, 1 [2 Cyc. 586].

Error should have been properly assigned, or appear of record in respect of such orders. See *supra*, XI [2 Cyc. 985]. But see Brown *v.* Thomson, (Tex. Civ. App. 1895) 31 S. W. 1087, to the effect that an assignment of error is not essential.

Proper objections and exceptions should have been taken as to such orders. Smith *v.* Glen's Falls Ins. Co., 62 N. Y. 85; Milbank *v.* Jones, 4 Misc. (N. Y.) 613, 24 N. Y. Suppl. 356, 53 N. Y. St. 523; Harding *v.* Hart, 118 N. C. 839, 24 S. E. 668; Clement *v.* Foster, 99 N. C. 255, 6 S. E. 186; Clark's Code Civ. Proc. N. C. (1900), pp. 740, 741; and *supra*, V [2 Cyc. 660].

Specification in notice of appeal of interlocutory judgment or intermediate orders is necessary in some jurisdictions. Long Island R. Co. *v.* Garvey, 159 N. Y. 334, 50 N. E. 60 [*affirming* 42 N. Y. Suppl. 155]; Reese *v.* Smyth, 95 N. Y. 645; Cameron *v.* Equitable L. Assur. Soc., 45 N. Y. Super. Ct. 628; Manhattan Brass Co. *v.* Gilman, 20 Misc. (N. Y.) 722, 45 N. Y. Suppl. 818; Brater *v.* Andrews, 26 N. Y. Suppl. 918, 57 N. Y. St. 206; Webster *v.* Clark, 22 N. Y. Suppl. 279, 51 N. Y. St. 808. But see Matter of Lawson, 42 N. Y. App. Div. 377, 59 N. Y. Suppl. 152, construing N. Y. Code Civ. Proc. §§ 1301, 2545, 2571, to the effect that this rule should be more liberally construed with respect to appeals from the surrogate. But see Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732, to the effect that no notice of appeal from such order is necessary. Omission to so specify in the notice of appeal cannot be remedied by an amendment so as to extend the statutory time in which an appeal may be taken. Webster *v.* Clark, 22 N. Y. Suppl. 279, 51 N. Y. St. 808.

68. Illustrations.— The following orders have been held to be within the rule stated in the text: Order denying motion for new trial on judge's minutes. Taylor *v.* Smith, 164 N. Y. 399, 58 N. E. 524 [*reversing* 24 N. Y. App. Div. 519, 49 N. Y. Suppl. 41]. Order denying motion for new trial on the ground of misconduct of an attorney. Fox *v.* Matthiessen, 155 N. Y. 177, 49 N. E. 673 [*reversing* 84 Hun (N. Y.) 396, 32 N. Y. Suppl. 356, 65 N. Y. St. 554, 24 N. Y. Civ. Proc. 285]. Order denying motion to postpone trial. Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251; Gregg *v.* Howe, 37 N. Y. Super. Ct. 420; Kelly *v.* Weir, 19 Misc. (N. Y.) 366, 43 N. Y. Suppl. 497; Garfield Nat. Bank *v.* Colwell, 8 N. Y. Suppl. 380, 28 N. Y. St. 723; Gallaudet *v.* Steinmetz, 6 Abb. N. Cas. (N. Y.) 224; and *compare* Mannix *v.* State, 115 Ind. 245, 17 N. E. 565, in which case the final judgment was upon the pleadings, not upon the merits. Order denying motion to resettle an order denying a motion for new trial. Fox *v.* Matthiessen, 155 N. Y. 177, 49 N. E. 673 [*reversing* 84 Hun (N. Y.) 396, 32 N. Y. Suppl. 356,

or suing out the writ of error,[69] but not to rulings upon demurrers favorable to

65 N. Y. St. 554, 24 N. Y. Civ. Proc. 285]. Order denying or refusing motion to set aside a judgment by default. Palmer *v.* Rogers, 70 Iowa 381, 30 N. W. 645 [*distinguishing* Montgomery County *v.* American Emigrant Co., 47 Iowa 91]; Cohol *v.* Allen, 37 Iowa 449; but see Witowski *v.* Maisner, 21 Misc. (N. Y.) 487, 47 N. Y. Suppl. 599, where it was held that the propriety of the terms imposed by an order opening a default could not be reviewed. Order directing delivery to, and sale by, sheriff of property in controversy. Mower *v.* Hanford, 6 Minn. 535. Order dismissing action, with costs. Goldmark *v.* Rosenfeld, 69 Wis. 469, 34 N. W. 228. Order dismissing an appeal from a justice's court for delay in bringing the case to trial. Newman *v.* Board, 74 Wis. 303, 41 N. W. 961. Order dismissing an order to show cause why assignee should not be required to pay a creditor, or produce his books. *In re* Baker, 72 Wis. 395, 39 N. W. 764. Order dissolving injunction. Goldmark *v.* Rosenfeld, 69 Wis. 469, 34 N. W. 228. Order granting or refusing to dismiss the cause and strike it from the calendar. Demming *v.* Weston, 15 Wis. 236; see also Conley *v.* Dugan, 105 Iowa 205, 74 N. W. 774, construing Iowa Code (1873), § 2537. Order overruling a demurrer to complaint for misjoinder of causes of action. Hackett *v.* Carter, 38 Wis. 394. Order recommitting referee's report for correction. Kerr *v.* Hicks, 122 N. C. 409, 29 S. E. 370; Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121 [but see Hunt *v.* Chapman, 62 N. Y. 333; Maner *v.* Wilson, 16 S. C. 469]. Order refusing to remand cause to court from which it had been irregularly removed on change of venue. Mannix *v.* State, 115 Ind. 245, 17 N. E. 565, in which case, however, the error was deemed immaterial, as the final judgment was upon the pleadings and not upon the merits. Order refusing to remove the cause from state to federal court. Tripp *v.* Santa Rosa St. R. Co., 69 Cal. 631, 11 Pac. 219; Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Durham *v.* Southern L. Ins. Co., 46 Tex. 182; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962. Order requiring plaintiff to elect between causes of action. Jones *v.* Johnson, 10 Bush (Ky.) 649. Order setting aside decree settling executor's final account. Matter of Cahalan, 70 Cal. 604, 12 Pac. 427. Order setting aside verdict. Hildebrand *v.* American Fine-Art Co., (Wis. 1901) 85 N. W. 268. Order striking out pleading or part thereof. Cowles *v.* Cowles, 9 How. Pr. (N. Y.) 361; Goldmark *v.* Rosenfeld, 69 Wis. 469, 34 N. W. 228; but see Sunny South Lumber Co. *v.* Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; Mahon *v.* Hall, 2 Hun (N. Y.) 154. See Clark's Code Civ. Proc. N. C. (1900), pp. 733–757, and cases cited.

On the other hand, it has been held that the rule does not apply to the following orders: Order continuing a default and allowing defendant to answer. Donkle *v.* Milem, 88 Wis. 33, 59 N. W. 586. Order dismissing petition asking to be allowed to intervene in a suit. Kennedy *v.* Meredith, 4 T. B. Mon. (Ky.) 409; State *v.* Judge Sixth Dist. Ct., 22 La. Ann. 176 [*compare* Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394]. Order granting motion for bill of particulars. Raff *v.* Koster, 38 N. Y. App. Div. 336, 56 N. Y. Suppl. 997. Order of intermediate court affirming refusal of law court to set aside judgment for irregularity. Stark *v.* Dinehart, 40 N. Y. 342. Order of intermediate court allowing case to be brought to argument notwithstanding a stipulation to the contrary. Tauziede *v.* Jumel, 138 N. Y. 431, 34 N. E. 274, 53 N. Y. St. 4. Order of reference. Drexel *v.* Pease, 129 N. Y. 96, 29 N. E. 241, 41 N. Y. St. 236; Van Marter *v.* Hotchkiss, 4 Abb. Dec. (N. Y.) 484; Roslyn Heights Land, etc., Co. *v.* Burrowes, 22 N. Y. App. Div. 540, 48 N. Y. Supp. 15; Mills *v.* Stewart, 88 Hun (N. Y.) 503, 34 N. Y. Suppl. 786, 68 N. Y. St. 584; Bloom *v.* National United Ben. Sav., etc., Co., 81 Hun (N. Y.) 120, 30 N. Y. Suppl. 700, 62 N. Y. St. 657, 1 N. Y. Annot. Cas. 26; McCall *v.* Moschowitz, 10 N. Y. Civ. Proc. 107 [but see, *contra*, Morgan *v.* Smith, 59 S. C. 49, 37 S. E. 43; Lee *v.* Fowler, 19 S. C. 607; Hyatt *v.* McBurney, 17 S. C. 143]. Order refusing leave to answer after judgment, notwithstanding demurrer. Keegan *v.* Peterson, 24 Minn. 1. Order refusing permission to file supplementary answer. Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 8 N. Y. Suppl. 162, 28 N. Y. St. 24. Order substituting personal representative upon death of one of two plaintiffs after judgment in favor of such plaintiff. Hackett *v.* Belden, 47 N. Y. 624.

Order denying or granting motion for new trial has been held to be within the rule. Mower *v.* Hanford, 6 Minn. 535; Hildebrand *v.* American Fine-Art Co., (Wis. 1901) 85 N. W. 268. *Contra*, Thurber *v.* Harlem Bridge, etc., R. Co., 60 N. Y. 326; Manhattan Brass Co. *v.* Gilman, 20 Misc. (N. Y.) 722, 45 N. Y. Suppl. 818.

Order granting or refusing motion for change of venue is an order within the rule. Schoch *v.* Winona, etc., R. Co., 55 Minn. 479, 57 N. W. 208; State *v.* Shaw, 21 Nev. 222, 29 Pac. 321; Hewitt *v.* Follett, 51 Wis. 264, 8 N. W. 177. But an appeal from the dismissal of a bill does not bring up the denial of a motion for change of venue, made at a previous term, on the hearing of an application to dissolve a preliminary injunction. Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932. Ala. Civ. Code, § 4485, provides that the "refusal of such application may, after final judgment, be reviewed and revised on appeal," but only the last refusal can be so reviewed where several applications have been made and denied. Hawes *v.* State, 88 Ala. 37, 7 So. 302.

69. Adverse rulings.— *Alabama.*— Etowah Min. Co. *v.* Christopher, 112 Ala. 554, 20 So. 924.

Idaho.— Miller *v.* Hunt, (Ida. 1899) 57 Pac. 315.

appellant or plaintiff in error;[70] to rulings on pleas in abatement;[71] to orders vacating or quashing attachment writs;[72] to orders taxing costs, or directing the payment of costs, made and entered before the judgment was complete.[73] But it has been held that the rule does not apply to orders made by the lower court in another independent proceeding where the same parties are interested.[74] Nor

Iowa.— Henkle *v.* Holmes, 97 Iowa 695, 66 N. W. 910.

Louisiana.— Miller *v.* Dupuy, 19 La. Ann. 166.

Maryland.— Ellinger *v.* Baltimore, 90 Md. 696, 45 Atl. 884; Stem *v.* Cox, 16 Md. 533.

Michigan.— Bennett *v.* Nichols, 12 Mich. 22.

Minnesota.— Keegan *v.* Peterson, 24 Minn. 1.

New York.— Wright *v.* Chapin, 74 Hun (N. Y.) 521, 26 N. Y. Suppl. 825, 56 N. Y. St. 718, 31 Abb. N. Cas. (N. Y.) 137; Richards *v.* Brice, 13 N. Y. St. 728. See also Wilson *v.* Simpson, 84 N. Y. 674; Cambridge Valley Nat. Bank *v.* Lynch, 76 N. Y. 514; De Silver *v.* Holden, 50 N. Y. Super. Ct. 236, 6 N. Y. Civ. Proc. 121; Maddock *v.* Van Kleeck, 49 N. Y. Super. Ct. 496; Church *v.* American Rapid Tel. Co., 47 N. Y. Super. Ct. 558.

Ohio.— Wanzer *v.* Self, 30 Ohio St. 378.

Utah.— Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652; Henderson *v.* Turngren, 9 Utah 432, 35 Pac. 495.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

Wisconsin.— State *v.* St. Croix County, 83 Wis. 340, 53 N. W. 698; Moritz *v.* Splitt, 55 Wis. 441, 13 N. W. 555.

United States.— Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316; Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

See 3 Cent. Dig. tit. "Appeal and Error," § 3507; and *supra*, III, D, 3, s, (II) [2 Cyc. 605].

The rule does not apply, however, where the appeal was taken from a subsequent judgment of nonsuit (Darton *v.* Sperry, 71 Conn. 339, 41 Atl. 1052); nor where the demurrer was sustained and leave given to file an amended plea, which was done, and the case was proceeded with upon the amended pleading (Ellinger *v.* Baltimore, 90 Md. 696, 45 Atl. 884); nor where the appeal is from a judgment rendered on an agreement intended to operate as a confession of judgment (Cumnor *v.* Sedgwick, 67 Conn. 66, 34 Atl. 763); nor where, in an action against several parties, the demurrer was sustained to the complaint for misjoinder, and the action was discontinued as to all but one party, a new complaint being filed against such party, (Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657).

70. Favorable rulings.— Holman *v.* De Lin, 30 Oreg. 428, 47 Pac. 708; Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383.

71. Rulings on pleas in abatement.— *Arkansas.*— Dyer *v.* Hatch, 1 Ark. 339.

Connecticut.— Payne *v.* Bacon, 1 Root (Conn.) 109.

Massachusetts.— Dana *v.* Staples, 21 Pick. (Mass.) 208.

Tennessee.— Chambers *v.* Haley, Peck (Tenn.) 159.

Vermont.— Butler *v.* Lowry, 3 Vt. 14.

United States.— Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211.

See 3 Cent. Dig. tit. "Appeal and Error," § 3508.

72. Quashing attachments.— *Alabama.*— Eslava *v.* Rigeaud, 3 Ala. 363.

Colorado.— Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280; Wehle *v.* Kerbs, 6 Colo. 167.

Louisiana.— Aurich *v.* Wolf, 30 La. Ann. 375, holding that, on a general appeal, an interlocutory decree maintaining a provisional seizure may be reviewed.

Missouri.— Wirt *v.* Dinan, 44 Mo. App. 583.

Nevada.— Williams *v.* Glasgow, 1 Nev. 533.

Rhode Island.— Kennedy *v.* Tiernay, 14 R. I. 528, holding that a proceeding against a garnishee is incidental to the principal suit, and that the ruling of the lower court discharging him is brought up on appeal from the principal judgment.

But see, *contra*, Herman *v.* Paris, 81 Cal. 625, 22 Pac. 971; Neal *v.* Bookout, 30 Ga. 40; Adkins *v.* Loucks, (Wis. 1900) 83 N. W. 934.

73. Orders taxing costs.— Whitney Iron Works Co. *v.* Reuss, 40 La. Ann. 112, 3 So. 500; Wells *v.* Vanderwerker, 45 N. Y. App. Div. 155, 60 N. Y. Suppl. 1089, 7 N. Y. Annot. Cas. 73; McHugh *v.* Chicago, etc., R. Co., 41 Wis. 79; Cord *v.* Southwell, 15 Wis. 211.

An order made on a motion to retax costs may be reached by an appeal from the judgment, if made before the judgment is rendered. Dooly *v.* Norton, 41 Cal. 439. But in Kirk *v.* Blashfield, 4 Hun (N. Y.) 269, it was held that the review of an order allowing costs, made before the entry of judgment, could be had only on appeal from the order. *Aliter*, if not made till after entry of judgment. Dooly *v.* Norton, 41 Cal. 439.

74. Brown *v.* State, 5 Colo. 496 (where the court was asked to review a ruling regarding a nonsuit in a former trial); Da Costa *v.* Dibble, 40 Fla. 418, 24 So. 911. And see Price *v.* Simmons, 13 Ala. 749, where it was held that a judgment removing an administrator from office was a separate and distinct judgment, and not reviewable upon a writ of error to a final decree settling the account.

Arrest and bail proceedings.—Rulings made in relation to the arrest of a defendant, and holding him to bail in an action, are not reviewable upon an appeal from the final judgment. Ross *v.* West, 2 Bosw. (N. Y.) 360; Hurst *v.* Samuels, 29 S. C. 476, 7 S. E. 822. See also Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575.

will the appellate court review, in a collateral proceeding, a decree from which no appeal has been taken.[75]

(II) *On Appeal From Final Decree in Equity.* While an appeal from a final decree in equity, ordinarily, brings up the whole cause upon its merits, including interlocutory orders connected with the decree,[76] such an appeal cannot bring up a question which was definitely adjudicated and disposed of prior to the time of making and entering the final decree appealed from.[77]

Contempt proceedings.— Such proceedings are criminal in their nature, and distinct from the suit in which the contempt is committed. Hence, rulings made in the contempt proceedings are not brought up for review on appeal from the decree entered in the cause. Choquette *v.* McCarthy, (Tex. Civ. App. 1900) 56 S. W. 956; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Alderson *v.* Kanawha County, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. Rep. 840, 5 L. R. A. 334.

Interlocutory orders on a first appeal are not reviewable on a second appeal. Matter of Budlong, 126 N. Y. 423, 27 N. E. 945, 38 N. Y. St. 436 [*affirming* 54 Hun (N. Y.) 131, 7 N. Y. Suppl. 289, 26 N. Y. St. 863, 18 N. Y. Civ. Proc. 18].

Though a bill of review is an independent proceeding, an appeal from a decree sustaining it brings before the appellate court all the proceedings back to the petition in the original cause. Gilleyen *v.* Martin, 73 Miss. 695, 19 So. 482; Denson *v.* Denson, 33 Miss. 560.

75. Evans' Estate, 150 Pa. St. 212, 30 Wkly. Notes Cas. (Pa.) 404, 24 Atl. 642.

A reference to ascertain damages sustained by reason of the issuance of an attachment or an injunction is an independent suit substituted for an action at law upon the bond, and an appeal from the decree entered upon the report does not bring up for review the proceedings in the original cause. Macheca *v.* Panesi, 4 Lea (Tenn.) 544; Winslow *v.* Mulchey, (Tenn. Ch. 1895) 35 S. W. 762.

Where a final order, as distinguished from a final decree, is appealed from, the court is restricted to a review of the orders and proceedings connected with such final order. Benedict *v.* Thompson, 2 Dougl. (Mich.) 299; Beavans *v.* Goodrich, 98 N. C. 217, 3 S. E. 516. See *supra*, III, D, 2 [2 Cyc. 591].

76. *Alabama.*— Savage *v.* Johnson, 125 Ala. 673, 28 So. 547; Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241.

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Griffin *v.* Orman, 9 Fla. 22; Le Baron *v.* Fauntleroy, 2 Fla. 276.

Maryland.— Bull *v.* Pyle, 41 Md. 419; Phelps *v.* Stewart, 17 Md. 231 [*distinguishing* Porter *v.* Askew, 11 Gill & J. (Md.) 346].

Minnesota.— In Dodge *v.* Allis, 27 Minn. 376, 7 N. W. 732, however, it was held that, on appeal from a final decree confirming the title of a purchaser, the interlocutory decree finding the amount due and directing a sale could not be reviewed.

New Jersey.— Pennington *v.* Todd, 47 N. J. Eq. 569, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589; Clair *v.* Terhune, 35 N. J. Eq. 336; Decker *v.* Ruckman, 28 N. J. Eq. 614; Crane *v.* Decamp, 22 N. J. Eq. 614.

New York.— Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; Jaques *v.* New York M. E. Church, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Teal *v.* Woodworth, 3 Paige (N. Y.) 470.

North Carolina.— Long *v.* Holt, 68 N. C. 53; Clark's Code Civ. Proc. N. C. (1900), § 562.

Pennsylvania.— Applying the rule stated in the text to appeals from decrees of the orphan's court. Bierly's Estate, 81* Pa. St. 419; Finney's Appeal, 37 Pa. St. 323; Hallowell's Appeal, 20 Pa. St. 215.

Tennessee.— Maloney *v.* Jones, (Tenn. Ch. 1900) 59 S. W. 700; Gamble *v.* Branch, (Tenn. Ch. 1898) 52 S. W. 897.

Wisconsin.— But see Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373, holding that where, instead of the usual determination of the sum due, the lower court had rendered a judgment in form *in personam*, the appellate court could not, in reviewing the judgment *in personam*, consider the regular judgment of foreclosure, the latter being reviewable only by an appeal from it exclusively.

See 3 Cent. Dig. tit. "Appeal and Error," § 3513 *et seq.*

An appeal from a decree on a cross-bill, the original bill being dismissed, brings up for examination the whole case, both as to bill and cross-bill. Woodrum *v.* Kirkpatrick, 2 Swan (Tenn.) 217.

Where, by statute, interlocutory decrees are subjects of distinct appeals, they cannot, as a rule, be reviewed on appeal from the final decree. Holt *v.* Holt, 131 Cal. 610, 63 Pac. 912; Barry *v.* Barry, 56 Cal. 10; Regan *v.* McMahon, 43 Cal. 625; Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Heagy *v.* Black, 90 Ind. 534; Clay County *v.* Markle, 46 Ind. 96; Andrews *v.* Powell, 27 Ind. 303. But see Morgan *v.* Smith, 59 S. C. 49, 37 S. E. 43; Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445 (to the effect that a prior interlocutory decree may be considered on appeal from a final decree, though the former was separately appealed from); Buckingham *v.* McLean, 13 How. (U. S.) 150, 14 L. ed. 90 (where such separate appeal was dismissed because not filed in compliance with the rules).

77. New Orleans *v.* Crescent City R. Co., 41 La. Ann. 904, 6 So. 719; Mapes *v.* Coffin, 5 Paige (N. Y.) 296.

An order confirming an administrator's report of sale cannot be reviewed on an appeal from decree made upon the final settlement of the administrator's accounts. Forrester *v.*

(III) *RULE WHERE ORDER APPEALED FROM IS BARRED BY LAPSE OF TIME.* It is, generally, held that, where a separate appeal may be taken from an interlocutory judgment, if the time for taking it has elapsed no review of it may be had on an appeal from the final judgment.[78]

b. Subsequent Orders and Proceedings. On an appeal from a judgment subsequent orders or proceedings cannot be reviewed.[79]

2. ON APPEAL FROM PRIOR ORDER — a. In General. While an appeal from an interlocutory, as well as from the final judgment or decree, brings up for review all the proceedings in the cause anterior to the final judgment or decree,[80] an appeal from an interlocutory order or decree alone brings up for review only the order or decree appealed from.[81] This rule has been applied to interlocutory

Forrester, 40 Ala. 557. See also Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

Where leave granted to file a supplemental bill does not reserve the right to raise any question as to an order previously entered upon bill and answer from which no appeal was taken, on appeal from such amended bill the propriety of previous orders is not before the court. Gibson *v.* Gautier, 1 Mackey (D. C.) 35.

78. *Illinois.*—Guyer *v.* Wilson, 139 Ill. 392, 28 N. E. 738 [*reversing* 36 Ill. App. 539].

Maryland.— Henderson *v.* Gibson, 19 Md. 234. See Hungerford *v.* Bourne, 3 Gill & J. (Md.) 133, holding that this rule does not apply to a non-appealable order.

Michigan.— Benedict *v.* Thompson, 2 Dougl. (Mich.) 299.

Nevada.— Maynard *v.* Johnson, 2 Nev. 16.

New York.— Ford *v.* David, 1 Bosw. (N. Y.) 569; Orange County Bank *v.* Fink, 7 Paige (N. Y.) 87; Taylor *v.* Read, 4 Paige (N. Y.) 561. But see New York cases cited *infra*, this note.

South Carolina.— De Walt *v.* Kinard, 33 S. C. 522, 12 S. E. 367. But see Hyatt *v.* McBurney, 17 S. C. 143, holding that one losing his right to an appeal from an intermediate order, by not giving notice of an appeal within the time prescribed, is not precluded from having such order reviewed on appeal from the final judgment.

Virginia.— See Cocke *v.* Gilpin, 1 Rob. (Va.) 22, to the effect that this rule does not apply in case of an order on the subject of an appeal.

Washington.— Deming Invest. Co. *v.* Ely, 21 Wash. 102, 57 Pac. 353.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; Lloyd *v.* Kyle, 26 W. Va. 534.

See 3 Cent. Dig. tit. "Appeal and Error," § 3495.

This rule does not prevail, however, in some jurisdictions. Wadsworth *v.* Goree, 96 Ala. 227, 10 So. 848; Nelms *v.* McGraw, 93 Ala. 245, 9 So. 719 (construing Ala. Civ. Code, §§ 3611, 3612, 3619); Carroll *v.* Byers, (Ariz. 1894) 36 Pac. 499; Hulme *v.* Diffenbacher, 53 Kan. 181, 30 Pac. 60; Whitmore *v.* Tarrytown, 137 N. Y. 409, 33 N. E. 489, 51 N. Y. St. 69; Teal *v.* Woodworth, 3 Paige (N. Y.) 470.

79. *Alabama.*— Hendon *v.* State, 49 Ala. 380.

Idaho.— Emery *v.* Langley, 1 Ida. 694.

Illinois.— Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

Kentucky.— Robinson *v.* Talbott, (Ky. 1900) 56 S. W. 717; Loving *v.* Meyler, (Ky. 1899) 49 S. W. 961.

Louisiana.— Union Nat. Bank *v.* Hyams, 50 La. Ann. 1110, 24 So. 774; Gourjon's Succession, 7 Rob. (La.) 422.

Michigan.— Kellogg *v.* Hamilton, 43 Mich. 269, 5 N. W. 315.

New York.— Lewis *v.* Greider, 51 N. Y. 231.

South Dakota.— Aultman *v.* Becker, 10 S. D. 58, 71 N. W. 753.

Wisconsin.— St. Paul Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623. See also Guetzkow *v.* Smith, 105 Wis. 94, 80 N. W. 1109, construing Wis. Rev. Stat. §§ 3069, 3070, and holding that an order denying a motion for a new trial, dated after the entry of the judgment, cannot be considered on appeal from the judgment.

See 3 Cent. Dig. tit. "Appeal and Error," § 3522 *et seq.*

This rule has been applied to motions to strike out cost bill, made long after the appeal was perfected (Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520; but compare cases cited *supra*, note 73), and to subsequent scire facias proceedings (Greenway *v.* Dare, 6 N. J. L. 305).

The rule is not applicable, however, where a decree has been set aside and subsequently reinstated, since the validity of the original decree rests upon the order reinstating it (McGowan *v.* James, 12 Sm. & M. (Miss.) 445); and it has been held that, on a petition in error to review a final judgment, a subsequent order of the trial court, striking from the record the bill of exceptions, might be reviewed without a second petition in error (Potter *v.* Myers, 31 Ohio St. 103).

80. Bebee *v.* State Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; and *supra*, XVII, B, 1.

81. A decision on the merits cannot be made on such an appeal, nor is the suit below thereby terminated.

Alabama.— Madden *v.* Floyd, 69 Ala. 221.

Florida.— Kahn *v.* Kahn, 15 Fla. 400.

Georgia.— Harvey *v.* Bowles, 112 Ga. 421, 37 S. E. 364, relating to a bill of exceptions *pendente lite.*

decrees in foreclosure proceedings directing the usual references,[82] to orders appointing receivers,[83] or refusing to revoke appointment of receivers,[84] to orders granting preliminary injunctions, to orders refusing preliminary injunctions,[85] to orders on motions to dissolve temporary injunctions,[86] to orders on

Illinois.— Hart *v.* Stern, 179 Ill. 31, 53 N. E. 1134 [*affirming* 78 Ill. App. 491]; Rosenberg *v.* Stern, 77 Ill. App. 248; Woerishoffer *v.* Lake Erie, etc., R. Co., 25 Ill. App. 84.

Indiana.— Binford *v.* Miner, 95 Ind. 438.

Maryland.— Goodburn *v.* Stevens, 5 Gill (Md.) 1.

New York.— Matter of May, 53 Hun (N. Y.) 127, 6 N. Y. Suppl. 356, 24 N. Y. St. 887; Franklin *v.* Osgood, 14 Johns. (N. Y.) 527; Huntington *v.* Nicoll, 3 Johns. (N. Y.) 566; Deas *v.* Thorne, 3 Johns. (N. Y.) 543; Copous *v.* Kauffman, 8 Paige (N. Y.) 583. But see Jemison *v.* Citizens' Sav. Bank, 85 N. Y. 546; Anonymous, 59 N. Y. 313; Hathaway *v.* Russell, 46 N. Y. Super. Ct. 103; Laidley *v.* Rogers, 22 N. Y. Suppl. 468, 51 N. Y. St. 228, 23 N. Y. Civ. Proc. 110 — for circumstances under which the court may pass upon the case on its merits. *Compare* McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, to the effect that, under N. Y. Code Civ. Proc. § 1349, an intermediate order cannot be reviewed on an appeal from an interlocutory judgment, although specified in the notice of appeal. Also *compare* Douglas *v.* Coonley, 84 Hun (N. Y.) 158, 32 N. Y. Suppl. 444, 65 N. Y. St. 729, to the effect that an appeal from an interlocutory judgment, entered pursuant to an order sustaining a demurrer, brings up the order.

North Carolina.— Green *v.* Griffin, 95 N. C. 50; Sledge *v.* Blum, 63 N. C. 374.

Pennsylvania.— Wilt *v.* Reed Electric Co., 187 Pa. St. 424, 41 Atl. 317; McFarland *v.* Clark, 4 Wkly. Notes Cas. (Pa.) 250.

Tennessee.— Hicks *v.* Porter, 90 Tenn. 1, 15 S. W. 1071.

Virginia.— Madden *v.* Madden, 2 Leigh (Va.) 377.

Washington.— Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570, 36 Pac. 460.

Wisconsin.— Rahn *v.* Gunnison, 12 Wis. 528.

United States.— Wiegand *v.* Copeland, 7 Sawy. (U. S.) 442, 14 Fed. 118.

See 3 Cent. Dig. tit. "Appeal and Error," § 3530 *et seq.*

82. Butterfield *v.* Third Ave. Sav. Bank, 25 N. J. Eq. 533, holding that, on an appeal from such a decree, the appellate court cannot consider a previous order refusing permission to defendant to put in a new or supplemental answer.

83. Martin *v.* Sexton, 72 Ill. App. 395; Northam *v.* Atherton, 67 Ill. App. 230; Goshen Woolen Mills Co. *v.* City Nat. Bank, 150 Ind. 279, 49 N. E. 154; Gray *v.* Oughton, 146 Ind. 285, 45 N. E. 191; Naylor *v.* Sidener, 106 Ind. 179, 6 N. E. 345; Hursh *v.* Hursh, 99 Ind. 500; Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342. See also Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

The court, however, will look to the complaint and test its sufficiency in so far as it relates to the appointment of the receiver, even though the appointment be an auxiliary to an action. Supreme Sitting, Order Iron Hall, *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210.

The distinction must be carefully made between the cases where the appointment of a receiver is but an auxiliary to the pending action, and cases where such appointment is the main relief sought. See Pearce *v.* Elwell, 116 N. C. 595, 21 S. E. 305.

84. Tuttle *v.* Blow, (Mo. 1901) 63 S. W. 839; Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630.

But all questions upon which the validity or regularity of such appointment depends are necessarily involved in the appeal, and may be considered, and so the refusal to change the venue may be reviewed. Shoemaker *v.* Smith, 74 Ind. 71, where the court said: "It is wholly immaterial whether it failed to acquire jurisdiction by service of process, or, after acquiring it, lost it by the proper application for a change of venue."

85. City Nat. Bank *v.* Bridgers, 114 N. C. 381, 19 S. E. 642; Jones *v.* Boyd, 80 N. C. 190; Schuck *v.* Reading, 186 Pa. St. 248, 40 Atl. 310; Proctor, etc., Co. *v.* Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405 [*approved* in Paris Medicine Co. *v.* W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227]; Florida Constr. Co. *v.* Young, 59 Fed. 721, 11 U. S. App. 683, 8 C. C. A. 231; Hart *v.* Buckner, 54 Fed. 925, 2 U. S. App. 488, 5 C. C. A. 1. See also Leake *v.* Smith, 76 Ga. 524.

86. Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754; Birmingham R., etc., Co. *v.* Birmingham Traction Co., 121 Ala. 475, 25 So. 777; Gould *v.* House, 40 Ind. 403; Kilmer Mfg. Co. *v.* Griswold, 67 Fed. 1017, 35 U. S. App. 246, 15 C. C. A. 161; Jensen *v.* Norton, 64 Fed. 662, 29 U. S. App. 121, 12 C. C. A. 608; Blount *v.* Société Anonyme du Filtre Chamberland Systeme Pasteur, 53 Fed. 98, 6 U. S. App. 335, 3 C. C. A. 455.

Extent and limits of the rule.—It has been held that even the consent and request of both parties will not have the effect of enlarging the scope of the inquiry in the appellate court. Columbus Watch Co. *v.* Robbins, 52 Fed. 337, 6 U. S. App. 275, 3 C. C. A. 103. But see, *contra*, Dudley E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 50 Fed. 785, 2 U. S. App. 188, 1 C. C. A. 668.

But in some jurisdictions, it seems, it is a rule of equitable convenience, that, if the full record is brought before the court in an appeal against an injunction granted by an interlocutory decree, after a full hearing, the court will go into the full merits as shown

motions vacating attachments, and to orders on motions refusing to vacate attachments.[87]

b. Order Overruling or Sustaining Demurrer. As a rule, on appeal from an order sustaining[88] or overruling a demurrer to a complaint or bill, only the causes assigned by the demurrer can be considered.[89]

3. On Appeal From Subsequent Order. The general rule is that, in the absence of statutory provisions to the contrary,[90] on appeal from an order, no previous order or judgment which is final in its nature, and from which

by the record. But it is only when the determination of the question whether the injunction is erroneous requires an examination of the whole case on its merits that this course will be pursued. Marden *v.* Campbell Printing-Press, etc., Co., 67 Fed. 809, 33 U. S. App. 123, 15 C. C. A. 26; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 61 Fed. 208, 21 U. S. App. 1, 116, 9 C. C. A. 450; Consolidated Piedmont Cable Co. *v.* Pacific Cable R. Co., 58 Fed. 226, 15 U. S. App. 216, 7 C. C. A. 195; Richmond *v.* Atwood, 52 Fed. 10, 5 U. S. App. 151, 2 C. C. A. 596, 17 L. R. A. 615.

87. Godfrey *v.* Godfrey, 75 N. Y. 434; Achelis *v.* Kalman, 60 How. Pr. (N. Y.) 491; Bicknell *v.* Speir, 18 N. Y. Suppl. 590, 45 N. Y. St. 651; Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289. See also, however, New York, etc., Bank *v.* Codd, 11 How. Pr. (N. Y.) 221; Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549 — to the effect that the review in such cases is not restricted to the question whether the affidavits and counter-affidavits disclose facts sufficient to confer jurisdiction upon the court issuing the attachment, but that the office of the appeal is to review the decision on its merits.

88. Sloan *v.* Frothingham, 65 Ala. 593; Lowry *v.* Newsom, 51 Ala. 570 (holding that, on appeal from an order overruling a demurrer to a scire facias, the inquiry is limited to the causes of demurrer specially assigned, and that other defects, however apparent, cannot avail appellant if these are not well taken); Kay *v.* Pruden, 101 Iowa 60, 69 N. W. 1137 (holding that, on an appeal from an order striking from the files an amendment of a complaint, an order for a change of venue may be reviewed); Potter *v.* Holmes, 72 Minn. 153, 75 N. W. 591 (holding that, on an appeal from an order overruling a demurrer to an amended complaint, the appellate court will not consider the propriety of the allowance of the amendment, or the denial of a motion to set aside an order allowing it); Flowers *v.* Bartlett, 66 Minn. 213, 68 N. W. 976 (holding, however, that rulings with respect to a change of venue may be considered on such an appeal). *Compare* Riddle *v.* Motley, 1 Lea (Tenn.) 468.

89. *Alabama.*— Magnetic Ore Co. *v.* Marbury Lumber Co., 113 Ala. 306, 21 So. 36 (holding that, on appeal from an order sustaining a demurrer to an amended bill, the appellate court will not review the order sustaining the demurrer to the original bill); Beebe *v.* Morris, 56 Ala. 525.

Connecticut.— Boland *v.* O'Neil, 72 Conn. 217, 44 Atl. 15, holding that the filing of a second amended complaint is a withdrawal of the first, and, on appeal from a ruling sustaining a demurrer thereto, a demurrer to the first amended complaint cannot be reviewed.

Georgia.— Mechanics', etc., Bank *v.* Harrison, 68 Ga. 463.

Iowa.— Hospers *v.* Wyatt, 63 Iowa 264, 19 N. W. 204.

Kansas.— Ludes *v.* Hood, 29 Kan. 49 (holding that the previous ruling upon a motion to make the pleading more certain can be considered only so far as it was involved in the ruling upon the demurrer); Emporia Nat. Bank *v.* Lyon County, 25 Kan. 85.

New York.— Sheridan *v.* Jackson, 72 N. Y. 170, holding that if plaintiff excepts to the dismissal of his complaint, the latter not stating facts sufficient to constitute a cause of action, instead of asking leave to amend, the appellate court will treat the complaint as if it had been demurred to, and will consider only its sufficiency.

Wisconsin.— Taylor *v.* North, 79 Wis. 86, 48 N. W. 126, holding that the appellate court cannot go back of the proceedings to which the demurrer is interposed to inquire whether it is regularly in the case.

United States.— Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 12 U. S. App. 1, 4 C. C. A. 199, holding that, if a judgment sustaining a demurrer to an amended complaint is brought up on writ of error, the answer filed to the original complaint is not before the court, and suggestions of counsel based upon it cannot be considered.

See 3 Cent. Dig. tit. "Appeal and Error." § 3537 *et seq.*

On appeal from judgment sustaining demurrer to answer to an application for receiver, the court may consider the sufficiency of the answer though the appeal was not taken when it could have been from the order appointing the receiver. Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537. But *compare* East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493, wherein it is said that, on appeal from a judgment against defendant for frivolousness of answer, the question is not whether the answer is frivolous, but whether it contains a defense by stating new matter constituting one, or by putting material allegations of the complaint at issue.

90. Collier *v.* Field, 2 Mont. 320; Sturgiss *v.* Dart, (Wash. 1900) 62 Pac. 858, construing Ballinger's Anno. Codes & Stat. Wash. (1897), § 6500, subd. 7.

an appeal might have been taken, can be considered.[91] This rule has been applied to appeals from orders denying rehearing,[92] from orders vacating or refusing to vacate orders or judgments,[93] from orders of seizure and sale,[94] from orders adjudging parties to be in contempt of court,[95] from decrees confirming

91. *Alabama.*— Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 121 Ala. 672, 25 So. 720.

California.—Whitney *v.* Buckman, 26 Cal. 447.

Illinois.— Freeman *v.* Freeman, 66 Ill. 53; Lovejoy *v.* Arnold, 88 Ill. App. 449; Bressler *v.* Martin, 42 Ill. App. 356.

Indiana.— Badger *v.* Merry, 139 Ind. 631, 39 N. E. 309.

Kentucky.— Johnson *v.* Deason, 3 Bibb (Ky.) 259.

Louisiana.— New Orleans *v.* De la Cuesta, 10 La. Ann. 724; Gradnigo *v.* Roques, 5 Mart. N. S. (La.) 85.

Maryland.— Harrison *v.* Morton, 87 Md. 671, 40 Atl. 897; Green *v.* Western Nat. Bank, 86 Md. 279, 38 Atl. 131; Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849. See also White *v.* Hook, 87 Md. 733, 40 Atl. 901.

Michigan.— Hack *v.* Norris, 46 Mich. 587, 10 N. W. 104.

Minnesota.— Papke *v.* Papke, 30 Minn. 260, 15 N. W. 117.

Mississippi.— McAfee *v.* Patterson, 2 Sm. & M. (Miss.) 593.

Missouri.— Witten *v.* Robison, 31 Mo. App. 525.

Nebraska.— Hampton Lumber Co. *v.* Van Ness, 54 Nebr. 185, 74 N. W. 587.

New Mexico.—Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Pinchot *v.* New York El. R. Co., 49 N. Y. App. Div. 356, 63 N. Y. Suppl. 489; Arkenburgh *v.* Arkenburgh, 14 N. Y. App. Div. 367, 43 N. Y. Suppl. 892; Lippincott *v.* Westray, 6 N. Y. Civ. Proc. 74.

North Carolina.— Childs *v.* Wiseman, 119 N. C. 497, 26 S. E. 126 (holding that, on appeal from an order refusing to discharge one from prison, where he had been confined for contempt in refusing to comply with a previous order, such previous order cannot be reviewed further than it appears, from its face, to be plainly erroneous); Mayo *v.* Whitson, 47 N. C. 231.

Pennsylvania.—Applegate *v.* Cohn, 1 Pa. Super. Ct. 344.

South Carolina.— Coleman *v.* Keels, 30 S. C. 614, 9 S. E. 270.

Tennessee.—Rouss *v.* Kendrick, (Tenn. Ch. 1897) 41 S. W. 1074.

West Virginia.— State *v.* Blair, 29 W. Va. 474, 2 S. E. 333.

Wisconsin.— Linden Land Co. *v.* Milwaukee Electric R., etc., Co., (Wis. 1900) 83 N. W. 851; Webster-Glover Lumber, etc., Co. *v.* St. Croix County, 63 Wis. 647, 24 N. W. 417; Breed *v.* Ketchum, 51 Wis. 164, 7 N. W. 550; Allen *v.* Beekman, 42 Wis. 185; Pinger *v.* Vanclick, 36 Wis. 141; Landon *v.* Burke, 33 Wis. 452. *Compare* Durning *v.* Burkhardt, 34 Wis. 585 [*distinguishing* Cobb *v.* Smith, 23 Wis. 261].

United States.—Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97; Terry *v.* Sharon, 131 U. S. 40, 9 S. Ct. 705, 33 L. ed. 94.

See 3 Cent. Dig. tit. "Appeal and Error." §§ 3541 *et seq.*; 3549 *et seq.*

But, on review of the denial of motion to quash execution, the court will look back to the original judgment so far as to ascertain if the execution is supported thereby (Creighton *v.* Denby, Minor (Ala.) 250); although it will not consider the propriety of the original judgment (State *v.* Blair, 29 W. Va. 474, 2 S. E. 333).

If a motion for a stay of proceedings under void judgment is overruled, an appeal from the order overruling brings up the whole record. Alexander *v.* Leland, 1 Ida. 425.

Question whether prior order was appealable.—In Matter of Hartman, 9 Abb. Pr. N. S. (N. Y.) 124, an appeal from the denial of a motion to set aside an order made in a special proceeding was decided without considering whether the original order was appealable or not.

92. Orders denying rehearing.— Radge *v.* Berner, 30 Ill. App. 182.

93. Orders vacating or refusing to vacate. — *Illinois.*— National Ins. Co. *v.* Chamber of Commerce, 69 Ill. 22; Lake Shore Sand Co. *v.* Goodman, 85 Ill. App. 353; Kortas *v.* Kentucky Liquor Co., 46 Ill. App. 366.

Kentucky.— Hermann *v.* Martin, 21 Ky. L. Rep. 1396, 55 S. W. 429.

Minnesota.— Brown *v.* Minnesota Thresher Mfg. Co., 44 Minn. 322, 46 N. W. 560.

New York.— Clapp *v.* Atterbury, 57 N. Y. Super. Ct. 579, 6 N. Y. Suppl. 510, 25 N. Y. St. 808.

South Carolina.— Coleman *v.* Keels, 30 S. C. 614, 9 S. E. 270.

94. Orders of sale.— Marionneaux *v.* Dardenne, 28 La. Ann. 457; Fazende *v.* Flood, 24 La. Ann. 425; Umrich *v.* Grow, 24 La. Ann. 308; Parkerson *v.* Grundy, 23 La. Ann. 530. See 3 Cent. Dig. tit. "Appeal and Error," § 3556½.

On such appeals the court cannot inquire whether proper notice has been given to the parties entitled to it (Henry *v.* Goldman, 27 La. Ann. 670); nor will it consider the rights and obligations of the parties growing out of another suit (New Orleans *v.* Pigniolo, 29 La. Ann. 835); nor the validity of the mortgage on which the order was based (Lapin *v.* Lapin, 21 La. Ann. 52).

On review of decree merely ordering mortgaged premises to be sold and the proceeds brought into court for distribution, the appellate court cannot determine conflicting claims. Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51.

95. Contempt proceedings.— Berkson *v.* People, 51 Ill. App. 102; Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69;

judicial sales,[96] and from decrees enforcing and carrying into effect other decrees.[97]

C. Parties Not Entitled to Allege Error — 1. In General — a. Appellant or Plaintiff in Error — (I) *On Objections and Exceptions of Adverse Party.*[98] Objections made and exceptions taken at the trial by the successful party cannot be made the basis of assignments of error in the appellate court by the unsuccessful party.[99]

(II) *On Rulings Not Prejudical to Appellant or Plaintiff in Error.* A court of review will not entertain assignments of error which appellant or plaintiff in error bases upon rulings, orders, decisions, or proceedings in the trial court which may be prejudicial or injurious to others, but are not so as to him[1]

Haines *v.* Haines, 35 Mich. 138; Clark *v.* Bininger, 75 N. Y. 344; Matter of Bornemann, 6 N. Y. App. Div. 524, 39 N. Y. Suppl. 686.

In Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21, one had taken an appeal from an order adjudging him in contempt for failure to appear in supplementary proceedings, and it was held that errors in the trial in which the judgment was rendered could not be considered.

96. Decrees confirming sales.— Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2 (foreclosure sale); Allen *v.* Shepard, 87 Ill. 314 (administrator's sale); Benson *v.* Yellott, 76 Md. 159, 24 Atl. 451 (trustee's sale); Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059 (foreclosure sale); Turner *v.* Farmers' L. & T. Co., 106 U. S. 552, 1 S. Ct. 519, 27 L. ed. 273 (foreclosure sale).

On appeal from an order denying motion to stay confirmation of sale, the decree of sale taken in the regular order of proceeding cannot be attacked. Mann *v.* Jennings, 25 Fla. 730, 6 So. 771.

97. Decrees enforcing other decrees.— Shepherd *v.* Rice, 38 Mich. 556; Caldwell *v.* Hodsden, 1 Lea (Tenn.) 45; Martin *v.* Clerk, 6 Tex. 26; Long *v.* Maxwell, 59 Fed. 948, 8 U. S. App. 484, 8 C. C. A. 410.

98. As to assignments of error in the lower court see *supra*, XI [2 Cyc. 980].

As to the presentation of grounds for review in the lower court see *supra*, V [2 Cyc. 660].

99. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Pierce *v.* Jackson, 21 Cal. 636.

Iowa.—Walkley *v.* Clarke, 107 Iowa 451, 78 N. W. 70.

Michigan.— *Compare* Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037.

Missouri.— State *v.* Jones, 26 Mo. App. 190.

Pennsylvania.—Alexander *v.* Weidner, 82 Pa. St. 452; Constine's Appeal, 1 Grant (Pa.) 242.

Wisconsin.— Miller *v.* Tracy, 86 Wis. 330, 56 N. W. 866.

See 3 Cent. Dig. tit. "Appeal and Error," § 3561.

1. Only the injured party can take advantage of an error committed in the lower court.

Alabama.— McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810; Eslava *v.* Farley, 72 Ala. 214.

Florida.— Neal *v.* Spooner, 20 Fla. 38.

Georgia.—Gammage *v.* Powell, 101 Ga. 540, 28 S. E. 969.

Idaho.— Sabin *v.* Burke, (Ida. 1894) 37 Pac. 352.

Illinois.— Friend *v.* Cohen, 160 Ill. 185, 43 N. E. 344; Humphreys *v.* Roth, 158 Ill. 186, 41 N. E. 751; National Bank *v.* King, 110 Ill. 254; Hannas *v.* Hannas, 110 Ill. 53.

Indiana.— Sutherland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. 624; Gavin *v.* Decatur County, 81 Ind. 480; Bierly *v.* Royse, (Ind. App. 1900) 57 N. E. 939.

Iowa.— Cotes *v.* Davenport, 9 Iowa 227; Ross *v.* Hayne, 3 Greene (Iowa) 211.

Kansas.—Roller *v.* Snodgrass, 14 Kan. 583.

Kentucky.— Turnham *v.* Turnham, 3 B. Mon. (Ky.) 581; Heath *v.* Mitcherson, 1 J. J. Marsh. (Ky.) 547; Snyder *v.* Cox, 21 Ky. L. Rep. 796, 53 S. W. 263.

Maryland.— Pratt *v.* Johnson, 6 Md. 397.

Michigan.— Brewer *v.* Dodge, 28 Mich. 359; Berry *v.* Lowe, 10 Mich. 9.

Minnesota.— Marshall, etc., Bank *v.* Cady, 76 Minn. 112, 78 N. W. 978.

Mississippi.— Thompson *v.* State, (Miss. 1890) 7 So. 403; Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Missouri.—Wall *v.* Nay, 30 Mo. 494; Dickerson *v.* Chrisman, 28 Mo. 134.

Montana.— Edwards *v.* Tracy, 2 Mont. 49.

Nevada.— Matter of Smith, 4 Nev. 254, 97 Am. Dec. 531.

North Carolina.— Hocutt *v.* Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

Pennsylvania.— Helsel *v.* Consolidated Traction Co., 14 Pa. Super. Ct. 420.

Tennessee.— Exchange, etc., Bank *v.* Bradley, 15 Lea (Tenn.) 279; Mitchell *v.* Nash, Cooke (Tenn.) 238.

Texas.— Musselman *v.* Strohl, 83 Tex. 473, 18 S. W. 857; Scott *v.* Childers, (Tex. Civ. App. 1900) 60 S. W. 775; Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585; Edinburgh American Land Mortg. Co. *v.* Briggs, (Tex. Civ. App. 1897) 41 S. W. 1036.

Utah.— Haslam *v.* Haslam, 19 Utah 1, 56 Pac. 243.

Washington.— Long *v.* Eisenbeis, (Wash. 1900) 63 Pac. 249.

West Virginia.— Grantham *v.* Lucas, 24 W. Va. 231.

— as, for instance, rulings favorable to the complaining party,[2] rulings upon questions, or branches of the litigation, which do not affect the interests of appellant or plaintiff in error,[3] and rulings prejudicially affecting opposite party

Wisconsin.— Cotzhausen *v.* H. W. Johns Mfg. Co., 107 Wis. 59, 82 N. W. 716; Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

United States.— Sage *v.* Central R. Co., 99 U. S. 334, 25 L. ed. 394.

See 3 Cent. Dig. tit. "Appeal and Error," § 3560 *et seq.*

As to the effect of harmless error, generally, see *infra*, XVII, H.

Error committed before appellant becomes party.—The consolidation of two equity suits cannot be objected to on appeal by one who did not become a party to the litigation until after the consolidation, and whose rights were not affected thereby. Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345.

2. Rulings favorable to appellant.— *Alabama.*— Bedell *v.* New England Mortg. Security Co., 91 Ala. 325, 8 So. 494.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Indiana.— Pritchett *v.* McGaughey, (Ind. 1898) 52 N. E. 397; Wilcoxon *v.* Annesley, 23 Ind. 285; Cummings *v.* Girton, 19 Ind. App. 248, 49 N. E. 360.

Kentucky.— *Compare* Griffith *v.* Depew, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141, which holds that, where a decree is reversed at the instance of the plaintiff in error, every error, both for and against him, ought to be rectified.

Michigan.— Stevens *v.* Pendleton, 94 Mich. 405, 53 N. W. 1108; Tapert *v.* Detroit, etc., R. Co., 50 Mich. 267, 15 N. W. 450.

Mississippi.—Dilworth *v.* Mayfield, 36 Miss. 40.

Missouri.— Hill *v.* Swingley, 159 Mo. 45, 60 S. W. 114; Kraft-Holmes Grocery Co. *v.* Crow, 36 Mo. App. 288.

New York.— Kidder *v.* Jones, 13 Misc. (N. Y.) 216, 34 N. Y. Suppl. 231, 68 N. Y. St. 112; Powell *v.* Kane, 5 Paige (N. Y.) 265.

North Carolina.— Madison County *v.* Candler, 123 N. C. 682, 31 S. E. 858; Edwards *v.* Phifer, 121 N. C. 388, 28 S. E. 548.

South Dakota.— Spencer *v.* Forcht, (S. D. 1900) 84 N. W. 765.

Vermont.— Erwin *v.* Stafford, 45 Vt. 390.

See 3 Cent. Dig. tit. "Appeal and Error," § 3562.

Rulings favorable to appellant's successful co-party.— Unless he has been injured or prejudiced thereby, a party who is unsuccessful in the trial court cannot, upon appeal or error, predicate error upon rulings or decisions favorable to his successful co-party.

Alabama.— Heyman *v.* McBurney, 66 Ala. 511.

California.— Kennedy-Shaw Lumber Co. *v.* Priet, 113 Cal. 291, 45 Pac. 336; Tripp *v.* Duane, 74 Cal. 85, 15 Pac. 439.

Illinois.— Jefferson *v.* Jefferson, 96 Ill. 551.

Indiana.—Duesterberg *v.* Swartzel, 115 Ind. 180, 17 N. E. 155.

Kentucky.— Williams *v.* Rogers, 14 Bush (Ky.) 776.

New York.— Geisler *v.* Acosta, 9 N. Y. 227; Wallace *v.* Third Ave. R. Co., 36 N. Y. App. Div. 57, 55 N. Y. Suppl. 132; Popham *v.* Twenty-Third St. R. Co., 48 N. Y. Super. Ct. 229.

Ohio.— Mead *v.* McGraw, 19 Ohio St. 55.

3. Rulings not affecting appellant's interests.— *Alabama.*— Woodruff *v.* Smith, (Ala. 1900) 28 So. 736; Hayes *v.* Kolsky, 104 Ala. 418, 16 So. 533.

Arizona.— Hall *v.* Southern Pac. Co., (Ariz. 1899) 57 Pac. 617.

California.— Dayton *v.* McAllister, 129 Cal. 192, 61 Pac. 913; People *v.* Reis, 76 Cal. 269, 18 Pac. 309.

Illinois.— Schwartz *v.* Ritter, 186 Ill. 209, 57 N. E. 887; Eggleston *v.* Morrison, 185 Ill. 577, 57 N. E. 775 [*affirming* 84 Ill. App. 625]; Farnan *v.* Borders, 119 Ill. 228, 10 N. E. 550; McGraw *v.* Storke, 44 Ill. App. 311.

Indiana.— Baker *v.* Armstrong, 57 Ind. 189.

Kentucky.— Meuth *v.* Long, 21 Ky. L. Rep. 21, 50 S. W. 967; Howard *v.* Howard, 10 Ky. L. Rep. 478, 9 S. W. 411, 1 L. R. A. 610.

Louisiana.— State *v.* Herdic Coach Co., 35 La. Ann. 245.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Minnesota.— Clark *v.* B. B. Richards Lumber Co., 72 Minn. 397, 75 N. W. 605.

New York.— Hone *v.* Van Schaick, 7 Paige (N. Y.) 221.

Pennsylvania.— Lerch *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336.

South Carolina.—*Ex p.* Neal Loan, etc., Co., 58 S. C. 269, 36 S. E. 584; Earley *v.* Law, 42 S. C. 330, 20 S. E. 136.

Texas.— Cook *v.* Steel, 42 Tex. 53; Bruce *v.* Weatherford First Nat. Bank, (Tex. Civ. App. 1901) 60 S. W. 1006.

Virginia.— Tebbs *v.* Lee, 76 Va. 744.

West Virginia.— Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321.

Wisconsin.— McGinnis *v.* Wheeler, 26 Wis. 651.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3563, 3564.

Upon the same principle a garnishee or an intervener will not be heard to complain, upon appeal or error, of mere irregularities and errors in the judgment against the principal defendant, which do not affect its validity.

Kentucky.— Meadors *v.* Brown, 16 Ky. L. Rep. 620, 29 S. W. 325.

Louisiana.— Yeatman *v.* Estill, 3 La. Ann. 222; Hanna *v.* Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339.

Mississippi.— Whitney *v.* Gregory, (Miss. 1894) 16 So. 292; Erwin *v.* Heath, 50 Miss. 795.

Texas.— Wyatt *v.* Foster, 79 Tex. 413, 15 S. W. 679; Rainbolt *v.* March, 52 Tex. 246.

or parties only.[4] Similarly, if the error does not affect the rights of appellant or plaintiff in error, he will not be heard to complain in the appellate court that the proceedings below were irregular because they affect the rights of third persons who were not made parties thereto,[5] or were made so in an irregular manner.[6] Nor will a judgment or decree be reversed, at the instance of appellant or plaintiff in error, because of alleged errors which concern only parties below who are not parties to the appeal or writ of error.[7] Rulings or decisions adverse to a

United States.— Habich *v.* Folger, 20 Wall. (U. S.) 1, 22 L. ed. 307.

See 3 Cent. Dig. tit. "Appeal and Error," § 3569; and compare *infra*, note 8.

On the other hand, however, in order that he may protect himself from liability to his creditor, a garnishee will be permitted to urge objections that render the judgment against the principal defendant absolutely void. Erwin *v.* Heath, 50 Miss. 795; Whitehead *v.* Henderson, 4 Sm. & M. (Miss.) 704.

Interpleaded parties.— Upon an appeal by plaintiff from a part of the judgment in an action on an insurance policy wherein the insurance company filed a bill of interpleader, other interpleaded parties, not appealing, cannot assign errors as to a judgment for plaintiff, except within the scope of the appeal taken. Stevens *v.* Germania L. Ins. Co., (Tex. Civ. App. 1901) 62 S. W. 824.

4. Rulings against adversary.— *Alabama.* — Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

Arkansas.— Lowe *v.* Loomis, 53 Ark. 454, 14 S. W. 674.

California.—Hobbs *v.* Nunn, (Cal. 1886) 11 Pac. 32; Klumpke *v.* Ackerson, (Cal. 1886) 11 Pac. 31.

Idaho.— Coffin *v.* Bradbury, (Ida. 1894) 35 Pac. 715.

Illinois.— Walker *v.* Tink, 159 Ill. 323, 42 N. E. 773; Hellman *v.* Schwartz, 44 Ill. App. 84.

Indiana.— Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756; Compton *v.* Crone, 58 Ind. 106.

Kentucky.— Ellison *v.* Ellison, (Ky. 1889) 11 S. W. 808.

Mississippi.—Saunders *v.* McLean, 65 Miss. 397, 4 So. 299.

Missouri.— Hohenthal *v.* Watson, 28 Mo. 360; Nelson *v.* Connecticut Mut. L. Ins. Co., 14 Mo. App. 592; Kortjohn *v.* Altenbernd, 14 Mo. App. 342.

New York.— Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582, 40 N. Y. St. 343; Robbins *v.* Codman, 4 E. D. Smith (N. Y.) 315.

North Carolina.— Hassell *v.* Walker, 50 N. C. 270.

Virginia.— Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

See 3 Cent. Dig. tit. "Appeal and Error," § 3567.

Rulings as between adversary co-parties.— Where error is committed in adjudicating the respective rights of adversary co-parties, an appellant or plaintiff in error cannot avail himself of such error.

California.— Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317; Cross *v.* Eureka, etc., Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808.

Illinois.— Tappan *v.* People, 67 Ill. 339; Fox *v.* Peck, 45 Ill. App. 239.

Kentucky.— Dean *v.* Dean, 8 Ky. L. Rep. 419, 1 S. W. 811.

Missouri.— Chicago, etc., R. Co. *v.* Elliott, 117 Mo. 549, 24 S. E. 53; Dunklin County *v.* Clark, 51 Mo. 60; Kehoe *v.* Phillipi, 42 Mo. App. 292.

Texas.— Nix *v.* Mayer, (Tex. 1886) 2 S. W. 819.

West Virginia.— Mann *v.* Lewis, 3 W. Va. 215, 100 Am. Dec. 747.

See 3 Cent. Dig. tit. "Appeal and Error," § 3570.

5. Error affecting persons not parties below.— *Alabama.*— Walker *v.* Jones, 23 Ala. 448; Bumpass *v.* Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

Illinois.— Portones *v.* Holmes, 33 Ill. App. 312.

Massachusetts.— Shirley *v.* Lunenburg, 11 Mass. 379.

Mississippi.— Graves *v.* Edwards, 32 Miss. 305.

New York.— Brown *v.* Evans, 34 Barb. (N. Y.) 594; Kruger *v.* Braender, 3 Misc. (N. Y.) 275, 23 N. Y. Suppl. 324, 51 N. Y. St. 906.

North Carolina.— Black *v.* Ore Knob Copper Co., 115 N. C. 382, 20 S. E. 476; Coates *v.* Wilkes, 94 N. C. 174.

Virginia.— Goddin *v.* Vaughn, 14 Gratt. (Va.) 102.

See 3 Cent. Dig. tit. "Appeal and Error," § 3565.

6. Short *v.* Raub, 81 Ill. 509; Kortjohn *v.* Seimers, 29 Mo. App. 271.

7. Error affecting parties below not parties to appeal.—*Alabama.*—Morgan *v.* Crabb, 3 Port. (Ala.) 470.

Arkansas.— Clark *v.* Barnett, 24 Ark. 30; Ringgold *v.* Stone, 20 Ark. 526.

Illinois.— Clark *v.* Shawen, 190 Ill. 47, 60 N. E. 116; Randolph *v.* Chisholm, 29 Ill. App. 172.

Kentucky.— Davidson *v.* Dishman, (Ky. 1900) 59 S. W. 326; Foley *v.* Fuller, 13 Ky. L. Rep. 591; Crigler *v.* Conner, 12 Ky. L. Rep. 502, 14 S. W. 640; State Bank *v.* Allen, 11 Ky. L. Rep. 268; Daum *v.* Hackett, 10 Ky. L. Rep. 38.

Louisiana.— Rochford *v.* Geraghty, 10 La. Ann. 429; Hall *v.* Wills, 3 La. Ann. 504; Miller *v.* Whittier, 6 La. 70.

Michigan.—Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285.

Pennsylvania.— Matter of Dyott, 2 Watts & S. (Pa.) 557.

Texas.— Samuel Cupples Wooden-Ware Co. *v.* Hill, (Tex. Civ. App. 1900) 59 S. W. 318;

garnishee or an intervener, and affecting him only, will not be reviewed by an appellate court upon the application of plaintiff or the principal defendant.[8]

(III) *Urging Error Against Co-Appellant or Co-Plaintiff in Error.* An appellant or plaintiff in error is not entitled to assign errors against his co-party, who has joined with him in the prosecution of an appeal or writ of error, unless he is expressly authorized so to do by statute or rule of practice.[9]

b. Appellee, Respondent, or Defendant in Error — (I) *In General.* Except in the case of a broad appeal in chancery,[10] an appellee, respondent, or defendant in error is not entitled, in the absence of a statute authorizing cross-assignments of error, to present for review exceptions taken by him to rulings, orders, instructions, decisions, or findings of the trial court, unless he has taken or sued out a separate, or cross, appeal, petition in error, or writ of error.[11]

Simmang *v.* Harris, (Tex. Civ. App. 1894) 27 S. W. 786.

Virginia.— Arrington *v.* Cheatham, 2 Rob. (Va.) 491.

See 3 Cent. Dig. tit. "Appeal and Error," § 3566.

See also *infra*, XVII, C, 1, c.

8. *California.*—Grand Grove, U. A. O. D., *v.* Garibaldi Grove No. 17, U. A. O. D., 105 Cal. 219, 38 Pac. 947.

Iowa.— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.

Massachusetts.— Whiting *v.* Cochran, 9 Mass. 532.

North Carolina.— Grubbs *v.* Stephenson, 117 N. C. 66, 23 S. E. 97.

Pennsylvania.— Conshohocken Tube Co. *v.* Iron Car Equipment Co., 167 Pa. St. 589, 36 Wkly. Notes Cas. (Pa.) 254, 31 Atl. 934.

West Virginia.— Warren *v.* Syme, 7 W. Va. 474.

Wisconsin.— Kirby *v.* Corning, 54 Wis. 599, 12 N. W. 69.

See 3 Cent. Dig. tit. "Appeal and Error," § 3571; and *supra*, note 3.

9. Davis *v.* Davis, 44 Ala. 342; Knox *v.* Steele, 18 Ala. 815, 54 Am. Dec. 181; Wiley *v.* Coovert, 127 Ind. 559, 27 N. E. 173; French *v.* Canada Southern R. Co., 42 Mich. 64, 3 N. W. 257. See 3 Cent. Dig. tit. "Appeal and Error," § 3572.

Compare Pierce *v.* Michel, 1 Mo. App. Rep. 74 (which says that, in a triangular contest, one defendant has a right to complain of the instructions of his co-defendant in so far only as they impose upon him a greater burden than he ought to assume); Palmer *v.* New York, etc., Transp. Co., 76 Hun (N. Y.) 181, 27 N. Y. Suppl. 561, 57 N. Y. St. 307 (which holds that, in an action against two defendants, an error in the admission of evidence offered by one of the defendants, over the objection and exception of the other, is available to the objecting defendant as against the plaintiff, upon appeal from a judgment entered upon a verdict in favor of the plaintiff, when such erroneous evidence was received, generally, in the case as to all parties and the jury was not instructed to disregard it as against the objecting defendant, and the probable effect of the evidence and of the charge of the court in reference thereto was to influence the verdict); and Zimmer *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308 (which holds that, in an action against joint tort-feasors wherein plaintiff recovered, either defendant is entitled to a reversal if the charge was erroneous as to him, even though it was given at his co-defendant's request).

When plaintiff and some defendants are not adverse parties.— Some of the defendants filed cross-complaint praying for substantially the same relief as that sought by the complaint. Judgment was rendered in favor of the other defendants, and the defendants who filed the cross-complaint appealed. It was held that they could not, on appeal, question the sufficiency of the original complaint, since they and the plaintiff were not really adverse parties. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483.

10. **A broad appeal in chancery,** in the absence of statutory provisions to the contrary, presents the cause for trial *de novo* in the appellate court; hence, a cross-appeal is not necessary to entitle appellee to allege error for the purpose of obtaining a modification or a reversal of a decree which contains errors prejudicial to his rights.

Florida.— Neubert *v.* Massman, 37 Fla. 91, 19 So. 625.

Illinois.— Cable *v.* Ellis, 86 Ill. 525. But it is essential that appellee should assign cross-errors if he wishes to obtain such relief. People *v.* Brislin, 80 Ill. 423.

Iowa.— West *v.* West, 90 Iowa 41, 57 N. W. 639.

Tennessee.— Wood *v.* Cooper, 2 Heisk. (Tenn.) 441.

Virginia.— Campbell *v.* Campbell, 22 Gratt. (Va.) 649; Burton *v.* Brown, 22 Gratt. (Va.) 1; Day *v.* Murdoch, 1 Munf. (Va.) 460.

This rule has been varied or modified by statute in some states. Gordon *v.* Miller, 14 Md. 204; Diffenderffer *v.* Winder, 3 Gill & J. (Md.) 311; Proctor *v.* Robinson, 35 Mich. 284; Lowrenz *v.* Penn, 1 Ohio Dec. (Reprint) 448; Pettigrew *v.* Evansville, 25 Wis. 223, 3 Am. Rep. 50.

In Alabama, if only the complainant in an equity cause appeals from the decree therein, the supreme court will not, at the instance of appellee, consider whether the bill contains equity, in the absence of any assignment of error raising such question. Carlin *v.* Jones, 55 Ala. 624; Bobe *v.* Stickney, 36 Ala. 482.

11. *Alabama.*— Holdsombeck *v.* Fancher, 112 Ala. 469, 20 So. 519; Kirksey *v.* Hardaway, 41 Ala. 330.

(II) *To Obtain Affirmative Relief.* This rule operates to prevent an appellee or defendant in error, who has not appealed or brought error, from obtaining affirmative relief by way of a modification or amendment of the judg-

California.— South San Bernardino Land, etc., Co. *v.* San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Olmsted's Estate, 122 Cal. 224, 54 Pac. 745.

Connecticut.— Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78.

Idaho.— Jones *v.* St. John Irrigating Co., 2 Ida. 58, 3 Pac. 1.

Illinois.— Rose *v.* Hale, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40; Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337 [*affirming* 82 Ill. App. 60]; Chicago Sanitary Dist. *v.* Adam, 179 Ill. 406, 53 N. E. 743; Siegel *v.* Andrews, 78 Ill. App. 611.

Iowa.— Carter *v.* Fred Miller Brewing Co., 111 Iowa 457, 82 N. W. 930; Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481; Matter of Stumpenhousen, 108 Iowa 555, 79 N. W. 376; Lane *v.* Parsons, 108 Iowa 241, 79 N. W. 61. *Compare* Fred Miller Brewing Co. *v.* Council Bluffs Ins. Co., 95 Iowa 31, 63 N. W. 565, which holds that, where no appeal was taken by appellee, objections not embraced within the conclusions of law on which the judgment is based will not be considered.

Kansas.— Myers *v.* Hutchison, 61 Kan. 191, 59 Pac. 275; Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242.

Kentucky.— Taylor *v.* Harrison, 18 Ky. L. Rep. 164, 35 S. W. 908; Trimble *v.* Lewis, 14 Ky. L. Rep. 527.

Maryland.— Trego *v.* Skinner, 42 Md. 426; Rider *v.* Gray, 10 Md. 282, 69 Am. Dec. 135; State *v.* Milburn, 9 Gill (Md.) 97.

Massachusetts.—Kane *v.* Shields, 167 Mass. 392, 45 N. E. 758; May *v.* Gates, 137 Mass. 389.

Michigan.— National Bldg., etc., Assoc. *v.* Burch, 124 Mich. 57, 82 N. W. 837; Miller *v.* Michigan Cent. R. Co., 123 Mich. 374, 82 N. W. 58; Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086; Campbell *v.* Smith, 103 Mich. 427, 61 N. W. 654.

Minnesota.— Edgerton *v.* Jones, 10 Minn. 427.

Mississippi.— Bush *v.* Nance, 61 Miss. 237.

Missouri.— Westminster College *v.* Peirsol, 161 Mo. 270, 61 S. W. 811; James *v.* Groff, 157 Mo. 402, 57 S. W. 1081; Meyer *v.* Stone, 40 Mo. App. 289.

Montana.— Buck *v.* Fitzgerald, 21 Mont. 482, 54 Pac. 942.

Nebraska.— Rogers *v.* Central L. & T. Co., 49 Nebr. 676, 68 N. W. 1048; Hamilton *v.* Whitney, 19 Nebr. 303, 27 N. W. 125.

Nevada.— Moresi *v.* Swift, 15 Nev. 215; Maher *v.* Swift, 14 Nev. 324.

New York.— Cox *v.* Stokes, 156 N. Y. 491, 51 N. E. 316 [*reversing* 78 Hun (N. Y.) 331, 29 N. Y. Suppl. 141, 60 N. Y. St. 706]; Clark *v.* Stewart, 127 N. Y. 676, 27 N. E. 1078, 38 N. Y. St. 905; Morris *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 512, 64 N. Y. Suppl. 878, 30 N. Y. Civ. Proc. 371; Jones *v.* New York, 47 N. Y. App. Div. 39, 62 N. Y. Suppl. 284.

North Carolina.— Waters *v.* Waters, 125 N. C. 590, 34 S. E. 548; Johnson *v.* Blake, 124 N. C. 106, 32 S. E. 397; Kiser *v.* Blanton, 123 N. C. 400, 31 S. E. 878.

Oregon.— Conrad *v.* Pacific Packing Co., 34 Oreg. 337, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021; Thornton *v.* Krimbel, 28 Oreg. 271, 42 Pac. 995; Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

Tennessee.—Gallena *v.* Sudheimer, 9 Heisk. (Tenn.) 189.

Virginia.— Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455. *Compare* Little *v.* Bowen, 76 Va. 724.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55; Jenkins *v.* Jenkins' University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; Tacoma *v.* Tacoma Light, etc., Co., 16 Wash. 288, 47 Pac. 738.

Wisconsin.— Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267; Jones *v.* Jones, 64 Wis. 301, 25 N. W. 218.

United States.— Bolles *v.* Outing Co., 175 U. S. 262, 20 S. Ct. 94, 44 L. ed. 156 [*affirming* 77 Fed. 966, 45 U. S. App. 449, 23 C. C. A. 594]; U. S. *v.* Blackfeather, 155 U. S. 180, 15 S. Ct. 64, 39 L. ed. 114; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 30 U. S. App. 163, 14 C. C. A. 133.

See 3 Cent. Dig. tit. "Appeal and Error," § 3573.

For exceptions to this rule, under statutes or rules of practice, see the following cases:

Florida.— O'Neil *v.* Percival, 25 Fla. 118, 5 So. 809.

Georgia.— Peeples *v.* Cavender, 108 Ga. 527, 34 S. E. 5; Moomaugh *v.* Everett, 88 Ga. 67, 13 S. E. 837.

Louisiana.— Gathe *v.* Broussard, 49 La. Ann. 312, 21 So. 839; Girod *v.* His Creditors, 2 La. Ann. 546.

New Hampshire.—Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

Texas.— Woeltz *v.* Woeltz, 93 Tex. 548, 57 S. W. 35; Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258; Crockett First Nat. Bank *v.* East, 17 Tex. Civ. App. 176, 43 S. W. 558; Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653. *Compare* Phoenix Ins. Co. *v.* Ward, 7 Tex. Civ. App. 13, 26 S. W. 763.

Vermont.— See Davis *v.* Partridge, 19 Vt. 431, which holds that upon an appeal from the decision of a county court accepting a report of auditors, either party may argue such questions as were decided against him below, though he took no exceptions at the time.

West Virginia.— Weekly *v.* Hardesty, (W. Va. 1900) 35 S. E. 880; Morgan *v.* Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

Delay in appealing.— An execution having been levied on certain lands, a junior encumbrancer filed his bill to compel the judgment

ment or decree under review,[12] even though the relief sought extends only to the adjustment of the costs,[13] or to the increase or reduction of the amount of the recovery.[14] For the same reason, an appellee or defendant in error is not entitled to allege error in the rendition of judgment against him on his counter-claim, when he failed to prosecute an appeal therefrom, or to sue out a writ of error thereto.[15]

(III) *To Sustain Judgment.* But, in some jurisdictions, when the whole record is carried up upon appeal, the appellee is permitted to present and urge exceptions taken by him below, for the purpose of sustaining his judgment,[16] or

creditor to levy on other property of the judgment debtor. The chancellor decided against his right so to do, and he prayed an appeal, but, before prosecuting his appeal, the property was sold under the execution. He moved this court to have the sale set aside. It was held that, although he was entitled to the ruling originally prayed for, yet as by his delay in prosecuting his appeal he had permitted the sale to take place, it was too late to afford him relief, and the sale could not be set aside. Baine *v.* Williams, 10 Sm. & M. (Miss.) 113.

12. *Arkansas.*— Turner *v.* Turner, 44 Ark. 25.

Indiana.— *Contra,* Patoka Tp. *v.* Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417, which holds that an appellee who properly saves a question and duly presents it by assignments of cross-errors is entitled to affirmative relief.

Iowa.— Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685.

Kentucky.— Noe *v.* Keen, 5 Ky. L. Rep. 926.

Louisiana.—In this state the practice seems to be that an appellee cannot secure an amendment or revision of the judgment in his favor unless he has answered the original appeal. Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Leeds *v.* Jones, 37 La. Ann. 427; Noble *v.* Steamer R. W. Powell, 20 La. Ann. 121; Dolese *v.* Barberot, 9 La. Ann. 352; Williams *v.* Duer, 14 La. 523; Foster *v.* Foster, 6 La. 22; Keen *v.* Carlisle, McGloin (La.) 78.

Michigan.— Tapert *v.* Detroit, etc., R. Co., 50 Mich. 267, 15 N. W. 450; Hoff *v.* Hoff, 48 Mich. 281, 12 N. W. 160; Foster *v.* Malone, 45 Mich. 255, 7 N. W. 817; Brown *v.* Bronson, 35 Mich. 415.

Minnesota.— New *v.* Wheaton, 24 Minn. 406.

Missouri.— Mack *v.* Wurmser, 135 Mo. 58, 36 S. W. 221; Nearen *v.* Bakewell, 110 Mo. 645, 19 S. W. 988.

New York.— Clowes *v.* Dickenson, 8 Cow. (N. Y.) 328.

North Carolina.— Oxford Bank *v.* Bobbitt, 108 N. C. 525, 13 S. E. 177.

Tennessee.— Gilreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. 250.

Texas.—*Compare* Texas, etc., R. Co. *v.* Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Wisconsin.— Witt *v.* Grand Grove, U. A. O. D., 55 Wis. 376, 13 N. W. 261.

United States.— Calder *v.* Henderson, 54 Fed. 802, 2 U. S. App. 627, 4 C. C. A. 584.

Canada.— Glines *v.* Cross, 12 Manitoba 442.

See 3 Cent. Dig. tit. "Appeal and Error," § 3576.

13. Charlton *v.* Sloan, 76 Iowa 288, 41 N. W. 303; Prosser *v.* Whitney, 46 Mich. 405, 9 N. W. 449; Mapes *v.* Coffin, 5 Paige (N. Y.) 296; Townsend *v.* Graves, 3 Paige (N. Y.) 453.

14. *Iowa.*— Devoe *v.* Hall, 60 Iowa 749, 14 N. W. 124; Smith *v.* Wolf, 55 Iowa 555, 8 N. W. 429.

Kansas.— Missouri Pac. R. Co. *v.* Lea, 47 Kan. 268, 27 Pac. 987.

Michigan.— Chadwick *v.* Chadwick, 59 Mich. 87, 26 N. W. 288.

Missouri.—Sanderson *v.* Wertz, 44 Mo. App. 496.

New York.— Glassner *v.* Wheaton, 2 E. D. Smith (N. Y.) 352.

Oregon.— Goldsmith *v.* Elwert, 31 Oreg. 539, 50 Pac. 867.

United States.— Kingory *v.* U. S., 44 Fed. 669.

See 3 Cent. Dig. tit. "Appeal and Error," § 3577.

15. From judgment on counter-claim.— Pace *v.* Heinley, 85 Iowa 733, 52 N. W. 124; Keen *v.* Carlisle, McGloin (La.) 78, which latter case distinguishes the right of an appellee to have a review of a judgment dismissing his demand in reconvention from his right to urge the consideration of errors committed against him in the proceedings resulting in the principal judgment.

16. *Iowa.*— Marshalltown First Nat. Bank *v.* Wright, 84 Iowa 728, 48 N. W. 91, 50 N. W. 23.

Massachusetts.— Harris *v.* Harris, 153 Mass. 439, 26 N. E. 1117.

New York.— Reed *v.* McConnell, 133 N. Y. 425, 31 N. E. 22, 45 N. Y. St. 227; Mackay *v.* Lewis, 73 N. Y. 382.

Wisconsin.— Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Witt *v.* Grand Grove, U. A. O. D., 55 Wis. 376, 13 N. W. 261; Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

United States.— Bush *v.* The Alonzo, 2 Cliff. (U. S.) 548, 4 Fed. Cas. No. 2,223.

See 3 Cent. Dig. tit. "Appeal and Error," § 3575.

In South Carolina respondent's exceptions will not be considered if he failed to give notice that he desired to sustain the judgment on other grounds than those upon which it was rested by the trial court. Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596.

of demonstrating that appellant is not entitled to the relief he seeks, at the hands of the appellate court, notwithstanding the errors committed against him at the trial.[17]

(IV) *In Actions For Accounting.* The right of a party to a bill seeking an accounting to assign errors upon his adversary's appeal is a question presenting much difficulty, as the authorities are about equally divided.[18]

(V) *Urging Error Against Co-Appellee or Co-Defendant in Error.* An appellee or defendant in error will not be heard to assign errors against his co-appellee or co-defendant in error unless he has prosecuted a separate appeal, or writ of error, for that express purpose.[19]

c. Persons Not Parties in Appellate Court. One who has not appealed or brought error, and who is not a party to the proceedings in the appellate court, has no standing to allege error,[20] and can derive no advantage from errors assigned by others who are properly before the appellate court.[21] It follows, therefore, that

In Wisconsin the statute authorizing this practice has been construed as applying only to causes tried by the court without a jury. Hacker *v.* Horlemus, 69 Wis. 280, 34 N. W. 125.

17. Davis *v.* Glenn, 3 La. Ann. 444; Randle *v.* Pacific R. Co., 65 Mo. 325. *Contra,* Monnet *v.* Merz, 127 N. Y. 151, 27 N. E. 827, 38 N. Y. St. 165. *Compare* North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713.

18. Right does not exist.— The better rule would seem to be that the right does not exist when not authorized by statute or rule of practice, except in chancery causes where a broad appeal is taken. Moors *v.* Washburn, 159 Mass. 172, 34 N. E. 182; Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127; Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862. Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127, and Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862, *supra,* seem in direct conflict with Lambert *v.* Griffith, 44 Mich. 65, 6 N. W. 106, and Grant *v.* Merchants', etc., Bank, 35 Mich. 515, which, however, they do not expressly overrule, or even mention.

See 3 Cent. Dig. tit. "Appeal and Error," § 3579.

Right does exist.—Foster *v.* Ambler, 24 Fla. 519, 5 So. 263; Cox *v.* Schermerhorn, 18 Hun (N. Y.) 16 [*overruling* Ross *v.* Ross, 6 Hun (N. Y.) 80]; Collins *v.* Hoxie, 9 Paige (N. Y.) 81 — the last two cases being based upon a rule of practice adopted by the appellate court.

19. *Kansas.*— Chicago Lumber Co. *v.* Tomlinson, 54 Kan. 770, 39 Pac. 694.

Kentucky.— Wilson *v.* Daniel, 13 B. Mon. (Ky.) 348; Marion Nat. Bank *v.* Phillips, 18 Ky. L. Rep. 159, 35 S. W. 910.

Louisiana.—Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867; Grangnard *v.* Forsyth, 44 La. Ann. 327, 10 So. 799. But *compare* Porche *v.* Lang, 16 La. Ann. 312.

New York.— Ross *v.* Ross, 6 Hun (N. Y.) 80; Collins *v.* Hoxie, 9 Paige (N. Y.) 81.

Texas.— Patterson *v.* Rogers, 53 Tex. 484; De la Vega *v.* League, 2 Tex. Civ. App. 252, 21 S. W. 565.

Virginia.— Blackwell *v.* Bragg, 78 Va. 529.

See 3 Cent. Dig. tit. "Appeal and Error," § 3580.

20. *Illinois.*— Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664; Morse *v.* Smith, 83 Ill. 396; St. Louis, etc., R. Co. *v.* Kerr, 48 Ill. App. 496.

Iowa.— Mathews *v.* Cedar Rapids, 80 Iowa 459, 45 N. W. 894, 20 Am. St. Rep. 436; Butler *v.* Barkley, 67 Iowa 491, 25 N. W. 747.

Kansas.— Hayner *v.* Eberhardt, 37 Kan. 308, 15 Pac. 168.

Kentucky.— Harrodsburg *v.* Harrodsburg Educational Dist., 9 Ky. L. Rep. 605, 7 S. W. 312. *Compare* Lampton *v.* Worley, 3 Litt. (Ky.) 1, which holds that, where a writ of error coram nobis has been obtained by false suggestion of the death of the original plaintiff, and the nomination of a fictitious administrator, the original plaintiff has a right to appear, and that it is no objection to a judgment in his favor that he was not a party to the writ of error.

Louisiana.— Herron's Succession, 32 La. Ann. 835; White *v.* Fifth Regular Baptist Church, 31 La. Ann. 521; Coleman *v.* Haight, 14 La. Ann. 564; Gauche *v.* Trautman, 7 La. Ann. 18.

Michigan.— Bundy *v.* Youmans, 44 Mich. 376, 6 N. W. 851.

Missouri.— Delassus *v.* Poston, 19 Mo. 425.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

Texas.—Anderson *v.* Silliman, 92 Tex. 560, 50 S. W. 576; Patterson *v.* Rogers, 53 Tex. 484; Levinski *v.* Williamson, 15 Tex. Civ. App. 67, 38 S. W. 376.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91.

See 3 Cent. Dig. tit. "Appeal and Error," § 3581.

Compare supra, XVII, C, 1, a, (II).

21. Stafford *v.* Maus, 38 Iowa 133; Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867; Roman *v.* Denney, 17 La. Ann. 126; Plauche *v.* Gravier, 6 Mart. N. S. (La.) 598; Bernardine *v.* L'Espinasse, 6 Mart. N. S. (La.) 94; Cooper *v.* Speiser, 34 Nebr. 500, 52 N. W. 403; Livingston *v.* Exum, 19 S. C. 223.

Under the Louisiana practice, one who is made a party to the appeal and adopts the allegations and prayer of appellant's petition, but does not himself appeal, is not entitled to relief. Tegart *v.* McCaleb, 10 La. Ann. 288.

one who was not a party to the proceedings below will not be heard to complain of such proceedings in the appellate court.[22] Nor can the judgment or decree of the lower court be modified or reversed to the prejudice of one who has not been brought within the jurisdiction of the appellate court, by being made a party to the proceedings therein.[23]

d. Where Error Affects Co-Party Only. A party is not entitled to have a judgment or decree reversed or modified because of errors affecting only his co-party below, where the latter is not before the appellate court complaining thereof.[24] Similarly, when the error concerning which complaint is made does not affect his interests in any way, a defendant who appeared in the cause or who was properly a party to the cause below, and against whom judgment was rendered, cannot predicate error upon the rendition of judgment against a co-defendant, not properly served with process, who has failed to appeal from the judgment,[25]

22. May *v.* Courtnay, 47 Ala. 185; Smith *v.* Hickman, 68 Ill. 314. Even though he was named as a party in the original pleading, but was never served with process. Cook *v.* Lasher, 73 Fed. 701, 42 U. S. App. 42, 19 C. C. A. 654. But see Griffing *v.* Bowmar, 3 Rob. (La.) 113, to the effect that, under La. Code Prac. art. 571, third persons not parties to the suit who allege themselves to be aggrieved by the judgment have a right of appeal and may thereupon avail themselves of anything in the record affecting their rights.

See 3 Cent. Dig. tit. "Appeal and Error," § 3583.

Party not moving for new trial.— Where one of several defendants moves for a new trial, and all defendants appeal from the order denying the motion, only the parties to the motion can complain of such order. Calderwood *v.* Brooks, 28 Cal. 151.

23. McNamara *v.* Schwaniger, 20 Ky. L. Rep. 1667, 49 S. W. 1061; Beauchamp *v.* Whittington, 10 La. Ann. 646; Theurer *v.* Schmidt, 10 La. Ann. 125; Core *v.* Corse, 10 La. Ann. 53; De Young *v.* De Young, 9 La. Ann. 545; Gordon *v.* Diggs, 9 La. Ann. 422.

24. *Alabama.*— Millsap *v.* Stanley, 50 Ala. 319.

Arkansas.— Thorn *v.* Ingram, 25 Ark. 52; State Bank *v.* Bailey, 4 Ark. 453.

California.— Diamond Coal Co. *v.* Cook, (Cal. 1900) 61 Pac. 578; McDonald *v.* Taylor, 89 Cal. 42, 26 Pac. 595; Ball *v.* Nichols, 73 Cal. 193, 14 Pac. 831.

Colorado.— Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681; Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947.

Idaho.—Wilson *v.* Wilson, (Ida. 1899) 57 Pac. 708.

Illinois.— Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664; Cook *v.* Illinois Trust, etc., Bank, 68 Ill. App. 478; Sanderson *v.* Snow, 68 Ill. App. 384.

Indiana.— Flood *v.* Joyner, 96 Ind. 459; Berghoff *v.* McDonald, 87 Ind. 549.

Iowa.— Eyre *v.* Cook, 9 Iowa 185.

Kansas.— Heil *v.* Heil, 40 Kan. 69, 19 Pac. 340.

Kentucky.— Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; Davis *v.* Bailey, 21 Ky. L. Rep. 839, 53 S. W. 31; Layton *v.* Weed Sewing Mach. Co., 4 Ky. L. Rep. 263.

Louisiana.— Parker *v.* Brashear, 16 La. 69.

Maryland.— Godwin *v.* Banks, 89 Md. 679, 43 Atl. 863.

Michigan.— Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130; Oliver *v.* Shoemaker, 35 Mich. 464.

Minnesota.— Borman *v.* Baker, 68 Minn. 213, 70 N. W. 1075.

Mississippi.— Baum *v.* Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441; Pintard *v.* Griffing, 32 Miss. 133.

Missouri.— Overspeck *v.* Thiemann, 92 Mo. 475, 4 S. W. 927; Papin *v.* Massey, 27 Mo. 445.

Nebraska.—Barnes *v.* George, 54 Nehr. 504, 74 N. W. 854.

New York.— Leach *v.* Kelsey, 7 Barb. (N. Y.) 466.

Tennessee.— Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568; Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148; Schoenpflug *v.* Ketcham, (Tenn. Ch. 1898) 52 S. W. 666.

Texas.— Chappell *v.* Brooks, 33 Tex. 275; Herndon *v.* Bremond, 17 Tex. 432 (co-party being the wife of appellant); Ward *v.* Tinnen, 10 Tex. 187.

Virginia.— Clayton *v.* Henley, 32 Gratt. (Va.) 65.

West Virginia.— Silverman *v.* Greaser, 27 W. Va. 550, the co-party being the wife of appellant.

See 3 Cent. Dig. tit. "Appeal and Error," § 3584.

This rule applies to proceedings in chancery as well as to common-law proceedings. Barker *v.* Callihan, 5 Ala. 708; Walker *v.* Abt, 83 Ill. 226; Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117; Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65.

This rule does not apply where the errors affect the interests of the complaining party also (Greenman *v.* Harvey, 53 Ill. 386; Carr *v.* Bredenherg, 50 S. C. 471, 27 S. E. 925; Willis *v.* Smith, 17 Tex. Civ. App. 543, 43 S. W. 325); or where their effect is to render the judgment absolutely void as to all the defendants (Weis *v.* Aaron, 75 Miss. 138, 21 So. 763, 65 Am. St. Rep. 594).

25. Co-party not served with process.— *Arkansas.*— Rheubottom *v.* Sadler, 19 Ark. 491.

or has waived or released the error.[26] Thus, it has been held that one who has not been injured thereby cannot assign as error that the judgment against his co-party was irregular or improper because based upon defective pleadings[27] or verdict,[28] or because of erroneous rulings as to pleadings,[29] evidence,[30] or instructions,[31] when such co-party does not complain thereof, and the error does not vitiate the entire judgment. Where the liability of defendants is several or independent, one of them, upon an appeal by himself alone from a judgment against all, will not be heard to complain that the judgment was improper or incorrect as to his co-defendants,[32] or that it was irregular because of the failure to first enter a formal default or *pro confesso* against them.[33] Irregularities in the proceedings below which affect the interests of minor defendants only[34]—such as the failure to appoint a guardian *ad litem* for them[35]—cannot be assigned as error by any of their co-defendants. Errors in a judgment against the sureties on a judicial bond are not available in behalf of the principal, who alone appeals from the judgment, which is correct as to him.[36]

California.— People *v.* Worth, (Cal. 1893) 33 Pac. 913; McGary *v.* Pedrorena, 58 Cal. 91.

Illinois.— Culver *v.* Cougle, 165 Ill. 417, 46 N. E. 242; Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223; Rhoades *v.* Rhoades, 88 Ill. 139; Reed *v.* Boyd, 84 Ill. 66.

Indiana.— Pattison *v.* Smith, 93 Ind. 447; Pell *v.* Farquar, 3 Blackf. (Ind.) 331.

Kentucky.— Violett *v.* Dale, 1 Bibb (Ky.) 144.

Louisiana.— Chapman *v.* Early, 12 La. 230.

Mississippi.— Burks *v.* Burks, 66 Miss. 494, 6 So. 244.

Ohio.— Larimer *v.* Clemmer, 31 Ohio St. 499.

South Carolina.— Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779.

Tennessee.— Bentley *v.* Hurxthal, 3 Head (Tenn.) 378.

Texas.— Gunn *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 278.

See 3 Cent. Dig. tit. "Appeal and Error," § 3585.

Rule is otherwise when interests are affected. Keiffer *v.* Barney, 31 Ala. 192; Greenman *v.* Harvey, 53 Ill. 386.

26. Failure to waive or release errors.— Ellis *v.* Bullard, 11 Cush. (Mass.) 496; Ash *v.* McCabe, 21 Ohio St. 181; Anderson *v.* Doolittle, 38 W. Va. 633, 18 S. E. 726; Arnold *v.* Arnold, 11 W. Va. 449.

27. Defective pleadings.— Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675; Wilkinson *v.* Cook, 44 Miss. 367.

28. Defective verdict.— Whitworth *v.* Ballard, 56 Ind. 279; *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Texas Elevator, etc., Co. *v.* Mitchell, 7 Tex. Civ. App. 222, 28 S. W. 45, in which last case judgment was rendered without any verdict at all.

29. Erroneous rulings as to pleadings.— Carroll *v.* Weaver, 65 Conn. 76, 31 Atl. 489; Cox *v.* Stout, 85 Ind. 422.

30. Erroneous rulings as to evidence.— Bryan *v.* Maume, 28 Cal. 238; Eppert *v.* Hall, 133 Ind. 417, 31 N. E. 74, 32 N. E. 713; Tuomey *v.* O'Reilly, etc., Co., 3 Misc. (N. Y.) 302, 22 N. Y. Suppl. 930, 52 N. Y. St. 119.

31. Erroneous rulings as to instructions.— Coykendall *v.* Gradle, 46 Ill. App. 270.

32. Improper judgment.— *California.*—McCreery *v.* Everding, 44 Cal. 284.

Illinois.— Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419 [*affirming* 82 Ill. App. 435]; Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 [*reversing* 65 Ill. App. 83].

Indiana.— Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Moore *v.* Winstead, (Ind. App. 1899) 55 N. E. 777.

Kentucky.— Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. (Ky.) 541.

Mississippi.— Peyton *v.* Scott, 2 How. (Miss.) 870.

Missouri.— *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Price *v.* Lederer, 33 Mo. App. 426.

Montana.— Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92; Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

New York.— Windecker *v.* Mutual L. Ins. Co., 12 N. Y. App. Div. 73, 43 N. Y. Suppl. 358.

North Carolina.— Lookout Lumber Co. *v.* Sanford, 112 N. C. 655, 16 S. E. 849.

Tennessee.— Kerns *v.* Perry, (Tenn. Ch. 1898) 48 S. W. 729.

Texas.— Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853; Hendrick *v.* Cannon, 5 Tex. 248; Sanderson *v.* Railey, (Tex. Civ. App. 1898) 47 S. W. 667.

Washington.— Wortman *v.* Vorhies, 14 Wash. 152, 44 Pac. 129.

See 3 Cent. Dig. tit. "Appeal and Error," § 3588.

33. McGehee *v.* Lehman, 65 Ala. 316; Malone *v.* Bosch, 104 Cal. 680, 38 Pac. 516; Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45; Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999.

34. Error affecting only infant co-defendant.— Rhoads *v.* Rhoads, 43 Ill. 239; Tibbs *v.* Allen, 27 Ill. 119; Musgrove *v.* Lusk, 2 Tenn. Ch. 576.

35. Failure to appoint guardian ad litem.— Kavanaugh *v.* Thompson, 16 Ala. 817; Boyle *v.* Boyle, 158 Ill. 228, 42 N. E. 140; Devereux's Succession, 13 La. Ann. 33. See 3 Cent. Dig. tit. "Appeal and Error," § 3589.

36. Error affecting only sureties.— Powell *v.* Sturdevant, 85 Ala. 243, 4 So. 718; Medlin *v.* Wilkerson, 81 Ala. 147, 1 So. 37; Hur-

2. Estoppel of Party to Allege Error — a. Error Committed or Invited by Party — (I) *In General.* An appellant or plaintiff in error will not be permitted to take advantage of errors which he, himself, committed,[37] or invited or induced the trial court to commit,[38] or which were the natural consequences of his own neglect[39] or misconduct.[40]

(II) *Relating to Jurisdiction.* While the authorities are in conflict, the better rule would seem to be that, as consent cannot confer jurisdiction,[41] a plaintiff against whom judgment is rendered is not estopped to assert, upon appeal or error, that the court to which he resorted had no jurisdiction of the subject-matter of the suit,[42] or of the person of the defendant.[43]

ley *v.* Vevens, 57 Ark. 547, 22 S. W. 172; Freiberg *v.* Freiberg, (Tex. 1892) 19 S. W. 791; Smith *v.* Allen, 28 Tex. 497; Martin *v.* Sykes, 25 Tex. Suppl. 197; Cheatham *v.* Riddle, 8 Tex. 162; Lott *v.* Keach, 5 Tex. 394. See 3 Cent. Dig. tit. "Appeal and Error," § 3590.

37. Welch *v.* Wallace, 8 Ill. 490; Clemson *v.* State Bank, 2 Ill. 45; People *v.* Offerman, 84 Ill. App. 132; Denny *v.* Moore, 13 Ind. 418; Smoots *v.* Foster, 16 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 218. See 3 Cent. Dig. tit. "Appeal and Error," § 3591.

38. *Colorado.*— Davis *v.* Dunlevy, 10 Colo. App. 344, 53 Pac. 250.

Connecticut.—Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99.

Georgia.— Oslin *v.* Telford, 108 Ga. 803, 34 S. E. 168; American Grocery Co. *v.* Kennedy, 100 Ga. 462, 28 S. E. 241.

Illinois.— Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23.

Iowa.— De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779.

Kansas.— Russell First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619; Gill *v.* Buckingham, 7 Kan. App. 227, 52 Pac. 897.

Kentucky.— Evans *v.* Partin, (Ky. 1900) 56 S. W. 648.

Maine.— Mudget *v.* Kent, 18 Me. 349.

Missouri.— Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20; Herman *v.* St. Louis R. Co., 77 Mo. App. 377; Guntley *v.* Staed, 77 Mo. App. 155.

Texas.— Hall *v.* Reese, (Tex. Civ. App. 1900) 58 S. W. 974.

Virginia.— Harrison *v.* Brock, 1 Munf. (Va.) 22.

United States.— Walton *v.* Chicago, etc., R. Co., 56 Fed. 1006, 12 U. S. App. 511, 6 C. C. A. 223.

See 3 Cent. Dig. tit. "Appeal and Error," § 3591.

When rule of "invited error" does not apply.— Where defendant, in an action against him for an accounting as a surviving partner, successfully objected to evidence of the value of partnership property at the time it was sold by him, basing his objection on an erroneous ground, the rule of "invited error" does not apply so as to preclude him from urging, on appeal, error in the statement of the account charging him with the value of the property on dissolution, such evidence being inadmissible under the pleadings. Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Tex. Civ. App. 1899) 50 S. W. 1058].

39. *Arkansas.*— Shropshire *v.* McLain, 6 Ark. 438.

Kentucky.— Kincaid *v.* Higgins, 1 Bibb (Ky.) 396.

Louisiana.— Powell *v.* Graves, 14 La. Ann. 860.

Minnesota.— Poehler *v.* Reese, 78 Minn. 71, 80 N. W. 847.

Missouri.— Rankin *v.* Perry, 5 Mo. 501.

Texas.— Hopkins *v.* Donaho, 4 Tex. 336.

Wisconsin.— Newton *v.* Allis, 16 Wis. 197.

See 3 Cent. Dig. tit. "Appeal and Error," § 3591.

40. *California.*— Merchants' Ad-Sign Co. *v.* Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277.

Illinois.— Morse Co. *v.* Eaton, 91 Ill. App. 411.

Kentucky.— Blakey *v.* Blakey, 3 J. J. Marsh. (Ky.) 674.

Nebraska.— Home F. Ins. Co. *v.* Decker, 55 Nebr. 346, 75 N. W. 841.

Pennsylvania.— Jarrett *v.* Tomlinson, 3 Watts & S. (Pa.) 114; Newhart *v.* Wolfe, 2 Pennyp. (Pa.) 295.

Texas.— North Texas Bldg. Co. *v.* Coleman, (Tex. Civ. App. 1900) 58 S. W. 1044.

United States.— Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

See 3 Cent. Dig. tit. "Appeal and Error," § 3591; and *infra*, XVII, C, 2, b, (I), (II).

41. See *supra*, II, B [2 Cyc. 536].

42. Jordan *v.* Dennis, 7 Metc. (Mass.) 590; Gomprecht *v.* Scott, 27 Misc. (N. Y.) 192, 57 N. Y. Suppl. 799 [*affirming* 55 N. Y. Suppl. 239]. *Compare* Secord *v.* Quigley, 106 Cal. 149, 39 Pac. 623, which holds that one who prays for the reformation of a decree, and is not awarded the full relief demanded, cannot contend, on appeal, that the court had no power to reform the decree, this decision being based on Cal. Civ. Code, §§ 3515, 3516, 3521; and Peralta *v.* Mariea, 3 Cal. 185, wherein it was held that a plaintiff who is nonsuited in the trial court cannot, on appeal, raise the question of the lower court's want of jurisdiction, the court saying that that would be only an additional reason to sustain the nonsuit. The point that consent could not confer jurisdiction was urged by appellant's counsel, but was not considered or passed upon by the supreme court.

See 3 Cent. Dig. tit. "Appeal and Error," § 3592; and *supra*, V, B, 1, c [2 Cyc. 680].

43. Capron *v.* Van Noorden, 2 Cranch (U. S.) 126, 2 L. ed. 229.

Jurisdiction of intermediate court.—On the same principle, a party is not estopped to deny, in a court of last resort, the jurisdiction of

(III) *Relating to Grounds of Action or Defense.* When a party relies, in the trial court, upon a certain ground of action or defense, he is bound thereby, and will not be allowed to assume, in the appellate court, any position which is inconsistent therewith,[44] nor will he be heard to question the propriety or validity of his course in that behalf.[45]

(IV) *Relating to Nature and Theory of Cause.* Parties cannot elect to try their causes on one theory in the lower court, and, when defeated on that line, assume a different position in the appellate court.[46]

(V) *Relating to Parties.* It being the plaintiff's duty to bring the proper parties before the trial court,[47] he will not be heard to assert, on appeal or error, that the proceedings below were defective for want of proper parties, when the defect was caused by his own neglect or misconduct.[48] One who has made others parties to the proceedings below is thereby estopped to predicate error thereon,[49] and an appellant or plaintiff in error cannot complain of a misjoinder[50] or non-joinder when it is the result of his own action.[51] A person who voluntarily

an intermediate court to which he removed a cause by appeal or certiorari. Mahan *v.* Lester, 20 Ala. 162; Lester *v.* Harris, 41 Miss. 668; Verbeck *v.* Verbeck, 6 Wis. 159.

Strangers to the record, who prosecute an appeal to an intermediate court, are not estopped to allege, in the court of last resort, that the judgment of the intermediate court is void. Watson *v.* May, 6 Ala. 133.

On the other hand, defendant, who submitted to the jurisdiction of the trial court by taking part in the proceedings, is thereby precluded from raising in the appellate court for the first time the question of want of jurisdiction. Siegel *v.* Andrews, 181 Ill. 350, 54 N. E. 1008 [*affirming* 78 Ill. App. 611]; Rodman *v.* Moody, 14 Ky. L. Rep. 202.

44. Withers *v.* Jacks, 79 Cal. 297, 21 Pac. 824, 12 Am. St. Rep. 143; Goll, etc., Co. *v.* Miller, 87 Iowa 426, 54 N. W. 443; Tell *v.* Beyer, 38 N. Y. 161; Van Dyke *v.* Jackson, 1 E. D. Smith (N. Y.) 419; Lazarus *v.* Ludwig, 17 Misc. (N. Y.) 378, 40 N. Y. Suppl. 97. See 3 Cent. Dig. tit. "Appeal and Error," § 3594.

45. Mandeville *v.* Mandeville, 35 Ga. 243. See also *supra*, V, A, 3, a [2 Cyc. 662].

46. Wolfe *v.* Supreme Lodge, K. and L. of H., 160 Mo. 675, 61 S. W. 637; La Fayette Mut. Bldg. Assoc. *v.* Kleinhoffer, 40 Mo. App. 388. See also *supra*, V, A, 3, f [2 Cyc. 670].

Hence, a party is estopped to urge, upon appeal or error, any error growing out of the trial, submission, or decision of the cause, or of any question therein, upon an incorrect theory, when such theory was of his own selection.

Arkansas.— Sithen *v.* Murphy, (Ark. 1889) 12 S. W. 497.

Illinois.— Carroll *v.* Drury, 170 Ill. 571, 49 N. E. 311; Snyder *v.* Snyder, 142 Ill. 60, 31 N. E. 303; Chicago *v.* Spoor, 91 Ill. App. 472.

Kansas.— Middlekauff *v.* Zigler, (Kan. App. 1900) 62 Pac. 729.

Missouri.— Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15; Bettes *v.* Magoon, 85 Mo. 580; White *v.* N. O. Nelson Mfg. Co., 53 Mo. App. 337.

New York.— Flaherty *v.* Miner, 123 N. Y. 382, 25 N. E. 418, 33 N. Y. St. 681 [*affirming* 15 Daly (N. Y.) 173, 4 N. Y. Suppl. 618, 23 N. Y. St. 91]; Fuchs *v.* Schmidt, 8 Daly (N. Y.) 317; Sperry *v.* Hellman, 2 Misc. (N. Y.) 414, 21 N. Y. Suppl. 1014, 51 N. Y. St. 577; Bierds *v.* More, 9 N. Y. St. 721.

Texas.— Luckie *v.* Schneider, (Tex. Civ. App. 1900) 57 S. W. 690; Cotton *v.* Rand, (Tex. Civ. App. 1899) 51 S. W. 55.

See 3 Cent. Dig. tit. "Appeal and Error," § 3593.

Or when such theory was adopted by the trial court at his request.

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

Illinois.— Miller *v.* Gable, 30 Ill. App. 578.

Iowa.— Croft *v.* Colfax Electric Light, etc., Co., (Iowa 1901) 85 N. W. 761; Crawford *v.* Wolf, 29 Iowa 567.

Michigan.— Needham *v.* King, 95 Mich. 303, 54 N. W. 891.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 99 Mo. 394, 11 S. W. 999; Mastin Bank *v.* Hammerslough, 72 Mo. 274; Lee *v.* Hassett, 39 Mo. App. 67.

New York.— Corn Exch. Bank *v.* American Dock, etc., Co., 14 N. Y. App. Div. 453, 43 N. Y. Suppl. 1028.

Pennsylvania.— Ritter *v.* Sieger, 105 Pa. St. 400.

South Carolina.— Bowen *v.* Stribling, 47 S. C. 61, 24 S. E. 986.

See *infra*, XVII, C, 2, b; and 3 Cent. Dig. tit. "Appeal and Error," § 3593.

47. See *supra*, VI [2 Cyc. 756].

48. Lack of proper parties.— Vandever *v.* Vandever, 3 Metc. (Ky.) 137; Ball *v.* Townsend, Litt. Sel. Cas. (Ky.) 325; Thomson *v.* Brown, 48 S. C. 350, 26 S. E. 655; Hurst *v.* Marshall, 75 Tex. 452, 13 S. W. 33; Carpenter *v.* Utz, 4 Gratt. (Va.) 270. See 3 Cent. Dig. tit. "Appeal and Error," § 3595. See also *supra*, V, B, 1, d [2 Cyc. 684].

49. Improper parties.— McCabe *v.* Goodwin, 106 Cal. 486, 39 Pac. 941; Renner *v.* Ross, 111 Ind. 269, 12 N. E. 508; Bond *v.* Armstrong, 88 Ind. 65. See also *infra*, notes 50, 51; and *supra*, V, B, 1, d [2 Cyc. 684]; VI, H, 2 *et seq.* [2 Cyc. 784 *et seq.*].

50. Misjoinder of parties.— Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82; Carrington *v.* Crocker, 37 N. Y. 336. See *supra*, V, B, 1, d [2 Cyc. 684]; VI, H, 2 [2 Cyc. 784].

51. Non-joinder of parties.— Powell *v.* Ross, 4 Cal. 197. See also *supra*, V, B, 1, d [2 Cyc. 684]; VI, H, 3 [2 Cyc. 784].

became a party to a proceeding below will not be heard in the appellate court either to deny that he was a party,[52] or to question the regularity or propriety of the manner in which he became one.[53]

(VI) *Relating to Pleadings*—(A) *Of Complaining Party.* An appellant or plaintiff in error is estopped to take advantage of his own fault in pleading—as, for instance, that his pleadings were defective,[54] or that he neglected[55] or refused to plead.[56] Nor will he be allowed to impeach in any way the correctness, propriety, or truth of his pleadings, or to repudiate an adjudication made in conformity thereto.[57]

(B) *Of Adverse Party.* The principle of estoppel to allege invited error prevents a party from assigning as error defects in his adversary's pleadings caused either by his motion to strike out parts thereof[58] or by his refusal to permit an amendment.[59] Nor can an assignment of error be based upon such a defect when the defect was cured by the pleadings of the complaining party.[60]

(VII) *Relating to Evidence*—(A) *Introduced by Complaining Party.* An appellate court will not permit an appellant or plaintiff in error to assign as error the admission of evidence which he, himself, introduced,[61] or which he, himself,

52. Conery *v.* Webb, 12 La. Ann. 282.

53. Delaware County Nat. Bank *v.* Headley, (Pa. 1886) 4 Atl. 464.

54. *Alabama.*— Jordan *v.* Hubbard, 26 Ala. 433.

Illinois.— Furness *v.* Williams, 11 Ill. 229.

Indiana.— Henderson *v.* Bates, 3 Blackf. (Ind.) 460.

Kentucky.— Luckett *v.* Austin, 4 Bibb (Ky.) 181.

Michigan.— Hogsett *v.* Ellis, 17 Mich. 351.

See 3 Cent. Dig. tit. "Appeal and Error," § 3596.

55. Barnett *v.* Graff, 52 Ill. 170; Miller *v.* Whittaker, 33 Ill. 386; Bender *v.* State, 26 Ind. 285.

56. Miller *v.* Powers, 18 Ind. 263.

57. Warren *v.* Sheldon, 173 Ill. 340, 50 N. E. 1065; John Matthews Apparatus Co. *v.* Neal, 89 Ill. App. 174; State *v.* Judges Ct. Appeals, 34 La. Ann. 1220; Harrison *v.* Godbold, McGloin (La.) 178; Brockman *v.* Consolidated Bldg., etc., Co., 5 Ohio N. P. 61, 7 Ohio Dec. 291; Banks *v.* House, (Tex. Civ. App. 1899) 50 S. W. 1022.

A party who committed the first fault in pleading, leading to the making up of an immaterial issue, is not entitled to assign as error that the cause was tried and decided on such issue.

Arkansas.— Frank *v.* Godwin, 24 Ark. 584.

Colorado.— Cole *v.* Cheovenda, 4 Colo. 17.

Illinois.— Graham *v.* Dixon, 4 Ill. 115.

Indiana.— Henly *v.* Streeter, 5 Ind. 207; O'Neal *v.* Wade, 3 Ind. 410.

Kentucky.— Stewart *v.* Durrett, 3 T. B. Mon. (Ky.) 113; Surlott *v.* Beddow, 3 T. B. Mon. (Ky.) 109; Jones *v.* Henry, 3 Litt. (Ky.) 46.

Maine.— Strout *v.* Durham, 23 Me. 483.

Nebraska.— Smith *v.* Myers, 54 Nebr. 1, 74 N. W. 277.

Texas.— Hancock *v.* Dimon, 17 Tex. 369.

Error invited by defect in pleading.— Although it seems clear that an error to the prejudice of appellant has been committed in fixing the amount of a note upon which judgment has been given against him, yet, where there is some confusion and uncertainty in the evidence upon the point which might have been satisfactorily explained had it been presented by his pleadings, he cannot, after the lapse of many years and after paying a large portion of the note, avail himself of the error in the supreme court. Muggah *v.* Tucker, 10 La. Ann. 683.

Error in the amendment of his own pleading, made upon his own motion, or assented to by him, cannot be urged by a party. Cragg *v.* Arendale, (Ga. 1901) 38 S. E. 399; Harms *v.* Jacobs, 160 Ill. 589, 43 N. E. 745.

Failure of trial court to dispose of his demurrer, when he neglected to insist that it should be disposed of, cannot be urged as error by a party on appeal. Gillilan *v.* Nixon, 26 Ill. 50.

58. Hooper *v.* Birchfield, 115 Ala. 226, 22 So. 68; Dunklee *v.* Rose, 12 Colo. App. 423, 56 Pac. 349; Reynolds *v.* Price, (Ky. 1900) 56 S. W. 502; Thouvenin *v.* Lea, 26 Tex. 612; Speake *v.* White, 14 Tex. 364; Haley *v.* Kilpatrick, 104 Fed. 647, 44 C. C. A. 102.

59. Conley *v.* Dibber, 91 Ind. 413; Sanger *v.* Noonan, (Tex. Civ. App. 1894) 27 S. W. 1056.

See *infra*, XVII, C, 2, b.

60. Shenck *v.* Hartford F. Ins. Co., 71 Cal. 28, 11 Pac. 807; Megrath *v.* Gilmore, 15 Wash. 558, 46 Pac. 1032.

Failure of one of the parties to produce his pleadings at trial, thereby causing a defect in the proceedings, cannot be taken advantage of in the appellate court by the opposite party when the latter was responsible therefor. Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100.

61. *Illinois.*— Moyer *v.* Swygart, 125 Ill. 262, 17 N. E. 450; Chicago City R. Co. *v.* Menely, 79 Ill. App. 679; Emerick *v.* Hileman, 71 Ill. App. 512; Cleveland, etc., R. Co. *v.* Bender, 69 Ill. App. 262.

Iowa.—Walker *v.* Stannis, 3 Greene (Iowa) 440.

Kansas.— Brury *v.* Smith, (Kan. App. 1898) 53 Pac. 74.

Kentucky.— White *v.* Fox, 1 Bibb (Ky.) 369, 4 Am. Dec. 643.

elicited by cross-examination of his adversary's witnesses in the trial of the cause in the court below.[62]

(B) *Introduced by Opposite Party.* An estoppel to allege as error the admission of evidence is created when the error was due to the fault of the complaining party.[63] In like manner, a party is estopped to predicate error on the admission of evidence from which he has derived,[64] or sought to derive, any advantage.[65] A party who introduces incompetent evidence, or evidence inadmissible under the pleadings, will not be permitted to assign as error the subseqnent admission of the same evidence,[66] similar evidence,[67] or rebuttal evidence, offered by his

Massachusetts.— Fish *v.* Bangs, 113 Mass. 123; Nixon *v.* Hammond, 12 Cush. (Mass.) 285.

Missouri.— Cox *v.* Sloan, 158 Mo. 430, 57 S. W. 1134; McQueen *v.* Lilly, 131 Mo. 9, 31 S. W. 1043; Carlin *v.* Haynes, 74 Mo. App. 34.

Nebraska.— Howell *v.* Graff, 25 Nebr. 130, 41 N. W. 142.

New York.— Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19.

North Carolina.— Justice *v.* Justice, 25 N. C. 58.

Virginia.— Harrison *v.* Brock, 1 Munf. (Va.) 22.

Washington.— Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

Wisconsin.— Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795.

United States.— McGillin *v.* Bennett, 132 U. S. 445, 10 S. Ct. 122, 33 L. ed. 422; Avendano *v.* Gay, 8 Wall. (U. S.) 376, 19 L. ed. 422.

See 3 Cent. Dig. tit. "Appeal and Error," § 3597; and *infra*, XVII, C, 2, b.

62. *Connecticut.*— Alling *v.* Forbes, 68 Conn. 575, 37 Atl. 390.

Illinois.— Emerick *v.* Hileman, 177 Ill. 368, 52 N. E. 311 [*affirming* 71 Ill. App. 512]; Board of Trade Tel. Co. *v.* Blume, 176 Ill. 247, 52 N. E. 258.

Indiana.— Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

Kentucky.— Jackson-Vanarsdall Distilling Co. *v.* Moore, (Ky. 1901) 61 S. W. 368.

Maine.— Brooks *v.* Goss, 61 Me. 307.

Minnesota.— Shelley *v.* Lash, 14 Minn. 498.

Missouri.— Carpenter *v.* Wilmot, 24 Mo. App. 589.

Nebraska.— Chicago, etc., R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571.

Tennessee.—Cartwright *v.* Smith, 104 Tenn. 689, 58 S. W. 331.

Wisconsin.— Roebke *v.* Andrews, 26 Wis. 311.

See 3 Cent. Dig. tit. "Appeal and Error," § 3599.

Immaterial evidence made material by cross-examination.— While a party, by cross-examination, does not waive his right to insist upon his objections to the evidence in chief, which he claims was incompetent, yet, if the evidence in chief was immaterial, he cannot afterward complain that his cross-examination has made it material. Leathers *v.* Bailer, 12 Ky. L. Rep. 190.

63. Todd *v.* Gamble, 74 Hun (N. Y.) 569, 26 N. Y. Suppl. 662, 57 N. Y. St. 256.

Illustrations.— As where the evidence tended to prove facts admitted by him (Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Fowler *v.* Gilbert, 38 Mich. 292; Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489; Butterworth *v.* Pecare, 8 Bosw. (N. Y.) 671), or related to a fact which he, himself, put in issue (Edgar *v.* Boies, 11 Serg. & R. (Pa.) 445), or he objected to its withdrawal (Young *v.* Harrison, 17 Ga. 30; New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Wilson *v.* Branning Mfg. Co., 120 N. C. 94, 26 S. E. 629. To same effect see Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204), or it was introduced by his adversary in response to his own request (Jacobs *v.* Bogart, (Ala. 1901) 29 So. 645; McGill *v.* Monette, 37 Ala. 49; Smith *v.* Brown, 46 Nebr. 230, 64 N. W. 714).

Secondary evidence.— A party will not be allowed to take advantage, in the appellate court, of an error in the admission of secondary evidence when, by his own conduct, he made the production of the best evidence impossible (Sellman *v.* Cobb, 4 Iowa 534; Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; Merriman *v.* McManus, 102 Pa. St. 102), or unnecessary (Universal F. Ins. Co. *v.* Swartz, 2 Walk. (Pa.) 34).

64. Turrell *v.* Elizabeth, 43 N. J. L. 272.

65. Wilson *v.* Gibson, 63 Mo. App. 656.

66. Kingsley *v.* Schmicker, (Tex. Civ. App. 1900) 60 S. W. 331; Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

67. *Arkansas.*— Beck *v.* Biggers, 66 Ark. 292, 50 S. W. 514.

Colorado.— Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681.

Indiana.— Wheeler *v.* Moore, 22 Ind. App. 186, 53 N. E. 426.

Iowa.— Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324.

Missouri.— Alms *v.* Conway, 78 Mo. App. 490; Wilson *v.* Gibson, 63 Mo. App. 656.

Nebraska.— Modern Woodmen Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826.

South Carolina.— South Carolina Terminal Co. *v.* South Carolina, etc., R. Co., 52 S. C. 1, 29 S. E. 565.

Texas.— Delaware Ins. Co. *v.* Bonnet, 20 Tex. Civ. App. 107, 48 S. W. 1104.

Wisconsin.— Minton *v.* Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857; Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175. *Compare* Esch *v.* Chicago, etc., R. Co., 72 Wis. 229, 39 N. W. 129, which holds that, where it is im-

adversary.[68] In like manner, an error in the admission of evidence is waived when the party aggrieved thereby subsequently introduces the same evidence.[69]

(c) *Excluded on Offer of Adverse Party.* When a party procures the exclusion of adverse evidence he is estopped to assign as error the fact that such evidence was excluded.[70]

(d) *Excluded on Offer of Complaining Party.* And he is likewise estopped to complain of the subsequent exclusion of similar,[71] or rebuttal, evidence offered by himself,[72] even though such evidence was competent.[73] An appellant or plaintiff in error is also precluded from complaining of an erroneous ruling excluding evidence offered by himself, when, after such ruling, he adopted a course inconsistent with his position at the time he offered the evidence.[74]

(e) *Sufficiency of Evidence.* It is not competent for a party to assume, on appeal or error, an attitude different from that which he occupied at the trial, and object to the judgment against him because of the want of evidence which was

possible to tell what effect the admission of improper evidence had upon the minds of the jury in arriving at their verdict, the judgment must be reversed, even though appellant himself first introduced the objectionable class of testimony.

One who has, himself, introduced secondary evidence is thereby estopped to allege as error that his adversary was permitted to meet him with like evidence.

Arkansas.— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

Indiana.—Hobbs *v.* Tipton County, 116 Ind. 376, 19 N. E. 186.

Tennessee.—Kelly *v.* Davis, 1 Head (Tenn.) 71.

Texas.— Kutch *v.* Holley, 77 Tex. 220, 14 S. W. 32.

Wisconsin.— Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692.

See 3 Cent. Dig. tit. "Appeal and Error," § 3598.

68. *Alabama.*— Milton *v.* Haden, 35 Ala. 230.

Iowa.— Bennett State Bank *v.* Schloesser, 101 Iowa 571, 70 N. W. 705.

Kansas.— Swofford Bros. Dry Goods Co. *v.* Zeigler, 2 Kan. App. 296, 42 Pac. 592.

Louisiana.— Mousseau *v.* Thebens, 19 La. Ann. 516.

Missouri.— Crabtree *v.* Vanhoozier, 53 Mo. App. 405.

New Jersey.— Den *v.* Downam, 13 N. J. L. 135.

69. *Kansas.*— Throne *v.* Horton First Nat. Bank, 6 Kan. App. 194, 51 Pac. 300.

Maine.— Ward *v.* Abbott, 14 Me. 275.

Minnesota.— Coit *v.* Waples, 1 Minn. 134.

Missouri.— Briscoe *v.* Huff, 75 Mo. App. 288.

Texas.— Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

See also *infra*, XVII, C, 2, b.

The rule is otherwise, however, when a party, after objecting to evidence and excepting to the ruling thereon, introduces similar evidence solely for the purpose of meeting his adversary's case, rebutting or combatting the evidence to which he excepted, and without any intention of abandoning his exceptions.

Washington Tp. Farmers' Co-operative Fuel, etc., Co. *v.* McCormick, 19 Ind. App. 663, 49 N. E. 1085; Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920; Horres *v.* Berkeley Chemical Co., 57 S. C. 189, 35 S. E. 500; San Antonio, etc., R. Co. *v.* De Ham, (Tex. Civ. App. 1899) 54 S. W. 385.

70. Williams *v.* Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99; Schloss *v.* Estey, 114 Mich. 429, 72 N. W. 264; Fogarty *v.* Bogart, 43 N. Y. App. Div. 430, 60 N. Y. Suppl. 81; Ford *v.* David, 1 Bosw. (N. Y.) 569; Perkiomen Brick Co. *v.* Dyer, 187 Pa. St. 470, 43 Wkly. Notes Cas. (Pa.) 98, 41 Atl. 326. See 3 Cent. Dig. tit. "Appeal and Error," § 3600.

Limitation of effect of evidence.— Where a party objects, generally, to the admission of evidence, and the court thereupon admits it or limits its effect, the objecting party cannot be heard, on appeal, to complain of the action of the trial court in thus limiting its effect. Henderson *v.* Chicago, etc., R. Co., 48 Iowa 216.

71. Hinton *v.* Whittaker, 101 Ind. 344; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977.

72. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

73. Hinton *v.* Whittaker, 101 Ind. 344.

74. As for instance, where he had an opportunity to reintroduce the evidence, but declined to do so (Flanagan *v.* Mitchell, 16 Daly (N. Y.) 223, 10 N. Y. Suppl. 234, 32 N. Y. St. 303), or failed to do so (Shakman *v.* Potter, 98 Iowa 61, 66 N. W. 1045); or where he subsequently objected to the admission of the same evidence when offered by his adversary (Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970); or where he used, in his own behalf, the evidence against which the excluded evidence was directed (Hobart *v.* Hobart, 58 Barb. (N. Y.) 296).

So, it has been held that a judgment will not be reversed because of the erroneous exclusion of evidence which is indirect and inconclusive in its nature, when the complaining party had an opportunity to introduce direct evidence on the same point, but neglected to do so. Buschman *v.* Codd, 52 Md. 202.

excluded at his instance.[75] In like manner, a party is estopped to complain of the judgment for insufficiency of evidence to sustain it when, on the trial, he supplied the deficiency by his own evidence;[76] or he admitted the existence of the facts which such evidence would have established either by asking an instruction based thereon,[77] or by stipulation,[78] or by concession.[79]

(VIII) *Relating to Instructions* — (A) *Given at Request of Complaining Party.* An appellant or plaintiff in error will not be heard to allege error in instructions which were given at his request by the trial court.[80] Thus, a party

75. *Illinois.*— Jobbins *v.* Gray, 34 Ill. App. 208.

Louisiana.—Virginia *v.* Himel, 10 La. Ann. 185.

Minnesota.— Sours *v.* Great Northern R. Co., 81 Minn. 337, 84 N. W. 114.

Missouri.—Walther *v.* Warner, 26 Mo. 143; Garst *v.* Good, 50 Mo. App. 149.

New York.— Johnson *v.* New York, 1 N. Y. Suppl. 254; Paine *v.* Ronan, 6 N. Y. St. 420. To same effect see Claflin *v.* Farmers', etc., Bank, 36 Barb. (N. Y.) 540, 24 How. Pr. (N. Y.) 1.

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188.

See 3 Cent. Dig. tit. "Appeal and Error," § 3601.

76. Green *v.* Gill, 47 Mich. 86, 10 N. W. 119; Brown *v.* O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267.

77. Auburn Bolt, etc., Works *v.* Shultz, 143 Pa. St. 256, 22 Atl. 904.

78. Matter of Gibbs, 4 Utah 97, 6 Pac. 525.

79. Matter of Learned, 70 Cal. 140, 11 Pac. 587; Berner *v.* Kaye, 14 Misc. (N. Y.) 1, 35 N. Y. Suppl. 181.

80. *California.*— Gray *v.* Eschen, 125 Cal. 1, 57 Pac. 664; Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585.

Colorado.— Denver *v.* Stein, 25 Colo. 125, 53 Pac. 283.

District of Columbia.— Evans *v.* Schoonmaker, 2 App. Cas. (D. C.) 62.

Georgia.— Alston *v.* Grantham, 26 Ga. 374.

Illinois.—Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247 [*affirming* 88 Ill. App. 485]; Illinois Steel Co. *v.* Novak, 184 Ill. 501, 56 N. E. 966 [*affirming* 84 Ill. App. 641]; Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. 507 [*affirming* 70 Ill. App. 363].

Indiana.— Worley *v.* Moore, 97 Ind. 15; Pennsylvania Co. *v.* Roney, 89 Ind. 453, 46 Am. Rep. 173.

Iowa.— Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771.

Kansas.— Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075; Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83; Western Union Tel. Co. *v.* McCall, (Kan. App. 1899) 58 Pac. 797; Wellington Waterworks *v.* Brown, 6 Kan. App. 725, 50 Pac. 966.

Kentucky.— Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Clift *v.* Stockdon, 4 Litt. (Ky.) 215.

Maine.— Robinson *v.* White, 42 Me. 209.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

Massachusetts.— West *v.* Lynn, 110 Mass. 514; Dennis *v.* Maxfield, 10 Allen (Mass.) 138.

Michigan.— Continental Ins. Co. *v.* Horton, 28 Mich. 173.

Minnesota.— McCarvel *v.* Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367.

Mississippi.—Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205; Liverpool, etc., Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810.

Missouri.— Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074; O'Rourke *v.* Lindell R. Co., 142 Mo. 342, 44 S. W. 254; Bosard *v.* Powell, 79 Mo. App. 184; Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284.

Montana.—Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

Nebraska.—Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79.

New York.— Elwell *v.* Fabre, 13 N. Y. Suppl. 829, 37 N. Y. St. 352.

North Carolina.— Thompson *v.* Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427.

Oregon.— Wesco *v.* Kern, 36 Oreg. 433, 59 Pac. 548, 60 Pac. 563.

Pennsylvania.— Benson *v.* Maxwell, 105 Pa. St. 274; Burd *v.* McGregor, 2 Grant (Pa.) 353; Williams *v.* Carr, 1 Rawle (Pa.) 420.

South Carolina.— Clarke *v.* Swearingen, 6 S. C. 291.

Texas.— Hardy *v.* De Leon, 5 Tex. 211; Herndon *v.* Lammers, (Tex. Civ. App. 1900) 55 S. W. 414; San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910; Roberts *v.* Zirkel, (Tex. Civ. App. 1899) 54 S. W. 618. *Compare* Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559 [*reversing* (Tex. Civ. App. 1898) 47 S. W. 384, 1020], which is to the following effect: Tex. Rev. Stat. art. 1319, prescribes that either party may present to the judge, in writing, such instructions as he desires, and the rules of practice require that requests be signed by counsel. It was held that, where the record does not show that instructions were written and signed by counsel, a party is not estopped from asserting error therein on a review on the ground that they were given at the request of his counsel.

Utah.— Beaman *v.* Martha Washington Min. Co., (Utah 1901) 63 Pac. 631.

Washington.—Reiner *v.* Crawford, (Wash. 1901) 63 Pac. 516.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

cannot assign as error an inconsistency in the charge which was produced by the giving of an instruction which he requested.[81]

(B) *Given at Request of Adverse Party.* The principle of invited error estops a party from complaining in the appellate court of an instruction, given at the request of his adversary, which is substantially like one given at his own request.[82]

(C) *Given by Trial Court* — (1) IN GENERAL. Nor will a party be heard to complain, on appeal or error, of the giving by the trial court of any instruction, even though erroneous, which was substantially similar to one requested by him.[83]

United States.— Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279; Bridgewater Gas Co. *v.* Home Gas Fuel Co., 59 Fed. 40, 16 U. S. App. 569, 7 C. C. A. 652.

See 3 Cent. Dig. tit. "Appeal and Error," § 3602.

Improper use of word.— An error in improperly using the word "not" in an instruction drawn by appellant's counsel, and which was the latter's own mistake, is no ground for reversal. Golder *v.* Mueller, 22 Ill. App. 527.

Modification at appellant's instance.— Where the court modified the charge at the request of plaintiff, the latter cannot take advantage of any error in such modification, especially where no exception was taken thereto. Regensburg *v.* Nassau Electric R. Co., 58 N. Y. App. Div. 566, 69 N. Y. Suppl. 147. But see Norfolk, etc., R. Co. *v.* Mann, (Va. 1901) 37 S. E. 849, holding that, where an instruction presented by defendant was modified by the court, and defendant excepted to the modification, the contention that defendant cannot ask a reversal for error in the modified instruction, because he invited the error, was without merit.

Time when instruction was given.—A party cannot complain of a charge that it was given at the wrong time when it was given as and when requested by him. Yore *v.* Mueller Coal, etc., Co., 147 Mo. 679, 49 S. W. 855.

81. **Inconsistency in instructions.**— Knollin *v.* Jones, (Ida. 1900) 63 Pac. 638; Consolidated Kansas City Smelting, etc., Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889; Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074; Young *v.* Hutchinson, 62 Mo. App. 512; McCullough *v.* Wabash Western R. Co., 34 Mo. App. 23; Mullaney *v.* Evans, 33 Oreg. 330, 54 Pac. 886.

Presumption as to contradictory instructions.— In the absence of a showing to the contrary, the presumption is that instructions prepared by counsel and presented to the court, though contradictory, were requested to be given, so that the giving of them cannot be assigned as error by the party offering them. Guarantee Co. of North America *v.* Mutual Bldg., etc., Assoc., 57 Ill. App. 254.

Modifying or refusing conflicting instructions.— Nor can a party, who requests conflicting instructions, complain, on appeal or error, of the action of the trial court in refusing one of them (Clark *v.* Pearson, 53 Ill. App. 310; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744), or modifying them for the purpose of reconciling them (Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166).

Waiver of error in instructions.— Error in an instruction is waived when the complaining party subsequently adopts the same error in instructions which he asks the court to give. Davis *v.* Brown, 67 Mo. 313; Drennon *v.* Dalincourt, 56 Mo. App. 128; Brady *v.* Georgia Home Ins. Co., (Tex. Civ. App. 1900) 59 S. W. 914; Richmond Traction Co. *v.* Hildebrand, 98 Va. 22, 34 S. E. 888. On the other hand, a party is not estopped to allege error in an instruction to which he reserved a proper exception, when he does not abandon his exception or adopt the error, but simply requests an instruction designed to meet the theory of the case contained in the erroneous instruction. North Chicago Electric R. Co. *v.* Peuser, 190 Ill. 67, 60 N. E. 78.

82. *Arkansas.*— St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941; Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212.

Illinois.— Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137]; Chicago, etc., R. Co. *v.* Harbur, 180 Ill. 394, 54 N. E. 327; Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210 [*affirming* 69 Ill. App. 363]; Chicago City R. Co. *v.* Allen, 169 Ill. 287, 48 N. E. 414 [*affirming* 68 Ill. App. 472].

Indiana.— Where a party propounded an interrogatory to the jury, calling for conclusions of law, he cannot complain, on appeal, that the adverse party was allowed to propound the same interrogatory. Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

Missouri.— Phelps *v.* Salisbury, 161 Mo. 1, 61 S. W. 582; Horgan *v.* Brady, 155 Mo. 659, 56 S. W. 294; Rives *v.* Columbia, 80 Mo. App. 173; Plummer *v.* Milan, 79 Mo. App. 439.

Texas.— Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1900) 60 S. W. 442.

See 3 Cent. Dig. tit. "Appeal and Error," § 3602.

83. *Connecticut.*— Tucker *v.* Baldwin, 13 Conn. 136, 33 Am. Dec. 384.

Illinois.— Egbers *v.* Egbers, 177 Ill. 82, 52 N. E. 285; Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12 [*affirming* 61 Ill. App. 420]; Springer *v.* Orr, 82 Ill. App. 558; Watson Cut Stone Co. *v.* Small, 80 Ill. App. 328.

Iowa.— Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950; Bonnot Co. *v.* Newman, 109 Iowa 580, 80 N. W. 655.

Kentucky.— Union Cent. L. Ins. Co. *v.* Hughes, (Ky. 1901) 60 S. W. 850; Buchanan

An appellant or plaintiff in error will not be permitted to allege that an instruction is erroneous when the error arose from a consideration of incompetent evidence introduced by himself.[84]

(2) STATING RULE OF DAMAGES. An appellant or plaintiff in error is estopped to question the correctness of a rule of damages stated in the charge at the trial, when such rule was adopted at his instance,[85] or was based upon a fact which was assumed by the court and both parties to exist.[86]

(D) *Submission of Issue or Question to Jury.* A party is estopped to predicate error on the submission of an issue or question to the jury, when the submission was made in compliance with his request,[87] even though it was made in a

v. Perry, (Ky. 1900) 58 S. W. 535; Toner *v.* South Covington, etc., St. R. Co., (Ky. 1900) 58 S. W. 439.

Maine.— Hovey *v.* Hobson, 55 Me. 256.

Missouri.— St. Louis Bridge, etc., Co. *v.* St. Louis Brewing Assoc., 129 Mo. 343, 31 S. W. 765; Stevens *v.* Crane, 116 Mo. 408, 22 S. W. 783; Foster Vinegar Mfg. Co. *v.* Guggemos, 98 Mo. 391, 11 S. W. 966; Richardson *v.* Marceline, 73 Mo. App. 360.

Nebraska.— Shiverick *v.* R. J. Gunning Co., 58 Nebr. 29, 78 N. W. 460; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

New York.—Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 38 N. Y. St. 56, 24 Am. St. Rep. 424, 12 L. R. A. 845 [*affirming* 57 Hun (N. Y.) 518, 11 N. Y. Suppl. 278, 33 N. Y. St. 98].

Texas.— Missouri, etc., R. Co. *v.* Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119; Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203, 49 S. W. 687. Notwithstanding the fact that his request was refused. Citizens' R. Co. *v.* Washington, (Tex. Civ. App. 1900) 58 S. W. 1042; International, etc., R. Co. *v.* Crook, (Tex. Civ. App. 1900) 56 S. W. 1005; Hillsboro *v.* Jackson, (Tex. Civ. App. 1898) 44 S. W. 1010.

Vermont.— Eastman *v.* Curtis, 67 Vt. 432, 32 Atl. 232.

Wisconsin.— Phillips *v.* Wisconsin State Agricultural Soc., 60 Wis. 401, 19 N. W. 377.

United States.— Badgett *v.* Johnson-Fife Hat Co., 85 Fed. 408, 56 U. S. App. 416, 29 C. C. A. 230.

See 3 Cent. Dig. tit. "Appeal and Error," § 3602.

Implied change produced by appellant's request.— In ejectment, the court charged the jury that they could not find for plaintiff on his alleged paper title. Defendant afterward requested the court to charge that the description contained in the deed to plaintiff did not include the *locus in quo*, which the court refused, and charged that the description did include the *locus in quo*. It was held that this implied change in the instruction was of defendant's procurement, and no ground for reversal of a judgment against him. McRoberts *v.* Bergman, 132 N. Y. 73, 30 N. E. 261, 43 N. Y. St. 559 [*affirming* 57 Hun (N. Y.) 591, 11 N. Y. Suppl. 108, 32 N. Y. St. 1111].

84. Phenix Ins. Co. *v.* Wilcox, etc., Guano Co., 65 Fed. 724, 25 U. S. App. 201, 13 C. C. A. 88.

Nor will appellant be allowed to claim that an instruction was erroneous because of the want of proof on a point covered by the instruction, when the defect in the evidence was caused by an exclusion had at his instance. Hill *v.* Nichols, 50 Ala. 336.

Instruction as to burden of proof.— But see Noe *v.* Keen, 5 Ky. L. Rep. 926, wherein it was held that the fact that appellant's counsel claimed the right to close the argument below, after the court had instructed the jury that the burden of proof was upon appellant, does not preclude him from having a reversal for error in the instructions as to the burden of proof.

85. Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399; Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985. See 3 Cent. Dig. tit. "Appeal and Error," § 3603.

In a trial before a referee, where the referee makes a ruling at defendant's request, adopting a rule for measuring damages, the defendant cannot, on appeal, challenge its correctness. Van Rensselaer *v.* Mould, 77 Hun (N. Y.) 553, 28 N. Y. Suppl. 901, 60 N. Y. St. 394.

See *infra*, XVII, C, 2, b.

86. Vail *v.* Reynolds, 42 Hun (N. Y.) 647.

87. *Colorado.*— Witcher *v.* Gibson, (Colo. App. 1900) 61 Pac. 192; Denver *v.* Soloman, 2 Colo. App. 534, 31 Pac. 507.

Illinois.— Watson Cut Stone Co. *v.* Small, 181 Ill. 366, 54 N. E. 995 [*affirming* 80 Ill. App. 328]; Lake Shore, etc., R. Co. *v.* Conway, 169 Ill. 505, 48 N. E. 483 [*affirming* 67 Ill. App. 155]; Hight *v.* Sanner, 71 Ill. App. 183.

Iowa.— Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291.

Missouri.— Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917; Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

New York.— Bennett *v.* Eastchester Gas Light Co., 54 N. Y. App. Div. 74, 66 N. Y. Suppl. 292; Parker *v.* Mott, 43 N. Y. App. Div. 338, 60 N. Y. Suppl. 295; Cameron *v.* New York El. R. Co., 38 N. Y. App. Div. 16, 56 N. Y. Suppl. 304 [*affirming* 23 Misc. (N. Y.) 590, 52 N. Y. Suppl. 1036]; Haviland *v.* Price, 6 Misc. (N. Y.) 372, 26 N. Y. Suppl. 757, 56 N. Y. St. 402; Weigley *v.* Kneeland, 69 N. Y. Suppl. 657.

Texas.— Texas, etc., R. Co. *v.* Bigham, (Tex. Civ. App. 1898) 47 S. W. 814.

form other than that requested.[88] And a party who treated disputed questions as issues of fact cannot complain in the appellate court of their submission to the jury;[89] similarly, a refusal of the trial court to submit a question to the jury cannot be assigned as error by one who treated the question as one of law,[90] or conceded that no facts in relation thereto were in dispute.[91] One who failed to request a submission,[92] or who asked that the jury be discharged,[93] is estopped to complain, on appeal, that questions of fact involved in the trial were not submitted to the jury for their determination.

(IX) *Relating to Mode of Trial.* Where a party voluntarily adopts a certain form of procedure, or agrees to the manner in which his rights shall be submitted for determination in the trial court, he will not be permitted to complain, upon appeal or error, that proceedings had in conformity thereto were erroneous.[94] Nor can he assign as error any irregularity in the mode of trial which was the direct result of his own negligence.[95]

(X) *Relating to Conduct of Trial.* A party will not be heard, in the appellate court, to attack the validity or propriety of proceedings incidental to the conduct of the trial below, when the proceedings complained of were had at

United States.— Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 85 Fed. 417, 56 U. S. App. 355, 29 C. C. A. 239.

See 3 Cent. Dig. tit. "Appeal and Error," § 3604.

Sufficiency of question submitted.— Where a question submitted to the jury, for their special verdict, was prepared by appellant's counsel, appellant will not be permitted to question its sufficiency for the first time on appeal. Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

88. Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 37 S. W. 771.

Rule applies though request was refused.— A party, who suggests an issue by a request for an instruction, cannot complain because the issue is submitted, though the request be refused. International, etc., R. Co. *v.* Crook, (Tex. Civ. App. 1900) 56 S. W. 1005.

See *infra*, XVI, C, 2, h.

89. Hamilton *v.* Arnold, 116 Mich. 684, 75 N. W. 133.

Submission made necessary by exclusion of evidence.— Plaintiff cannot complain of the submission to the jury of the terms of a lease, the writing having been excluded on his objection, and the oral testimony not having been objected to. Hirschfield *v.* Franks, 112 Mich. 448, 70 N. W. 894.

Submission upon complainant's improper evidence.— The propriety of the trial court's action in submitting a question to the jury cannot be attacked, in the appellate court, by one who improperly introduced the evidence which resulted in the submission. Atlanta St. R. Co. *v.* Atlanta, 66 Ga. 104; Simpson *v.* Pegram, 112 N. C. 541, 17 S. E. 430.

Subsequently requested instructions relating thereto will not give the right to take advantage of an erroneous submission. Wynn *v.* Central Park, etc., R. Co., 14 N. Y. Suppl. 172.

90. Collester *v.* Hailey, 6 Gray (Mass.) 517; Lee *v.* Hassett, 39 Mo. App. 67; McIlvaine *v.* McIlvaine, 6 Serg. & R. (Pa.) 559.

91. Sire *v.* Rumbold, 14 N. Y. Suppl. 925 [*affirming* 11 N. Y. Suppl. 734]; New Era L. Assoc. *v.* Weigle, 128 Pa. St. 577, 24 Wkly. Notes Cas. (Pa.) 551, 18 Atl. 393.

92. Ormes *v.* Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; State Bank *v.* Southern Nat. Bank, 54 N. Y. App. Div. 99, 66 N. Y. Suppl. 349.

93. Marshalltown First Nat. Bank *v.* Crabtree, 86 Iowa 731, 52 N. W. 559.

94. *Alabama.*— Judge Limestone County Ct. *v.* French, 3 Stew. & P. (Ala.) 263.

Colorado.— Green *v.* Taney, 7 Colo. 278, 3 Pac. 423.

Illinois.— Doran *v.* Mullen, 78 Ill. 342.

Indiana.— Crabs *v.* Mickle, 5 Ind. 145.

Iowa.— Graham *v.* Rooney, 42 Iowa 567; Haggard *v.* Atlee, 1 Greene (Iowa) 44.

Kansas.— Wiscomb *v.* Cubberly, 51 Kan. 580, 33 Pac. 320.

Montana.— Harris *v.* Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475.

New York.— Mertens *v.* Roche, 39 N. Y. App. Div. 398, 57 N. Y. Suppl. 349; Sire *v.* Rumbold, 11 N. Y. Suppl. 734; Bantle *v.* Krebs, 4 N. Y. Suppl. 824, 23 N. Y. St. 381.

Texas.— Marx *v.* Heidenheimer, 63 Tex. 304.

United States.— Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113.

See 3 Cent. Dig. tit. "Appeal and Error," § 3605.

95. Submission to jury of cause as to defaulting defendant.— If plaintiff, without demanding judgment by default against one of several defendants who has failed to plead, submits the cause to the jury upon the plea of the others, and verdict and judgment are rendered in favor of defendants, it is an irregularity occasioned by his own negligence, and of which he has no right to complain. Anderson *v.* Walker, 31 Miss. 642.

Trial ex parte.— It is no ground of complaint that the cause was tried *ex parte*, when the defendant neglected to attend. Thayer *v.* Rieder, 14 La. 383.

his instance,[96] or were invited or induced by his own conduct.[97] Thus, a party is not entitled to assign as error improper remarks made at the trial by adverse counsel, when they were called forth by equally improper remarks made by his own counsel.[98] It seems, however, that an error in such a proceeding, which goes to the foundation of the judgment, may be presented and urged for the first time in the appellate court by the party who is responsible therefor.[99]

(XI) *Relating to Verdict.* A party cannot be heard to complain of a verdict which was based upon incompetent evidence introduced by himself,[1] or of a verdict on the ground that the jury disregarded certain instructions, upon the giving of which instructions he also alleges error,[2] or of a verdict when at the same time he seeks to reverse an order setting aside the verdict and granting a new trial.[3]

(XII) *Relating to Findings of Fact.* Where facts are found as alleged in a party's sworn pleading, he is estopped to question their correctness in the appellate court.[4] In like manner, he is precluded from attacking a finding of fact made,[5] or amended, at his instance.[6] Nor can he challenge a finding for an inaccuracy caused by his own fault.[7]

(XIII) *Relating to Judgment.* Where a party procures the rendition or entry of a judgment, decree, or order, he is estopped to assert, on appeal or error,

96. **Submitting to jury matters not in evidence.**— White *v.* Fox, 1 Bibb (Ky.) 369, 4 Am. Dec. 643; Alcott *v.* Boston Steam Flour-Mill Co., 11 Cush. (Mass.) 91; Howell *v.* Press Pub. Co., 48 N. Y. App. Div. 318, 62 N. Y. Suppl. 908.

Trial by jury of non-jury cause.— Louisville, etc., R. Co. *v.* Trent, 16 Lea (Tenn.) 419.

Wrongful assumption of affirmative of issue.— Smith *v.* Sergent, 67 Barb. (N. Y.) 243.

Wrongful assumption of burden of proof.— Parker *v.* Richolson, 46 Kan. 283, 26 Pac. 729.

97. **Submission to jury of matters not in evidence previously submitted by complaining party.**— Lake Shore, etc., R. Co. *v.* Bodemer, 33 Ill. App. 479. When error in permitting the jury to take the accounts sued on to their room was prejudicial solely because of plaintiff's failure to give evidence explanatory of the peculiar manner in which the account was stated, plaintiff cannot urge the error on appeal. Hickman *v.* Layne, 47 Nebr. 177, 66 N. W. 298.

Taking of evidence before joinder of issue. — Vaughan *v.* Smith, 69 Ala. 92.

98. **Improper remarks of counsel.**— Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003; New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897; Cartier *v.* Troy Lumber Co., 35 Ill. App. 449; Nebraska Sav., etc., Bank *v.* Brewster, 59 Nebr. 535, 81 N. W. 441; Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; Heidenheimer *v.* Thomas, 63 Tex. 287.

A judgment will not be reversed because of the improper conduct of appellee's attorney at the trial, where appellant's attorney was equally responsible for the manner in which the trial was conducted. Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433 [*affirming* 87 Ill. App. 257].

99. Wilkinson *v.* Bennett, 3 Munf. (Va.) 314. See 3 Cent. Dig. tit. "Appeal and Error," § 3306; and *infra*, XVII, C, 2, b.

1. Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127. See 3 Cent. Dig. tit. "Appeal and Error," § 3607.

2. Rogers *v.* Rogers, 46 Ind. 1.

3. Whitely *v.* Mississippi Water Power, etc., Co., 38 Minn. 523, 38 N. W. 753, wherein it is held that one who appeals from an order setting aside a verdict and granting a new trial will not be permitted to impeach the verdict, or to assign errors upon exceptions taken by him at the trial which terminated in such verdict.

4. Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337; Riverside Land, etc., Co. *v.* Jensen, 73 Cal. 550, 15 Pac. 131. See 3 Cent. Dig. tit. "Appeal and Error," § 3607.

Failure to deny allegations in adversary's pleadings.— Where the trial court found facts substantially as alleged in the complaint, the correctness of the finding cannot be challenged on appeal by defendant when the allegations in the complaint upon which the finding was based were not denied in the answer. Edmonds *v.* Webb, 129 Cal. 619, 62 Pac. 171.

5. Michigan F. & M. Ins. Co. *v.* Wich, 8 Colo. App. 409, 46 Pac. 687; Franks *v.* Jones, 39 Kan. 236, 17 Pac. 663; National Loan, etc., Co. *v.* Rockland Co., 94 Fed. 335, 36 C. C. A. 370.

In New York it has been held that where defendants request a finding of the damages suffered down to the time of the trial, and such damages are so found and allowed, they cannot afterward object that damages were allowed for acts committed after the action was brought. Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222, 39 N. Y. St. 498, 549.

6. Conklin *v.* Hinds, 16 Minn. 457.

7. Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681.

that it is erroneous.[8] One who asks and obtains relief cannot appeal from the decree granting it because the effect thereof differs from his anticipations.[9]

(XIV) *Relating to Amount of Damages.* An appellant or plaintiff in error is precluded from objecting, on appeal, that an excessive allowance was made to his adversary out of a fund in which both of them are interested, when he has received the benefit of a similar allowance;[10] or that judgment was rendered against him below for an excessive amount, when the error was due to his own negligence.[11] Upon his adversary's appeal a party is estopped to claim damages in the appellate court which he voluntarily remitted in the lower court.[12]

(XV) *Relating to Orders Granting or Denying Motions.* The entry of an order granting or denying a motion cannot be assigned as error by one who procured the making and entry of the order.[13] On the same principle, the failure of the trial court to act on a motion cannot be assigned as error by one who was responsible for the court's non-action.[14]

(XVI) *Relating to Defects in Proceedings For Review.* An appellant or plaintiff in error will not be permitted to base an assignment of error upon a defect in the record, such record being made up, at his instance, for the purpose of taking the cause to the appellate court.[15] Nor can appellant assert that his

8. *Illinois.*— Essroger *v.* Chicago, 185 Ill. 420, 56 N. E. 1086; Stein *v.* Goldsmith, 44 Ill. App. 108.

Indiana.— McMahan *v.* McMahan, 142 Ind. 110, 40 N. E. 661.

Kentucky.— Stone *v.* Werts, 3 Bush (Ky.) 486; Stith *v.* Patterson, 3 Bush (Ky.) 132; Clough *v.* Clough, 3 B. Mon. (Ky.) 64; Outten *v.* Grinstead, 4 J. J. Marsh. (Ky.) 608.

Maryland.— Devecmon *v.* Shaw, 70 Md. 219, 16 Atl. 645.

New York.— Proestler *v.* Kuhn, 49 N. Y. 654; Matter of Patterson, 61 Hun (N. Y.) 625, 16 N. Y. Suppl. 146, 40 N. Y. St. 919; Selover *v.* Lockwood, 21 N. Y. Suppl. 661, 50 N. Y. St. 228.

Pennsylvania.— Totten's Appeal, 40 Pa. St. 385.

South Carolina.— Ramseur *v.* Moore, 43 S. C. 304, 21 S. E. 81.

South Dakota.— Bailey *v.* Scott, 1 S. D. 337, 47 N. W. 286.

Wisconsin.— Treat *v.* Hiles, 75 Wis. 265, 44 N. W. 1088.

United States.— U. S. *v.* Memphis, 97 U. S. 284, 24 L. ed. 937.

See 3 Cent. Dig. tit. "Appeal and Error," § 3607.

Dismissal by plaintiff.— A plaintiff cannot assail, on appeal, the action of the trial court in dismissing the cause, when the dismissal was made upon his own motion.

Kansas.— Sawyer *v.* Forbes, 36 Kan. 612, 14 Pac. 148.

Kentucky.— Fauntleroy *v.* Crow, 5 B. Mon. (Ky.) 136.

Missouri.— Dumey *v.* Schoeffler, 20 Mo. 323.

Nebraska.— Norwegian Plow Co. *v.* Bollman, 47 Nebr. 186, 66 N. W. 292, 31 L. R. A. 747.

New York.— Alleva *v.* Hagerty, 32 Misc. (N. Y.) 711, 65 N. Y. Suppl. 690.

Texas.— Aycock *v.* Texas Transp. Co., 21 Tex. Civ. App. 153, 50 S. W. 1061.

Virginia.— Pitts *v.* Tidwell, 3 Munf. (Va.) 88.

When answer conceded plaintiff's right to a judgment, and the judgment is correct on the facts presented, though not rendered as defendant desired, it will not be reversed, at his instance. Duncan *v.* Louisville, 13 Bush (Ky.) 378, 26 Am. Rep. 201. See also Vance *v.* Evans, 11 W. Va. 342, holding that a defendant who, by his answer, asks the court to make inquiries more extended than the statements in the bill might justify, and upon such inquiry to decree between him and a co-defendant, is thereby precluded from assigning as error such enlarged extent of inquiry, or that a decree between him and the co-defendant was based thereon.

9. Union Bethel Church *v.* Gaylord, 1 Ky. L. Rep. 403; Campbell *v.* Crone, 10 Nebr. 571, 7 N. W. 334.

10. Terry *v.* Merchants', etc., Bank, 93 U. S. 38, 23 L. ed. 794.

11. Billingsley *v.* Groves, 5 Ind. 553. See 3 Cent. Dig. tit. "Appeal and Error," § 3608.

Judgments for amounts in excess of the jurisdiction of the trial court form exceptions to the rule stated in the text. Forsyth *v.* Warren, 62 Ill. 68.

12. Kemp *v.* Womack, 1 Rob. (La.) 369; Floyd *v.* Efron, 66 Tex. 221, 18 S. W. 497.

13. *Alabama.*— Karter *v.* Peck, 121 Ala. 636, 25 So. 1012.

California.— Scatena *v.* California Cannery Co., 115 Cal. 14, 46 Pac. 737.

Illinois.— Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74].

Texas.— Rice *v.* Powell, Dall. (Tex.) 413.

Virginia.— Terry *v.* Ragsdale, 33 Gratt. (Va.) 342.

United States.— Walton *v.* Chicago, etc., R. Co., 56 Fed. 1006, 12 U. S. App. 511, 6 C. C. A. 223.

See 3 Cent. Dig. tit. "Appeal and Error," § 3609.

14. As where it was necessary to examine the petition, which was in the possession of the complaining party's attorney and not accessible to the trial judge. Akes *v.* Sanford, (Tex. Civ. App. 1896) 39 S. W. 952.

15. Brown *v.* King, 1 Bibb (Ky.) 462.

appeal is void because the proceedings from which it was taken were irregular and unauthorized.[16]

b. Proceedings Assented to, or Acquiesced in, by Party — (i) *In General.* Where a party deliberately consents at the trial to the entry of an order,[17] the making of a ruling,[18] the rendition of a judgment,[19] or to the taking of any proceedings incidental to the trial, and such ruling, action, or proceeding does not constitute fundamental error, he is estopped to predicate error thereon in the appellate court.[20] Similarly, as a litigant must elect whether or not he will con-

16. Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

17. Brotherton *v.* Hart, 11 Cal. 405; Johnson *v.* Howard, 25 Minn. 558; Hirsch *v.* Mayer, 165 N. Y. 236, 59 N. E. 89 [*affirming* 54 N. Y. Suppl. 1075].

Consenting to the making of parties.— One who consented that others should be made parties to the proceedings in the trial court will not be allowed to complain thereof in the appellate court. Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862; Cook *v.* Ferral, 13 Wend. (N. Y.) 285.

See *supra*, XVII, C, 2, a, (v).

18. Salls *v.* Barons, 40 Kan. 697, 20 Pac. 485; Chamberlain *v.* Brown, 25 Nebr. 434, 41 N. W. 284.

19. Smith *v.* Kimball, 128 Ill. 583, 21 N. E. 503; McCall Co. *v.* Reinhardt, 25 Misc. (N. Y.) 770, 56 N. Y. Suppl. 170.

Errors committed against another.—A party who has consented to a decree cannot avail himself of errors committed against another party in the same cause. Williams *v.* Neil, 4 Heisk. (Tenn.) 279.

Judgment by default or decree pro confesso.— Where a judgment by default or decree *pro confesso* was entered against a defendant who was properly before the trial court, he cannot question, on appeal or error, the correctness of the judgment, or of the proceedings leading thereto, unless they were fundamentally erroneous. Thomas *v.* Bellamy, 126 Ala. 253, 28 So. 707; Davis *v.* Jones, 123 Ala. 647, 26 So. 321; Glos *v.* Swigart, 156 Ill. 229, 41 N. E. 42 [*affirming* 54 Ill. App. 316]; Agnew *v.* Fults, 119 Ill. 296, 10 N. E. 667; Mead *v.* Bagnall, 15 Wis. 156.

Voluntary nonsuit.— On the same principle, a plaintiff who voluntarily took a nonsuit in the trial court is not entitled to complain thereof in the appellate court, and cannot secure a review of any erroneous rulings or decisions made during the progress of the suit. Mahoney *v.* Chandler, 7 Ala. 732; Beall *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 695; Watson *v.* Anderson, Hard. (Ky.) 458; Greene County Bank *v.* Gray, 146 Mo. 568, 48 S. W. 447; Sone *v.* Palmer, 28 Mo. 539; Schulter *v.* Bockwinkle, 19 Mo. 647; Granbery *v.* Newby, 52 N. C. 422.

The rule does not apply to a judgment by consent rendered in contravention of the positive provisions of a statute. Ocobock *v.* Nixon, (Ida. 1899) 57 Pac. 309. Nor is the party estopped to attack a decree different from that contemplated in the stipulation under which it was entered. Strode *v.* Miller, (Ida. 1900) 59 Pac. 893.

20. Mudget *v.* Kent, 18 Me. 349. See 3 Cent. Dig. tit. "Appeal and Error," § 3611.

See also *supra*, XVII, C, 2 a, (i).

This rule has been applied in the following instances:

Consolidation of distinct causes. Lamar Land, etc., Co. *v.* Belknap Sav. Bank, (Colo. 1901) 64 Pac. 210.

Dismissal of levy in claim case. Plaster *v.* Terry, (Ga. 1901) 37 S. E. 971.

Failure of jury to answer interrogatories. Bagley *v.* Grand Lodge, A. O. U. W., 31 Ill. App. 618.

Form of trying question. State *v.* Judge Civil Dist. Ct., 33 La. Ann. 927.

Giving of oral instructions to jury. Rice *v.* Goodridge, 9 Colo. 237, 11 Pac. 91.

Premature closing of evidence. Perkins *v.* Fish, 121 Cal. 317, 53 Pac. 901.

Premature hearing of motion for new trial. Thompson *v.* Connolly, 43 Cal. 636. *Compare* Brownlee *v.* Hewitt, 1 Mo. App. 360, wherein it is held that the fact of a party consenting to argue the cause out of the presence of the court, when requested so to do by the trial judge, does not constitute a waiver of his right to have the argument of the cause conducted in the presence of the court.

Reception of informal verdict. Treadwell *v.* Wells, 4 Cal. 260.

Reception of verdict in absence of jury. Butterworth *v.* Pfeifer, 80 Ill. App. 240; Burlingame *v.* Burlingame, 18 Wis. 285.

Reference in case not referable. Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794.

Selection of special judge. Whipkey *v.* Nicholas, (W. Va. 1899) 34 S. E. 751.

Trial before wrong judge. Smith *v.* Smith, 40 N. Y. App. Div. 251, 57 N. Y. Suppl. 1122.

Trial by eleven jurors. San Antonio Traction Co. *v.* White, (Tex. Civ. App. 1900) 60 S. W. 323.

Trial of issue not raised by pleadings. Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868.

A feme covert, suing as sole, shall not, after judgment, assign her coverture for error. Nixon *v.* Dye, 1 N. J. L. 251.

Estoppel to deny consent.— Where a written agreement is made that certain facts shall go to the jury as admitted, is headed by the title of the case, and signed by plaintiff and some of the defendants, a defendant, whose name is not signed to it, but who is present in court in person and by attorneys when the agreed statement is presented, and permits it to be read without objection, cannot insist, in the appellate court, that he was not a party

test a proceeding had at the trial, adverse to his contention, and is bound by his election, he will not be permitted to assign as error an order, ruling, decision, or other proceeding not fundamentally erroneous, which he acted under,[21] or took any benefit under,[22] or otherwise acquiesced in.[23] This rule has been applied

to the agreement. Whitehall *v.* Crawford, 37 Ind. 147.

21. *Alabama.*— Planters', etc., Bank *v.* Willis, 5 Ala. 770, where the plaintiff exercised his right of election as between remedies.

Illinois.— Gage *v.* Chicago, 141 Ill. 642, 31 N. E. 163, where the party elected to take a new trial rather than abide by the judgment, and was not allowed to urge as error the setting aside of the judgment.

Indiana.— Byers *v.* Hickman, 36 Ind. 359; Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843, to the effect that one who has amended his pleading after a demurrer has been sustained cannot present for review a ruling on the demurrer. See also Kessler *v.* Citizens' St. R. Co., 20 Ind. App. 427, 50 N. E. 891, a failure to object to the entry of a judgment on a special verdict.

Iowa.— Walker *v.* Beaver, 50 Iowa 504; Rees *v.* Leech, 10 Iowa 439, holding that where, after amendment of a petition, evidence offered by plaintiff was admitted which had been rejected before the amendment, the rejection of the evidence in the first instance could not be urged as error by plaintiff.

Mississippi.— Reed *v.* Wiley, 5 Sm. & M. (Miss.) 394, where one participated in a hearing of a case referred which was not properly referable.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 107 Mo. 230, 17 S. W. 816, holding that under the operation of this rule a party who declined to participate in the trial below, after an adverse ruling against him, is not entitled to a review of the judgment subsequently rendered against him.

New York.— Lawrence *v.* Church, 128 N. Y. 324, 28 N. E. 499, 40 N. Y. St. 406 [*reversing* 10 N. Y. Suppl. 566, 32 N. Y. St. 751], where the party elected to reduce his judgment in order to prevent the reversal thereof and was not allowed to question the correctness of a court rule requiring the reduction. See also Mills *v.* Stewart, 88 Hun (N. Y.) 503, 34 N. Y. Suppl. 786, 68 N. Y. St. 584, 2 N. Y. Annot. Cas. 165, participation in a reference where the case was not referable.

Pennsylvania.— Scranton Bldg. Assoc. *v.* Ranck, (Pa. 1888) 13 Atl. 840, where the party elected to take one of two judgments offered him by the court.

Texas.— Anderson *v.* Walker, (Tex. Civ. App. 1899) 49 S. W. 937, holding that where a demurrer by one of two defendants is sustained and the action dismissed as to him, such demurrer is an acquiescence in the ruling.

Wisconsin.— Newton *v.* Allis, 16 Wis. 197, acquiescing in the entry of a judgment on a defective verdict.

In Louisiana an appellee who answers the appeal, and prays the reversal of the judgment on its merits, thereby waives the right of asking the review by the appellate court of a decree in favor of appellants, overruling a plea of misjoinder. World's Industrial, etc., Centennial Exposition *v.* North, etc., American Exposition, 39 La. Ann. 1, 1 So. 358.

Election to appeal.— Where the court orders that a temporary injunction be dissolved, and that the injunction bill be dismissed if complainant wishes to take an appeal, an appeal from the order constitutes an election to have the bill dismissed, and complainant cannot urge such dismissal as error. Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434.

When rule does not apply.— A plaintiff by entering judgment on a verdict in his favor, in order to appeal therefrom, is not estopped to object to the verdict for inadequacy of damages. Smith *v.* Dittman, 16 Daly (N. Y.) 427, 11 N. Y. Suppl. 769, 34 N. Y. St. 303. So, where plaintiff objected to an order for the change of venue, and filed his bill of exceptions in the court that made the order, he did not waive his objection by appearing in the court to which the case was removed, but was entitled to have it reviewed on appeal. Gee *v.* St. Louis R. Co., 140 Mo. 314, 41 S. W. 796.

22. Tucker *v.* Tucker, 5 N. Y. 408; Burton *v.* Brown, 22 Gratt. (Va.) 1.

One who accepts relief, which is granted upon terms imposed as a condition, will not be heard to complain, on appeal, that he was required to abide by or perform the condition. Mahone *v.* Williams, 39 Ala. 202; Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Tupper *v.* Kilduff, 26 Mich. 394; American Exch. Bank *v.* Brentzinger, 10 Ohio Dec. 208.

Rejection of relief offered on terms.— After judgment against a party who rejected a continuance offered on terms, the ruling of the trial court on the merits of his motion for a continuance cannot be reviewed in the appellate court. Couts *v.* Neer, 70 Tex. 468, 9 S. W. 40.

23. *Georgia.*— Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77, acquiescence by failure to plead.

Louisiana.— Trouilly's Succession, 52 La. Ann. 276, 26 So. 851.

Michigan.— Slater *v.* Breese, 36 Mich. 77, acquiescence by failure to object to reference and report.

Minnesota.— Bergh *v.* Sloan, 53 Minn. 116, 54 N. W. 943.

Mississippi.— Lamar *v.* Williams, 39 Miss. 342.

Nebraska.—Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336.

Pennsylvania.— Rees *v.* Livingston, 41 Pa. St. 113, acquiescence by failure to move to strike out evidence.

South Dakota.—Way *v.* Johnson, 5 S. D.

where the complaining party has consented to, or acquiesced in, the nature and theory upon which the cause was tried or submitted,[24] the sufficiency of his adversary's pleadings,[25] the admission of evidence,[26] or the giving of instructions;[27] where he has consented to submission of issues or questions to the jury;[28] and where he has consented to the validity or propriety of proceedings incidental to the con-

237, 58 N. W. 552, acquiescence by failure to object to improper question.

Texas.— Hatcher *v.* Barnard, (Tex. Civ. App. 1894) 25 S. W. 647, acquiescence by failure to amend pleading.

Wisconsin.— Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125 (acquiescence by failure to move to strike out evidence); Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86 (acquiescence by failure to object to improper remarks of trial judge); Cobb *v.* Harrison, 20 Wis. 625 (acquiescence by failure to plead).

See 3 Cent. Dig. tit. "Appeal and Error," § 3612.

See *supra*, XVII, C, 2, a, (I).

24. Nature and theory of cause.— *Illinois.* —Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975 [*affirming* 73 Ill. App. 234].

Indiana.— Chenowith *v.* Hicks, 5 Ind. 224.

Kansas.—Watkins *v.* National Bank, 51 Kan. 254, 32 Pac. 914.

Louisiana.— Wells *v.* Wells, 23 La. Ann. 224.

Massachusetts.—Waite *v.* Worcester Brewing Co., 176 Mass. 283, 57 N. E. 460; Aldrich *v.* Carpenter, 160 Mass. 166, 35 N. E. 456.

Missouri.— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Bowlin *v.* Creel, 63 Mo. App. 229.

New York.— Kohler *v.* Wright, 7 Bosw. (N. Y.) 318; Beekman *v.* Bond, 19 Wend. (N. Y.) 444.

Texas.— Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145.

Wisconsin.— Evans *v.* Enloe, 64 Wis. 671, 26 N. W. 170.

United States.— Colorado Cent. Consol. Min. Co. *v.* Turck, 54 Fed. 262, 12 U. S. App. 85, 4 C. C. A. 313.

See *supra*, XVII, C, 2, a, (III), (IV).

This rule, however, is subject to the exception that a party who conceded the unconstitutionality of a statute in the trial court is not precluded from asserting its constitutionality on appeal. Mouat Lumber, etc., Co. *v.* Freeman, 7 Colo. App. 152, 42 Pac. 1040, the court saying: "It is not competent for counsel to stipulate the unconstitutionality of a law."

25. Recognizing sufficiency of adversary's pleading.— McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641.

See *supra*, XVII, C, 2, a, (VI).

A party cannot base an assignment of error upon a defect in his adversary's pleadings when he had waived such defect either by express stipulation (Kelsey *v.* Lamb, 21 Ill. 559; Munson *v.* Hegeman, 10 Barb. (N. Y.) 112), or by treating the pleadings as sufficient (Work *v.* Kinney, (Ida. 1900) 63 Pac. 596; Holly *v.* Powell, 63 Ill. 139).

But a party does not treat a defective pleading as sufficient when he simply asks an instruction which is designed to meet and combat the theory of the case as disclosed by such pleading. McClintic *v.* McClintic, 111 Iowa 615, 82 N. W. 1017.

See *supra*, XVII, C, 2, a, (VI), (B).

26. Permitting admission of evidence.—The appellate court will not permit a party to assign as error the admission of evidence which he agreed that his adversary might introduce.

Indiana.—Wakeman *v.* Jones, 1 Ind. 517.

Maryland.— Edelen *v.* Hardy, 7 Harr. & J. (Md.) 61, 16 Am. Dec. 292.

Missouri.— McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674.

Nebraska.—Elsanger *v.* Grovijohn, 29 Nebr. 129, 45 N. W. 273.

New York.—Where parties agreed at the trial that they would not object to evidence taken under a commission, except as noted on the return, and one party, himself, under such agreement, introduced illegal testimony, he will not be allowed, on appeal, to object to the incompetency of the testimony of the adverse party admitted under such agreement. Matter of Bull, 14 Daly (N. Y.) 510, 2 N. Y. Suppl. 52, 16 N. Y. St. 674.

Wisconsin.— Flanegan *v.* Earnest, 2 Pinn. (Wis.) 196, 1 Chandl. (Wis.) 149.

United States.— Deering Harvester Co. *v.* Kelly, 103 Fed. 261, 43 C. C. A. 225.

See *supra*, XVI, C, 2, a, (VII).

Likewise, it has been held that a party is estopped to complain of the erroneous admission of evidence over his objection when he subsequently permitted evidence of the same tenor to be introduced without objection (McPherson *v.* Andes, 75 Mo. App. 204), or when he had previously permitted the introduction of similar evidence (McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924).

See *supra*, XVI, C, 2, a, (VII).

27. Instructions given.— An appellant or plaintiff in error is estopped to question the correctness of a rule of damages stated in the charge at the trial, when he had consented to the adoption of such rule. Frye *v.* Hinkley, 18 Me. 320; Bielman *v.* Chicago, etc., R. Co., 50 Mo. App. 151.

See *supra*, XVII, C, 2, a, (VIII).

28. Submission of issue or question to jury. —Lemmon *v.* Sibert, (Colo. App. 1900) 61 Pac. 202; Davis *v.* Winslow, 51 Me. 264, 81 Am. Dec. 573. Where an instruction is based on a statement of the question in issue, and such statement is assented to by a party, he cannot complain that the instruction makes the verdict depend on the decision of that question. Rowersock *v.* Beers, 82 Ill. App. 396.

See *supra*, XVII, C, 2, a, (VIII).

duct of the trial below.[29] On the other hand, when he does not abandon his exceptions and does not acquiesce in the objectionable proceedings, he is not estopped to complain thereof, upon appeal or error, by simply taking steps in the trial court with a view of meeting his adversary's case as affected by such proceedings.[30]

(II) *By Pleading Over or Proceeding to Trial.* One who pleads over or proceeds to trial on the merits, after an adverse decision on his demurrer,[31] motion for verdict,[32] or motion for nonsuit, will not be permitted to allege error in such decision, as he will be presumed to have acquiesced therein.[33] In some jurisdictions a party is deemed to have acquiesced in a decision granting a new trial when, after excepting thereto, he appears at the new trial and participates therein.[34]

(III) *By Taking or Failing to Take an Appeal.* A party who takes an appeal from a judgment against him so recognizes it that he is estopped to attack it, in the appellate court, on the ground that he was not properly made a party to the proceedings,[35] or that there was an irregularity in the entry of the judgment.[36] On the other hand, he is not thereby estopped to raise the question

29. Blain *v.* Manning, 36 Ill. App. 214 (where the evidence was heard by the trial judge at a place without his jurisdiction); Angier *v.* Howard, 94 N. C. 27 (where a paper not in evidence was submitted to the jury).

See *supra*, XVII, C, 2, a, (IX), (X).

30. Commercial Union Assur. Co. *v.* Scammon, 35 Ill. App. 659 (where plaintiff asked for a judgment upon a new ground after judgment was refused on the first ground); Tobin *v.* Missouri Pac. R. Co., (Mo. 1891) 18 S. W. 996; Gamble *v.* Gibson, 83 Mo. 290 [*affirming* 10 Mo. App. 327]; Nickerson *v.* Ruger, 76 N. Y. 279 (attempting to make a case in compliance with erroneous ruling as to burden of proof); Wright *v.* Northwestern Union R. Co., 37 Wis. 391.

31. **Demurrer overruled.**— McLarren *v.* Thurman, 8 Ark. 313; Dingle *v.* Swain, 15 Colo. 120, 24 Pac. 876; Garver *v.* Lynde, 7 Mont. 108, 14 Pac. 697; Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169.

Compare Lennox *v.* Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242 (which holds that where part of the petition is stricken out on demurrer, to which the plaintiff excepts, but goes to trial without asking leave to file an amended petition or formally refiling the original, he is entitled, on appeal, to review the action of the trial court in striking out part of the petition); also Johnson *v.* Clements, 23 Tex. Civ. App. 112, 54 S. W. 272 (wherein it was held that a defendant who demurred to the petition, and, after his demurrer was overruled, admitted the cause of action as alleged, to acquire the right to open and conclude, as provided by Tex. Dist. and County Ct. Rules, No. 31, did not thereby waive his right to complain of the ruling on the demurrer, as it could not be the purpose of the rule to require defendant to waive a fundamental error).

See 3 Cent. Dig. tit. "Appeal and Error," § 3614.

Unanswered demurrer.—If an unanswered demurrer is on record and the parties go to trial by consent, it will not be cause for reversal. Parker *v.* Palmer, 22 Ill. 489.

32. **Motion for verdict denied.**— Where a defendant, after the overruling of his motion to instruct the jury that plaintiff is not entitled to a recovery, puts in his case, he cannot avail himself of any error in the denial of his motion. Campau *v.* Bemis, 35 Ill. App. 37; Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740. To same effect see Erickson *v.* Citizens' Nat. Bank, 9 N. D. 81, 81 N. W. 46.

33. **Motion for nonsuit denied.**— Burt *v.* Oneida Community, 137 N. Y. 346, 33 N. E. 307, 50 N. Y. St. 722, 19 L. R. A. 297; Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 34 [*reversing* 84 Fed. 430, 51 U. S. App. 693, 28 C. C. A. 443].

34. **Participating in new trial.**— Porter *v.* Hanley, 10 Ark. 186; Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657. *Contra*, Gann *v.* Worman, 69 Ind. 458 [*distinguishing* Vernia *v.* Lawson, 54 Ind. 485; Marsh *v.* Elliott, 51 Ind. 547].

Estoppel to complain of decision granting new trial.— A judgment rendered on a new trial will not be set aside because the new trial was allowed on insufficient grounds, if the adverse party admitted before the court below the truth of certain evidence, showing that the first judgment was wrong; and the fact that such admission was made to prevent a continuance makes no difference. Houck *v.* Deitz, 3 Ind. 385.

35. **Taking appeal.**—Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916; Spiero *v.* Metropolitan St. R. Co., 14 Misc. (N. Y.) 21, 35 N. Y. Suppl. 123; Bibby *v.* Myer, 10 Paige (N. Y.) 220. See 3 Cent. Dig. tit. "Appeal and Error," § 3616.

36. Fretz *v.* Carlile, 4 La. Ann. 561; Minor *v.* Lanbelle, 9 La. 323; Weathersby *v.* Hughes, 7 Mart. N. S. (La.) 233; Gardere *v.* Murray, 5 Mart. N. S. (La.) 244; Breed *v.* Repsher, 4 Mart. (La.) 187; Irwin *v.* Nuckolls, 3 Nebr. 441.

Misnomer in entry of judgment.— Where the court, after allowing an amendment of a summons by substitution of defendant's proper corporate name, assumes jurisdiction and en-

of the lower court's lack of jurisdiction to entertain the cause at all,[37] or to render judgment for the amount which it did.[38] Upon the same theory, a party who has taken a limited appeal — as an appeal which is from a portion of the decree only,[39] or which does not embrace an appealable order[40] — is deemed to have acquiesced in all other parts of the proceedings, and is precluded from asserting that there is error other than fundamental error in them.

D. Amendments of Pleadings, Additional Proofs, and Trials De Novo — **1. Amendments of Pleadings — a. In General.**[41] A case must be heard, on appeal, on the issues tried below, and on no others; and, except by consent of the adverse party, no amendment will be allowed in the appellate court which will have the effect of reversing the judgment or in any way affecting a substantial right of such party.[42] It seems, however, that, if the objection is purely formal, if the real question in controversy has been fully and fairly tried and correctly settled, and if the identity of the original cause will be preserved, the appellate court may allow the pleadings to be amended, when such a course is necessary to meet the requirements of justice.[43]

ters judgment against defendant as originally summoned, the recital, in an appeal bond of defendant, that the judgment was against it is a recognition of the judgment. Union Pac. R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

37. Schuylkill County *v.* Minogue, 160 Pa. St. 164, 34 Wkly. Notes Cas. (Pa.) 80, 28 Atl. 643.

38. Forsyth *v.* Warren, 62 Ill. 68.

Sureties in an undertaking on appeal are estopped, by the recitals therein, from assigning as error that the taxation of costs below was incorrect. Levi *v.* Dorn, 28 How. Pr. (N. Y.) 217.

39. Appeal from part of a decree. — Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479; Millard *v.* Harris, 119 Ill. 185, 10 N. E. 387; Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4. *Compare* Simmons Hardware Co. *v.* Whittaker, 17 Ky. L. Rep. 1391, 34 S. W. 1086.

Affirmance of other parts of the decree. — One who appeals from one portion of a decree does not thereby acquire the right to ask for the affirmance of other and independent parts of the decree of which no one complains. Green *v.* Blackwell, 32 N. J. Eq. 768.

40. Appeal not embracing appealable order. — Kirby *v.* Fitzgerald, 31 N. Y. 417; Kelsey *v.* Western, 2 N. Y. 500; Pringle *v.* Sizer, 7 S. C. 131; Rockford Shoe Co. *v.* Jacob, 6 Wash. 421, 33 Pac. 1057. But *compare* Hickock *v.* Scribner, 3 Johns. Cas. (N. Y.) 311, which holds that, where it appears, upon the appeal from the final decree in a suit to redeem a mortgage, that the decree for redemption was radically bad in consequence of failure to make an assignee of the mortgage a party to the proceedings, the defendant may avail himself of the objection even though he omitted to appeal from an interlocutory order overruling the objection for want of parties, as the decree could not be obeyed by defendant.

41. As to the presumption that pleadings were amended in the lower court see *infra*, XVII, E, 2.

42. *Iowa.* — Ottumwa Brick, etc., Co. *v.* Ainley, 109 Iowa 386, 80 N. W. 510; Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784.

Maine. — Perry *v.* Plunkett, 74 Me. 328. See also Crocker *v.* Craig, 46 Me. 327.

Maryland. — Baker *v.* Winter, 15 Md. 1.

Massachusetts. — Locke *v.* Kennedy, 171 Mass. 204, 50 N. E. 531. See also Dudley *v.* Sumner, 5 Mass. 438, wherein it was held that as, under Mass. Stat. (1786), c. 66, actions tried on review must be tried on the original pleadings even when a new trial was granted, the direction to amend was not allowable.

New Hampshire. — Rowell *v.* Bruce, 5 N. H. 381.

New Jersey. — State *v.* Hartman Steel Co., 51 N. J. L. 446, 20 Atl. 67.

North Carolina. — Howard *v.* Mutual Reserve Fund L. Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; Askew *v.* Pollock, 66 N. C. 49; Tyrrel Justices *v.* Simmons, 48 N. C. 187.

Ohio. — In Hosmer *v.* Williams, Wright (Ohio) 355, it was held that an amendment, even in a matter of form, could not be allowed after writ of error brought. See also Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31, holding that, when a case is reserved to the supreme court upon issues joined and an agreed statement of facts, a change of the pleadings would make new issues and require other evidence, and should not be allowed, unless, by refusing amendment, the rights of a party would be sacrificed or injustice done.

Pennsylvania. — Frankem *v.* Trimble, 5 Pa. St. 520.

South Carolina. — Charles *v.* McLeod, 2 Bay (S. C.) 407.

United States. — Post *v.* Beacon Vacuum Pump, etc., Co., 89 Fed. 1, 50 U. S. App. 407, 32 C. C. A. 151.

See 3 Cent. Dig. tit. "Appeal and Error," § 3617.

Permission to amend refused by intermediate court. — If the district court refuses to allow an amendment in accordance with permission given by the county court, the supreme court cannot allow such an amendment on an original motion. Spellman *v.* Frank, 18 Nebr. 110, 24 N. W. 442.

43. *Georgia.* — Phelps *v.* Daniel, 86 Ga. 363, 12 S. E. 584.

b. To Conform to the Evidence, Verdict, or Judgment. Upon a proper showing, the appellate court may allow an amendment of the pleadings so as to make them conform to the proof, the verdict, and the judgment thereon,[44] where such amendment will not substantially change the claim or the defense.[45]

c. To Show Jurisdiction. Where enough appears on the face of the papers to give the appellate court jurisdiction, it is within the discretion of the court to allow the pleadings to be amended upon motion, provided no new cause of action, affecting the jurisdiction of either court, is thereby introduced.[46]

New Hampshire.—Bailey *v.* Smith, 43 N. H. 409.

New Jersey.— Ware *v.* Milville Mut. M. & F. Ins. Co., 45 N. J. L. 177; O'Neill *v.* Leeds, (N. J. 1899) 43 Atl. 650 (allowing the amendment of a declaration by inserting a count therein, though permission to do so in the lower court was not taken advantage of); American Popular L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198.

New York.— Fitch *v.* New York, 88 N. Y. 500; Volkening *v.* De Graaf, 81 N. Y. 268; Whiting *v.* New York, 37 N. Y. 600; Weems *v.* Shaughnessy, 70 Hun (N. Y.) 175, 24 N. Y. Suppl. 271, 54 N. Y. St. 101; Riker *v.* Curtis, 10 Misc. (N. Y.) 125, 30 N. Y. Suppl. 940, 62 N. Y. St. 514; Hill *v.* Stocking, 6 Hill (N. Y.) 277.

North Carolina.—Baxter *v.* Baxter, 48 N. C. 303.

Pennsylvania.— Thornton *v.* Britton, 144 Pa. St. 126, 28 Wkly. Notes Cas. (Pa.) 467, 22 Atl. 1048; Waite *v.* Palmer, 78 Pa. St. 192; Morris *v.* McNamee, 17 Pa. St. 173.

Rhode Island.— R. I. Pub. Stat. c. 220, § 20, provides that where a case is taken to the supreme court by a bill of exceptions, such court "may make such order therein as the court of common pleas ought to have done, and show cause for such proceedings to be had in the cause as to law and justice shall appertain." In Wright *v.* Card, 16 R. I. 719, 19 Atl. 709, the supreme court deferred judgment to give defendant opportunity to amend a plea alleging that the judgment was procured by fraud.

Tennessee.— Royston *v.* Wear, 3 Head (Tenn.) 7.

United States.—Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49.

In equity cases the power of the appellate court to allow amendments of form or substance is fully established. Warren *v.* Moody, 9 Fed. 673, wherein it is said that the practice is well settled in this regard upon appeals to the circuit court of the United States in admiralty and revenue cases. But see State Bank *v.* Niles, Walk. (Mich.) 398.

But it has been held that, if there be cases in which an amendment should be allowed, after a demurrer to a bill for multifariousness is sustained, the application for leave to amend must be made in the court below. McIntosh *v.* Alexander, 16 Ala. 87.

44. *Massachusetts.*—Stone *v.* White, 8 Gray (Mass.) 589.

Nebraska.— Scott *v.* Spencer, 44 Nebr. 93, 62 N. W. 312.

New Jersey.— Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553.

New York.— Davis *v.* Grand Rapids F. Ins. Co., 157 N. Y. 685, 51 N. E. 1090 [*affirming* 15 Misc. (N. Y.) 263, 36 N. Y. Suppl. 792, 71 N. Y. St. 813]; Harris *v.* Tumbridge, 83 N. Y. 92, 38 Am. Rep. 398; Thompson *v.* Kessel, 30 N. Y. 383; Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirming* 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513]; Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460, 37 N. Y. Suppl. 1037, 74 N. Y. St. 333; Van Orden *v.* Morris, 19 Misc. (N. Y.) 497, 43 N. Y. Suppl. 1108.

Pennsylvania.— Trego *v.* Lewis, 58 Pa. St. 463; Prevost *v.* Nicholls, 4 Yeates (Pa.) 479.

Rhode Island.— See Heath *v.* Bligh, 9 R. I. 31.

Texas.— Fergus *v.* Dodson, (Tex. Civ. App. 1895) 33 S. W. 273.

Contra, however, see Perkins *v.* West Coast Lumber Co., (Cal. 1893) 33 Pac. 1118; Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211.

See 3 Cent. Dig. tit. "Appeal and Error," § 3619.

45. **An amendment changing action from one cause to another** and different ground of action cannot be made to support the judgment, and is not allowable on appeal. Fisher *v.* Rankin, 7 N. Y. Suppl. 837, 27 N. Y. St. 582, 25 Abb. N. Cas. (N. Y.) 191. See also Hondorf *v.* Atwater, 75 Hun (N. Y.) 369, 27 N. Y. Suppl. 447, 57 N. Y. St. 694.

Defense to counter-claim.— A counter-claim is in the nature of a cross-action on which defendant may have affirmatice relief against plaintiff, and plaintiff, to sustain judgment for him, cannot, on appeal, amend his reply so as to set up the statute of limitations in bar. Williams *v.* Willis, 15 Abb. Pr. N. S. (N. Y.) 11.

Extent and limits of rule.— While, within certain limitations, a record may, upon proper notice, be so amended as to make it truly state what actually occurred in court, and which should have been entered of record at the time (Higgs *v.* Huson, 8 Ga. 317), it cannot be amended with the purpose of interpolating into it matters which did not actually take place (Ogden *v.* Lake View, 121 Ill. 422, 13 N. E. 159). Nor will the court order an amendment to create error; no amendment will be allowed in the appellate court for the purpose of reversing a judgment. Howell *v.* Grand Trunk R. Co., 92 Hun (N. Y.) 423, 36 N. Y. Suppl. 544, 71 N. Y. St. 640; Williams *v.* Birch, 6 Bosw. (N. Y.) 674.

46. Sawyer *v.* Keene, 47 N. H. 173; Osgood *v.* Green, 30 N. H. 210; Kennedy *v.* Georgia Bank, 8 How. (U. S.) 586, 12 L. ed. 1209 (holding that, while consent cannot confer

d. With Respect to the Parties. Where a case has been tried on the merits, and the allowance, on appeal, of an amendment as to parties would be a technical matter prejudicing the rights of no one, such amendment may be allowed.[47]

2. Additional Proofs. Defects in proofs cannot be supplied in the appellate court — that court can determine a cause only on the record of the court below, and cannot, without consent of the parties, hear additional proofs.[48] Sometimes, however, even though new evidence cannot be introduced in the appellate court for the purpose of making a case, the appellate court will send down to the lower court for papers, found, during the investigation, to be necessary for their information, in order to explain and show the effect of the evidence in the case;[49]

jurisdiction, if the appellate court has jurisdiction over the subject-matter and the parties, it may, with the consent of the parties, allow an amendment to correct a defect caused by inadvertence). See 3 Cent. Dig. tit. "Appeal and Error," § 3618.

Limitations of this rule. — But an amendment cannot be granted so as to confer jurisdiction upon the appellate court (Agnew *v.* Dorman, Taney (U. S.) 386, 1 Fed. Cas. No. 100); or to introduce new matter which the court below had not jurisdiction to determine (Osgood *v.* Green, 30 N. H. 210). Nor will the appellate court allow an amendment which is necessary to give the lower court jurisdiction. McQuade *v.* O'Neil, 15 Gray (Mass.) 52, 77 Am. Dec. 350; Webb *v.* Tweedie, 30 Mo. 488; St. Louis, etc., R. Co. *v.* Newcom, 56 Fed. 951, 12 U. S. App. 503, 6 C. C. A. 172; Smith *v.* Jackson, 1 Paine (U. S.) 486, 22 Fed. Cas. No. 13,065.

47. *California.* — See Baldwin *v.* Bornheimer, 48 Cal. 433.

New York. — Pease *v.* Morgan, 7 Johns. (N. Y.) 468.

North Carolina. — Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Grant *v.* Rogers, 94 N. C. 755.

Pennsylvania. — Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49 (an action by a father for death of a child, in which case it was permitted to add the mother's name as plaintiff); Clifford *v.* Prudential L. Ins. Co., 161 Pa. St. 257, 28 Atl. 1085 (where one who sued as administrator on an insurance policy which had been assigned to him was allowed to amend so as to describe himself as assignee); Shaffer *v.* Eichert, 132 Pa. St. 285, 19 Atl. 81; Com. *v.* Mahon, 12 Pa. Super. Ct. 616.

Virginia. — Hooper *v.* Royster, 1 Munf. (Va.) 119.

United States. — Chicago, etc., R. Co. *v.* Leavenworth First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

See 3 Cent. Dig. tit. "Appeal and Error," § 3620.

Limitations of the rule. — An amendment cannot be allowed, in the appellate court, the effect of which might be to preclude some just defense. Smyth *v.* Carden, 1 Swan (Tenn.) 27. The total change of one of the parties to the action, or a change of the person suing as relator, is too radical. Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650.

48. *Colorado.* — Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Georgia. — Myrick *v.* Vineburgh, 30 Ga. 161.

Illinois. — David *v.* David, 87 Ill. App. 186.

Kentucky. — But see Sullivan *v.* Wilson, 101 Ky. 427, 19 Ky. L. Rep. 664, 41 S. W. 260, construing Ky. Gen. Stat. c. 42, § 2, as to an exception to this rule, created by statute.

Louisiana. — State *v.* Police Jury, 28 La. Ann. 272; Keenan *v.* Freret, 22 La. Ann. 31.

Maine. — Potter *v.* Sewall, 54 Me. 142; Wood *v.* Estes, 35 Me. 145.

Mississippi. — Hoggatt *v.* Hunt, Walk. (Miss.) 216.

New York. — Moser *v.* New York, 21 Hun (N. Y.) 163; Onderdonk *v.* Voorhis, 2 Rob. (N. Y.) 623; Mitchell *v.* Lenox, 14 Wend. (N. Y.) 662; Wendell *v.* Lewis, 6 Paige (N. Y.) 233.

North Carolina. — Person *v.* Leary, 126 N. C. 504, 36 S. E. 35.

Texas. — Patrick *v.* Gibbs, 17 Tex. 275.

Vermont. — Blake *v.* Tucker, 12 Vt. 39; Aldis *v.* Burdick, 8 Vt. 21.

Virginia. — But see Auditor *v.* Pauly, 5 Call (Va.) 331; Com. *v.* Banks, 4 Call (Va.) 338.

United States. — Roemer *v.* Simon, 91 U. S. 149, 23 L. ed. 267; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388.

See 3 Cent. Dig. tit. "Appeal and Error," § 3625.

49. Donohue *v.* Whitney, 15 N. Y. Suppl. 622, 39 N. Y. St. 706 (wherein the court says: "We sometimes receive a record on the argument with like effect as if given upon the trial, but only to remove some objection based upon non-production of record in a case where its absence on the trial or in the appeal book is a mere informality"); Blue *v.* Ritter, 118 N. C. 580, 24 S. E. 356. *Compare*, also, Blanchard *v.* Cooke, (Mass. 1888) 17 N. E. 313, construing Mass. Pub. Stat. c. 151, § 26, and applying the maxim *interest rei publicæ ut sit finis litium.*

Thus, omission in proof of matter of record may be introduced for the purpose of sustaining a judgment. Barnett *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 98, 65 N. Y. Suppl. 509; O'Day *v.* J. Chris. G. Hupfel Brewing Co., 30 Misc. (N. Y.) 460, 62 N. Y. Suppl. 473; Hooper *v.* Royster, 1 Munf. (Va.) 119, in which last case the court of appeals granted a certiorari for the transcript of a record in another chancery suit, referred to in the appeal papers in the chancery suit before them.

but nothing will be received by the court which will have the effect of reversing the judgment.[50]

3. Trials De Novo — a. Nature of. A trial *de novo* means a trial anew in the appellate tribunal, according to the usual or prescribed mode of procedure in other cases, involving similar questions, whether of law or fact.[51]

b. Right to — (I) *In General.* Under statutes giving the right of appeal, no case can be tried *de novo* in the appellate court unless such statute expressly permits or directs such a course to be pursued;[52] and a statute making provision for such a trial will be strictly construed, and will not be expanded, by judicial interpretation, so as to include cases not strictly within its terms.[53]

(II) *In Equitable Proceedings* — (A) *In General.* Under the old chancery practice suits in equity were tried *de novo* on appeal upon the entire record and evidence;[54] and it has been said that "the adoption of the codes scarcely made

50. People *v.* Barker, 146 N. Y. 304, 40 N. E. 996, 66 N. Y. St. 658.

51. Lewis *v.* Baca, 5 N. M. 289, 21 Pac. 343. See 2 Cent. Dig. tit. "Appeal and Error," § 3626.

Strictly speaking, the court does not exercise appellate jurisdiction in trials *de novo*. The bestowal of a mere appellate power upon a court does not authorize it to try a case anew. Lacy *v.* Williams, 27 Mo. 280; Lewis *v.* Nuckolls, 26 Mo. 278.

52. *Alabama.*— Hendricks *v.* Johnson, 6 Port. (Ala.) 472.

Arizona.— Maricopa County *v.* Jordan, (Ariz. 1900) 60 Pac. 693.

Arkansas.— Kurtz *v.* Dunn, 36 Ark. 648; Union County *v.* Kelly, 23 Ark. 350; Clark County *v.* Spence, 21 Ark. 465.

Florida.— State *v.* King, 20 Fla. 399.

Georgia.— Freeman *v.* Carr, 104 Ga. 718, 30 S. E. 935.

Indiana.—Weatherly *v.* Higgins, 6 Ind. 73.

Iowa.— Lawrence *v.* Thomas, 84 Iowa 262, 51 N. W. 11; Chase *v.* Weston, 75 Iowa 159, 39 N. W. 246; Brett *v.* Myers, 65 Iowa 274, 21 N. W. 604.

Louisiana.— Saunders *v.* Ingram, 5 Mart. N. S. (La.) 644.

Massachusetts.— Walker *v.* Haskell, 11 Mass. 177.

Michigan.— Gance *v.* The Scow Jack Robinson, 18 Mich. 456.

Mississippi.—Lyles *v.* Barnes, 40 Miss. 608.

New Hampshire.— Holman *v.* Kingsbury, 4 N. H. 104; Hillsborough *v.* Deering, 4 N. H. 86.

New Jersey.—Valentino *v.* Bird, 57 N. J. L. 538, 31 Atl. 606; Feeney *v.* Ruger, 57 N. J. L. 356, 31 Atl. 217.

New York.—Abrahamson *v.* Koch, 7 Misc. (N. Y.) 122, 27 N. Y. Suppl. 310, 57 N. Y. St. 512.

North Carolina.—Evans *v.* Governor's Creek Transp., etc., Co., 50 N. C. 331. See also Morehead *v.* Atlanta, etc., R. Co., 52 N. C. 500.

Pennsylvania.—Johns *v.* Erb, 5 Pa. St. 232; Matter of Dyott, 2 Watts & S. (Pa.) 557.

Tennessee.— Davis *v.* State, 92 Tenn. 634, 23 S. W. 59.

Texas.— Perry *v.* Rohde, 20 Tex. 729.

Washington.—Murray *v.* Shoudy, 13 Wash. 33, 42 Pac. 631.

Wisconsin.— Spaulding *v.* Milwaukee, etc., R. Co., 57 Wis. 304, 14 N. W. 368, 15 N. W. 482.

United States.—U. S. *v.* Sawyer, 1 Gall. (U. S.) 86, 27 Fed. Cas. No. 16,227.

See 3 Cent. Dig. tit. "Appeal and Error," § 3626 *et seq.*; and cases cited *infra*, note 53.

53. *Arkansas.*— Kelly *v.* Union County, 23 Ark. 331.

Illinois.— Lucas *v.* Dennington, 86 Ill. 88.

Nebraska.— Robertson *v.* Hall, 2 Nebr. 17.

North Carolina.— Plunkett *v.* Penninger, 47 N. C. 367; Clark *v.* Cameron, 26 N. C. 161; State *v.* Jackson, 7 N. C. 230. See also Bagley *v.* Wood, 34 N. C. 90; Burton *v.* Sheppard, 2 N. C. 460; Snoden *v.* Humphries, 2 N. C. 29.

North Dakota.— Ricks *v.* Bergsvendsen, 8 N. D. 578, 80 N. W. 768; Devils Lake First Nat. Bank *v.* Merchants' Nat. Bank, 5 N. D. 161, 64 N. W. 941; Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58. See also National Cash Register Co. *v.* Wilson, 9 N. D. 112, 81 N. W. 285; Mooney *v.* Donovan, 9 N. D. 93, 81 N. W. 50; Hayes *v.* Taylor, 9 N. D. 92, 81 N. W. 49; Erickson *v.* Citizens' Nat. Bank, 9 N. D. 81, 81 N. W. 46.

Texas.— Henry *v.* Drought, 10 Tex. Civ. App. 379, 30 S. W. 584; Arredondo *v.* Arredondo, (Tex. Civ. App. 1894) 25 S. W. 336.

Wisconsin.— McDonald *v.* Falvey, 18 Wis. 571.

England.— See Baker *v.* Ridgeway, 2 Bing. 41, 9 E. C. L. 472.

See 2 Cent. Dig. tit. "Appeal and Error," § 3626 *et seq.*; and cases cited *supra*, note 52.

54. **The appellate court could itself sift the whole evidence,** and determine what the finding of the chancery court should have been upon such evidence as was competent and proper. The chancellor below and the appellate court were judges of both law and fact.

Arkansas.— Nolen *v.* Harden, 43 Ark. 307, 51 Am. Rep. 563.

Indiana.—Wells *v.* Sprague, 10 Ind. 305; Leach *v.* Leach, 10 Ind. 271.

Indian Territory.—Daugherty *v.* Bogy, (Indian Terr. 1899) 53 S. W. 542.

New York.— Bloodgood *v.* Clark, 4 Paige (N. Y.) 574.

Tennessee.—Carnes *v.* Polk, 5 Heisk. (Tenn.) 244; Morris *v.* Richardson, 2 Humphr. (Tenn.) 389.

any impression upon equity cases, so far as their trial in the lower or appellate courts was concerned." [55]

(B) *Depending Upon the Evidence Before the Court.* The appellate court will not, even upon the consent of both parties, try a case in equity on its merits without having before it all the evidence on which the case was tried in the first instance.[56]

(C) *Determination of the Nature of the Action.* In determining whether an action is one in equity or at law, for the purpose of a trial *de novo*, which the courts are frequently called upon to do,[57] the mere fact that it was tried by the court rather than by a jury is not conclusive.[58] An appeal relating solely to an independent equitable cause of action set out in the petition[59] or in an

United States.— Blease *v.* Garlington, 92 U. S. 1, 23 L. ed. 521.

See 3 Cent. Dig. tit. "Appeal and Error," § 3630 *et seq.*; and also *supra*, I, C, 2, a [2 Cyc. 515].

55. Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211 [*citing* Thompson Tr. § 2772]. See also Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772, construing Shannon's Code Tenn. (1894), § 6074.

56. Thayer *v.* Littlefield, 5 Rob. (La.) 152; *In re* Fluegel, (N. D. 1901) 86 N. W. 712; Wyatt *v.* Wyatt, 31 Oreg. 531, 49 Pac. 855.

The practice in Iowa.— *Generally.*—In this state a case in equity will not be tried *de novo* unless it affirmatively appears that all the evidence of every character offered or introduced in the court below is brought up. Watson *v.* Burroughs, 104 Iowa 745, 73 N. W. 866; Fred Miller Brewing Co. *v.* Hansen, 104 Iowa 307, 73 N. W. 827; Smith *v.* Knight, 103 Iowa 733, 72 N. W. 413; Carlton *v.* Brock, 91 Iowa 710, 58 N. W. 1069. There must be an issue of fact joined, and the evidence must be in writing, properly certified by the trial judge, and made a part of the record within the time allowed for the appeal. Ring *v.* Froelich, (Iowa 1898) 77 N. W. 506; Smith *v.* Wellslager, 105 Iowa 140, 74 N. W. 914; Payne *v.* Cresap, 104 Iowa 749, 73 N. W. 882. If these requirements are complied with, a case is triable *de novo* in the appellate court although no motion or order be made that the case be tried on written evidence. Hines *v.* Horner, 86 Iowa 594, 53 N. W. 317.

See 3 Cent. Dig. tit. "Appeal and Error," § 3640 *et seq.*

A certificate that the record contains all the evidence offered and introduced on the trial is not sufficient. Cheney *v.* McColloch, 104 Iowa 249, 73 N. W. 580; Monmouth Second Nat. Bank *v.* Ash, 85 Iowa 74, 51 N. W. 1160. But see Adams County *v.* Graves, 75 Iowa 642, 36 N. W. 889, for a certificate which was held to be sufficient. The clerk's certificate is not sufficient to secure a trial *de novo*. It is the office of the certificate of the judge to identify the evidence and make it of record when filed, while it is the office of the certificate of the clerk to identify and authenticate the record. Bauernfiend *v.* Jonas, 104 Iowa 56, 73 N. W. 500. It must appear that the judge's certificate was signed within the time prescribed by law. Wisconsin, etc., R. Co. *v.* Braham, 71 Iowa 484, 32 N. W. 392; Russell *v.* Johnston, 67 Iowa 279, 25 N. W. 232; Mitchell *v.* Laub, 59 Iowa 36, 12 N. W. 755.

Trial de novo should not be refused for formal defects in the record which cannot affect the final result (Smith *v.* Watson, 88 Iowa 73, 55 N. W. 68), or where a complete transcript has been filed after errors in the abstract have been pointed out (Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18), or where the case was brought up under the mistaken belief that it was not a case for trial *de novo*, and the abstract, for that reason, did not properly present it (Sherwood *v.* Sherwood, 44 Iowa 192). But see Snider *v.* Wilson, (Iowa 1899) 78 N. W. 802, for instance of proper refusal to grant trial *de novo*.

Party estopped to object to trial de novo.— A party upon whose motion the cause is tried as an equitable action cannot object to the trial of the cause *de novo* on appeal. Sands *v.* Peirson, 61 Iowa 702, 17 N. W. 107; Fortney *v.* Jacoby, 51 Iowa 95, 49 N. W. 1053.

Where the appeal is tried by the second method — that is, the same as in ordinary proceedings — the case is not triable *de novo* on appeal. Only legal errors can be reviewed. Jones *v.* Clark, 37 Iowa 586; Mallory *v.* Luscombe, 31 Iowa 269; Lynch *v.* Lynch, 28 Iowa 326; Snowden *v.* Snowden, 23 Iowa 457; Manning *v.* Horr, 18 Iowa 117.

57. Gibson *v.* Fischer, 68 Iowa 29, 25 N. W. 914; McFarland *v.* Folsom, 61 Iowa 117, 15 N. W. 863.

58. McCormick *v.* Lundberg, 74 Iowa 558, 38 N. W. 409; Matter of Harrington, 54 Iowa 33, 6 N. W. 125.

Failure to demand a jury in such a case does not alter the situation. Hageman *v.* Harrison, (Iowa 1899) 79 N. W. 275.

But where an equitable issue was raised in an action at law to determine the title to real property, and the relief was of an equitable character, the case was held triable *de novo*. Ingle *v.* Culbertson, 43 Iowa 265.

Removal of case to chancery courts.— If a case instituted as a law case is transferred to the chancery court, being of an equitable nature, in subsequent proceedings the chancery practice must be followed, and, on appeal, the hearing will be *de novo*. Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.

59. Sallady *v.* Webb, 2 Ohio Cir. Ct. 553, holding that an appeal from a petition setting forth a cause of action purely equitable does not open for retrial issues joined on cross-demands, disclosing legal causes of action.

answer[60] will not open for retrial an independent legal cause of action disclosed therein.

(III) *On Appeals From Probate Courts.* Generally, appeals from courts of probate jurisdiction are regulated by statutory provisions peculiar thereto, and on such appeal the superior court tries the cause *de novo* and renders such judgment or makes such order as the probate court should have rendered or made. The judgment is not affected by any defect or infirmity that might pertain or belong to the judgment in the probate court.[61]

c. Scope of Inquiry — (I) *In General.* On a new trial in the appellate court the whole case is open for judicial inspection.[62] All questions may be presented which legitimately arise on the record, whether urged or relied on in the lower court or not.[63] But the court will not review the evidence in detail.[64]

(II) *Adhering to Issues Tried in Lower Court.* The cause is to be tried in the appellate court upon the same issues that were presented in the lower court,[65]

60. Buckner *v.* Mear, 26 Ohio St. 514.

61. *Arkansas.*— Hilliard *v.* Hilliard, 52 Ark. 283, 12 S. W. 578; Grider *v.* Apperson, 38 Ark. 388.

Georgia.—Watson *v.* Warnock, 31 Ga. 716.

Kentucky.— Gibson *v.* Fishback, (Ky. 1901) 60 S. W. 396.

Michigan.— Matter of Leonard, 95 Mich. 295, 54 N. W. 1082.

Missouri.— Matter of Boothe, 38 Mo. App. 456. But see Boone *v.* Shackleford, 66 Mo. 493; McCraw *v.* Hubble, 61 Mo. 107.

Montana.— McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314.

Nebraska.— *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

New Hampshire.— Norway Plains Sav. Bank *v.* Young, 68 N. H. 13, 36 Atl. 550.

New Jersey.—Read *v.* Drake, 2 N. J. Eq. 78.

New Mexico.— Lewis *v.* Baca, 5 N. M. 289, 21 Pac. 343.

Ohio.— But *compare* Walker *v.* Webb, 2 Ohio Dec. (Reprint) 568, holding that in no case can consent confer jurisdiction, and that the superior court cannot ignore the proceedings in the probate court and try the questions at issue *de novo*, even by consent of the parties, where there is no authority for such proceeding in any statutory provision.

Oregon.—Wilkes *v.* Cornelius, 21 Oreg. 341, 23 Pac. 473.

Tennessee.—Brien *v.* Baker, 5 Sneed (Tenn.) 213.

Texas.— Kelly *v.* Settegast, 68 Tex. 13, 2 S. W. 870; Callaghan *v.* Grenet, 66 Tex. 236, 18 S. W. 507.

Vermont.— *In re* Welch, 69 Vt. 127, 37 Atl. 250; Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

See 3 Cent. Dig. tit. "Appeal and Error," § 3628; and *supra*, I, C, 1, f, (IV), (VI) [2 Cyc. 514].

62. The examination will not be restricted to that portion of the judgment which may be adverse to appellant. Tyler *v.* Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660.

Under a statute providing that in all cases of appeal, whether on a judgment by default or otherwise, the case "shall be entered, tried, and determined in the court appealed to in like manner as if it had been originally commenced therein" unless there is some waiver or stipulation to vary the rights of parties, an appeal opens the whole case as to the law, the facts, and the judgment. Jaha *v.* Belleg, 13 Allen (Mass.) 78.

63. Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196. See 3 Cent. Dig. tit. "Appeal and Error," § 3645 *et seq.*

Errors committed by the court below which could have no effect upon the appellate court in determining the rights of the parties in a case in equity, such as the improper admission of testimony (Tabor *v.* Foy, 56 Iowa 539, 9 N. W. 897; Putney *v.* O'Brien, 53 Iowa 117, 4 N. W. 891; Van Bogart *v.* Van Bogart, 46 Iowa 359; Willis *v.* Peterson, 56 N. C. 338), are immaterial (Bell *v.* Waudby, 4 Wash. 743, 31 Pac. 18. See also Munch *v.* Shabel, 37 Mich. 166; 3 Cent. Dig. tit. "Appeal and Error," § 3648).

64. Radford *v.* Folsom, 58 Iowa 473, 12 N. W. 536, holding that the court cannot be expected to do more than state its conclusions upon the facts.

65. *Iowa.*—Van Rees *v.* Witzenburg, (Iowa 1900) 83 N. W. 787.

Kansas.— Cooper *v.* Armstrong, 3 Kan. 78.

Kentucky.— See Holbrook *v.* Head, 9 Ky. L. Rep. 755, 6 S. W. 592.

Louisiana.— Saunders *v.* Ingram, 5 Mart. N. S. (La.) 644.

Michigan.— Matter of Campau, 48 Mich. 236, 12 N. W. 217.

Nebraska.— Union Pac. R. Co. *v.* Ogilvy, 18 Nebr. 638, 26 N. W. 464.

North Carolina.— Willis *v.* Peterson, 56 N. C. 338.

Ohio.—Wanzer *v.* Self, 30 Ohio St. 378. See also Christy *v.* Douglas, Wright (Ohio) 485; Search *v.* Pence, 7 Ohio Cir. Ct. 540.

Oregon.— Cain *v.* Harden, 1 Oreg. 360.

See 3 Cent. Dig. tit. "Appeal and Error," § 3646.

The objection to new issues, however, must be made at the time of framing the issues. The rule cannot be invoked when evidence is offered in support of such issue. Madison First Nat. Bank *v.* Carson, 48 Nebr. 763, 67 N. W. 779.

Where one of two defendants appealed from a judgment in an action to recover the purchase-price of goods, and, in the appellate court, plaintiff filed his petition, based on the

unless new matter has arisen since the trial,[66] or a change is made after leave of the appellate court is obtained.[67]

d. Mode and Conduct of Trial — (I) *Pleadings* — (A) *In General.* While pleas in bar may be introduced as well on the appeal as upon the original hearing, the rule is that pleas in abatement should be interposed at the first opportunity in the court below.[68]

(B) *Amendments* — (1) In General. For the same reasons which allow new pleadings to be filed, the appellate court may permit amendments to be made in trials *de novo* as freely as though the action had been originally begun in the appellate court, provided such amendments do not change the cause of action sued on in the lower court.[69] If, upon inspection, the pleadings prove to be so

same cause of action, the debt being the same, and asked for judgment against appellant alone, it was held there was no change of issues. Lamb *v.* Thompson, 31 Nebr. 448, 48 N. W. 58.

66. Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176 (where the court refused to strike out the defense of infancy where no bill of particulars was filed, and there was nothing to show that such defense was not interposed in the lower court); Darner *v.* Daggett, 35 Nebr. 695, 53 N. W. 608; Fuller *v.* Schroeder, 20 Nebr. 631, 31 N. W. 109 (holding that such new defense, as payment or release, arising since the trial, might be interjected).

67. Kilgore *v.* Emmitt, 33 Ohio St. 410; Search *v.* Pence, 7 Ohio Cir. Ct. 540.

Effect of filing new answer.— Under Mass. Superior Ct. Rules, No. 43, requiring that a written answer shall be filed in all appeal cases unless the court otherwise order, the filing of such answer does not withdraw a special denial filed in the lower court. True *v.* Dillon, 138 Mass. 347.

Right of one defaulted below to file answer. — Under a statute providing that where judgment has been rendered by default the defendant "shall have a right to plead any and all defenses which he might have pleaded had the cause been originally brought" in the appellate court, the defendant may, without first asking leave, file his answer in the appellate court. Martin *v.* McLaughlin, (Colo. 1885) 6 Pac. 137. In the absence of such statute there is no such right. Cain *v.* Harden, 1 Oreg. 360.

Sufficiency of plea.—The permission to plead orally in the lower court, and to file a new plea or answer in writing after appeal, does not relieve defendant of the obligation, when he pleads tender, to perfect his tender by paying the money into the lower court before trial of the case, or from making that fact appear in his answer in the appellate court. Brickett *v.* Wallace, 98 Mass. 528.

When new matter is introduced in the answer there may be a reply. Chicago, etc., R. Co. *v.* Gustin, 35 Nebr. 86, 52 N. W. 844.

68. Hazelrigg *v.* Pursley, 69 Ill. App. 467; Eaton *v.* Whitaker, 6 Pick. (Mass.) 465.

In Connecticut it has been held that, on an appeal from the county court to the superior court, the parties might, when the cause came up entirely unembarrassed by previous proceedings, plead anew, as if there had been no pleadings below. King *v.* Lacy, 8 Conn. 499. But, if the cause proceeds to trial without new pleadings, the presumption is that the pleadings below are relied upon. Talbot *v.* Wheeler, 4 Day (Conn.) 448; Loomis *v.* Tyler, 4 Day (Conn.) 141.

In Massachusetts, under Mass. Superior Ct. Rules, No. 43, defendant may file an answer setting up that the action was prematurely brought, this being a defense which may be pleaded in bar, and not a mere matter of abatement. Fels *v.* Raymond, 134 Mass. 376. And it was held that if the court of common pleas refused to receive a plea in abatement which ought to have been received, and defendant was obliged to plead over, the supreme judicial court should have allowed it to be filed on appeal. Dana *v.* Staples, 21 Pick. (Mass.) 208; Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89; Cleveland *v.* Welsh, 4 Mass. 591.

69. *Arkansas.*— Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680; Vestal *v.* Little Rock, 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Colorado.— Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Georgia.—Vance *v.* Crawford, 4 Ga. 445.

Kentucky.— Roberts *v.* Abner, 19 Ky. L. Rep. 887, 42 S. W. 337; Southern Lumber Co. *v.* Wireman, 19 Ky. L. Rep. 585, 41 S. W. 297.

Louisiana.— Saunders *v.* Ingram, 5 Mart. N. S. (La.) 644.

Missouri.— Hunt *v.* Bouton, 63 Mo. 187; Tegler *v.* Mitchell, 46 Mo. App. 349.

Nebraska.— Ittner *v.* Robinson, 35 Nebr. 133, 52 N. W. 846; Volland *v.* Baker, 32 Nebr. 391, 49 N. W. 381, 13 L. R. A. 140; Bishop *v.* Stevens, 31 Nebr. 786, 48 N. W. 827.

New Hampshire.— Clark *v.* Robinson, 37 N. H. 579; Osgood *v.* Green, 30 N. H. 210; Parker *v.* Gregg, 23 N. H. 416.

North Carolina.— Sudderth *v.* McCombs, 67 N. C. 353.

Ohio.— Nelson *v.* Kennedy, 4 Ohio Cir. Ct. 498.

Rhode Island.—Walker Ice Co. *v.* Blanchard, 18 R. I. 243, 27 Atl. 330.

Texas.— McLane *v.* Paschal, 62 Tex. 102.

Vermont.— Leonard *v.* Leonard, 67 Vt. 318, 31 Atl. 783; Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

See 3 Cent. Dig. tit. "Appeal and Error," § 3655 *et seq.*

Refusal to amend in the lower court does not affect the right to amend on appeal.

[XVII, D, 3, d, (I), (B), (1).]

informal as to be senseless, repugnant, ambiguous, argumentative, or so indefinite as to make the trial of any issue embarrassing, an amendment should always be allowed, but not to the extent of raising any new or substantially different issue from the one tried in the lower court.[70]

(2) AFFECTING JURISDICTION. If, however, the jurisdiction of either the appellate court or the court below would be affected by the amendment, it cannot be made.[71]

(II) *EVIDENCE* — (A) *Admissibility* — (1) IN GENERAL. As a rule, either plaintiff or defendant may, on a trial *de novo*, produce in the appellate court any competent testimony tending to establish his position,[72] whether introduced in the court below or not.[73]

(2) IN CHANCERY CASES. While the court will, in trying a chancery appeal, confine itself to testimony received below,[74] it may admit or exclude evidence

Ware *v.* Griner, (Tex. Civ. App. 1894) 26 S. W. 898.

Waiver of objection to amendment.— Where, on appeal, a complaint is amended so as to change the action from one against defendants as partners to one against them as individuals, they waive the objection by thereafter defending the suit. Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Where one of several defendants appeals.— Under a statutory provision declaring that an appeal, though entered by only one of several joint defendants, brings up the whole record, requires a *de novo* investigation, and entitles all the parties to be heard on the whole merits of the case, a defendant who does not join in the appeal, since he is bound by the result, may make any appropriate amendment to an answer already entered. Murray *v.* Marshall, 106 Ga. 522, 32 S. E. 634.

70. Monroe *v.* Northern Pac. Coal Min. Co., 5 Oreg. 509; Moser *v.* Jenkins, 5 Oreg. 447; Cain *v.* Harden, 1 Oreg. 360.

The substitution of a different plaintiff (Roberts *v.* Abner, 19 Ky. L. Rep. 887, 42 S. W. 337; Moore *v.* Lancaster, Wright (Ohio) 35) or a new defendant in the appellate court makes a new case and is not permissible (Morrissy *v.* Coolidge Fuel, etc., Co., 88 Wis. 275, 60 N. W. 421).

In Ohio, under statutory provisions to that effect, new parties may be brought in, on appeal, by amendment where justice requires it. Henry *v.* Jeans, 48 Ohio St. 443, 28 N. E. 672.

In Texas even the cause of action may be changed by amendment, under certain restrictions, such as the payment of costs. McLane *v.* Paschal, 62 Tex. 102.

71. *Kentucky.*— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794.

Nebraska.— Union Pac. R. Co. *v.* Ogilvy, 18 Nebr. 638, 26 N. W. 464.

New Hampshire.— Osgood *v.* Green, 30 N. H. 210.

North Carolina.— Robeson *v.* Hodges, 105 N. C. 49, 11 S. E. 263; Capps *v.* Capps, 85 N. C. 408.

Ohio.—Van Dyke *v.* Rule, 49 Ohio St. 530, 31 N. E. 882.

Rhode Island.— Walker Ice Co. *v.* Blanchard, 18 R. I. 243, 27 Atl. 330.

Vermont.— See also Whitney *v.* Sears, 16 Vt. 587.

See 3 Cent. Dig. tit. "Appeal and Error," § 3657 *et seq.*

But the petition may be amended in the appellate court so as to claim damages in excess of the claim made below, if the increased amount is within the jurisdiction of the lower court. People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582; Volland *v.* Baker, 32 Nebr. 391, 49 N. W. 381, 13 L. R. A. 140.

72. Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66, holding that plaintiff may prove any fact in order to show the validity of a cause of action.

73. Lew *v.* Lowell, 6 Allen (Mass.) 25 (holding that where defendant had filed in the lower court a plea amounting to the general issue, he might, on appeal, give any evidence in a matter of defense that might have been admissible below, there having been no order to plead anew); McAden *v.* Banister, 63 N. C. 478 (holding that any evidence which would have been competent in the lower court is admissible); Slade *v.* Burton, 28 N. C. 207 (holding that, on an appeal from an order of the county court to amend the record, the superior court might hear further evidence); Bell *v.* Crawford, 25 Ohio St. 402 (holding that the parties might introduce any competent testimony, without regard to the question whether it was, or might have been, introduced below). See 3 Cent. Dig. tit. "Appeal and Error," § 3659.

But see Ramsey *v.* Dumars, 19 N. J. L. 66, decided under a statute confining parties to the same evidence. "The object of the statute," said the court, "was to preserve the issues; not to require that the proofs be identical." See also Voorhees *v.* Hendrickson, 29 N. J. L. 101.

Newly-discovered evidence.— The New Jersey court of appeals tries a cause over again upon its merits, and a new witness may be introduced to prove or to give additional evidence of any disputed and material fact. Ryerson *v.* Marseillis, 16 N. J. L. 450.

Order of lower court immaterial.— On a trial *de novo*, the order of the lower court in the case is immaterial, and should be rejected as an item of evidence to be considered by the jury. Central Bank *v.* St. John, 17 Wis. 157.

74. Walker *v.* Ayres, 1 Iowa 449; Mason *v.* Daly, 117 Mass. 403. But see Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4; Heard *v.* Murray, 93 Ala. 127, 9 So. 514 — to the effect that, under Ala. Civ. Code,

offered or rejected at the trial below, where the purport thereof is clear, without granting a new trial.[75]

(3) On Appeal From Probate Courts. On appeal from a probate court, the appellate court, trying the cause *de novo*, standing in the place of the probate court, should render such judgment as the latter should have rendered,[76] and to this end it may hear evidence, it being generally held that new evidence may be introduced in the appellate court.[77]

(B) *Burden of Proof, and Right to Open and Close.* On a trial *de novo* of an equity case the plaintiff below makes the opening argument, the burden of proof being on him precisely as in the lower court.[78]

(III) *Submission of Issues to Jury.* At common law, where a case has once been tried by a jury, there cannot be a new trial by jury in the reviewing court;[79] and it may be stated, as a general rule, that trials by jury will not be allowed in the appellate court.[80]

§ 3535, allowing an appeal to the chancellor from an order of the register appointing a receiver without notice, the trial before the chancellor is one *de novo*, and that other evidence than that received by the register may be introduced.

75. Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

Evidence upon immaterial issues will not be considered by the appellate court even though no exception was taken to its admission in the court below. Blagen *v.* Smith, 34 Oreg. 394, 56 Pac. 292, 44 L. R. A. 522. And, to the same effect, see Van Rees *v.* Witzenburg, (Iowa 1900) 83 N. W. 787; Willis *v.* Peterson, 56 N. C. 338.

Ex parte affidavits are not competent evidence in an equitable action tried *de novo* in the supreme court, as other cases by ordinary proceedings. Mortell *v.* Friel, 85 Iowa 738, 52 N. W. 513, construing Iowa Code (1873), § 3155.

Evidence properly objected to in the court below will not be considered in the appellate court. Grafton *v.* Moorman, 88 Iowa 736, 55 N. W. 308.

Questions involving the competency of testimony are original questions, to be considered in the appellate court upon the objections made in the court below. Blough *v.* Van Hoorebeke, 48 Iowa 40.

76. Snyder *v.* Snyder, 142 Ill. 60, 31 N. E. 303; Steele *v.* Price, 5 B. Mon. (Ky.) 58. See also Jacobs *v.* Morrow, 21 Nebr. 233, 31 N. W. 739.

Where the appeal deals only with a question of law, it has been held in Arkansas that the circuit court should not render judgment upon the merits of the case. Dempsey *v.* Fenno, 16 Ark. 491.

77. *Arkansas.*— Sullivan *v.* Deadman, 23 Ark. 14.

Georgia.— Moody *v.* Moody, 29 Ga. 519.

Maine.— Moody *v.* Hutchinson, 44 Me. 57.

Nebraska.—Jacobs *v.* Morrow, 21 Nebr. 233, 31 N. W. 739.

New Jersey.—Read *v.* Drake, 2 N. J. Eq. 78.

New York.— Caujolle's Appeal, 9 Abb. Pr. (N. Y.) 393. See also Scribner *v.* Williams, 1 Paige (N. Y.) 550.

Pennsylvania.— Rees' Appeal, 2 Watts & S. (Pa.) 417, where it was held that the court would first hear the cause as brought up, and then allow depositions to be taken, if justice required it.

South Carolina.— *Ex p.* Apeler, 35 S. C. 417, 14 S. E. 931 (where, however, it was held that the requirements of the statute were not complied with regarding the notice which must be given before trial); Wallis *v.* Gill, 3 McCord (S. C.) 475.

Utah.— Gray *v.* Howe, 2 Utah 64.

United States.— See, *contra*, Gittings *v.* Burch, 2 Cranch C. C. (U. S.) 97, 10 Fed. Cas. No. 5,464.

See 3 Cent. Dig. tit. "Appeal and Error," § 3662.

In New Jersey the ordinary may, in cases on appeal where the subject-matter of the litigation is one over which he has original as well as appellate jurisdiction, hear the case on the proofs sent up from the court below alone, or permit additional proofs to be taken, and then hear the case on the additional proofs in connection with those sent up from the court below, or, if the proofs taken in the court below have not been preserved, or are so imperfect that they cannot be used with safety, he may give the parties leave to take new proofs, and hear the appeal on such new proofs. Heisler *v.* Brickett, 45 N. J. Eq. 367, 19 Atl. 621; Heisler *v.* Sharp, 44 N. J. Eq. 167, 14 Atl. 624. See also Personette *v.* Johnson, 40 N. J. Eq. 173. See 3 Cent. Dig. tit. "Appeal and Error," § 3625; and *supra*, XVII, D, 2.

78. Devore *v.* Adams, 68 Iowa 385, 27 N. W. 267; Bennett *v.* Standifer, 15 S. C. 418.

79. U. S. *v.* Wonson, 1 Gall. (U. S.) 5, 28 Fed. Cas. No. 16,750.

80. Brooks *v.* Weyman, 3 Mart. (La.) 9; Briggs *v.* Shaw, 15 Vt. 78; Kearns *v.* Thomas, 37 Wis. 118 [*distinguishing* Nutting *v.* Page, 4 Gray (Mass.) 581; Charles *v.* Porter, 10 Metc. (Mass.) 37].

But *compare* Lewis *v.* Baca, 5 N. M. 289, 21 Pac. 343, wherein it was held that where a suit at law was begun in equity and appealed to the district court, where it was triable *de novo*, the plaintiff was entitled to a trial by jury.

But, under a constitutional provision giving the supreme court power to issue writs of error "and to hear and determine the same,"

E. Presumptions and Inferences Upon the Record — 1. In Support of the Appeal — a. Right of Appeal. A right of appeal may not be created by presumption; but, where the facts upon which the right depends admit of different constructions, that construction may be adopted as presumably correct which permits the appeal, as against that which forbids it.[81] On the other hand, a right of appeal may not be destroyed by presumption; but a presumption of law, admitting of but one construction, may intervene to prevent its inception.[82]

b. Compliance With Statutory Prerequisites. That all statutory prerequisites to the perfecting of an appeal have been complied with must, as a general proposition, appear in the record, unsupplied by any presumption of law arising simply from an attempt to appeal,[83] when the question is raised in the appellate

it has been held that a venire may be issued for a jury to try an issue of fact in the supreme court. Teller *v.* Wetherell, 6 Mich. 46.

Issues of fact, however, may be prepared for the jury, under the direction of the court. Withee *v.* Rowe, 45 Me. 571; Heath *v.* Bligh, 9 R. I. 31; Hughes *v.* Kirkpatrick, 37 S. C. 161, 15 S. E. 912; *Ex p.* Apeler, 35 S. C. 417, 14 S. E. 931. But see Amory *v.* Amory, 26 Wis. 152, for circumstances under which such a course was held to be improper.

On appeal from a probate court a jury trial cannot be demanded in the appellate court in the absence of a statute providing therefor. Bradstreet *v.* Bradstreet, 64 Me. 204; Withee *v.* Rowe, 45 Me. 571; Devin *v.* Patchin, 26 N. Y. 441; Hughes *v.* Kirkpatrick, 37 S. C. 161, 15 S. E. 912; Rollin *v.* Whipper, 17 S. C. 32; *In re* Welch, 69 Vt. 127, 37 Atl. 250.

81. **A general appeal** may be presumed to have been taken from an adverse provision of the judgment, there being also a favorable provision. Hintrager *v.* Hennessy, 46 Iowa 600.

An order allowing plaintiff to amend will be presumed to have been upon the motion of plaintiff, and, because plaintiff appealed, does not admit of the construction that plaintiff declined to amend, or that there was an order of dismissal. White *v.* Chesapeake, etc., R. Co., 26 W. Va. 800.

Compliance with a statutory condition upon which the right of review depends will not be presumed in the absence of a showing to that effect in the record. Hunt *v.* Downs, 50 Iowa 696.

Consent decree cannot be appealed from by a party consenting; and, where the record showed such consent, the fact that appellant had formerly been adjudged in default was held not to rebut the presumption in favor of the correctness of the record. Ætna L. Ins. Co. *v.* Smith, 56 Iowa 763, 9 N. W. 328. The authority of appellant's attorney to consent to a decree not wholly outside the scope of the case as made by the pleadings will be presumed when questioned for the first time on appeal. Schmidt *v.* Oregon Gold-Min. Co., 28 Oreg. 9, 40 Pac. 406, 1014, 52 Am. St. Rep. 759. In the absence of any showing that recitals of appearance and consent to a judgment were false, they must be presumed to be correct. Ingle *v.* Bell, 84 Tex. 463, 19 S. W. 553.

Continuance of motion for new trial was inferred from the overruling of the motion and settling exceptions at the term next succeeding that of the judgment, where, otherwise, the right of appeal would have been lost. St. Louis Plattdeutscher Club *v.* Tegeler, 17 Mo. App. 569.

Intention to appeal from a final judgment, instead of an interlocutory order, may be inferred from the greater importance of the former, where the appeal relates to both in terms but can stand only as to one, the appeal from the latter being rejected as surplusage. Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38. *Aliter*, where the appeal is from two appealable orders of the same character. Hackett *v.* Gunderson, 1 S. D. 479, 47 N. W. 546.

That an appealable order was made will be presumed, in case of doubt. Lawrence County *v.* Meade County, 6 S. D. 626, 62 N. W. 957; Evans *v.* Bradley, 4 S. D. 83, 55 N. W. 721; Shealy *v.* Chicago, etc., R. Co., 72 Wis. 471, 40 N. W. 145.

That dismissal was by the court and not by voluntary act of plaintiff will be presumed from the record entry: "Petition Dismissed." Rush *v.* Rush, 29 Ohio St. 440.

That motion for new trial was filed within the prescribed time may be presumed, it appearing that the motion was entertained without objection. Girdner *v.* Beswick, 69 Cal. 112, 10 Pac. 278; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696; Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1. *Contra*, State Ins. Co. *v.* Duncan, (Kan. App. 1897) 51 Pac. 314; Taylor *v.* Genail, 10 Mo. App. 250.

Where the entertaining of an appeal from an interlocutory order is discretionary upon it being made to appear that the allowance of a special appeal would subserve the ends of justice, in the absence of special circumstances, it was presumed that a temporary restraining order was right and proper, and not reviewable on appeal. Siggers *v.* Snow, 15 App. Cas. (D. C.) 575.

As against recited facts presumptions to support an appeal will not be indulged. Tate *v.* McCrary, 21 Ala. 499.

Right of appeal as nearest of kin not presumed from the description of appellants from a decree of probate merely as "brothers and sisters" of the deceased. Hill *v.* Hill, 6 Ala. 166.

82. **Conclusive presumption of law preventing a special legislative appeal.**— Prout *v.* Berry, 2 Gill (Md.) 147 [*cited* with approval in Dorsey *v.* Gary, 37 Md. 64, 11 Am. Rep. 528; State *v.* Northern Cent. R. Co., 18 Md. 193].

83. *Alabama.*— Foster *v.* Harrison, 3 Ala. 25; Hancock *v.* Holmes, 3 Ala. 9.

court.[84] But the burden of establishing non-compliance, in any doubtful case, is upon the appellee who claims it,[85] and, therefore, all reasonable inferences from admitted or apparent facts will be drawn in favor of supporting the appeal.[86] And,

Iowa.— Brown *v.* Crandal, 23 Iowa 112.

Louisiana.— Girod *v.* His Creditors, 2 La. Ann. 546.

Missouri.— Burns *v.* Hunton, 24 Mo. 337.

North Carolina.— Campbell *v.* Allison, 63 N. C. 568.

Texas.— McLane *v.* Russell, 29 Tex. 127.

See also *supra*, XIII [2 Cyc. 1025].

But see Feurth *v.* Anderson, 87 Mo. 354, to the effect that "an appeal from an inferior court will be presumed to have been taken within the time allowed by law when the record shows nothing to the contrary." *Compare*, also, Bolling *v.* Anderson, 4 Baxt. (Tenn.) 550, where a five-years' neglect to move for a dismissal for certain defects was held to raise the conclusive presumption that all steps necessary to bring the case to the appellate court had been regularly and properly taken.

84. Collateral inquiry.— When the appellate court has acted upon the appeal, with jurisdiction of the subject-matter conferred by law, and jurisdiction of appellee by his appearance, compliance with statutory prerequisites for the taking of such appeal cannot thereafter be questioned in any collateral proceeding. Board of Education *v.* Campbell, 17 Kan. 537.

85. *California.*— Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 226.

Illinois.— Sullivan *v.* Dollins, 11 Ill. 16; Campbell *v.* State Bank, 2 Ill. 423.

Mississippi.— Robertson *v.* Johnson, 40 Miss. 500.

Oregon.— Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288.

South Carolina.— Lake *v.* Moore, 12 S. C. 563.

Tennessee.— Taliaferro *v.* Herring, 10 Humphr. (Tenn.) 271.

United States.— French *v.* Shoemaker, 12 Wall. (U. S.) 86, 20 L. ed. 270.

An appeal, prima facie sufficient, will not be defeated by presumption of technical irregularity which might have existed, but which does not affirmatively appear. Moody *v.* Dickinson, 54 S. C. 526, 32 S. E. 563; Sutton *v.* Consolidated Apex Min. Co., 12 S. D. 576, 82 N. W. 188.

86. *Alabama.*— Marshall *v.* Croom, 50 Ala. 479.

California.— Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 226.

Connecticut.— Ripley *v.* Merchants' Nat. Bank, 41 Conn. 187, inference to sustain appeal bond.

Georgia.— Kimbrough *v.* Pitts, 63 Ga. 496 (inference that entry of appeal was made in time); Nisbet *v.* Lawson, 1 Ga. 275.

Illinois.— Petillon *v.* Gilman, 86 Ill. 401, inference that surety justified according to law.

Louisiana.— Castell *v.* Castell, 28 La. Ann. 91 (inference that undated waiver of citation was within time); Tharp *v.* Waggner, 26 La. Ann. 317 (inference that obligee named in bond was clerk of court); Wood *v.* Harrell, 14 La. Ann. 61 (inference that separate appeal was abandoned).

Maryland.— State *v.* Mackall, 11 Gill & J. (Md.) 456, inference that entry of appeal was made in time.

Massachusetts.— Rawson *v.* Dofner, 143 Mass. 76, 8 N. E. 892.

Michigan.— Hanaw *v.* Bailey, 83 Mich. 24, 46 N. W. 1039, 9 L. R. A. 801.

Mississippi.— Belew *v.* Jones, 56 Miss. 592.

Nebraska.— Jacobs *v.* Morrow, 21 Nebr. 233, 31 N. W. 739, inference that bond conformed to order therefor.

Nevada.— State *v.* Alta Silver Min. Co., 24 Nev. 230, 51 Pac. 982.

New Jersey.— Yard *v.* Bodine, 18 N. J. L. 490, inference that proper affidavit for appeal was made, the record showing that the oath was administered.

New York.—Anderson *v.* Carter, 24 N. Y. App. Div. 462, 49 N. Y. Suppl. 255, inference that notice of appeal was given in time.

North Carolina.— Harmon *v.* Herndon, 99 N. C. 477, 6 S. E. 411.

North Dakota.— Sutton *v.* Consolidated Apex Min. Co., 12 S. D. 576, 82 N. W. 188, inference that notice of appeal was addressed to, and served upon, all the necessary parties.

Ohio.— Robinson *v.* Chadwick, 22 Ohio St. 527.

Oregon.—Carothers *v.* Wheeler, 1 Oreg. 194.

Pennsylvania.— Treichler *v.* Bower, 1 Woodw. (Pa.) 219, inference that proper affidavit for appeal was made.

Tennessee.—State *v.* Hyde, 4 Baxt. (Tenn.) 464 (inference that appeal was seasonably entered); Taliaferro *v.* Herring, 10 Humphr. (Tenn.) 271.

Texas.— Rodgers *v.* Ferguson, 32 Tex. 533.

Washington.— Yakima Water, etc., Co. *v.* Hathaway, 18 Wash. 377, 51 Pac. 471 (inference that acknowledgment of service of notice of appeal was made before filing notice); Matter of Day, 18 Wash. 359, 51 Pac. 474 (inference that oral notice of appeal was given at time of the judgment); Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868; Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732 (inference to sustain notice of appeal).

See 3 Cent. Dig. tit. "Appeal and Error," § 3788 *et seq.*

That authority to execute bond existed.— In case of a corporation surety, authority may be inferred from the corporate signature and seal (Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836), although only a scrawl appeared for a corporate seal (Miller *v.* Superior Mach. Co., 79 Ill. 450). In case of an execution by

in the absence of any showing to the contrary, it will be presumed that the duties of officers in this respect have been fulfilled,[87] and that the ruling of an intermediate court upon the sufficiency of an appeal to that court was correct,[88] as well, also, as all rulings of the trial court upon the taking of the appeal.[89]

agent, authority may be inferred from approval of the bond. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 226; Belew v. Jones, 56 Miss. 592; Robertson v. Johnson, 40 Miss. 500. In case of an execution by appellant's attorney or by an attorney in fact, authority may be inferred from acceptance of the bond. Sullivan v. Dollins, 11 Ill. 16; Camphell v. State Bank, 2 Ill. 423.

That the bond was approved may be inferred from acceptance (Marshall v. Croom, 50 Ala. 479); from filing (Rawson v. Dofner, 143 Mass. 76, 8 N. E. 892; Robinson v. Chadwick, 22 Ohio St. 527); from acceptance and filing (Hanaw v. Bailey, 83 Mich. 24, 46 N. W. 1039, 9 L. R. A. 801); and from its presence in the record (Rodgers v. Ferguson, 32 Tex. 533; Evans v. Pigg, 28 Tex. 586), provided it be also apparently filed (McLane v. Russell, 29 Tex. 127).

That the bond was duly filed may be inferred from an entry of its filing with "F. S. H., Clerk" (Carothers v. Wheeler, 1 Oreg. 194); from its presence in the transcript (Allen v. Rhodebaugh, Wright (Ohio) 322; Evans v. Pigg, 28 Tex. 586), if the bond be also approved (McLane v. Russell, 29 Tex. 127); and from a filing on the same day with the notice of appeal (State v. Alta Silver Min. Co., 24 Nev. 230, 51 Pac. 982; Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868).

That the bond was within time may be inferred from acceptance and approval (Nisbet v. Lawson, 1 Ga. 275; Carroll v. Jacksonville, 2 Ill. App. 481); though the time was erroneously extended beyond the term (Carmichael v. Trustees School Lands, 3 How. (Miss.) 84); though not formally filed, if dated (Allen v. Rhodebaugh, Wright (Ohio) 322); though the bond is without date, except the date of justification (Harmon v. Herndon, 99 N. C. 477, 6 S. E. 411); and though the date of approval is shown only by the date of filing (Robinson v. Chadwick, 22 Ohio St. 527), or by the date of the bond (Evans v. Pigg, 28 Tex. 586).

That the objections to the bond were waived may be inferred from its filing and approval, without apparent objection and proper exception, in the case of an insufficient bond (Hancock v. Bramlett, 85 N. C. 393), and in the case of a filing beyond the time limit (Singer Mfg. Co. v. Barrett, 94 N. C. 219; Taliaferro v. Herring, 10 Humphr. (Tenn. 271).

87. Presumptions of official duty fulfilled. — That the judge did not violate the law by granting a suspensive appeal, where only a devolutive appeal was permissible. State v. Judge Second Dist. Ct., 5 La. Ann. 518. That the judge did not abuse his discretion in fixing the return-day, where such discretion is limited by statute to the giving of additional time for the preparation of the record on appeal. Bartoli v. Huguenard, 39 La. Ann. 411, 2 So. 196, 6 So. 30. That an appeal bond was taken by the judge where it was improper for the clerk to take it because he was surety. Russell v. Sprigg, 10 La. 421. That the clerk issued writ of error upon a sufficient petition, where the petition was not in the record. Tombigbee R. Co. v. Bell, 4 Sm. & M. (Miss.) 689. That the clerk transmitted the record within the time limit, where the time of transmission was not shown. State v. Mackall, 11 Gill & J. (Md.) 456. That the clerk had the lawful custody of papers to which he made certification, although, prior thereto, the papers had been delivered to another court. Reed v. Wilson, 75 Wis. 39, 43 N. W. 560. That the clerk recorded "forthwith" a notice of appeal which is in the transcript. Garrison v. Parsons, (Fla. 1899) 25 So. 336. That the discrepancy in the dates was a mere clerical error. Glenn v. Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262. That counsel's sworn and uncontroverted statement as to a diminution of the record is true. Johnston v. George, 6 Md. 452.

Contra.— The authority of a deputy revenue collector to stamp an appeal bond, left unstamped through inadvertence, was held not to be a proper subject of presumption where his authority was special, to be exercised only in case of the sickness or inability of the collector, which was not shown, and leave of court to affix the stamp not having been obtained. Brown v. Crandal, 23 Iowa 112.

88. *Arkansas.*— Atkins v. Johnson, etc., Co., 67 Ark. 493, 55 S. W. 930.

Colorado.— Hall v. Denver Omnibus, etc., Co., 13 Colo. App. 417, 58 Pac. 402.

Indiana.— Whisenand v. Belle, 154 Ind. 38, 55 N. E. 950; Maxam v. Wood, 4 Blackf. (Ind.) 297.

Kentucky.— Greer v. Spencer, 3 Ky. L. Rep. 469.

New York.— Ely v. McNight, 30 How. Pr. (N. Y.) 97.

Wyoming.— Daley v. Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870.

89. Presumption to sustain favorable rulings of trial court.— A sufficient affidavit, petition, or prayer for appeal may be presumed in support of an order granting or allowing the appeal, without specific objection (Abeyta v. Lynch, 6 Colo. 40; Sallee v. Ireland, 9 Mich. 154; Mundy v. Ross, 15 N. J. L. 466), although the order was made beyond the time for the filing of the petition (Espen v. Hinchliffe, 131 Ill. 468, 23 N. E. 592).

An award of supersedeas may be inferred from the circumstance that both parties acted on that hypothesis, a bond therefor being given, and no entry or record thereof being required by law. Whitehead v. Boorom, 7 Bush (Ky.) 399; Baltimore, etc., R. Co. v. Vanderwarker, 19 W. Va. 265. See also *supra*, VIII, C, 1, b [2 Cyc. 886].

In the absence of the grounds of dismissal

c. Joinder of Parties on Appeal. The record, unaided by any legal presumption not equally available to either party, must show that all parties necessary to a determination of the appeal have been joined;[90] but, where the necessity for parties other than those joined is not apparent on the record, according to every reasonable inference, there is no presumption that others are necessary, and the burden is on the objecting party to establish a defect of parties;[91] but ambiguities and uncertainties in this respect are to be resolved most strongly against appellant, in order to support the judgment.[92]

d. Sufficiency of the Record — (I) *Bill, Case, or Statement* — (A) *Sufficiency of Settlement.* From the settlement of a bill of exceptions, case-made, or statement it will be presumed, in the absence of an affirmative showing to the contrary on the record, that all necessary preliminary steps were taken[93] and that

of an appeal by the trial court, or of a bill of exceptions showing that the dismissal was groundless, the dismissal must be presumed to have been upon one or more sufficient grounds. Warren *v.* Oliver, 111 Ga. 808, 35 S. E. 673.

Leave to withdraw appeal may be inferred from the allowance of a second appeal, and citation only on the latter. Taylor *v.* Huey, 11 La. Ann. 614.

Necessary action of lower court presumed. — The granting of an appeal may be inferred from the taking of a recognizance. Hillhouse *v.* Dunning, 7 Conn. 139. From the fixing of the amount of the appeal bond and granting time to file same. Abeyta *v.* Lynch, 6 Colo. 40. From the filing and approval of the bond:

Colorado.— Callahan *v.* Jennings, 16 Colo. 471, 27 Pac. 1055.

Kentucky.— Dearing *v.* Wilcoxen, 21 Ky. L. Rep. 195, 51 S. W. 159.

Louisiana.— State *v.* Evans, 11 La. Ann. 626.

Tennessee.— King *v.* Booker, 1 Heisk. (Tenn.) 11.

United States.— Washington, etc., R. Co. *v.* Washington, 7 Wall. (U. S.) 575, 19 L. ed. 274.

Notice of application for extension of time to file bond may be presumed in order to sustain an order allowing such extension. Pennington *v.* McNally, 11 Colo. 557, 19 Pac. 503.

The allowance within time was inferred from the date of the judgment where the order granting the appeal bore no date, was signed by a justice other than the one who rendered the judgment, and was attached to the judgment. McMillan *v.* Davis, 52 N. C. 218.

Writ quashed in lower court.— Where a writ of error coram vobis is quashed in the lower court for insufficiency of notice thereof, and the judge states that there were objections besides those in the record, it will be presumed that the omitted objections justified the ruling. Dorris *v.* Calow, 2 Litt. (Ky.) 370.

90. See *supra*, XIII [2 Cyc. 1025].

No presumption to supply necessary parties.— From a notice of appeal purporting to have been taken from an intermediate appellate court by all necessary parties, where the judgment of such court showed that one joint defendant had been omitted on the appeal from a justice of the peace. Elster *v.* Goodyear, 55 N. Y. App. Div. 190, 66 N. Y. Suppl. 951.

Presumption that clerk acted within his authority.— Where the clerk certifies that one of two defendants sued out a writ of error, and executed bond, etc., the presumption is that one sued out the writ in the name of both defendants, "because on such case alone is the clerk authorized to issue it, or to supersede the judgment." Foster *v.* Harrison, 3 Ala. 25.

91. Gumbel *v.* Pitkin, 113 U. S. 545, 5 S. Ct. 616, 28 L. ed. 1128.

Several appeals with one bond not inferred. — From a recital in the bond of "sundry executions" having been levied on the property in question, "it cannot be intended that the justice directed a consolidation of the cases before him; the most natural inference would seem to be that but one of the cases had been tried, or, if all had been tried, but one had been appealed from." Murray *v.* Ezell, 3 Ala. 148.

Identity of appellant may be inferred, as one of two parties who jointly gave notice of motion for new trial, from the fact that the order denying the motion was limited to that on behalf of "defendant," and appellant was the only one prepared and settled a case on appeal. Barnhart *v.* Edwards, 111 Cal. 428, 44 Pac. 160.

92. Jennings *v.* Davis, 5 Dana (Ky.) 127.

Dismissal of one defendant may be presumed, in order to sustain the judgment, from the fact that he was not included in the judgment, where such dismissal could have been properly ordered, and there is no showing that it was not. Smith *v.* Wilson, 18 Tex. Civ. App. 24, 44 S. W. 556.

Dismissal inferred from disclaimer.— Although the record fails to show a judgment of dismissal on the disclaimer of a defendant, yet, where the cause has proceeded in the lower court without further regard to such defendant, a dismissal as to him will be inferred. Gullett *v.* O'Connor, 54 Tex. 408.

93. All necessary steps of settlement presumed.— *California.*— Sullivan *v.* Wallace, 73 Cal. 307, 14 Pac. 789; Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463; Young *v.* Rosenbaum, 39 Cal. 646.

Florida.— Bowen *v.* Darby, 14 Fla. 202.

the settlement occurred within the time prescribed by law,[94] provided that the settlement is legally regular,[95] which may also be presumed where the judge of

Illinois.— Morrison *v.* People, 52 Ill. App. 482.

Kansas.— Douglass *v.* Parker, 32 Kan. 593, 5 Pac. 178.

Michigan.— Sallee *v.* Ireland, 9 Mich. 154.

Ohio.— Felch *v.* Hodgman, 62 Ohio St. 312, 56 N. E. 1018.

United States.— U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437.

See 3 Cent. Dig. tit. "Appeal and Error," § 3795 *et seq.*

As to settlement of bill, case, or statement see *supra*, XIII, D, E.

For presumptions about taking exceptions see *infra*, XVII, E, 2, a.

Submission to opposing counsel before settlement may be presumed where the record is silent on that point, the bill having been settled in proper time and marked part of the record. Findlay Brewing Co. *v.* Brown, 62 Ohio St. 202, 56 N. E. 871; Steinbock *v.* Covington, etc., Bridge Co., 6 Obio Dec. 328, 4 Ohio N. P. 229.

94. A settlement within time will be presumed where it does not affirmatively appear that the settlement was beyond time.

Alabama.— Cox *v.* Whitfield, 18 Ala. 738.

California.— Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463.

Florida.— Doe *v.* Roe, 13 Fla. 602.

Georgia.— Taliaferro *v.* Smiley, 112 Ga. 62, 37 S. E. 106; Allison *v.* Jowers, 94 Ga. 335, 21 S. E. 570; Swatts *v.* Spence, 68 Ga. 496.

Illinois.— Hyde Park *v.* Dunham, 85 Ill. 569; Goodrich *v.* Cook, 81 Ill. 41.

Indiana.— Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. 1022.

Missouri.— Nelson *v.* Withrow, 14 Mo. App. 270.

Ohio.— Norton *v.* Parker, 17 Ohio Cir. Ct. 715, 8 Ohio Cir. Dec. 572.

Texas.— San Antonio, etc., R. Co. *v.* De Ham, (Tex. Civ. App. 1899) 54 S. W. 395.

See 3 Cent. Dig. tit. "Appeal and Error," § 3797.

As to time of settlement of bill, case, or statement see *supra*, XIII, D, 6, d; XIII, E, 3, b.

Presumptions removing doubts as to time. — That an extension of time was granted or consented to. Robinson *v.* Hartridge, 13 Fla. 501; Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222; Allen *v.* Levy, 59 Miss. 613; *contra*, Otero County *v.* La Junta First Nat. Bank, 8 Colo. App. 371, 46 Pac. 618. That a *nunc pro tunc* settlement was due to a justifiable omission, not the fault of appellant. Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236; McGavock *v.* Woodlief, 20 How. (U. S.) 221, 15 L. ed. 884; *contra*, Underwood *v.* Masterson, 67 Ill. App. 315. That a bill settled a few days after trial was prepared during trial. Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368. That a settlement of a bill at a second succeeding term after trial was due to continuance of the hearing on motion for new trial. Nelson *v.* Withrow, 14 Mo. App. 270. That good cause was shown for an extension of time to make a case. Campbell *v.* Reese, (Kan. App. 1899) 56 Pac. 543.

A date of settlement before submission of the case for trial has been presumed to be a clerical error, and that the bill was signed at a time when the judge had a right to sign it. Dement *v.* Tubman, (Md. 1894) 29 Atl. 11.

A settlement beyond time, in Indiana, was held not to have been cured by any presumption arising from a recital in the bill that "now, within the time fixed, the defendants present their bill of exceptions." Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936.

95. Agreement of parties will be presumed from the certificate of the judge to a statement as an agreed statement, though signed by counsel for one party only. Schneider *v.* Stephens, 60 Tex. 419.

Disagreement of parties will be presumed from a statement of facts by the judge, made as upon such disagreement. Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 452; McManus *v.* Wallis, 52 Tex. 534.

Direction to attest and seal will be presumed from the fact that the clerk attested and sealed the case-made, which it was his duty to do only when so directed by the judge. Hammerslough *v.* Hackett, 30 Kan. 57, 1 Pac. 41.

Presumption as to separate statements.— Where the case on appeal is not settled in the court below, but the different statements of counsel are separately brought up, the appeal will not be dismissed, but the court will presume that the amendments contained in appellee's case were consented to by appellant, and it will be taken as the case on appeal. Owens *v.* Phelps, 92 N. C. 231.

Presumption of extrajudicial signing.— A bill of exceptions not appearing to have been either signed or filed in court, but time being allowed for completing it in vacation, is presumed to have been prepared and signed extrajudicially, out of court, and is unauthorized and void. Corley *v.* Evans, 4 Bush (Ky.) 409.

Settlement presumed.— When an appeal is moved in its order on the calendar, the court will presume that the case therein has been settled, unless moved to interfere on affidavits alleging the contrary. Frost *v.* Smith, 7 Bosw. (N. Y.) 108.

That there was no settlement may be presumed from the omission of the judge's name in copying the bill of exceptions, so that it appears that he did not sign it (Jones *v.* Sprague, 3 Ill. 55); and, where there is no bill and suggestion of a diminution of the record, the presumption is that the original bill was not signed. (Pierson *v.* Watters, 7 Ill. App. 400).

the trial court has assumed to act, and the want of authority is not shown,[96] and provided, also, that the bill, case, or statement has been filed after settlement.[97]

(B) *Sufficiency of Contents.* From a proper settlement it will be presumed that the contents of the bill, case, or statement are all that is necessary for presentation of the points in dispute[98]—for example, all of the evidence[99] or proceedings[1]

96. Signature before expiration of office may be presumed from the signature as during office, where the date did not appear, and sixty days had been given to file exceptions, the official tenure of the judge expiring in twenty days and the bill being filed thereafter. Bowen *v.* Preston, 48 Ind. 367.

That circuit justice did not sit may be presumed from a settlement by the district judge. Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209.

That judges not signing bill were absent may be presumed from a signature by the president alone, though his associates were present at the commencement of the term. Miller *v.* Burger, 2 Ind. 337.

That signing judges heard motion for new trial may be presumed from the fact that the exceptions related only to the overruling of the motion, which, however, was based on the claim that the judgment was against the weight of the evidence, and it did not appear that either of the judges participated in the trial, though they were of the same judicial district. Wilson *v.* Giddings, 28 Ohio St. 554.

That superior judge was absent may be presumed from a settlement by another judge. Sheehan *v.* Davis, 17 Ohio St. 571.

Presumption that bystanders who settle bill are reputable.— Hixon *v.* Weaver, 9 Ark. 133.

Authority of a special judge, in Indiana, to sign a bill of exceptions was held not to be presumed in the absence of anything in the record to show how he came to be thus acting. Fountain County *v.* Coats, 17 Ind. 150.

97. A filing after time-limit may be presumed to have been by permission for special reasons or by consent, where the filing was without objection (Chadwell *v.* Chadwell, 98 Ky. 643, 33 S. W. 1118; Henrizi *v.* Kehr, 90 Wis. 344, 63 N. W. 285); and such filing has been held not to rebut the presumption that the settlement was within time (Goodrich *v.* Cook, 81 Ill. 41. *Compare* Underwood *v.* Masterson, 67 Ill. App. 315). In Indiana it has been held that the record must affirmatively show that leave was given during the term for a filing after term, and that a bill, not shown to have been filed in open court or during the term, will be presumed to have been filed after the term (Hart *v.* Walker, 77 Ind. 331); but, where there had been an order extending the time, it was presumed that a bill regularly in the transcript was filed in accordance therewith (Armstrong *v.* Harshman, 93 Ind. 216); and, where a bill was filed during the trial term, it was presumed to have been filed within the time given to the applicant for that purpose (Lake Erie, etc., R. Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464).

Irrespective of the time of filing, it has been held that a bill which is silent as to when it was settled will be presumed to have been properly settled in term or, by agreement, after term. Claggett *v.* Gray, 1 Iowa 19.

Signature before filing was presumed where the bill was filed in open court, appeared to have been signed, and the record did not show that it was signed after filing. Minnick *v.* State, 154 Ind. 379, 56 N. E. 851; Martin *v.* State, 148 Ind. 519, 47 N. E. 930.

98. Contents of a copy of a bill filed in the appellate court is presumed to be the same as the original in the trial court. Clayton *v.* May, 68 Ga. 27; Harman *v.* State, 22 Ind. 331.

As to contents of bill, case, or statement see *supra*, XIII, D, 4; XIII, E, 2.

Upon an agreed statement, there are no such presumptions in regard to the sufficiency of its contents as attend the settlement of a case by the trial judge. Maghee *v.* Baker, 15 Ind. 254.

99. Presumption that all of the evidence was included.— *Alabama.*—Gresham *v.* Bryan, 103 Ala. 629, 15 So. 849; Hendricks *v.* Johnson, 6 Port. (Ala.) 472.

Arkansas.— Leggett *v.* Grimmett, 36 Ark. 496.

California.— Clark *v.* Gridley, 35 Cal. 398; Smith *v.* Athern, 34 Cal. 506.

Illinois.— Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428.

Kentucky.— Green *v.* Literal, 5 Ky. L. Rep. 429.

Michigan.— Schermerhorn *v.* Merritt, 123 Mich. 310, 82 N. W. 513, 83 N. W. 405; Gard *v.* Stevens, 12 Mich. 292, 86 Am. Dec. 52.

Mississippi.— Porter *v.* Duglass, 27 Miss. 379; Stamps *v.* Bush, 7 How. (Miss.) 255.

Missouri.— Silvey *v.* Summer, 61 Mo. 253.

New York.— Murphy *v.* Hays, 68 Hun (N. Y.) 450, 23 N. Y. Suppl. 70, 52 N. Y. St. 749; Green *v.* Shute, 15 Daly (N. Y.) 361, 7 N. Y. Suppl. 646, 27 N. Y. St. 816.

Wisconsin.— Flanders *v.* Sherman, 19 Wis. 178.

Contra, unless there be a statement that all of the evidence is included. O'Brien *v.* Creitz, 10 Kan. 202; Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 24 U. S. App. 295, 11 C. C. A. 439.

See 3 Cent. Dig. tit. "Appeal and Error," § 3800.

As to necessity of incorporating evidence in bill, case, or statement see *supra*, XIII, D, 4, b; XIII, E, 2, b.

1. Proceedings presumed included.—All affidavits in support of a motion. Hood *v.* Pearson, 67 Ind. 368; Whitestone Milling Co. *v.* Zahm, 10 Ind. App. 471, 36 N. E. 764; Green *v.* Shute, 15 Daly (N. Y.) 361, 7 N. Y. Suppl.

in the lower court, or so much thereof as may be necessary[2]—in the absence of a contrary showing in the record;[3] and the truth of all recitals or statements therein as to such contents is presumed,[4] as well, also, as recitals and statements

646, 27 N. Y. St. 816; Hroch *v.* Aultman, etc., Co., 3 S. D. 477, 54 N. W. 269. All instructions given. Dulaney *v.* Nunnery, 7 Ky. L. Rep. 304.

Uncertainties of trial-court proceedings cured by presumption: Omission to specifically mark and identify copies of pleadings and proceedings in case-made. Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Ryan *v.* Madden, 46 Kan. 245, 26 Pac. 679. Omission to specify that portions stricken out of the original bill were stricken out by order of the trial judge, where the copy filed in the supreme court, disregarding the portions stricken out, corresponded with the original in the lower court. Clayton *v.* May, 68 Ga. 27. Omission to state that the signature of the judge was affixed to the record at the close of the day's proceedings, as required by statute, where such signature appears, together with the clerk's certificate that the transcript is an entry of record of the day's proceedings. Scott *v.* Millard, 10 Ind. 158.

2. *California.*— Bedan *v.* Turney, 99 Cal. 649, 34 Pac. 442.

Michigan.— Rose *v.* Jackson, 40 Mich. 29.

Missouri.—Cummings *v.* Denny, 6 Mo. App. 602.

New York.—Meislahn *v.* Englehard, 2 Misc. (N. Y.) 187, 21 N. Y. Suppl. 588, 49 N. Y. St. 714.

Utah.— Cereghino *v.* Cereghino, 4 Utah 100, 6 Pac. 523.

West Virginia.— Edgell *v.* Conaway, 24 W. Va. 747.

Wisconsin.— Flanders *v.* Sherman, 19 Wis. 178.

United States.— Arthurs *v.* Hart, 17 How. (U. S.) 6, 15 L. ed. 30.

All material evidence presumed to have been included.— Though all the evidence be not included, and certain rulings requested were refused upon all the evidence, the presumption is that all of the material evidence bearing on the question is set out. Foster *v.* Ropes, 111 Mass. 10. Where it is provided that only so much of the evidence of proceedings shall be incorporated in the bill of exceptions as may be necessary to explain the rulings below which have been excepted to, there is no presumption beyond such necessity. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

Failure to include any particular evidence raises the presumption that the omitted evidence was unfavorable to party excepting or would not have aided his case. Tabor *v.* Judd, 62 N. H. 288; Lobdell *v.* Marshall, 58 N. H. 342.

Failure to suggest a diminution, in case the record shows that certain evidence is not in the transcript, is warrant for the presumption that the omitted evidence is not material. Peebles *v.* Green, 6 Lea (Tenn.) 471.

3. **No presumption of further evidence or proceedings** from the omission to specify that all was included in the record — that which was included being sufficient to support the judgment. Gresham *v.* Bryan, 103 Ala. 629, 15 So. 849; Hidden *v.* Jordan, 28 Cal. 301; Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428; Cattle *v.* Haddox, 14 Nebr. 59, 14 N. W. 803. *Aliter*, where a further presumption is necessary to support the judgment. Bowman *v.* Bowman, 64 Ill. 75. But no such further presumption will be indulged upon an agreed statement of facts. Hall *v.* Virginia City, 91 Ill. 535.

The contrary must appear from the record. Porter *v.* Duglass, 27 Miss. 379.

The contrary appearing on the record, the ordinary presumption that the record contains all matters pertinent to the proper presentation of the appeal is overcome, notwithstanding the presumption is required by statute, for, in such case, the statute is held not to apply. Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659.

4. **Statements or recitals as to contents presumed true.**— That all of the affidavits read and filed with a motion were included. Vanscoyoc *v.* Kimler, 77 Ill. 151. That all of the evidence was included. Bishop *v.* Taylor, (Fla. 1899) 25 So. 287; Maghee *v.* Baker, 15 Ind. 254; Schermerhorn *v.* Merritt, 123 Mich. 310, 82 N. W. 513, 83 N. W. 405; Porter *v.* Duglass, 27 Miss. 379; Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 24 U. S. App. 295, 11 C. C. A. 439. That all of the facts given in evidence were included. Bennett *v.* Dowling, 22 Tex. 660. That certain evidence was admitted. Avocato *v.* Dell 'Ara, (Tex. Civ. App. 1900) 57 S. W. 296.

An indorsement of approval and assent by attorney for appellee will carry the presumption that the memorandum contained everything material to the question raised. Creshull *v.* Mullen, 104 N. Y. 660, 10 N. E. 430.

Attorney's certificate of no amendments to a bill of exceptions, when presented for that purpose, implies that all of the testimony has been included. Cattle *v.* Haddox, 14 Nebr. 59, 14 N. W. 803.

Recital of an admission, in the acknowledgment of service of a case-made, that it contains all of the proceedings will be taken as true and that all the testimony was included. Lindsay *v.* Kearny County, 56 Kan. 630, 44 Pac. 603.

Recital of a direction to clerk to insert certain proceedings is ground for the presumption that the insertion was made — for example, that all of the instructions were inserted. King *v.* Barber, 61 Iowa 674, 17 N. W. 88.

Repugnant statements reconciled by pre-

of the facts proved or occurring on the trial,[5] and the genuineness of the documents included therein.[6]

sumption.— An expression that there was no evidence of any indebtedness was construed to mean that there was no positive proof, evidence of such indebtedness appearing from other statements. Goodgame *v.* Clifton, 13 Ala. 583.

5. Pennsylvania Co. *v.* Swan, 37 Ill. App. 83; Chrisman *v.* Gregory, 4 B. Mon. (Ky.) 474; Swenson *v.* Kleinschmidt, 10 Mont. 473, 26 Pac. 198; Marsh *v.* Synder, 14 Nebr. 237, 15 N. W. 341.

Recitals or statements of fact presumed true.— That the official reporter was duly appointed and sworn as such. Garn *v.* Working, 5 Ind. App. 14, 31 N. E. 821. That the reasons stated for a ruling are the only reasons. State *v.* Farrer, 35 La. Ann. 315; Dunham *v.* Forbes, 25 Tex. 23. That exceptions were taken at the trial, and in the order and at the time stated in the bill (Hyde Park *v.* Dunham, 85 Ill. 569); and a statement that an exception was taken implies that it was taken at the proper time and in the proper manner (Thiving *v.* Clifford, 136 Mass. 482; Simonton *v.* Kelly, 1 Mont. 363; Hunt *v.* Bloomer, 12 How. Pr. (N. Y.) 567; Hall *v.* Harris, 2 S. D. 331, 50 N. W. 98; Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122; *contra*, Borah *v.* Martin, 2 Pinn. (Wis.) 401, 2 Chandl. (Wis.) 56); but a statement, in a bill settled after the trial, that the plaintiff "excepts" will not warrant the presumption that the exception was taken at the trial (Dufield *v.* Cross, 13 Ill. 699; *contra*, Wakeman *v.* Lyon, 9 Wend. (N. Y.) 241). That due service of the notice of appeal and undertaking was made and admitted. Bell *v.* Thomas, 7 S. D. 202, 63 N. W. 907. That a waiver of an exemption was executed, and was in writing, though the writing was not stated. Hearn *v.* State, 62 Ala. 218.

Statement that certain facts "appeared" is equivalent to a statement that there was no controversy in regard to it (Noyes *v.* Rockwood, 56 Vt. 647); and, though evidentiary questions be also stated in the exceptions in relation to what appeared, the statement of what appeared will control (Amsden *v.* Floyd, 60 Vt. 386, 15 Atl. 332).

Statement of fact not conclusive.— A certificate that there was evidence tending to prove certain facts does not preclude the theory that there was evidence to the contrary. Ft. Wayne *v.* Durnell, 13 Ind. App. 669, 42 N. E. 242; Bourne *v.* Merritt, 22 Vt. 429.

Uncertain statements will be so construed, if possible, as to support the judgment.

Alabama.— Wilson *v.* Wilson, 18 Ala. 176.

Louisiana.— Dromgoole *v.* Gardner, 10 Mart. (La.) 433.

Massachusetts.— Bingham *v.* Boston, 161 Mass. 3, 36 N. E. 473.

Nebraska.— Marsh *v.* Synder, 14 Nebr. 237, 15 N. W. 341.

Nevada.— Wilson *v.* Hill, 17 Nev. 401, 30 Pac. 1076.

Virginia.— Smith *v.* Walker, 1 Call (Va.) 28.

Presumption does not go beyond statement.
— *Alabama.*— Murray *v.* Tardy, 19 Ala. 710.

Illinois.— Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237.

Missouri.—Cummiskey *v.* Williams, 20 Mo. App. 606.

Ohio.— Mathews *v.* Leaman, 24 Ohio St. 615; Eclipse Ins. Co. *v.* Schoemer, 2 Cinc. Super. Ct. (Ohio) 474; Hooker *v.* Wittenberg College, 2 Cinc. Super. Ct. (Ohio) 353.

Vermont.— Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; Bourne *v.* Merritt, 22 Vt. 429.

Presumption will not exceed or contradict statement, even to support judgment. Townsend *v.* Jeffries, 17 Ala. 276; Shaw *v.* Hoffman, 25 Mich. 162. Thus, a statement that the evidence upon a certain point is not set out "because it fully sustains the verdict" does not imply that the verdict might not have been otherwise if excluded evidence had been admitted. Dossett *v.* Miller, 3 Sneed (Tenn.) 71.

No presumption of truth of a contradicted statement — for example, where an instrument was recited as a bond, and, upon being set out, it appeared not to have been sealed. Hamilton *v.* Hamilton, 27 Ill. 158.

Recital of a legal conclusion will not be presumed to be correct in the absence of sufficient evidence to support it, but may be disregarded as the assertion of an erroneous legal proposition. Crothers *v.* Ross, 17 Ala. 816.

6. **Copies of documents** contained in the bill of exceptions will be presumed to be copies of the identical ones in evidence where bill purports to contain all the evidence, though the particular documents are not separately certified. Imperial Hotel Co. *v.* H. B. Claflin Co., 175 Ill. 119, 51 N. E. 610.

The copy of a bond, regular on its face, is presumed to be a correct copy of the instrument sued on, though the result is a reversal of the judgment for defendant, because of testimony received which was admissible, upon the hypothesis that the bond bore on its face evidence of erasure after delivery. Edelin *v.* Sanders, 8 Md. 118.

An insertion, by reference, of a document is not conclusive that the document was inserted at, or prior to, the settlement of the bill, and, where it appears that the clerk copied it thereafter, it will not be considered as before the court. Seymour Woollen Factory Co. *v.* Brodhecker, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528. From a proper insertion by reference it is presumed that the whole paper is intended to be presented, and not merely so much as best comports with its description. Moore *v.* Bond, 18 Me. 142.

(II) *Transcript or Abstract of Record.* In the absence of any showing to the contrary, the correctness and completeness of a duly certified transcript or abstract of the record is to be presumed,[7] and amendments thereto, when permissible, are presumed to have been ordered upon sufficient reasons, when the reasons therefor are not shown.[8] Again, an amendment may be presumed though the fact does not appear;[9] also, that the amendment contains all important facts

Answer of garnishee not filed.— Where the judgment purports to be founded upon the answer of a garnishee on file, and it does not appear from the record that plaintiff required an oral answer, the appellate court will presume that the answer in writing upon the record, though not marked "Filed," is the answer indicated by the judgment. Lewis *v.* Duhose, 29 Ala. 219.

Stipulation of counsel presumed to have been executed, where there was an appearance and trial in the court below — otherwise in case of judgment by default. Moore *v.* Briggs, 14 Ala. 700.

7. *Alabama.*— White *v.* Branch Bank, 1 Ala. 435.

California.— Gordon *v.* Donahue, 79 Cal. 501, 21 Pac. 970.

Georgia.— Sluder *v.* Bartlett, 72 Ga. 463.

Illinois.— Von Glahn *v.* Von Glahn, 40 Ill. 73.

Indiana.— Tomhaugh *v.* Grogg, 156 Ind. 355, 59 N. E. 1060.

Iowa.— Kirchman *v.* Standard Coal Co., (Iowa 1901) 84 N. W. 939; Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

Kentucky.— O'Kelly *v.* Safety Bldg., etc., Co., 21 Ky. L. Rep. 1313, 54 S. W. 834; Washington L. Ins. Co. *v.* Menefee, 21 Ky. L. Rep. 916, 53 S. W. 260.

Louisiana.— Crawford *v.* Jewell, 2 La. 163.

Michigan.— Hamilton *v.* Langley, 52 Mich. 549, 18 N. W. 353.

New York.— Luysten *v.* Sniffen, 1 Barb. (N. Y.) 428.

Oregon.— Lew *v.* Lucas, 37 Oreg. 208, 61 Pac. 344.

Texas.— Johnson *v.* Galbraith, 17 Tex. 364.

See 3 Cent. Dig. tit. "Appeal and Error," § 3804 *et seq.*

As to requisites of transcript or abstract of record see *supra*, XIII, F, G.

Error in record presumed, to sustain order of trial court.— Where it appears from the record that an order of sale notified all persons "to appear on this day," and that the order to show cause was made returnable on the next day of the month, an error in making up the record will be presumed rather than that the order was made before the return-day. Russell *v.* Lewis, 3 Oreg. 380.

Facts held to repel presumption.— Omission of filing mark. Wooster *v.* McGee, 1 Tex. 17. Statement in the clerk's certificate that the sheets preceding it "contain a transcript of all the proceedings on which the cause was tried, since the last appeal, with the exceptions of the transcripts of the two former appeals, which are already in the supreme court." Allain *v.* Preston, 5 La. 478.

Facts held not to repel presumption.— The presence of a paper with a date later than the judgment. Gordon *v.* Donahue, 79 Cal. 501, 21 Pac. 970. Careless and negligent manner of making records, resulting in probable clerical mistakes. Judah *v.* McNamee, 3 Blackf. (Ind.) 269. Omission to attach certificate until nearly a month after filing. Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535. Omission to state that evidence was certified by trial judge. Kirchman *v.* Standard Coal Co., (Iowa 1901) 84 N. W. 939. Making a written request to the clerk to insert a copy of bill of exceptions, under a statute requiring the clerk to insert the original when requested, the original having been inserted, and it being presumed that this was done upon an oral request made subsequently to the written one. Tombaugh *v.* Grogg, 156 Ind. 355, 59 N. E. 1060.

If a record is susceptible of different constructions it will be harmonized, if possible, with the end in view of supporting the judgment below. Union Pac. R. Co. *v.* Horney, 5 Kan. 340.

Oral testimony will be presumed to be included. Morrison *v.* Lynch, 36 La. Ann. 611.

Partial transcript, irregularly made out, will be presumed to contain all of the record relevant to the issues presented. Lane *v.* Farleigh, 5 Ky. L. Rep. 328.

Private seal will be presumed from scroll and recital of seal. Hines *v.* North Carolina, 10 Sm. & M. (Miss.) 529.

Scrawl by the copyist will be presumed to be a copy of an official seal, where an official seal is required, though there is nothing to show that it is not a private seal, since a literal copy of a seal cannot be transcribed (Moore *v.* Titman, 33 Ill. 358); and a mere recital of such a seal has been held sufficient, without a scrawl (Norfleet *v.* Russell, 64 Mo. 176); but where there is neither scrawl nor recital it is presumed that there was no seal (Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937).

Revenue stamp will be presumed to have been upon an instrument where required, though none is copied, since a revenue stamp is no part of the instrument. Owsley *v.* Greenwood, 18 Minn. 429.

Where abstracts of the evidence, furnished by both parties, were conflicting and neither were certified, the defendant's version, which supported the judgment, was presumed correct. McGuire *v.* De Frese, 77 Mo. App. 683.

8. Youngblood *v.* Youngblood, 54 Ala. 486; Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; Gebbie *v.* Mooney, 121 Ill. 255, 12 N. E. 472; Kirkwood *v.* Heege, 9 Mo. App. 576.

9. An amendment was presumed where two exemplifications of a record were before the appellate court, one of which showed a valid

omitted from the original,[10] or that, in the absence of an amendment, the original contains such facts.[11]

2. In Support of the Judgment — a. General Rules. As a general rule, the judgment appealed from is presumed to be right until, by an affirmative showing on the record, the contrary is established.[12] It follows, therefore, that every

service of process, and the other did not. Farrelly *v.* Cross, 10 Ark. 197.

Interlineations — Amendments after filing. — Where there was no evidence in the record from which it could be inferred that interlineations in a bill, alleged to have been made as amendments, were made after the bill was filed, it was presumed that the court below had evidence that they were a part of the original bill, or, at least, that there was no evidence that they constituted amendments. Mason *v.* Bair, 33 Ill. 194. It will not be presumed that a cipher telegram, copied into the record without explanatory interlineations which appeared thereon when produced on appeal, bore such interlineation at a time before the trial when it was sought to charge a party with notice thereof. J. K. Armsby Co. *v.* Eckerly, 42 Mo. App. 299. A printed abstract, containing a written interlineation in the petition set out therein, without which interlineation the trial court's finding could not be sustained, will be presumed to be a correct amended abstract, in the absence of any contrary showing in the record. Mahaska County *v.* Ruan, 45 Iowa 328. Where an affidavit on a motion to set aside a judgment by default alleges that the return to the summons was not signed by the sheriff, but the transcript shows the presence of the sheriff's signature at the time of the default, a presumption will arise, in the absence of clear proof to the contrary, that an amendment was lawfully made, so as to have the return declare the truth. Heaton *v.* Peterson, 6 Ind. App. 1, 31 N. E. 1133.

10. Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334; O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764.

11. Bell *v.* Thomas, 7 S. D. 202, 63 N. W. 907; Davenport *v.* Buchanan, 6 S. D. 376, 61 N. W. 47.

A failure to incorporate evidence in the transcript raises the presumption that the parties intentionally waived its presence. Sugg *v.* Farmers' Mut. Ins. Assoc., (Tenn. Ch. 1901) 63 S. W. 226; Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. 1900) 63 S. W. 194.

12. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204; Wise *v.* Ringer, 42 Ala. 488.

Arkansas.— Hannah *v.* Carrington, 8 Ark. 117.

California.— Campbell *v.* Walls, 77 Cal. 250, 19 Pac. 427.

Connecticut.—Malmo's Appeal, Conn. (1900) 47 Atl. 163.

Florida.— Proctor *v.* Hart, 5 Fla. 465.

Georgia.— Grier *v.* Cross, 79 Ga. 435, 6 S. E. 14; Gray *v.* Willingham, 59 Ga. 858.

Idaho.— Toulouse *v.* Burkett, 2 Ida. 265, 13 Pac. 172.

Illinois.— Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254; Loven *v.* Dr. Peter Tahrney, etc., Co., 55 Ill. App. 292.

Indiana.— Taylor *v.* Birely, 130 Ind. 484, 30 N. E. 696; Dritt *v.* Dodds, 35 Ind. 63; Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 44 N. E. 377.

Iowa.— Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879; Jewett *v.* Miller, 12 Iowa 85.

Kansas.— Ford *v.* Pearson, 37 Kan. 554, 15 Pac. 535.

Kentucky.— Hudgens *v.* Spencer, 4 Dana (Ky.) 589.

Louisiana.— Florance *v.* Vaurigaud, 15 La. 255.

Maine.— Berry *v.* Berry, 84 Me. 541, 24 Atl. 957.

Maryland.— Schultze *v.* State, 43 Md. 295; Alexander *v.* Webster, 6 Md. 359.

Massachusetts.— Leyden *v.* Sweeney, 118 Mass. 418.

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

Minnesota.— Teller *v.* Bishop, 8 Minn. 226.

Mississippi.— Scharff *v.* Chaffe, 68 Miss. 641, 9 So. 897; Smith *v.* Berry, 1 Sm. & M. (Miss.) 321.

Missouri.— Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720; Beckley *v.* Skroh, 19 Mo. App. 75.

Nebraska.—Carter *v.* Gibson, (Nebr. 1901) 85 N. W. 45; Ashpole *v.* Hallgren, 60 Nebr. 196, 82 N. W. 623; Buchanan *v.* Mallalieu, 25 Nebr. 201, 41 N. W. 152.

Nevada.— Roney *v.* Buckland, 5 Nev. 219; Nosler *v.* Haynes, 2 Nev. 53.

New Hampshire.— Metropolitan L. Ins. Co. *v.* Helmer, 65 N. H. 672, 23 Atl. 521.

New Jersey.— Loweree *v.* Newark, 38 N. J. L. 151.

New Mexico.— U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

New York.— Smith *v.* Greenwich, 145 N. Y. 649, 40 N. E. 254.

North Carolina.— McCrimmen *v.* Parish, 116 N. C. 614, 21 S. E. 407; Wade *v.* Dick, 36 N. C. 313.

Ohio.— Courtright *v.* Staggers, 15 Ohio St. 511.

Oregon.— Danvers *v.* Durkin, 14 Oreg. 37, 12 Pac. 60.

Pennsylvania.— Sorg *v.* First German Evangelical St. Paul's Congregation, 63 Pa. St. 156.

South Carolina.— Scott *v.* Alexander, 27 S. C. 15, 2 S. E. 706; Coburn *v.* Magwood, Riley Eq. (S. C.) 187.

Tennessee.— Louisville, etc., R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19.

Texas.— McClane *v.* Rogers, 42 Tex. 214.

Vermont.—Moulthrop *v.* School Dist. No. 1, 59 Vt. 381, 9 Atl. 608.

reasonable intendment and presumption will be resolved against appellant and in favor of the correctness of the proceedings below;[13] and the presumption that

Virginia.— Morrison *v.* Wilkinson, (Va. 1893) 17 S. E. 787; Wright *v.* Smith, 81 Va. 777.

West Virginia.— Griffith *v.* Corrothers, 42 W. Va. 59, 24 S. E. 569.

Wisconsin.— Griffin, etc., Co. *v.* Joannes, 80 Wis. 601, 50 N. W. 785; Brower *v.* Merrill, 3 Pinn. (Wis.) 46, 3 Chandl. (Wis.) 46.

United States.— Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; Bagnell *v.* Broderick, 13 Pet. (U. S.) 436, 10 L. ed. 235.

See 3 Cent. Dig. tit. "Appeal and Error," § 3667 *et seq.*

Substantial error will not be presumed to have been cured in the absence of an affirmative showing in the record to that effect, though it was capable of being rendered harmless. Michalitschke *v.* Wells, 118 Cal. 683, 50 Pac. 847. *Aliter*, where there is no bill of exceptions containing the proceedings on the trial. Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002.

13. Every reasonable presumption is against appellant, and the burden is upon him to show error.

Alabama.— Dudley *v.* Chilton County, 66 Ala. 593; Patton *v.* Hayter, 15 Ala. 18.

California.— Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61; Whipley *v.* Flower, 6 Cal. 630.

Colorado.— Webber *v.* Emmerson, 3 Colo. 248.

Connecticut.—Malmo's Appeal, (Conn. 1900) 47 Atl. 163.

Georgia.— Dempsey *v.* McCalla, 99 Ga. 96, 24 S. E. 867.

Illinois.— Chicago City R. Co. *v.* Duffin, 126 Ill. 100, 18 N. E. 279 [*reversing* 24 Ill. App. 28]; Fred Miller Brewing Co. *v.* Beckington, 54 Ill. App. 191.

Iowa.— Hendrie *v.* Rippey, 9 Iowa 351.

Kentucky.— Patrick *v.* McClure, 1 Bibb (Ky.) 52; Jennings *v.* Davis, 5 Dana (Ky.) 127.

Michigan.— Peabody *v.* McAvoy, 23 Mich. 526.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

Nebraska.— Wright *v.* Greenwood Warehouse Co., 7 Nebr. 435.

New York.— Mead *v.* Bunn, 32 N. Y. 275; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Pennsylvania.— Gram's Appeal, 4 Watts (Pa.) 43.

South Dakota.— Pollard *v.* Fidelity F. Ins. Co., 1 S. D. 570, 47 N. W. 1060.

Texas.— Clark *v.* McKnight, (Tex. Civ. App. 1901) 61 S. W. 349; International, etc., R. Co. *v.* Smith, (Tex. 1890) 14 S. W. 642.

Vermont.— Cram *v.* Cram, 33 Vt. 15; Oaks *v.* Oaks, 27 Vt. 410.

Wisconsin.—Van Patten *v.* Wilcox, 32 Wis. 340.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3669, 3670.

Facts supplied by presumption to support judgment, in the absence of showing to contrary: That a debt was payable within the state. Martin *v.* Chicago, etc., R. Co., 50 Mo. App. 428. That a contract of insurance was made where an insurance company was shown to have authority to transact business. American Ins. Co. *v.* Woodruff, 34 Mich. 6. That a mortgagor resided in the town where his mortgage was recorded. Jenks *v.* Smith, 3 Den. (N. Y.) 592. That intersecting streets are common thoroughfares, which a municipality is under duty to keep in repair. Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925. That a shed, the subject of a trespass, was so attached to the realty as to entitle plaintiff to maintain the action. Kelley *v.* Seward, 51 Vt. 436. That defects in an exhibit were supplied by sufficient proof. Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601; Davenport Plow Co. *v.* Mewis, 10 Nebr. 317, 4 N. W. 1059. That a change in the manner of holding stock — from a pledge to absolute ownership — was legally made. Williams *v.* Walker, 9 N. Y. St. 60. That an ordinance under which plaintiff claimed, in existence at the time of the trial, was in force at the time the claim arose. Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036. That *lis pendens* notice was properly filed and before the court. Sage *v.* McLaughlin, 34 Wis. 550. That a notice, required to be in writing, was verbal, the bill of exceptions showing only that a notice was given. Harris *v.* Rowlands, 23 Ala. 644. That an appraisement and classification of public lands set out was duly and legally made. Clark *v.* McKnight, (Tex. Civ. App. 1901) 61 S. W. 349.

Exhibits to pleadings are presumed to have been offered in evidence, though no statement to that effect is made, the contrary not appearing. Wynn *v.* Rosette, 66 Ala. 517; Gafney *v.* Reeves, 6 Ind. 71; Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601.

Presumption against fact.— A note described as made at "Columbus, Geo.," was presumed not to have been made in the state of Georgia, where such presumption was necessary to affirm the judgment. Hargrove *v.* Smith, 1 Ala. 80.

Presumption of compliance with the law, in the absence of showing to the contrary: That a notary recorded an instrument of protest. Pogne *v.* Hickman, 9 Rob. (La.) 158. That a certificate which bears no date and no stamp was furnished before the going into effect of the act in reference to stamped instruments. Citizens' Bank *v.* Dixey, 21 La. Ann. 32. That a recorded deed was recorded upon motion, as required by law. Robb *v.* Ankeny, 4 Watts & S. (Pa.) 128.

That contingency which will support the judgment will be presumed, though there is a probability of another contingency which would defeat it.

the judgment is right becomes conclusive upon a failure of the record to show that the necessary exceptions were duly taken to the rulings complained of,[14] and,

Alabama.—Wynn *v.* Simmons, 33 Ala. 272; Furlow *v.* Merrell, 23 Ala. 705.

Iowa.— Conrad *v.* Baldwin, 3 Iowa 207.

Kansas.— Bush *v.* Doy, 1 Kan. 86.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

New York.— Juliand *v.* Watson, 43 N. Y. 571; Carman *v.* Pultz, 21 N. Y. 547; Palm *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 162, 17 N. Y. Suppl. 471, 42 N. Y. St. 219.

Texas.— Gammage *v.* Moore, 42 Tex. 170; Pierce *v.* Pierce, 21 Tex. 469.

West Virginia.— Werninger *v.* Wilson, 2 W. Va. 1.

That the court has not made a void order will be presumed if the order in question is susceptible of the opposite construction. Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61; Malmo's Appeal, (Conn. 1900) 47 Atl. 163; Stewart *v.* Logan County, 2 Ohio Cir. Ct. 134, 1 Ohio Cir. Dec. 404.

Wrong date will be presumed to have been sufficiently explained to trial court, in the case of a date of a forthcoming bond subsequent to the time therein stipulated for delivery of the property (Hyman *v.* Seaman, 33 Miss. 185); and in a default judgment upon a note, where the declaration shows an apparent discrepancy between the date of maturity and the date of demand (Williams *v.* State Bank, 1 Coldw. (Tenn.) 43).

Presumptions not to be indulged in support of judgment: That the name of a township had been changed. Neal *v.* Keller, 19 Kan. 111. That plaintiff did not have an ox-cart, under a statute exempting a wagon or an ox-cart, as the debtor may choose, and the judgment being in trover for the recovery of the value of a wagon sold on execution. Chamberlain *v.* Whitney, 65 Vt. 488, 27 Atl. 72. That proof was made of a bond alleged, but not set out, in the bill and denied in the answer. Holdridge *v.* Bailey, 5 Ill. 124. That a sale of liquors was unlawful. Brown *v.* McHugh, 36 Mich. 433. That certain documentary evidence necessary to the judgment was filed. Herbert *v.* Uhl, 20 N. Y. Suppl. 743, 49 N. Y. St. 496. That proof was made of a matter not properly put in issue, though necessary to the judgment. Comstock *v.* Hollon, 2 Mich. 355. That a bond sued on, regular on its face in the record, was materially altered after delivery. Edelin *v.* Sanders, 8 Md. 118.

From the silence of appellee on a given point made by appellant in his brief it cannot be presumed that the point is waived or admitted, nor can appellant be thus relieved of the burden of showing error. Martin *v.* Martin, 74 Ind. 207.

Rule of presumption is not abrogated by a statute permitting an appellant to bring up, upon appeal, only those parts of the proceedings below which he considers necessary to his case. McKee *v.* Stein, 91 Ky. 240, 16 S. W. 583; Huffaker *v.* National Bank, 13 Bush (Ky.) 644; Phillips *v.* Phillips, 15 Ky. L. Rep. 816.

14. Presumption is conclusive in the absence of exceptions, where exceptions are necessary.

Alabama.— Tennile *v.* Walshe, 81 Ala. 160, 1 So. 85; Williams *v.* Gunter, 28 Ala. 681.

Arkansas.— Turner *v.* Collier, 37 Ark. 528.

California.— Carpy *v.* Dowdell, 131 Cal. 495, 63 Pac. 778.

Colorado.— Mulock *v.* Wilson, 19 Colo. 296, 35 Pac. 532; Otero County *v.* La Junta First Nat. Bank, 8 Colo. App. 371, 46 Pac. 618.

Illinois.— Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671; Dufield *v.* Cross, 13 Ill. 699; McKillip *v.* Bonynge, 86 Ill. App. 618; Grand Lodge, B. R. T., *v.* Randolph, 84 Ill. App. 220 [*affirmed* in 186 Ill. 89, 57 N. E. 882].

Michigan.— Day *v.* Backus, 31 Mich. 241; Borden *v.* Clark, 26 Mich. 410.

Mississippi.— Sintes *v.* Barber, 78 Miss. 585, 28 So. 722.

Missouri.—Riggins *v.* O'Brien, 34 Mo. App. 613.

Nebraska.— Sutton *v.* Sutton, 60 Nebr. 400, 83 N. W. 200.

New Mexico.— U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

Pennsylvania.— Passenger Conductors' L. Ins. Co. *v.* Birnbaum, (Pa. 1887) 10 Atl. 138.

Tennessee.— Kincaid *v.* Bradshaw, 6 Baxt. (Tenn.) 102.

Texas.— Withee *v.* Withee, 50 Tex. 327; Page *v.* Conaway, (Tex. Civ. App. 1896) 34 S. W. 143.

Virginia.— Ford *v.* Gardner, 1 Hen. & M. (Va.) 72.

West Virginia.—Kuykendall *v.* Ruckman, 2 W. Va. 332.

Wisconsin.— Butler *v.* Gillis, 104 Wis. 421, 80 N. W. 735.

United States.— Searcy *v.* Hogan, Hempst. (U. S.) 20, 21 Fed. Cas. No. 12,584*a*.

As to necessity of reservation in lower court of grounds of review see *supra*, V [2 Cyc. 660].

Exception is not presumed to have been taken at the trial, merely from the use of the word "excepts" in the bill settled thereafter. Dufield *v.* Cross, 13 Ill. 699. But see Wakeman *v.* Lyon, 9 Wend. (N. Y.) 241; and, *contra*, Foree *v.* Smith, 1 Dana (Ky.) 151.

Exceptions are presumed to have been taken properly, from a notation by the judge on instructions given that they were excepted to (Kellow *v.* Central Iowa R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858); from a statement thereof in the abstract, though it is omitted from the amended abstract (Palmer *v.* Rogers, 70 Iowa 381, 30 N. W. 645); from a statement that all and each of a series of instructions were excepted to, and that the exceptions were taken separately (Atchison, etc., R. Co. *v.* Retford, 18 Kan. 245); from a settlement of the bill after the trial (Hughes *v.* Robertson,

in addition thereto, sufficient assignments of error,[15] and facts in the record to support such assignments.[16] When all of the facts are properly before the appel-

1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104; Toole *v.* Bearce, 91 Me. 299, 39 Atl. 558); from the statement of an overruled objection, though no special exception appears (McBride *v.* Cicotte, 4 Mich. 478).

Exceptions not passed on will be presumed to have been accepted. Jones *v.* Call, 93 N. C. 170.

Exceptions unnecessary.— In equity cases, in Iowa, exceptions are unnecessary to a review by the appellate court, and, where all of the evidence is in the record and the issues are equitable, it will be presumed that the trial was in equity (Baldwin *v.* Davis, 63 Iowa 231, 18 N. W. 897), and that the evidence was taken in writing, pursuant to an order upon motion therefor (Bailey *v.* Landingham, 53 Iowa 722, 6 N. W. 76; Ryan *v.* Mullinix, 45 Iowa 631; Hammersham *v.* Fairall, 44 Iowa 462).

15. Presumption conclusive in the absence of assignments of error.— Campbell *v.* Dooling, 26 Ark. 647; Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141; Wynne *v.* Kennedy, 11 Tex. Civ. App. 693, 33 S. W. 298.

As to necessity of assignments of error see *supra*, XI, B [2 Cyc. 980].

16. Presumption conclusive in the absence of facts to support error.— The silence of the record as to facts showing error cannot be supplied by presumption.

Alabama.— Girard F. Ins. Co. *v.* Boulden, (Ala. 1892) 11 So. 773; McRae *v.* Harmon, 98 Ala. 349, 13 So. 527.

Arkansas.—Smith *v.* Fletcher, (Ark. 1889) 11 S. W. 824; St. Francis County *v.* Lee County, 46 Ark. 67.

California.— Ohleyer *v.* Bunce, 65 Cal. 544, 4 Pac. 549; McCarthy *v.* Yale, 39 Cal. 585.

Colorado.— Knowles *v.* Clear Creek, etc., Mill, etc., Co., 18 Colo. 209, 32 Pac. 279.

Illinois.— Baker *v.* Singer, 35 Ill. App. 271.

Kansas.— Shelton *v.* Dunn, 6 Kan. 129.

Kentucky.— Seibert *v.* Bloomfield, (Ky. 1901) 63 S. W. 584; Braxdale *v.* Speed, 1 A. K. Marsh. (Ky.) 105.

Louisiana.—Rohrbacker *v.* Schilling, 12 La. Ann. 17.

Michigan.— Hoffman *v.* Harrington, 28 Mich. 90.

Mississippi.—Wells *v.* Smith, 44 Miss. 296; Green *v.* Creighton, 7 Sm. & M. (Miss.) 197.

New York.— Viele *v.* Troy, etc., R. Co., 20 N. Y. 184; Northampton Nat. Bank *v.* Kidder, 13 Abb. N. Cas. (N. Y.) 376.

Texas.— Kendall *v.* Page, 83 Tex. 131, 18 S. W. 333; Bellah *v.* Orr, etc., Shoe Co., (Tex. Civ. App. 1896) 35 S. W. 301; Newby *v.* Morris, (Tex. Civ. App. 1895) 29 S. W. 914.

United States.— Collins *v.* Riley, 104 U. S. 322, 26 L. ed. 752.

All of the evidence not appearing, no inference concerning any evidence beyond that before the court can be drawn in favor of appellant, and if the particular point turns upon the omitted evidence, it will be resolved against appellant.

Alabama.— Elliott *v.* Round Mountain Coal, etc., Co., 108 Ala. 640, 18 So. 689; Furlow *v.* Merrell, 23 Ala. 705.

Arkansas.— McClairen *v.* Wicker, 8 Ark. 192.

California.— Matter of Bates, 105 Cal. 646, 38 Pac. 941; McDonald *v.* Dodge, 97 Cal. 112, 31 Pac. 909.

Colorado.— Beck *v.* Trimble, (Colo. App. 1899) 59 Pac. 412.

Illinois.— Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Pearce *v.* Hyde Park, 126 Ill. 287, 18 N. E. 824; Brown *v.* Griffin, 40 Ill. App. 558; Steiger *v.* Prather, 29 Ill. App. 27.

Indiana.— Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551; Burton *v.* Reagan, 75 Ind. 77.

Iowa.— Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912.

Kansas.— Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327; McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679.

Kentucky.— Harvey *v.* Payne, 2 Metc. (Ky.) 451; Bean *v.* Meguiar, 16 Ky. L. Rep. 715, 29 S. W. 306.

Maryland.— McCann *v.* Baltimore, etc., R. Co., 20 Md. 202.

Michigan.— Pratt *v.* Brown, 106 Mich. 628, 64 N. W. 583; Belleville Sav. Bank *v.* Richardi, 56 Mich. 453, 23 N. W. 87.

Mississippi.— Hines *v.* North Carolina, 10 Sm. & M. (Miss.) 529; Briggs *v.* Clark, 7 How. (Miss.) 457.

Missouri.— Cape Girardeau *v.*. Burrough, 112 Mo. 559, 20 S. W. 652.

Nebraska.— Davenport Plow Co. *v.* Mewis, 10 Nebr. 317, 4 N. W. 1059.

New York.— Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487 [*affirming* 46 N. Y. Suppl. 1090]; Niebuhr *v.* Schreyer, 135 N. Y. 614, 32 N. E. 13, 48 N. Y. St. 73; McBurney *v.* Cutler, 18 Barb. (N. Y.) 203.

Texas.— Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Fleiner *v.* Walker, 5 Tex. Civ. App. 145, 23 S. W. 1029.

Wisconsin.—Canfield *v.* Bayfield County, 74 Wis. 60, 41 N. W. 437, 42 N. W. 100; Stewart *v.* McSweeney, 14 Wis. 468.

No evidence appearing, all rulings based thereon become conclusive, and every fact necessary to support the judgment which could have been established by proper evidence will be presumed.

Alabama.—Roundtree *v.* Snodgrass, 36 Ala. 185.

California.— Matter of Scott, 128 Cal. 578, 61 Pac. 98.

Colorado.— Antlers Land, etc., Co. *v.* Fesler, (Colo. App. 1899) 59 Pac. 406.

Illinois.— Best *v.* Beal, 85 Ill. 127.

Indiana.—Baker *v.* Armstrong, 57 Ind. 189; Conoway *v.* Weaver, 1 Ind. 263.

Kentucky.— Bard *v.* McElroy, 6 B. Mon.

late court for review, no special presumption in favor of the judgment will be indulged.[17]

b. Jurisdiction — (I) *Of the Subject-Matter* — (A) *General Rule.* The existence of facts necessary to confer jurisdiction of the subject-matter on the trial court will be presumed, on appeal from a judgment, until the contrary appears affirmatively of record.[18] Accordingly it has been held that the appellate

(Ky.) 416; Wilson *v.* Hunt, 6 B. Mon. (Ky.) 379.

Michigan.— Sheldon *v.* Weatherwax, 75 Mich. 418, 42 N. W. 845.

Mississippi.—Wells *v.* Smith, 44 Miss. 296; Steadman *v.* Holman, 33 Miss. 550.

Missouri.— Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915; State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326.

New York.— Kirby *v.* Carpenter, 7 Barb. (N. Y.) 373.

Pennsylvania.— Election Cases, 65 Pa. St. 20.

Texas.— Turner *v.* Houston, 21 Tex. Civ. App. 214, 51 S. W. 642; Colbert *v.* Brown, (Tex. Civ. App. 1899) 51 S. W. 521.

West Virginia.— Garrison *v.* Myers, 12 W. Va. 330.

Wisconsin.— Butler *v.* Gillis, 104 Wis. 421, 80 N. W. 735.

Omitted evidence apparently insufficient.— Where the record purports to contain all the evidence except certain documents referred to but not incorporated, the nature of which shows them to be insufficient, even when taken together with all the other evidence, to support the judgment, it is not to be presumed that there was other evidence omitted which would support it. Beaird *v.* Wolf, 19 Ill. App. 36.

Rules of practice of trial court not appearing, the presumption is that the action taken was in accordance therewith. Holloway *v.* Freeman, 22 Ill. 197; Tyler *v.* Murray, 57 Md. 418; Kunkel *v.* Spooner, 9 Md. 462, 66 Am. Dec. 332; Calvert *v.* Coxe, 1 Gill (Md.) 95.

An incomplete transcript or judgment-roll will, as to the omitted portion, be presumed to support the judgment.

California.— Hastings *v.* Cunningham, 35 Cal. 549.

Georgia.— Howe Mach. Co. *v.* Souder, 58 Ga. 64; Easley *v.* Camp, 40 Ga. 698.

Iowa.— Kimball *v.* Wilson, 59 Iowa 638, 13 N. W. 748; Blythe *v.* Blythe, 25 Iowa 266.

Kentucky.— Brassfield *v.* Burgess, 10 Ky. L. Rep. 660, 10 S. W. 122; Geoghegan *v.* Beeler, 9 Ky. L. Rep. 407.

Minnesota.— Herrick *v.* Butler, 30 Minn. 156, 14 N. W. 794.

Missouri.— Lewis *v.* Whitten, 112 Mo. 318, 20 S. W. 617.

Vermont.— Spaulding *v.* Crawford, 27 Vt. 155.

Aliter, where the parties have agreed that the transcript contains everything necessary to a determination of the questions involved. Banta *v.* Louisville Sav., etc., Co., (Ky. 1900) 59 S. W. 501.

Doubtful statements, unsupported by facts, will support presumptions against appellant. Stark *v.* Whitman, 58 Tex. 375.

17. Miller *v.* Havens, 51 Mich. 482, 16 N. W. 865.

Upon all the evidence, the same presumptions will arise as should have been indulged in the trial court. Blunt *v.* Bates, 40 Ala. 470; Spears *v.* Clark, 6 Blackf. (Ind.) 167. In such case the appellate court will not presume what the record fails to disclose. Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

Upon an agreed statement of facts, the court will not presume, in support of the judgment, that any essential fact not shown therein was established on the trial. Rogers *v.* Gould, 20 Tex. 437; Thatcher *v.* Mills, 11 Tex. 692. Nor will it presume that any fact shown therein was not considered; the question thus presented is purely one of the proper application of the law to admitted facts. Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248.

Facts which cannot be brought into the record — for example, such as are solely within the personal knowledge of the trial judge — will be presumed to support the judgment below. Welch *v.* Welch, 33 Wis. 534.

18. **Presumption is that court of general jurisdiction acted with authority,** when the record is silent on the subject.

Illinois.—Wallace *v.* Cox, 71 Ill. 548; Yaeger *v.* Henry, 39 Ill. App. 21.

Indiana.—Milk *v.* Kent, 60 Ind. 226; Shirts *v.* Irons, 28 Ind. 458.

Maryland.— Schultze *v.* State, 43 Md. 295.

Missouri.— C. H. Burke Mfg. Co. *v.* The Steamboat A. Saltzman, 42 Mo. App. 85; Riggins *v.* O'Brien, 34 Mo. App. 613.

New York.— Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

North Carolina.— State *v.* Baker, 63 N. C. 276; State *v.* Ledford, 28 N. C. 5.

Ohio.— Knox County Mut. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 275.

Texas.— Wood *v.* Mistretta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135; Simmons *v.* Rhodes, (Tex. Civ. App. 1894) 27 S. W. 903.

Washington.—Bird *v.* Winyer, (Wash. 1901) 64 Pac. 178.

See 3 Cent. Dig. tit. "Appeal and Error," § 3682 *et seq.*

As to necessity of record showing jurisdiction of trial court see *supra,* XIII, A, 2, b [2 Cyc. 1032].

In doubtful cases, that construction will be presumed correct which will sustain the jurisdiction, as against that which would defeat it. M. Rumley Co. *v.* Moore, 151 Ind. 24, 50 N. E. 574; Milk *v.* Kent, 60 Ind. 226;

court will presume the existence of the authority of a special judge,[19] the special authority of a regular judge,[20] the venue of the cause,[21] the subject of the action,[22]

Frost *v.* Myrick, 1 Barb. (N. Y.) 362; Stark *v.* Whitman, 58 Tex. 375.

Recitals of jurisdictional facts are presumed conclusive in the absence of any showing to the contrary. Beverly *v.* Stephens, 17 Ala. 701; Merchant *v.* North, 10 Ohio St. 251.

The contrary appearing upon a complete record of all the evidence upon which the court acted, the presumption in favor of jurisdiction is successfully overcome. Driver *v.* Driver, 153 Ind. 88, 54 N. E. 389.

The existence or extent of the law creating or defining jurisdiction cannot be the subject of presumption. People *v.* Toal, 85 Cal. 333, 24 Pac. 603.

19. Presumptions to sustain authority of special judge.— That he acted under appointment according to law. Caldwell *v.* Bell, 3 Ark. 419; Stewart *v.* Adam, etc., Co., (Ind. 1899) 55 N. E. 760; Wood *v.* Franklin, 97 Ind. 117; Green *v.* Walker, 99 Mo. 68, 12 S. W. 353; Hess *v.* Dean, 66 Tex. 663, 2 S. W. 727; but *compare* Fountain County *v.* Coats, 17 Ind. 150. That the statutory necessity for a special judge existed. Leonard *v.* Fulwiler, 60 Ind. 273; Leonard *v.* Blair, 59 Ind. 510; Ellison *v.* Beannabia, 4 Okla. 347, 46 Pac. 477; Tracey *v.* Pendleton, 23 Pa. St. 171. That an adjourned term for a special judge was regularly appointed. Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071. That the judge possessed the statutory qualifications. Brown *v.* Buzan, 24 Ind. 194; Haycroft *v.* Walden, 14 Ky. L. Rep. 892; King *v.* Pfeiffer, 62 Tex. 307. That he took the statutory oath before assuming to act. Harper *v.* Jacobs, 51 Mo. 296. That his proceedings were lawfully continued beyond the incumbency of another regular judge. Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 896. That he was reappointed for a second term. Bartley *v.* Phillips, 114 Ind. 189, 16 N. E. 508. See 3 Cent. Dig. tit. "Appeal and Error," § 3683.

In Arkansas it has been held that no presumption will be indulged in favor of the regularity of the proceedings over which a special judge presides unless they appear to have been had in the regular progress of the business of the court, the term of which appears to have been opened by the regular judge. Cruson *v.* Whitley, 19 Ark. 99.

20. Presumptions to sustain special authority of regular judge.— That the hearing of a motion for a new trial before a judge other than the one who presided at the trial was directed in a regular manner by the presiding judge. Martin *v.* Platt, 131 N. Y. 641, 30 N. E. 565, 43 N. Y. St. 326 [*affirming* 16 N. Y. Suppl. 115, 40 N. Y. St. 761, (*affirming* 26 Abb. N. Cas. (N. Y.) 382, 15 N. Y. Suppl. 49)]. That a judge who presided outside of his circuit, county, or district did so in accordance with special statutory authority. *In re* Corralitos Co-operative Drying, etc., Co., (Cal. 1900) 62 Pac. 1076; Scott *v.* White, 71 Ill. 287; Stricker *v.* Kubusky, 35 Ill. App. 159; The Alaska, 35 Fed. 555.

21. Presumptions to sustain venue.— That an order was made at the place where, by law, the court was authorized to be held, conceding that it was not made in the regular court-room. Jasper *v.* Schlesinger, 22 Ill. App. 637. That a cause was assigned to the proper court to be tried, under a statute providing for distribution and apportionment of business. Stockham *v.* Boyd, 22 Wkly. Notes Cas. (Pa.) 118, 12 Atl. 258. That a cause in a court other than the one in which it was instituted came there on change of venue, if such removal was legally possible. Doss *v.* Stevens, 13 Colo. App. 535, 59 Pac. 67; Wells *v.* Mason, 5 Ill. 84; Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; Wolcott *v.* Wolcott, 32 Wis. 63. That an application for a change of venue, appearing never to have been acted upon, was abandoned or properly denied. Mooreman *v.* Mooreman, 39 Iowa 706; Grant *v.* Planters' Bank, 4 How. (Miss.) 326. That the necessity for a change of venue existed and was properly shown. Thorn *v.* Provence, 31 Ark. 190; Warner *v.* Warner, 100 Cal. 11, 34 Pac. 523; Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211; McAulay *v.* Truckee Ice Co., 79 Cal. 50, 21 Pac. 434; Willett *v.* Porter, 42 Ind. 250; Turner *v.* Campbell, 34 Ind. 317. That a new trial was granted before a change of venue was ordered. Garrigan *v.* Dickey, 1 Ind. App. 421, 27 N. E. 713. That the order for a change of venue was properly made and entered.

California.— Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211.

Indiana.— Knox County *v.* Barnett, 106 Ind. 599, 7 N. E. 205; Mayes *v.* Goldsmith, 58 Ind. 94.

Iowa.— Robbins *v.* Neal, 10 Iowa 560.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216.

North Carolina.— Emery *v.* Hardee, 94 N. C. 787.

Texas.— Hall *v.* Jackson, 3 Tex. 305; Borden *v.* Houston, 2 Tex. 594.

Utah.— Elliot *v.* Whitmore, 10 Utah 246, 37 Pac. 461.

Wisconsin.— Lamonte *v.* Ward, 36 Wis. 558.

See 3 Cent. Dig. tit. "Appeal and Error," § 3689.

22. Presumptions of jurisdiction over the subject of action.— That the residence of the parties was such as to confer jurisdiction of the subject-matter. Honore *v.* Home Nat. Bank, 80 Ill. 489; Wallace *v.* Cox, 71 Ill. 548; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Candill *v.* Tharp, 1 Greene (Iowa) 94. That there was personal property of a decedent within the jurisdiction of a court of probate. Apple's Estate, 66 Cal. 432, 6 Pac. 7. That the domicile of an intestate was within the state where his assets were administered. Phillips *v.* Peteet, 35 Ala. 696; McFarland

the amount in controversy,[23] the exercise of authority in a regular manner[24] at a regular term,[25] or the sufficient and due appointment of a special term.[26] When the lower court has expressly determined the jurisdictional matter in question, such determination will be presumed to be right unless the record clearly shows it to be wrong.[27]

v. Stewart, 109 Iowa 561, 80 N. W. 657. That the subject of a foreclosure was situated within the court's jurisdiction. Brown *v.* Anderson, 90 Ind. 93; Culph *v.* Phillips, 17 Ind. 209. That a tort for which judgment was given occurred within the court's jurisdiction. Wade *v.* Missouri Pac. R. Co., 78 Mo. 362. That statutory consent, to enable a justice of the peace to entertain a suit involving over one hundred dollars, was given. Hopkins Fine Stock Co. *v.* Reid, 106 Iowa 78, 75 N. W. 656.

As to necessity of record showing jurisdiction of subject-matter see *supra*, XIII, A, 2, b, (IV) [2 Cyc. 1035].

23. Amount will be presumed within jurisdiction if the contrary does not clearly appear of record. Hackney *v.* Schow, 21 Tex. Civ. App. 613, 53 S. W. 713; Mathews *v.* Ripley, 101 Wis. 100, 77 N. W. 718. See also *supra*, XIII A, 2, b (V) [2 Cyc. 1035].

Consent, in the absence of objection, may be presumed, in order to enable a justice of the peace to entertain jurisdiction of a suit for more than one hundred dollars, where the amount in controversy was within that which could have been so litigated by consent. Hopkins Fine Stock Co. *v.* Reid, 106 Iowa 78, 75 N. W. 656.

Facts not rebutting presumption in favor of jurisdictional amount.— Judgment for a less sum than that for which the court was authorized to entertain a suit, where the amount claimed was within the amount limit and a set-off had been pleaded. Camp *v.* Marion County, 91 Ala. 240, 8 So. 786. Judgment for a small sum in excess of the amount limit, where such excess was within that which could have been allowed as interest upon the amount claimed (Richards *v.* Belcher, 6 Tex. Civ. App. 284, 25 S. W. 740), or where a slight excess was more than compensated for by a lower rate of interest than that which might have been allowed (Simmons *v.* Rhodes, (Tex. Civ. App. 1894) 27 S. W. 903).

24. Presumptions of regular judicial action. — That an absent judge was disqualified to act. Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013. That a disqualified judge did not act. Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333. That an adjournment requiring consent of parties was made upon consent. Wood *v.* Spofford, 29 Misc. (N. Y.) 357, 60 N. Y. Suppl. 492. That an order was made by a judge (not named) who had authority (Matter of Ross Tp. Public Road, 5 Pa. Super. Ct. 85), though the sole judge of the district was disqualified (Link *v.* Connell, 48 Nebr. 574, 67 N. W. 475. That a case, tried by the regular judge, had been abandoned by a special judge to whom it had been transferred. Hervey *v.* Parry, 82 Ind. 263. That an order made outside the circuit was heard within the circuit. State *v.* Satterwhite, 20 S. C. 536. That only one of two judges present presided. Sargent *v.* Evanston, 154 Ill. 268, 40 N. E. 440. That a cause, indefinitely continued, was not placed on the dead docket. Dours *v.* Cazentre, McGloin (La.) 251.

Facts held to rebut presumption of regularity.— Leaving the bench in the course of the trial, by the regular judge, whose place was assumed and the trial determined by another person, the latter being a member of the bar but not a judge. Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; and, to similar effect, see Fountain County *v.* Coats, 17 Ind. 150. Proceedings for removal to a federal court. Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168.

25. Presumptions of judicial action at term. — That the term was regularly convened at the time fixed therefor. Miller *v.* George, 30 S. C. 526, 9 S. E. 659; Hardin *v.* Trimmier, 30 S. C. 391, 9 S. E. 342; but see, *contra*, American F. Ins. Co. *v.* Pappe, 4 Okla. 110, 43 Pac. 1085. That the term of the appealed judgment was regularly appointed. Cook *v.* Skelton, 20 Ill. 107, 71 Am. Dec. 250; Cook *v.* Renick, 19 Ill. 598; Hanes *v.* Worthington, 14 Ind. 320. That a term order was made in term-time. Skinner *v.* Roberts, 92 Ga. 366, 17 S. E. 353. That a judgment, which could not have been rendered at a special term, was rendered at a general term. Darby *v.* Callaghan, 16 N. Y. 71. That a term was continued up to the latest period allowed by law. Harrison *v.* Meadors, 41 Ala. 274; Sanford *v.* Richardson, 1 Ala. 182; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Reed *v.* Higgins, 86 Ind. 143. That an adjourned term was reconvened. Green *v.* Morse, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518. That a term in another county had been adjourned so as to permit the continuation of the term in question after the time fixed for the former. Weaver *v.* Cooledge, 15 Iowa 244. That a term was not allowed to lapse by the intervention of a long period — that is, twenty-three days since a given term-day. Hyde *v.* Kent, 47 Nebr. 26, 66 N. W. 39. That a garnishment suit was continued over the term at which judgment in the principal suit was rendered. Old Second Nat. Bank *v.* Williams, 112 Mich. 564, 71 N. W. 150.

26. Presumptions as to special term.—That a special term was duly held in pursuance of an order therefor (Sparkman *v.* Daughtry, 35 N. C. 168), and for the transaction of general business (Hicks *v.* Ellis, 65 Mo. 176). That a special term was regularly appointed. Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482. That a general term was adjourned, so as to permit the holding of a special term. Myers *v.* Mitchell, 1 S. D. 249, 46 N. W. 245.

27. *Indiana.*— State *v.* Whitewater Valley Canal Co., 8 Ind. 320.

(B) *Statutory Exceptions.* By statute, some courts of limited or special jurisdiction can be held to have acquired jurisdiction only when certain prerequisite facts are affirmatively shown.[28] But, even in such cases, authority, once shown, is presumed to have been rightfully exercised unless the record shows the contrary.[29] In the United States courts, also, for statutory reasons, the presumption is that the court below was without jurisdiction when the record, as to the existence of necessary jurisdictional facts, is silent.[30]

(II) *OF THE PERSON*—(A) *General Rule.* Upon an incomplete record of the lower court, as to the facts necessary to vest jurisdiction of the person of defendant, and from an apparently regular judgment, it will, on appeal from such judgment, be presumed that such jurisdictional facts, as to all necessary

Iowa.— Mooreman *v.* Mooreman, 39 Iowa 706.

New York.— Barker *v.* Cunard Steamship Co., 91 Hun (N. Y.) 495, 36 N. Y. Suppl. 256, 70 N. Y. St. 858, 25 N. Y. Civ. Proc. 108.

Texas.— Roach *v.* Malotte, 23 Tex. Civ. App. 400, 56 S. W. 701.

Virginia.— Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482.

Facts not rebutting presumption of correct determination below.— The overruling of an objection to the qualification of the trial judge "without hearing evidence," because "this does not necessarily imply that the court refused to hear evidence, but may well mean that none was offered." Stark *v.* Whitman, 58 Tex. 375. The introduction of the judgment-roll of a case wherein the surrogate was a party, as such, this being consistent with the assumption that the surrogate had no personal interest in the subject-matter. Matter of Bingham, 127 N. Y. 296, 27 N. E. 1055, 38 N. Y. St. 765.

The judgment of an intermediate court upon jurisdictional facts of the trial court will be supported by presumptions similar to those which attend a determination by the trial court. Katzmann *v.* Mosler Safe Co., 82 Ill. App. 226; Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 53 S. W. 713; Mathews *v.* Ripley, 101 Wis. 100, 77 N. W. 718. See also *supra*, XIII, A, 2, a [2 Cyc. 1032].

28. Authority of courts of special or limited jurisdiction must appear by an affirmative showing of the facts upon which jurisdiction depends, and cannot, therefore, be presumed, in the absence of such showing.

Alabama.— Crawford *v.* McLeod, 64 Ala. 240.

Illinois.— The Tug Montauk *v.* Walker, 47 Ill. 335.

Iowa.— Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

New Jersey.—Snediker *v.* Quick, 13 N. J. L. 306.

Vermont.— Barrett *v.* Crane, 16 Vt. 246.

See also *supra*, XIII, A, 2, b [2 Cyc. 1032].

A court of general jurisdiction, exercising a special statutory authority, as to such special authority occupies a situation similar to a court of special and limited jurisdiction, and the existence of facts prerequisite to the exercise of such jurisdiction will not be presumed. Haywood *v.* Collins, 60 Ill. 328; The Tug Montauk *v.* Walker, 47 Ill. 335.

29. Jurisdiction of inferior courts will be presumed to have been rightfully exercised after shown to exist. Key *v.* Vaughn, 15 Ala. 497; Maxam *v.* Wood, 4 Blackf. (Ind.) 297; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Rowan *v.* Lamb, 4 Greene (Iowa) 468; Wight *v.* Warner, 1 Dougl. (Mich.) 384.

30. Börs *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419. But see Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071, holding that, where a point which would give the lower court jurisdiction appears in the record as the basis of the judgment, it will not be presumed, in order to defeat the jurisdiction, that the decision was upon some other point not found in the record, and not appearing to have been suggested in the lower court.

Destroyed records may be presumed to have shown diverse citizenship.— Where, after removal of a case from a state court to a United States circuit court, the records were destroyed by fire and the trial proceeded, without objection, upon substituted pleadings which did not show the citizenship of the parties, it was presumed that diverse citizenship, authorizing the removal, had previously been shown. Pittsburgh, etc., R. Co. *v.* Ramsey, 22 Wall. (U. S.) 322, 22 L. ed. 823.

Jurisdiction appearing from some of the counts, though not from others, and the judgment being supported by the former, no objection having been taken to the jurisdiction and the evidence not appearing to show that the judgment was upon the latter, jurisdiction will be presumed. United States Bank *v.* Moss, 6 How. (U. S.) 31, 12 L. ed. 331.

Presumption of leave to dismiss as to one defendant.— Where an amended bill was filed, by leave of court, omitting one of the original parties defendant, whose presence might have defeated the jurisdiction of the court upon the ground of diverse citizenship, it was presumed, in the absence of a contrary showing, that leave to dismiss as to such party was given. Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10.

The United States supreme court will presume authority of state court to make a particular order, under state laws, in a case of conflicting claims of receivers appointed by a state court and a United States circuit court. Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660.

parties, existed;[31] and sufficient proof of all unimpeached recitals, statements, findings, or apparent or inferable facts in the record will be presumed as to the due issuance of proper process,[32] the service thereof, in person[33] or by publica-

31. Presumption of jurisdiction of the person, upon incomplete record.— *Alabama.*— Keith *v.* Cliatt, 59 Ala. 408.

Arkansas.— *Contra,* Rutherford *v.* State Bank, 3 Ark. 558.

California.— Dowling *v.* Comerford, 99 Cal. 204, 33 Pac. 853.

Kansas.— Ornn *v.* Merchants Nat. Bank, 16 Kan. 341.

Kentucky.— Massie *v.* Anderson, 2 Litt. (Ky.) 270.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216.

Missouri.— Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

New Hampshire.— *Contra,* Symmes *v.* Libbey, Smith (N. H.) 137.

Ohio.— Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Welsh *v.* Childs, 17 Ohio St. 319.

South Dakota.— Searls *v.* Knapp, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873.

Wyoming.—*Contra,* Garbanati *v.* Beckwith, 2 Wyo. 213.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3690 *et seq.*; 3693 *et seq.*

As to necessity of record showing jurisdiction of the person see *supra,* XIII, A, 2, b, (III) [2 Cyc. 1034].

Grounds of a motion to quash service not appearing, the correctness of an order denying the motion will be presumed. Stephens *v.* Bradley, 24 Fla. 201, 3 So. 415.

In the absence of an exception to the overruling of a motion to quash return of service, acquiescence in the ruling will be presumed. Thompson *v.* Boggs, 8 W. Va. 63.

In summary proceedings, on notice and motion, the same presumptions as to jurisdictional facts are indulged as in the case of actions upon summons and complaint. Shouse *v.* Lawrence, 51 Ala. 559.

32. Showing of process must be presumed conclusive, in the absence of a showing to the contrary. Haworth *v.* Huling, 87 Ill. 23; Lynch *v.* Johnston, Hard. (Ky.) 372.

Facts held not to impeach showing of process.— The presence of only one summons, returnable to the first term, showing that some of defendants were not found, since there is a possibility of an *alias* summons at a subsequent term (Haworth *v.* Huling, 87 Ill. 23); and the same holding was made where the only summons in the record was defective (Turner *v.* Jenkins, 79 Ill. 228). The absence of a seal from the copy of the process in the record, the presumption being that the original was duly sealed. Bryan *v.* Spruell, 16 La. 313.

Facts held to impeach recital of process.— Presence in the record of a summons insufficient because returnable too soon. Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697. Presence in the record of a summons which is defective because not containing the names of some of defendants. Dickison *v.* Dickison, 124 Ill. 483, 16 N. E. 861. The apparent absence of a seal from the citation. Rutherford *v.* State Bank, 3 Ark. 558.

33. Recitals of personal service will be presumed correct in the absence of any showing to the contrary.

Alabama.— Godbold *v.* Meggison, 16 Ala. 140; Doswell *v.* Stewart, 11 Ala. 629.

California.— Riverside County *v.* Stockman, 124 Cal. 222, 56 Pac. 1027; Dowling *v.* Comerford, 99 Cal. 204, 33 Pac. 853.

Illinois.— Haworth *v.* Huling, 87 Ill. 23; Turner *v.* Jenkins, 79 Ill. 228; Augustine *v.* Doud, 1 Ill. Apn. 588.

Kansas.— Ornn *v.* Merchants Nat. Bank, 16 Kan. 341.

Kentucky.— McKay *v.* Mayes, 16 Ky. L. Rep. 862, 29 S. W. 327.

Pennsylvania.— Finch *v.* Lamberton, 62 Pa. St. 370.

See 3 Cent. Dig. tit. "Appeal and Error," § 3693 *et seq.*

Facts held not to impeach showing of personal service.— An indorsement of acknowlment of service by one defendant, dated prior to the time the officer received the notice for service on other defendants. Doswell *v.* Stewart, 11 Ala. 629. The absence of a date on the officer's return, the presumption being that the return was made before the hearing, and on time. Rivard *v.* Gardner, 39 Ill. 125; Shea *v.* Plains Tp., 7 Kulp (Pa.) 554. The presence of only one summons, where the record discloses that two were issued and served. O'Driscoll *v.* Soper, 19 Kan. 574. Service by the coroner after issuance of process to the sheriff, for it may be presumed that such service was made because of a vacancy or disability in the office of sheriff. Adamson *v.* Parker, 3 Ala. 727; Rodolph *v.* Mayer, 1 Wash. Terr. 133. Residence of one of defendants in another county, because he may have been found by the officer in the county in which service was made. Saunders *v.* Gilmer, 8 Tex. 295. The absence of the officer's signature on the copy of his return before the court, the presumption being that the original was duly signed. Rives *v.* Kumler, 27 Ill. 291.

A negative admission, in a motion to quash service, that the movant "was not served with summons on the amended and supplemental petition" has been held to be ground for the presumption that summons on the original petition was duly served. McKay *v.* Mayes, 16 Ky. L. Rep. 862, 29 S. W. 327.

In case of service upon agent, the agency of the person served will be presumed if not questioned; and, where the question has been determined in the trial court, in the absence of the evidence, the determination will be presumed correct. Farragut F. Ins. Co. *v.* Ford, 15 Tex. Civ. App. 70, 38 S. W. 638.

Setting out in the record of an insufficient service rebuts the presumption arising from a recital of service, since it may not be pre-

tion,[34] the waiver of process by a general appearance,[35] and any other fact necessary to invest the court with jurisdiction of the person[36] of all necessary

sumed that another sufficient service was made. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Botsford *v.* O'Conner, 57 Ill. 72, Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351. *Aliter,* where it appears that there were two summons, one of which has been lost or destroyed (O'Driscoll *v.* Soper, 19 Kan. 574) and *contra,* where the record was not complete (Blankenbeker *v.* Ennis, 78 Ill. App. 457; Spraker *v.* Ennis, 78 Ill. App. 446).

34. Record recitals from which due publication may be presumed.— That proper order of publication — appearing in the record — was published in a newspaper. Swift *v.* Stebbins, 4 Stew. & P. (Ala.) 447. That publication was made conformably to an order therefor, which order is shown in the record. Kyle *v.* Philips, 6 Baxt. (Tenn.) 43; Moore *v.* Holt, 10 Gratt. (Va.) 284. That requisite notice was given. Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405. That the court found proper publication of notice. McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597; Sloan *v.* Graham, 85 Ill. 26; Styles *v.* Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. 227.

The affidavit and order for publication not appearing in the record, their sufficiency cannot be reviewed, but will be presumed. Lyle *v.* Siler, 103 N. C. 261, 9 S. E. 491.

Facts held not to rebut presumption of publication.— The absence of an affidavit showing necessity for publication. Herd *v.* Cist, (Ky. 1889) 12 S. W. 466. Failure of affidavit for publication to state that it was made for plaintiff. Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571. Omission, in the order for publication, to state that affidavits afforded satisfactory evidence of necessity for publication. Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62, 2 Abb. Pr. N. S. (N. Y.) 47. Entry of the citation for publication against a firm on the docket in the firm-name. Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149.

But see Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117, wherein it was held that the presumption of due publication was rebutted, by a showing, in a record containing all the facts, of insufficient publication. *Compare* Styles *v.* Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. 227, to the effect that a recital: "Duly executed as to defendants," should not be presumed to apply to a defendant not included in the order of publication.

35. Statements held conclusive of a general appearance, in the absence of any showing to the contrary: Recital of appearance by attorney. Keith *v.* Cliatt, 59 Ala. 408; Catlin *v.* Gilders, 3 Ala. 536; Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Yaeger *v.* Henry, 39 Ill. App. 21; Potter *v.* Parsons, 14 Iowa 286; Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761; Yturri *v.* McLeod, 26 Tex. 84. Recital, in an order against a foreign corporation, of due service, and that the order was made after hearing counsel for defendant in opposition thereto. People *v.* American L. & T. Co., 17 N. Y. Suppl. 76, 43 N. Y. St. 332. Recital in the record that defendants demurred (Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664; Edwards *v.* Beall, 75 Ind. 401), or filed an answer (Sidwell *v.* Worthington, 8 Dana (Ky.) 74), or pleaded the statute of limitations (Shields *v.* Farmers' Bank, 5 W. Va. 259); but not merely a recital that defendant had leave to answer (Bailes *v.* State, 20 Tex. 498). Recital in the judgment that it was rendered in accordance with prayer and stipulation. Grete *v.* Knott, 2 Ida. 18, 3 Pac. 25.

See 3 Cent. Dig. tit. "Appeal and Error," § 3698.

Authority of attorney to enter appearance will be presumed until the contrary is shown. Stubbs *v.* Leavitt, 30 Ala. 352; *In re* Meade, (Cal. 1897) 49 Pac. 5; Potter *v.* Parsons, 14 Iowa 286; Byers *v.* Sugg, (Tenn. Ch. 1900) 57 S. W. 397.

The reasons for withdrawal of appearance by an attorney will, where the record upon the matter is silent, be presumed to have been allowed upon satisfactory evidence presented. Symmes *v.* Major, 21 Ind. 443.

Facts held not to impeach recitals of general appearance.— One of the defendants served by publication. Chester *v.* Walters, 30 Tex. 53. Two defendants represented by different attorneys, or one, only, being represented by attorney, the recital of appearance being general. Jennings *v.* Conn, 11 Iowa 542; Yturri *v.* McLeod, 26 Tex. 84.

Facts supplied by presumption to support an appearance.— That "Mrs. P. McMahon," who entered appearance, was identical with the McMahon against whom judgment was rendered without personal service. St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. 475.

Judgment by default for failure to appear, upon an insufficient summons, rebuts the presumption arising from a recital of appearance. Norblett *v.* Farwell, 38 Cal. 155.

Recital of appearance limited to parties served.— Where some of defendants were personally served and others were not, and the recital was merely that "the parties came by their attorneys," the recital was held to refer only to the parties served, and not to warrant a presumption that those who were not served appeared. Ladiga Saw-Mill Co. *v.* Smith, 78 Ala. 108. *Contra,* Shields *v.* Farmers' Bank, 5 W. Va. 259; Ely *v.* Tallman, 14 Wis. 28.

36. Other facts presumed in the absence of countervailing facts: That a suit was properly revived upon the death of a plaintiff or defendant. Godbold *v.* Meggison, 16 Ala. 140; Rundles *v.* Jones, 3 Ind. 35; Parshall *v.* Moody, 24 Iowa 314; Porter *v.* Sharpe, 16 Iowa 438; Kelley *v.* Stevens, 58 Kan. 569, 50 Pac. 595; Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81; Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548. That a guardian *ad litem* for minor defendants was duly appointed. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269;

parties; but such a presumption can never be indulged, when it affirmatively appears that the trial court did not have jurisdiction of the person of the parties.[37]

(B) *In Default Judgments.* On appeal from a judgment by default the distinction has been made that jurisdiction of the person of the defendant must affirmatively appear of record in the lower court in order to sustain the judgment of that court, and that, therefore, the presumption, upon an incomplete lower-court record, is that the lower court did not have such jurisdiction;[38] but this distinction has not been universally acknowledged,[39] and, even if it be acknowledged, it cannot avail an appellant or plaintiff in error unless it also appears that the entire record of the matter in the lower court is before the appellate court,[40]

Batchelder *v.* Baker, 79 Cal. 266, 21 Pac. 754; Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Williams *v.* Stratton, 10 Sm. & M. (Miss.) 418; Mason *v.* McLean, 6 Wash. 31, 32 Pac. 1006; Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548. That a party defendant, who is claimed to be a minor, was of full age. Kavalier *v.* Machula, 77 Iowa 121, 41 N. W. 590. That defendant resided within the jurisdiction of the court. Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Horner *v.* O'Laughlin, 29 Md. 465. That a defendant sued as guardian was such in fact. Clayton *v.* McKinnon, 54 Tex. 206.

37. A defect of parties must affirmatively appear, else it will be presumed that all necessary parties were before the court.

Alabama.— Pinney *v.* Werborn, 72 Ala. 58.

Minnesota.— Tune *v.* Sweeney, 34 Minn. 295, 25 N. W. 628.

Mississippi.— Henderson *v.* Guyot, 6 Sm. & M. (Miss.) 209.

Nevada.— Alford *v.* Dewin, 1 Nev. 207.

New Jersey.— Wood *v.* Fithian, 24 N. J. L. 838.

Virginia.— Thomas *v.* Dawson, 9 Gratt. (Va.) 531; Ball *v.* Johnson, 8 Gratt. (Va.) 281.

Consent to new party will be presumed where no objection appears, and the trial has proceeded upon issues raised by such party. Huntingdon, etc., R. Co. *v.* McGovern, 29 Pa. St. 78.

Facts not rebutting presumption as to necessary parties: The striking out of a party defendant, the grounds therefor not being shown. Odom *v.* Shackleford, 44 Ala. 331. Conveyance by plaintiff, pending suit, of the property for damages to which the judgment is rendered, the presumption being that subsequent proceedings were for the benefit of the grantee. Heilbron *v.* Land, etc., Co., 96 Cal. 7, 30 Pac. 802.

Facts rebutting presumption.— Where the record shows minor defendants, not represented by a proper guardian, the presumption of jurisdiction of the persons of all necessary parties is rebutted. Cavender *v.* Smith, 5 Iowa 157.

In the absence of proceedings material to an order granting or denying the substitution or addition of parties, the presumption follows that the order was right. Cockrill *v.* Clyma, 98 Cal. 123, 32 Pac. 888; Fairbanks *v.* Farwell, 141 Ill. 354, 30 N. E. 1056; Porter *v.* Sharpe, 16 Iowa 438; Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369.

Upon a bill admitting of different constructions, one of which shows a defect of parties and the other does not, the appellate court will presume that construction the correct one which supports the judgment below. Jennings *v.* Davis, 5 Dana (Ky.) 127.

38. *Arkansas.*— Rutherford *v.* State Bank, 3 Ark. 558.

California.— Schloss *v.* White, 16 Cal. 65.

Nevada.— Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351 [*overruling* Blasdel *v.* Kean, 8 Nev. 305].

Texas.—Nasworthy *v.* Draper, (Tex. Civ. App. 1894) 28 S. W. 564; Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697.

Wisconsin.— Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836.

Continuance not presumed.— Where the scire facias to revive a dormant judgment was not contained in the transcript of a judgment by default, and no continuance was shown and such judgment could not legally be entered on the first day of the term, it was held that the presumption of a continuance from a former term could not be indulged in support of the judgment. Hollis *v.* Herzberg, (Ala. 1901) 29 So. 582.

Record statements in judgments by default held insufficient.— Recital in the judgment entry that due service was made on defendant. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351; Nasworthy *v.* Draper, (Tex. Civ. App. 1894) 28 S. W. 564; Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697. Record of an order for continuance after a default was taken. Norblett *v.* Farwell, 38 Cal. 155.

39. Facts supplied by presumption in default judgments, in the absence of any showing to the contrary: That a vacancy occurred in the office of sheriff, so as to authorize a service by the coroner of process delivered to the sheriff. Adamson *v.* Parker, 3 Ala. 727. That sufficient proof of service was given at the time of entry of judgment, where the proof in the record was defective. Skillman *v.* Greenwood, 15 Minn. 102; Gemmell *v.* Rice, 13 Minn. 400. That the appearance of defendant was duly entered by the court upon a returned summons before default, as required by law. Horner *v.* O'Laughlin, 29 Md. 465.

40. In the absence of a bill of exceptions, containing the proof of publication upon which a default judgment was rendered, it has been held that sufficient proof thereof

and that thereupon jurisdiction of the lower court of the person of the defendant does not appear.[41]

c. Pleadings — (I) *Right of Action* — (A) *Capacity to Sue.* In the absence of an affirmative showing to the contrary, the plaintiffs in an action will be presumed to be invested with the legal capacity which they assume,[42] and in which the judgment is rendered,[43] and, also, where, in addition, special authority is requisite, that they have received such authority;[44] and all rulings based upon capacity or incapacity to sue will be presumed correct in the absence from the record of the grounds for such ruling, or in the absence of error apparent therefrom.[45]

(B) *Cause of Action.* Although, as a general rule, a cause of action in support of a judgment will not, on appeal, be presumed where it does not fairly

would be presumed to have been made. McBride *v.* Hartwell, 2 Kan. 410. So, also, where the affidavit of a third person as to the genuineness of defendant's signature to an acceptance of service was not before the court, it was presumed that the affidavit was made in open court. Norwood *v.* Riddle, 1 Ala. 195.

Showing, in an incomplete transcript, of default judgment held conclusive.— A finding that proof of publication was duly made. State *v.* Elgin, 11 Iowa 216. A recital of facts amounting to an appearance, though the transcript contained no process. Guy *v.* Winston, 1 Stew. (Ala.) 149.

41. Uncertainties held not fatal to jurisdiction in default judgments.— The name of the sheriff who executed the process appearing to be identical with that of one of defendants. Cumming *v.* Richards, 32 Ala. 459. Failure in the return to designate the person served as defendant, as in such case the court will not presume that there might have been other persons of the same name upon whom the summons might have been served. Long *v.* Gaines, 4 Bush (Ky.) 353.

42. Allegations of capacity presumed in the absence of denial.— That petitioners are aliens. Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731. That several plaintiffs have a joint interest in the cause, upon which a joint judgment is rendered. Anderson *v.* Rogers, 1 Bush (Ky.) 200; Wood *v.* Fithian, 24 N. J. L. 838. That plaintiff is a corporation. British American Land Co. *v.* Ames, 6 Metc. (Mass.) 391; Hunter *v.* William J. Lemp Brewing Co., (Tex. Civ. App. 1896) 46 S. W. 371. That plaintiff holds the office by virtue of which he sues. Paige *v.* Fazackerly, 36 Barb. (N. Y.) 392.

As to pleadings as part of record see *supra*, XIII, A, 3, b [2 Cyc. 1035].

Allegations of capacity, in the absence of the pleading, may be presumed to have been made. Long *v.* State, 17 Nebr. 60, 22 N. W. 120.

Facts presumed to sustain capacity.— That letters of administration with the will annexed which had been issued to plaintiff were so issued upon a renunciation of the trust by executors appointed in the will. Finch *v.* Houghton, 19 Wis. 149. That the widow of the father of infant plaintiffs, joined with them, was their mother and competent to maintain suit for them as guardian in socage. Bartholomew *v.* Lyon, 67 Barb. (N. Y.) 86.

Facts showing capacity presumed in the absence of objection in lower court: That a showing of right to sue as a poor person was sufficient. Hood *v.* Pearson, 67 Ind. 368. That plaintiff was a person of full age. Edwards *v.* Beall, 75 Ind. 401. That the insertion of the word "as," showing suit "as trustee," was made as a proper amendment before verdict. Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101; Smith *v.* Pinney, 86 Mich. 484, 49 N. W. 305. That the cause of action accrued to the plaintiff in his representative capacity. Baker *v.* Ormsby, 5 Ill. 325; Williams *v.* Williams, 1 Ind. 450.

Facts held not to rebut presumption of capacity: Action by a mother in behalf of her son for a right accruing to her, there being nothing to show that she had not relinquished her right in his favor. Abeles *v.* Bransfield, 19 Kan. 16. Expiration of the term of a temporary administrator, there being nothing to show that the appointment had not been continued. Williams *v.* Planters', etc., Nat. Bank, 91 Tex. 651, 45 S. W. 690.

Suit in a double or a doubtful capacity will be presumed to have proceeded upon that which will support the judgment, in the absence of objection in the lower court. Abeles *v.* Bransfield, 19 Kan. 16; Bisland *v.* Provosty, 14 La. Ann. 169; Stidle *v.* Twin City Council No. 121, Jr. O. U. A. M., 8 Pa. Super. Ct. 178, 42 Wkly. Notes Cas. (Pa.) 554.

That an objection to capacity was made may be presumed from the fact that a general demurrer was filed, presented, and overruled. Smith *v.* Chicago, etc., R. Co., 86 Iowa 202, 53 N. W. 128.

43. A judgment against plaintiffs, because of the exclusion of evidence showing a cause of action if plaintiff sued as husband and wife, will be supported by the presumption that plaintiffs sued in their individual capacity, nothing to the contrary appearing in the declaration, and although the caption of the bill of exceptions designates plaintiffs as husband and wife. Strickland *v.* Burns, 14 Ala. 511.

44. Baltimore *v.* Baltimore, etc., Turnpike Road, 80 Md. 535, 31 Atl. 420; McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41; Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249.

45. Hood *v.* Pearson, 67 Ind. 368.

appear upon an inspection of the record,[46] yet, where the objection is made for the first time in the appellate court,[47] every reasonable presumption as to uncertainties will be indulged in favor of a cause of action,[48] and, upon an incomplete record, the absent portion will, in support of the judgment, be presumed to show, if possible, a sufficient cause of action;[49] and the correctness of all rulings

46. **Failure to allege cause of action will not be supplied by presumption.**

California.— Wills *v.* Porter, (Cal. 1900) 61 Pac. 1109.

Indiana.— Beaird *v.* U. S., 5 Ind. 220.

Maryland.— Lester *v.* Hardesty, 29 Md. 50.

Washington.— Johnson *v.* Cook, (Wash. 1901) 64 Pac. 729.

Wisconsin.— Farrell *v.* Drees, 41 Wis. 186; Johnson *v.* Johnson, 4 Wis. 135.

Fact presumed to defeat cause of action, in the absence of contrary allegation: That plaintiff had knowledge of an alleged fraudulent transaction on the day following its occurrence. Wills *v.* Porter, (Cal. 1900) 61 Pac. 1109.

Recovery on a void contract cannot be presumed to have been supported by a right of *quantum meruit*, for labor under such contract, which was not pleaded. Clark *v.* Davidson, 53 Wis. 317, 10 N. W. 384.

47. **The recital of a ruling upon demurrer** raises the presumption that a demurrer was interposed, though none appears in the record. Commercial Electric Light, etc., Co. *v.* Tacoma, 17 Wash. 661, 50 Pac. 592.

48. **Doubtful or ambiguous pleadings,** which do not, upon a favorable construction, omit any fact essential to a cause of action, will, if possible, be resolved in favor of a cause of action which will support the judgment. Belmont Bank *v.* Durbin, 2 West. L. Month. 543.

Essential facts presumed, in the absence of objection in lower court: That an alleged date of a note, subsequent to date of notice to pay, is a clerical error. Raspadori *v.* Cresta, (Cal. 1900) 62 Pac. 218. That land, the subject of the action, was acquired by a bank in satisfaction of a prior debt, where the purchase would otherwise have been illegal. Litchfield *v.* Preston, 98 Va. 530, 37 S. E. 6.

Inferences from facts supplying alleged defects: That defendant in a divorce proceeding was a free person of color, where there was an allegation that complainant was such a person. Hansford *v.* Hansford, 10 Ala. 561. That a caption entitled as of a term subsequent to the judgment was a clerical misprision. Tunstall *v.* Donald, 15 Ala. 841. That a governor's certificate of a right to an office, shown "as filed," to obtain a mandamus, was filed by the applicant. Harwood *v.* Marshall, 10 Md. 451.

One good paragraph in a complaint will be presumed to be the one upon which the judgment is based, nothing to the contrary appearing. Deweese *v.* Hutton, 144 Ind. 114, 43 N. E. 13; Rochester *v.* Bowers, (Ind. App. 1899) 52 N. E. 814. *Aliter*, where it appears that a demurrer to an insufficient paragraph was overruled, and it was otherwise uncertain on which paragraph the verdict and judgment rested. Lake St. El. R. Co. *v.* Brooks, 90 Ill. App. 173; Cleveland, etc., R. Co. *v.* Voght, (Ind. App. 1901) 60 N. E. 797.

Similarly, a bad special count will not defeat a judgment where it may be presumed to have been justified under the common counts. Rowell *v.* Chandler, 83 Ill. 288.

Upon inconsistent causes of action, one of which supports the judgment, it will be presumed, in the absence of any showing to the contrary, that the others were abandoned. Davis *v.* Severance, 49 Minn. 528, 52 N. W. 140; Trimble *v.* Doty, 16 Ohio St. 118.

49. **Facts presumed upon incomplete record.**— That the action was in tort, conformably to the judgment (Allen *v.* Harper, 26 Ala. 686); otherwise where there was a plain misjoinder of counts (Creel *v.* Brown, 1 Rob. (Va.) 281). That an order was made permitting plaintiff to sue in replevin for a portion of his property which was sold, and thereafter to seek damages for the sold portion. Taub *v.* McClelland-Colt Commission Co., 10 Colo. App. 190, 51 Pac. 168. That a writ, omitted from the record, was not issued until the cause accrued, though the complaint was filed before. Charlestown School Tp. *v.* Hay, 74 Ind. 127.

In the absence of the pleading, a cause of action will be presumed, if the judgment is possible and admits of any cause of action.

Alabama.— Allen *v.* Harper, 26 Ala. 686.

Illinois.— Corrigan *v.* Reilly, 64 Ill. App. 531.

Kentucky.— Harvey *v.* Payne, 2 Metc. (Ky.) 451; Tucker *v.* Medsker, 5 Ky. L. Rep. 429.

Minnesota.— Davidson *v.* Farrell, 8 Minn. 258.

Nebraska.— Reynolds *v.* Reynolds, 10 Nebr. 574, 7 N. W. 322.

Pennsylvania.— Rundell *v.* Kalbfus, 125 Pa. St. 123, 17 Atl. 238.

Contra.— Murray *v.* Tardy, 19 Ala. 710; Waggoner *v.* Green, 40 Ill. App. 648.

A cause appearing to be barred, except for the existence of special facts, may be sustained by the presumption that such special facts were shown in evidence, where the evidence is not in the record.

Arkansas.— Hensley *v.* Moore, 9 Ark. 69.

Iowa.— Ward *v.* Cochran, 36 Iowa 432.

Kansas.—Otis *v.* Jenkins, McCahon (Kan.) 87.

Michigan.— Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893.

Mississippi.— French *v.* Davis, 38 Miss. 218.

Missouri.— Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555.

North Carolina.— Greer *v.* Herren, 99 N. C. 492, 6 S. E. 257.

Also, where the time of the institution of

touching the existence or sufficiency of the cause of action will be presumed until the contrary plainly appears, whether favorable to the cause of action[50] or adverse to it.[51]

(11) *Pleas and Defenses.* In the absence from the record of a special plea the presumption is that the trial proceeded upon the general issue,[52] or that

plaintiff's suit is doubtful, the cause will be presumed to be not barred. Hughes *v.* Libby, 41 Wis. 469.

An original petition, brought into an amendment by reference, will, when absent from the record, be presumed to contain every necessary allegation, though the amendment, which is set out, does not. Continental Ins. Co. *v.* Com., 6 Ky. L. Rep. 450.

Oral pleadings which have not been brought into the record must, if possible, be presumed to state a cause of action supporting the judgment. Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197; Merkin *v.* Gersh, 30 Misc. (N. Y.) 758, 63 N. Y. Suppl. 75; Grahosski *v.* Gewerz, 17 N. Y. Suppl. 528, 44 N. Y. St. 127; Crawford *v.* Sanders, (Tex. Civ. App. 1897) 38 S. W. 820. *Aliter,* where the record shows that a particular issue was not pleaded. Morris *v.* Long, (Tex. Civ. App. 1894) 26 S. W. 467.

Where different constructions are admissible upon an uncertain record, that will be presumed correct which finds a cause of action and supports the judgment. Evans *v.* Schafer, 88 Ind. 92.

Where one of two counts is missing, and the count set out is sufficient to support the judgment, and under which it appears that the evidence was admitted, it will be presumed, as against an objection that the evidence should have been admitted under both counts, that the missing count was withdrawn. Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Where the evidence, but not the declaration, is in the record, a sufficient cause of action will be presumed to have been stated in the pleading, if the evidence sustains any cause of action. Deane *v.* Michigan Stone Co., 69 Ill. App. 106; Corrigan *v.* Reilly, 64 Ill. App. 531; Crawford *v.* Sanders, (Tex. Civ. App. 1897) 36 S. W. 820.

50. **An order overruling a general demurrer** to the complaint will be sustained by every possible presumption. Lawrence Nat. Bank *v.* Kowalsky, 105 Cal. 41, 38 Pac. 517; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269.

In the absence of an original petition, the amendment thereto being in the record, an order overruling a demurrer to the latter was sustained, upon the presumption that the original and amendment, together, stated a cause of action. Huffaker *v.* National Bank, 13 Bush (Ky.) 644.

In the absence of one paragraph of a complaint, the overruling of a general demurrer will be presumed to have been correct. Dekalb Nat. Bank *v.* Nicely, (Ind. App. 1899) 55 N. E. 240.

No presumption that omitted original petition stated a different cause.— It has been held, on appeal from a judgment holding a cause of action barred by limitation, that it could not be presumed, in order to sustain the ruling, that the original pleading, which appears to have been filed before the running of the statute, stated a cause of action different from that stated in the amendment which was filed thereafter. Dwight *v.* Matthews, (Tex. 1901) 62 S. W. 1052 [*reversing* (Tex. Civ. App. 1901) 60 S. W. 805].

Where one of two inconsistent causes of action is sustained, and the other ignored by the trial court, it will, in the absence of the proceedings upon the trial, be presumed that plaintiff elected to proceed upon the cause of action which was sustained. Davis *v.* Severance, 49 Minn. 528, 52 N. W. 140.

51. **A special count must appear** in order to secure a review of a judgment against plaintiff, though the court is presumed to have knowledge of what the common counts in assumpsit contain. Evans *v.* Gould, 82 Ill. App. 151.

In the absence of the pleading, a ruling against cause of action is presumed correct. Winchel *v.* Sullivan, 48 Ind. 253.

Recital of ruling contrary to judgment.— In a suit on a note and for foreclosure of a mortgage, where the judgment recited that a demurrer to the petition was overruled and gave judgment for plaintiff only on the notes, it was presumed that the demurrer was sustained as to the foreclosure. Morrison *v.* Bean, 15 Tex. 267.

To defeat a ruling against a cause of action, the lack of essential averments cannot be supplied by presumption. Wilson *v.* Gaines, 103 U. S. 417, 26 L. ed. 401.

52. Polla *v.* Searcy, 84 Ala. 259, 4 So. 137; Hatchett *v.* Molton, 76 Ala. 410; Felger *v.* Etzell, 75 Ind. 417; Columbia *v.* Davis, 5 Blackf. (Ind.) 358. See 3 Cent. Dig. tit. "Appeal and Error," § 3701.

Plea special to original, and general to amended, complaint.— Where special pleas were filed to the original complaint, and issue was joined on an amendment thereto without showing any special plea to the latter, it was presumed that the trial proceeded upon the special pleas to the original complaint and the general issue to the amendment. Steed *v.* Knowles, 97 Ala. 573, 12 So. 75 [*following* Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222].

Presence of certain pleas in the record raises the presumption that there were no others. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Presumption of general issue may be rebutted by proceedings inconsistent therewith. Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219.

Trial upon a special plea not in the record

the defense which might thereby have been interposed was waived[53] or did not exist,[54] unless the judgment appears to be based upon the missing special plea or upon a special defense in a missing answer.[55] But, where the record is complete, the presumption does not relate to defenses which appear not to have been made;[56] and, where the court below has ruled upon the sufficiency or existence of a plea or defense, the correctness of the ruling will be presumed until the contrary is shown.[57] In the absence of an objection or ruling thereon in the

has been held to raise the presumption that the plea was formally made. Russell *v.* Wright, 98 Ala. 652, 13 So. 594.

53. Bliss *v.* Sneath, 119 Cal. 526, 51 Pac. 848.

Withdrawal of pleas upon which issue has been joined raises the presumption that, as to other pleas to which demurrers had been sustained, the intention was to stand on the sufficiency of the pleas not withdrawn. Hall *v.* Perkins, 5 Ill. 548.

54. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547.

55. Sufficient plea or answer presumed, where none appears, in order to sustain judgment, the record not showing that such plea or answer was not filed and considered.

Alabama.— Knight *v.* Bradley, 101 Ala. 517, 14 So. 406.

Indiana.— Holding *v.* Smith, 42 Ind. 536. *Contra,* Dart *v.* Lowe, 5 Ind. 131.

Iowa.— Budyman *v.* Viele, 3 Greene (Iowa) 297.

Kansas.— Buecher *v.* Casteen, 41 Kan. 141, 21 Pac. 112.

Kentucky.— *Contra,* Trotter *v.* Williamson, 6 T. B. Mon. (Ky.) 38.

Texas.— Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

Oral defenses, not in the record, will be presumed to contain everything necessary to the judgment. Leake *v.* Sutherland, 25 Ark. 219.

The plea least prejudicial to plaintiff will be presumed where the evidence might have been adduced under one of two or more pleas — for example, a plea of payment as against a set-off. Knight *v.* Bradley, 101 Ala. 517, 14 So. 406.

56. A complete record, showing certain defenses, raises the presumption that there were no others; wherefore it has been held that a finding on an issue not included therein must be ignored on appeal. Kemp Grocery Co. *v.* Sawyer, 11 Tex. Civ. App. 518, 33 S. W. 1031.

57. Facts presumed to support rulings in favor of defenses.— That a plea *puis darrein continuance* was filed upon a satisfactory showing or by consent, no affidavit appearing to show occurrence of facts, since the last continuance. Morrow *v.* Morrow, 3 Brev. (S. C.) 394. That no sufficient ground of demurrer was presented, in the absence of the overruled demurrer. Crowder *v.* Red Mountain Min. Co., (Ala. 1900) 29 So. 847. That an overruled demurrer, absent from the record, presented only the general ground as to insufficiency in substance. Langston *v.* Marks, 68 Ga. 435; Jones *v.* Lavender, 55 Ga. 228. That a plea or defense which was received was within time. Conrad *v.* Baldwin, 3 Iowa 207; Price *v.* Sinclair, 5 Sm. & M. (Miss.) 254; Maggort *v.* Hansbarger, 8 Leigh (Va.) 532. That an amended answer which was received over plaintiff's objection, but is not in the record, complied with the law. McNew *v.* Williams, 18 Ky. L. Rep. 364, 36 S. W. 687.

Facts presumed to sustain rulings against defenses or pleas.— That an omitted demurrer to a plea specified sufficient grounds for sustaining it. Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422. That an omitted court rule, as to the time of filing a plea, sustains a refusal to permit the plea. Kunkel *v.* Spooner, 9 Md. 462, 66 Am. Dec. 332; Wilder *v.* Stafford, 30 Vt. 399; Washington, etc., Steam Packet Co. *v.* Sickles, 19 Wall. (U. S.) 611, 22 L. ed. 203. That pleas which had been made were withdrawn, where the judgment recites that defendant "says nothing in bar or preclusion of plaintiff's claim." Dearing *v.* Smith, 4 Ala. 432. That a recital of a sustained demurrer, as having been interposed by defendant to his own plea, was a clerical mistake. Evans *v.* McMahan, 1 Ala. 45. That the dismissal of another action pending occurred after the sustaining of a plea on that ground, the time of the dismissal being uncertain. Rawson *v.* Guiberson, 6 Iowa 507. That an action was brought in time, where the record does not show when it was instituted, and a plea of limitation has been overruled. Marbourg *v.* McCormick, 23 Kan. 38; Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893. That a plea was received too late, as to which a motion of *ne recipiatur* has been granted. Spencer *v.* Patten, 84 Md. 414, 35 Atl. 1097. That defendant was accorded sufficient opportunity to plead further. Brassfield *v.* Burgess, 10 Ky. L. Rep. 660, 10 S. W. 122. That a trial of the plea of *nul tiel record* preceded the overruling thereof. Pomeroy *v.* State, 40 Ala. 63. But see Anderson *v.* Fisk, 36 Cal. 625, for facts not presumed to sustain rulings against defenses.

Facts not rebutting presumption of correct ruling against defense.— A memorandum of pleas found on file, where the ruling was that "the defendant failed to file his plea within the time prescribed by law." Crosby *v.* Lassiter, 4 Ala. 201. A record statement that an answer was filed, which, however, could not be found by the clerk after diligent search, a default having been entered for failure to answer. Wall *v.* Galvin, 80 Ind. 447. An answer filed on the same day that a default was made final. Blessey *v.* New Orleans Oil Factory, 13 La. Ann. 310. The absence from the record of a demurrer which is recited to have

trial court, every reasonable presumption as to the existence or sufficiency of a defense will be indulged in order to support the judgment.[58]

(III) *Replication.* A replication to, or denial of, a defense, when necessary, to sustain the judgment, will be presumed to have been made or waived unless the contrary affirmatively or clearly appears from a complete record,[59] and its presence in the record raises the presumption that it was properly filed and considered.[60]

(IV) *Rejoinder.* The existence of a rejoinder, and the sufficiency thereof to raise the issue upon which judgment is based, will be presumed unless the contrary clearly appears.[61]

been sustained. Barney *v.* Bush, 9 Ala. 345.

Erroneous ruling against defense will not be presumed to have been cured on the trial. On the contrary, the presumption will be that the theory upon which the ruling was made was consistently adhered to in the admission and exclusion of evidence, unless the reverse appears. Michalitschke *v.* Wells, 118 Cal. 683, 50 Pac. 847; Albany City F. Ins. Co. *v.* Keating, 46 Ill. 394; Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402.

Presumption that a plea was not filed.— Where the record showed that defendant filed "the following plea," setting it out, but it was not marked "Filed," nor was there any entry of the time it came in, nor any notice taken of it by the court or either party, it was presumed that the plea was placed among the papers by mistake or interpolation. Moore *v.* Stone, 5 Ark. 256.

Upon an incomplete record of the pleading, from which it cannot certainly be ascertained that a ruling upon a demurrer to a plea was incorrect, it will be presumed to be correct. Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Leath *v.* Wright, 2 How. (Miss.) 774.

Where it is uncertain which plea was demurred to, and there is a special plea, it will be presumed that a ruling sustaining the demurrer was directed to that plea, so that defendant might have the benefit of the general issue. Lamb *v.* Holmes, 60 Ill. 497.

58. Presumptions to sustain the judgment, in the absence of objection.— That an account, under a plea of the statute of limitation, was an open one, so as to bring it within the statute. Wright *v.* Preston, 55 Ala. 570. That a special plea was waived or abandoned, in case of a trial upon the general issue, or upon other pleas, without objection. Feagin *v.* Pearson, 42 Ala. 332; Evans *v.* Gordon, 8 Port. (Ala.) 142; Stewart *v.* Henry, 5 Blackf. (Ind.) 445; Saum *v.* Jones County, 1 Greene (Iowa) 165; Georgia Home Ins. Co. *v.* Jones, 49 Miss. 80; Roberts *v.* Haley, 2 How. (Miss.) 886; Jenn *v.* Spencer, 32 Tex. 657; Hall *v.* Stevens, 89 Wis. 447, 62 N. W. 81. That a plea of *nul tiel record* to a judgment had been waived where the judgment appears to have been read to the jury, without objection. Thompson *v.* Williams, 7 Sm. & M. (Miss.) 270. That an alleged agreement was in writing, or other circumstances existed taking it out of the statute of frauds. Smith *v.* Stevenson, 190 Pa. St. 48, 42 Atl. 380.

59. *Indiana.*— Jones *v.* Hathaway, 77 Ind. 14; Smith *v.* Johnson, 69 Ind. 55.

Iowa.— Bower *v.* Webber, 69 Iowa 286, 28 N. W. 600.

Kentucky.— Combs *v.* Combs, 19 Ky. L. Rep. 1449, 43 S. W. 697.

Missouri.— Thompson *v.* Wooldridge, 102 Mo. 505, 15 S. W. 76.

Nebraska.— Lewis Invest. Co. *v.* Boyd, 48 Nebr. 604, 67 N. W. 456.

New Jersey.— Whyte *v.* Arthur, 17 N. J. Eq. 521. *Aliter,* where it appeared from the testimony that the issue which would have been raised by a reply was not tried. Johnson *v.* Van Doren, 2 N. J. L. 351.

See 3 Cent. Dig. tit. "Appeal and Error," § 3699 *et seq.*

Amended answer presumed same as original.— Where, after reply, an amended answer was filed, and the record showed no reply to the amendment, and judgment for failure to reply had been denied because the reply served was a sufficient reply thereto, on appeal it was presumed, in the absence of the original answer and in order to sustain the ruling of the court below, that the amended answer was the same as the original. Lamberty *v.* Roberts, 10 N. Y. Suppl. 190, 31 N. Y. St. 936, 19 N. Y. Civ. Proc. 63.

An amendment of a replication may be presumed upon the same general rule of presumption which supplies a missing replication. Hammer *v.* Downing, (Oreg. 1901) 64 Pac. 651.

A portion only of the replication in the record, which portion does not contain a complete denial of an answer, does not rebut the presumption that there was a complete denial. Bower *v.* Webber, 69 Iowa 286, 28 N. W. 600.

Inference of waiver required unless issues are shown.— In Ames *v.* Parrott, (Nebr. 1901) 86 N. W. 503 [*following* Stewart *v.* American Exch. Bank, 54 Nebr. 461, 74 N. W. 865] it was held that, "to bring a case within the rule that no advantage may be taken in this court of failure to reply below, where trial was had on the theory that a reply had been filed, there must be something in the record from which an inference may be drawn that reply was waived, or from which this court may ascertain what issues were actually tried."

60. Rooker *v.* Wise, 14 Ind. 276; Tabler *v.* Anglo-American Assoc., 17 Ky. L. Rep. 815, 32 S. W. 602; Callison *v.* Autry, 4 Tex. 371.

61. Recital of general issue to replication. — Where the judgment entry recited that defendant pleaded the general issue to the replication, this was presumed to mean that

(v) *Intervention.* Though sufficient ground for intervention must affirmatively be shown in the petition to intervene to entitle an intervener to relief, the existence of such right will be presumed upon failure to appeal from an order allowing it,[62] and the existence of such order will be inferred from the absence of objection to the intervention proceedings.[63]

(vi) *Form and Filing of Pleadings.* All rulings appertaining to the form or filing of the pleadings will be presumed correct unless excepted to,[64] and the pleading in question and the ruling thereon, as well as the grounds of the ruling, embodied in the record;[65] and, when exception has been duly taken, and the pleading and ruling, and grounds of the ruling, are before the appellate court, every reasonable inference will be drawn and every reasonable presumption indulged in support of the ruling.[66] Also, in the absence of objection, proper

he rejoined to the replication generally, where justice seemed to require it, and the evidence justified the presumption. Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820. And where a defendant omitted to join issue upon a replication to his special plea after his demurrer to the replication had been overruled, and the record only recited that "thereupon said cause came on to be heard upon the general issue of not guilty," it was presumed that he rested upon his demurrer. Hays *v.* Roberts, 23 Ark. 193.

62. Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325.

63. Virgin *v.* Brubaker, 4 Nev. 31.

64. Hawley *v.* Kocher, 123 Cal. 77, 55 Pac. 696.

Consent to a ruling will be presumed, if no objection is made, where the state of the pleadings permits the ruling only upon consent of the parties. McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 813, 62 Pac. 12.

Opportunity to except.— In the absence of anything to the contrary in the record, it will be presumed that complainant's counsel was present in court upon the granting of a motion to withdraw answer and file demurrer. Saunders *v.* Savage, (Tenn. Ch. 1900) 63 S. W. 218.

65. In the absence from the record of a demurrer, and the pleading to which it is interposed is demurrable, it will be presumed that sufficient grounds were stated in the demurrer if it has been sustained — otherwise if it has been overruled. Merritt *v.* Flemming, 42 Ala. 234; Harrison *v.* Nolin, 41 Ala. 256; Whitten *v.* Graves, 40 Ala. 578; Newsom *v.* Huey, 36 Ala. 37; Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; Burdge *v.* Lewis, 43 Ind. 349.

In the absence of a joinder upon demurrer, it will be presumed that such joinder was made or waived, in view of a judgment on the demurrer. Davies *v.* Gibson, 2 Ark. 115; Wilcox *v.* Woods, 4 Ill. 51.

In the absence of specifications of defects relied on to support a demurrer, it will be presumed that the demurrer was rightly overruled. Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686.

In the absence of a stricken pleading, it must be presumed that it was properly struck out. Knowlton *v.* Dolan, 151 Ind. 79, 51 N. E. 97. So, where a portion of pleading was struck out, and the remainder was not in the record, it was presumed that the stricken portion was redundant, from which the remainder required no aid. Minnesota Thresher Mfg. Co. *v.* Schaack, 9 S. D. 184, 68 N. W. 287.

In the absence of the court rules, referred to as grounds of an order sustaining a motion to strike out, it will be presumed that they support the ruling. Holloway *v.* Freeman, 22 Ill. 197; Kimkel *v.* Spooner, 9 Md. 462, 66 Am. Dec. 332.

Omission of a former pleading from the record renders conclusive the presumption that the overruling of a motion to cause a pleading to comply with such former pleading was correct. Krebbs *v.* Holway, 58 Nebr. 65, 78 N. W. 397.

The existence of an erroneous ruling cannot be presumed from a recital thereof in a motion ostensibly made in view of such ruling — for example, a motion to amend by specially pleading the statute of frauds upon the recited ground that the court had held such special plea necessary. American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360, 11 So. 488.

66. A ruling in general terms, upon several grounds, will be presumed to have been based upon any of the grounds which sufficiently support it, and upon such grounds only. McDonald *v.* Pearson, 114 Ala. 630, 21 So. 534; Baker *v.* Graves, 101 Ala. 247, 13 So. 275; Stone *v.* Watson, 37 Ala. 279; Lake St. El. R. Co. *v.* Brooks, 90 Ill. App. 173; Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396; Howe *v.* Elwell, 57 N. Y. App. Div. 357, 67 N. Y. Suppl. 1108.

A ruling upon insufficient grounds will, nevertheless, be presumed correct where other and sufficient grounds are specified by the objecting party. People *v.* Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90.

Facts presumed in support of ruling.—That a party other than defendant, who signed a stricken-out plea without indicating that he signed as attorney for defendant, was not such attorney. Bellows *v.* Cheek, 20 Ark. 424. That a count on a contract and a count for work and labor were not for the same cause of action, in justification of a refusal to strike out the latter. Bates *v.* Dehaven, 10 Ind. 319.

Facts not presumed in support of ruling.— That a sustained demurrer was addressed to

amendments which appear will be presumed to have been duly allowed[67] and filed,[68] even where the amendment appears only by implication,[69] and it will also

some other than a plainly specified paragraph which is clearly not demurrable. Eagle Mach. Works *v.* Arens, 123 Ind. 233, 24 N. E. 234. That there existed grounds for striking out a plea or answer other than appear from a complete record. Farish *v.* Jones, 23 Ark. 323; Garnhart *v.* U. S., 16 Wall. (U. S.) 162, 21 L. ed. 275. That the opposing party was present in court when a motion to substitute pleadings was made, so as to dispense with notice of the motion. Murray *v.* Tardy, 19 Ala. 710 [*overruling* Wilkerson *v.* Branham, 5 Ala. 608].

Where it is uncertain whether a demurrer is general or special, and an order overruling it would have been wrong if special, it will be presumed to have been general. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Where it is uncertain which of several demurrers was overruled, it appearing that one only was overruled, it will be presumed to have been one which is untenable. Blinks *v.* State, 48 Ind. 172. Conversely, where it is uncertain which of several demurrers was sustained, it will be presumed to have been the one as to which the pleading is insufficient. Troxel *v.* Thomas, 155 Ind. 519, 58 N. E. 725.

Where the time of a ruling on demurrer is doubtful and the ruling would have been wrong if made after an amendment, it will be presumed to have been made before the amendment. Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95.

67. Proper amendments presumed to have been duly allowed in the absence of objection.

Illinois.— Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741.

Indiana.— Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163; Figart *v.* Halderman, 75 Ind. 564; Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610.

Iowa.— Giddings *v.* Giddings, 57 Iowa 297, 10 N. W. 673.

Kansas.— Denver, etc., R. Co. *v.* Cowgill, 44 Kan. 325, 24 Pac. 475.

Michigan.— Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101; Smith *v.* Pinney, 86 Mich. 484, 49 N. W. 305.

Missouri.— Leavenworth Terminal R., etc., Co. *v.* Atchison, 137 Mo. 218, 37 S. W. 913.

Nebraska.— Johnson *v.* Missouri Pac. R. Co., 18 Nebr. 690, 26 N. W. 347.

North Carolina.— Monger *v.* Kelly, 115 N. C. 294, 20 S. E. 374.

Pennsylvania.— Goodman *v.* Gay, 15 Pa. St. 188, 53 Am. Dec. 589; Eyster *v.* Rineman, 11 Pa. St. 147.

Rhode Island.— Matteson *v.* Whaley, 19 R. I. 648, 35 Atl. 962.

United States.— Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10.

Aliter, where the contrary presumption is necessary in order to support a ruling on demurrer. Bentley *v.* Dickson, 1 Ark. 165.

Presumption of allowance of amendment is rebutted by an affidavit of the clerk that he has searched the records and docket-entries pertaining to the action and has found no such order, nor any record thereof (Orton *v.* Noonan, 31 Wis. 90); by the fact that the judgment corresponded to the prayer of the original, and not with the prayer of the amendment (Pridgin *v.* Strickland, 8 Tex. 427, 58 Am. Dec. 124).

68. Smith *v.* Robinson, 11 Ala. 270.

Amendments as to matter of form merely, properly allowable of course in the trial court, will be presumed to have been made so as to entitle the parties to the benefit thereof, no injustice being thereby done to the adverse parties.

Alabama.— Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216; Alabama Conf. M. E. Church South *v.* Price, 42 Ala. 39; Galliard *v.* Dubose, 34 Ala. 207.

Arkansas.— Dorris *v.* Grace, 24 Ark. 326.

Florida.— Campbell *v.* Chaffee, 6 Fla. 724.

Indiana.— Decatur *v.* Grand Rapids, etc., R. Co., 146 Ind. 577, 45 N. E. 793; Kohli *v.* Hall, 141 Ind. 411, 40 N. E. 1060; Waltz *v.* Waltz, 84 Ind. 403; Niblack *v.* Goodman, 67 Ind. 174.

Kansas.— Capitol Ins. Co. *v.* Pleasanton Bank, 48 Kan. 397, 29 Pac. 578; Carnahan *v.* Lloyd, 4 Kan. App. 605, 46 Pac. 323.

Montana.—Nyhart *v.* Pennington, 20 Mont. 158, 50 Pac. 413.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572; Lomerson *v.* Hoffman, 24 N. J. L. 674.

New York.— Douai *v.* Lutjens, 21 N. Y. App. Div. 254, 47 N. Y. Suppl. 659; Rifenburg *v.* Ham, 60 N. Y. Suppl. 124.

Oklahoma.— Carson *v.* Butt, 4 Okla. 133, 46 Pac. 596.

Pennsylvania.— Natalie Anthracite Coal Co. *v.* Ryon, 188 Pa. St. 138, 43 Wkly. Notes Cas. (Pa.) 265, 41 Atl. 462; Harley *v.* Lebanon Mut. Ins. Co., 120 Pa. St. 182, 13 Atl. 833.

South Dakota.— But see Seiberling *v.* Mortinson, 10 S. D. 644, 75 N. W. 202.

Washington.—Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244; Ward *v.* Moorey, 1 Wash. Terr. 104.

Wisconsin.— Murray *v.* Scribner, 74 Wis. 602, 43 N. W. 549; Weston *v.* McMillan, 42 Wis. 567.

United States.— Columbus Constr. Co. *v.* Crane Co., 98 Fed. 946, 40 C. C. A. 35.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3621, 3622, 3710 *et seq.*

69. Amendment by implication presumed from proceedings inconsistent with the contrary.

Alabama.— Masterson *v.* Matthews, 60 Ala. 260; Campbell *v.* Gullatt, 43 Ala. 57.

Georgia.— Brunswick Grocery Co. *v.* Spencer, 97 Ga. 764, 25 S. E. 764.

Indiana.—First Presb. Church *v.* Lafayette, 42 Ind. 115.

Kansas.— Kellogg *v.* Douglas County Bank,

be presumed that the court has not exceeded its discretion in allowing amendments,[70] or in disallowing them.[71] In the absence of a ruling upon the form or existence of a pleading, subsequent proceedings thereon as if it existed and was sufficient raises a corresponding presumption in its favor,[72] the presumption, how-

58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596; Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Minnesota.— Coons *v.* Lemieu, 58 Minn. 99, 59 N. W. 977.

New York.— Maders *v.* Whallon, 74 Hun (N. Y.) 372, 26 N. Y. Suppl. 614, 56 N. Y. St. 327.

South Dakota.— Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Virginia.— *Contra*, Creel *v.* Brown, 1 Rob. (Va.) 281.

In order to reverse a judgment, an amendment will not be presumed where the judgment is based upon the failure to allege facts which are sought to be supplied by presuming an amendment. Johnson *v.* Cook, (Wash. 1901) 64 Pac. 729.

Upon a complete record, there being nothing to show an amendment, such amendment cannot be presumed to have been made. Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936.

70. *Alabama.*—Berney Nat. Bank *v.* Guyon, 111 Ala. 491, 20 So. 520.

Massachusetts.— Rich *v.* Jones, 9 Cush. (Mass.) 329.

Nebraska.— Singer Mfg. Co. *v.* Doggett, 16 Nebr. 609, 21 N. W. 468.

New Hampshire.—Farr *v.* Wheeler, 20 N. H. 569.

North Carolina.— Patterson *v.* Wadsworth, 94 N. C. 538.

Oregon.— Robinson *v.* Carlon, 34 Oreg. 319, 55 Pac. 959.

Pennsylvania.— Election Cases, 65 Pa. St. 20; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488.

Allowing amendment to original, after striking out amendment, may, where no order striking out the original was made, be sustained upon the presumption that the original was allowed to remain on file for the purposes of the trial. Ligare *v.* Chicago, 168 Ill. 151, 48 N. E. 391.

An amendment after evidence will be presumed to have been allowed in furtherance of justice, in the absence of an affirmative showing by the objecting party that he was thereby misled or prejudiced. Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541. In such case it will also be presumed that the facts were fully litigated, and that there was no necessity of opening the case for further evidence. Dougan *v.* Turner, 51 Minn. 330, 53 N. W. 650.

A notice of an amendment which should have been given to the opposing party was presumed to have been given, in the absence of a clear showing to the contrary in the record of the lower court, though the writ of error contained a statement that no notice was given. Prior *v.* Wilbur, 63 Vt. 407, 22 Atl. 74.

71. Proper disallowance of amendments presumed, in the absence of any showing to the contrary. Thompson *v.* Young, 90 Md. 72, 44 Atl. 1037; Timmons *v.* Chouteau, 13 Mo. 223; Washington Bank *v.* Horn, (Wash. 1901) 64 Pac. 534.

Presumption that time allowed to amend was sufficient.— In view of statutes allowing no delay for amendments as to matter of form, and requiring an allowance of ten days for amendments as to matter of substance, and in the absence of the original pleading, an order allowing three days to amend was presumed to have properly contemplated an amendment as to form only. Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589.

An application to amend will not be presumed, where the record is silent on the subject, for the purpose of finding error in the disallowance of an amendment. State *v.* Winter, 148 Ind. 177, 47 N. E. 462; Birlant *v.* Cleckley, 48 S. C. 298, 26 S. E. 600.

72. Facts presumed from subsequent proceedings to support a pleading.— That a petition for a temporary injunction was sworn to, there being nothing to show whether the injunction was issued upon the original petition, which was sworn to, or upon the amended petition, which was not sworn to. Johnson *v.* Daniel, (Tex. Civ. App. 1901) 63 S. W. 1032. That the objection that several causes of action were improperly united was not sustained, it being uncertain upon what ground a demurrer was sustained, trial having subsequently proceeded upon the causes in question. State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574. That a withdrawn demurrer was withdrawn before submission of the case to the jury. Robinson *v.* Francis, 7 How. (Miss.) 458. That the signature to a pleading is genuine. Lester *v.* Watkins, 41 Miss. 647; Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393. That a demurrer, appearing as not acted on, was withdrawn or abandoned, or avoided by amendment, or overruled without objection, or properly overruled.

Alabama.— Mouton *v.* Louisville, etc., R. Co., (Ala. 1900) 29 So. 602; Birmingham R., etc., Co. *v.* Baker, 126 Ala. 135, 28 So. 87; Alabama Nat. Bank *v.* Hunt, 125 Ala. 512, 28 So. 488; Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

Arizona.— U. S. *v.* Barnard, 1 Ariz. 319, 25 Pac. 523.

Arkansas.— Davies *v.* Gibson, 2 Ark. 115.

California.— Hoeft *v.* Supreme Lodge, K. of H., 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; Moran *v.* Abbey, 58 Cal. 163.

Idaho.— U. S. *v.* Alexander, 2 Ida. 354, 17 Pac. 746; Guthrie *v.* Phelan, 2 Ida. 89, 6 Pac. 107.

Indiana.— Indianapolis, etc., R. Co. *v.* McAhren, 12 Ind. 552; Indianapolis, etc., R. Co. *v.* Paramore, 12 Ind. 406.

Iowa.— Sigler *v.* Woods, 1 Iowa 177.

Kentucky.— Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326.

Mississippi.— Shirley *v.* Fearne, 33 Miss.

ever, being unfavorable, where subsequent proceedings assume such pleading to be absent or insufficient.[73]

d. Trial—(I) *Preliminaries to the Trial.* It will be presumed, on appeal, that all necessary proceedings preliminary to the trial were had until, upon a complete record thereof, the contrary appears;[74] and it is also presumed

653, 69 Am. Dec. 375; Field *v.* Weir, 28 Miss. 56.

Missouri.— Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130; Sweeney *v.* Willing, 6 Mo. 174.

South Dakota.— Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Tennessee.— Blackmore *v.* Phill, 7 Yerg. (Tenn.) 451.

Texas.— Chambers *v.* Miller, 9 Tex. 236; Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953; International, etc., R. Co. *v.* Ritchie, (Tex. Civ. App. 1894) 26 S. W. 840.

Utah.— Evans *v.* Jones, 10 Utah 182, 37 Pac. 262.

Virginia.—Matthews *v.* Jenkins, 80 Va. 463.

West Virginia.—Bantz *v.* Basnett, 12 W. Va. 772.

United States.— Basey *v.* Gallagher, 20 Wall. (U. S.) 670, 22 L. ed. 452; Townsend *v.* Jemison, 7 How. (U. S.) 706, 12 L. ed. 880.

Contra, where it appears that the demurrer could not, in any view of the law, have been rightly overruled. Creel *v.* Brown, 1 Rob. (Va.) 281.

See 3 Cent. Dig. tit. "Appeal and Error," § 3699 *et seq.*

Defects curable by evidence after verdict will be presumed to have been supplied by proof or waived, in the absence of objection, or the contrary appearing from the evidence.

Alabama.— McElhaney *v.* Gilleland, 30 Ala. 183.

Arkansas.— Hershy *v.* Baer, 45 Ark. 240.

Indiana.— Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936; Brown *v.* Searle, 104 Ind. 218, 3 N. E. 871.

Kansas.— Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Michigan.— Stange *v.* Clemens, 17 Mich. 402.

Minnesota.— Daniels *v.* Winslow, 2 Minn. 113.

Missouri.— Benham *v.* Banker-Edwards Bldg. Co., 60 Mo. App. 34.

Montana.— Hershfield *v.* Aiken, 3 Mont. 442.

South Dakota.— Lindsay *v.* Pettigrew, 6 S. D. 130, 60 N. W. 744.

United States.—Stockton *v.* Bishop, 4 How. (U. S.) 155, 11 L. ed. 918.

Presumption of defects cured by verdict is rebutted by a motion for nonsuit on account of the defects. Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97. By a failure of a complete record of the evidence to show that the defect could have been supplied. Anderson *v.* Hulme, 5 Mont. 295, 5 Pac. 865. By a failure to state a cause of action, in which case it cannot be presumed that other facts, constituting a cause of action, were proved. Farrell *v.* Drees, 41 Wis. 186.

Pleadings found in the record, not signed by counsel or indorsed as filed, will, in the absence of others, be presumed to have been the pleadings which formed the basis of the proceedings. Letondal *v.* Huguenin, 26 Ala. 552; Reid *v.* Nash, 23 Ala. 733.

Upon an apparently complete record, it has been held that the existence of a pleading, necessary to the judgment and which does not appear, should not be presumed. Waggoner *v.* Green, 40 Ill. App. 648.

73. Facts presumed, from subsequent proceedings, to defeat a pleading.— That a demurrer to a plea was sustained without objection, judgment having been given for plaintiff. Harrison *v.* Martinsville, etc., R. Co., 16 Ind. 505, 79 Am. Dec. 447; Botts *v.* Fitzpatrick, 5 B. Mon. (Ky.) 397. That some of the counts of an answer were struck out, demurrer having been sustained to others and judgment having been given for plaintiff. Union Dist. Tp. *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39. That an original petition was properly disposed of as insufficient, either upon demurrer or motion to strike out, two amendments thereto having been adjudged insufficient. State *v.* Pohlman, 60 Mo. App. 444.

74. Preliminary proceedings presumed, upon incomplete record, to have occurred.— That the proper pleadings were on file when the issue was joined. Wynne *v.* Whisenant, 37 Ala. 46; Wade *v.* Killough, 3 Stew. & P. (Ala.) 431; Citizens Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820; Henderson *v.* Alderson, 7 W. Va. 217. *Compare* Murray *v.* Tardy, 19 Ala. 710; and, *contra*, Dart *v.* Lowe, 5 Ind. 131. That an injunction staying the proceedings had been dissolved. James *v.* Tait, 8 Port. (Ala.) 476. That a previous reference of the cause had been vacated. Cooke *v.* Williamson, 11 Ind. 242; Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119. That a court rule, requiring service of a copy of the petition with the process, had been observed. Smith *v.* Harrington, 89 Iowa 603, 57 N. W. 413; Knapp *v.* Haight, 23 Iowa 75. That a rule to plead was given. Melchior *v.* Ralston, 2 Yeates (Pa.) 154. That a cause, properly triable at the term at which it was heard, was duly entered on the trial docket. Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60. That an affidavit of inability to pay jury-fees was filed. Neeper *v.* Irons, 3 Tex. App. Civ. Cas. § 180. That an issue, appearing to have been made up, was an issue on the merits of the case. Phillips *v.* Kelly, 29 Ala. 628; Pryor *v.* Beck, 21 Ala. 393; Smith *v.* Branch Bank, 5 Ala. 26; Levi *v.* McCraney, Morr. (Iowa) 91.

that the determination of such proceedings was right, until substantial error is affirmatively shown.[75]

(II) *Interlocutory and Ancillary Orders.* In the absence of a clear showing to the contrary all interlocutory or ancillary orders will be presumed by the appellate court to be correct — such as orders relating to attachments,[76] garnishments,[77] injunctions,[78] arrests,[79] receiverships,[80] depositions,[81] continuances,[82]

That an issue, the character of which is not shown, was the general issue. Columbia *v.* Davis, 5 Blackf. (Ind.) 358; Southern R. Co. *v.* Rhodes, 86 Fed. 422, 58 U. S. App. 349, 30 C. C. A. 157. That defendants who did not join issue were defaulted. U. S. *v.* Barnard, 1 Ariz. 319, 25 Pac. 523. That issue was properly joined as to all of the parties to the judgment. Berney Nat. Bank *v.* Guyon, 111 Ala. 491, 20 So. 520; Bettis *v.* Saint, 28 Ala. 214; Eastland *v.* Sparks, 22 Ala. 607; Lucas *v.* Hitchcock, 2 Ala. 287; Castleberry *v.* Pearce, 2 Stew. & P. (Ala.) 141; Bardin *v.* L'Engle, 13 Fla. 571; Trentman *v.* Eldridge, 98 Ind. 525; Combs *v.* Combs, (Ky. 1897) 43 S. W. 697; Carn *v.* Fillman, 10 Wkly. Notes Cas. (Pa.) 152; Swearingen *v.* Wilson, 2 Tex. Civ. App. 157, 21 S. W. 74.

Facts presumed from proceedings inconsistent with the contrary.— That a ruling sustaining a demurrer was waived or the demurrer withdrawn, by going to trial without amendment and without objection. Betts *v.* Betts, 18 Ala. 787. That a dismissal for failure to amend was vacated by the court or by agreement, where the trial was had without objection. Hill *v.* Road Dist. No. 6, 10 Ohio St. 621. That a demurrer was disposed of before trial, or waived, where trial is had without objection. U. S. *v.* Barnard, 1 Ariz. 319, 25 Pac. 523; Southern R. Co. *v.* Rhodes, 86 Fed. 422, 58 U. S. App. 349, 30 C. C. A. 157.

Waiver of ruling on demurrer not presumed. — See Kirksey *v.* Dubose, 19 Ala. 43.

75. A stay of proceedings will be presumed to have been invalid or non-existent where a motion to strike from the docket on that ground was overruled, and no order of stay appears in the record. Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

Examination of defendant before trial.— Where a defendant refused to appear and submit to examination before trial, under Ind. Rev. Stat. (1894), § 517 *et seq.*, and, in response to a motion to strike out his pleadings therefor, filed an affidavit which was not in the record on appeal, it was presumed that the motion to strike was properly overruled. Working *v.* Garn, 148 Ind. 546, 47 N. E. 951.

76. Attachments.— Granting an attachment (Goddard *v.* Cunningham, 6 Iowa 400; Hill *v.* Knickerbocker Electric Light, etc., Co., 14 N. Y. Suppl. 517, 38 N. Y. St. 417, 21 N. Y. Civ. Proc. 141); revoking an order of attachment (State *v.* Dixon, 47 La. Ann. 1, 16 So. 589); discharging or quashing an attachment (Solomon *v.* Saly, 6 Colo. App. 170, 40 Pac. 150; Ballance *v.* Samuel, 4 Ill. 380; Harper *v.* Bell, 2 Bibb (Ky.) 221; Shewell *v.* Stone, 12 Mart. (La.) 386; Cobb *v.* O'Neal, 1 How. (Miss.) 581; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862). See 3 Cent. Dig. tit. "Appeal and Error," § 3718.

77. Garnishments.—Discharging a garnishment. Marriott *v.* Lewis, 25 Ala. 332; Price *v.* Thomason, 11 Ala. 875; Goodwin *v.* Brooks, 6 Ala. 836. See 3 Cent. Dig. tit. "Appeal and Error," § 3719.

78. Injunctions.— Granting an injunction (Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78; Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555; Patterson *v.* Stair, 26 Ind. 137; State *v.* Eggleston, 34 Kan. 714, 10 Pac. 3; Detroit, etc., Plank Road Co. *v.* Detroit Citizens' St. R. Co., 97 Mich. 583, 56 N. W. 940); granting a temporary injunction without notice (Seneff *v.* Olivet Baptist Church, 89 Ill. App. 352); refusing to grant an injunction (Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455); refusing to dissolve an injunction (Farni *v.* Tesson, 51 Ill. 393; Way *v.* Lamb, 15 Iowa 79). See 3 Cent. Dig. tit. "Appeal and Error," § 3717.

79. Arrests.— Granting an order of court (*Ex p.* Sargeant, 17 Vt. 425); refusing to vacate an order of arrest (Moers *v.* Morro, 29 Barb. (N. Y.) 361, 17 How. Pr. (N. Y.) 280; Moers *v.* Martens, 8 Abb. Pr. (N. Y.) 257; Bauer *v.* Schevitch, 11 N. Y. Civ. Proc. 433; Reynolds *v.* Conway, 61 Vt. 313, 17 Atl. 842). See 3 Cent. Dig. tit. "Appeal and Error," § 3720.

80. Receiverships.— Appointing a receiver (Gathright *v.* Oil City Land, etc., Co., 21 Ky. L. Rep. 1657, 56 S. W. 163; Pearson *v.* Kendrick, 74 Miss. 235, 21 So. 37; Fleming *v.* Carson, 37 Oreg. 252, 62 Pac. 374); refusing to vacate a receivership (Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706).

81. Suppressing a deposition.— Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433; Reese *v.* Beck, 9 Ind. 238; McCormick *v.* Largey, 1 Mont. 158; Fleming *v.* Beck, 48 Pa. St. 309.

Refusing to suppress a deposition.—*Arkansas.*— Trapnall *v.* State Bank, 18 Ark. 53.

Indiana.— Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Hussey *v.* McGilpin, 4 Ind. 593.

Iowa.— Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Steel *v.* Miller, 40 Iowa 402.

South Dakota.— Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

Texas.— Fant *v.* Andrews, (Tex. Civ. App. 1898) 46 S. W. 909; Garlington *v.* McIntosh, (Tex. Civ. App. 1895) 33 S. W. 389; Garner *v.* Cutler, 28 Tex. 175.

See 3 Cent. Dig. tit. "Appeal and Error," § 3721.

82. Continuances.— Setting aside a continuance (Amory *v.* Reilly, 9 Ind. 490); refusing to grant a continuance (Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971; Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Steel *v.* McCutchen, 5 Mo. 522; Texas

and other like orders;[83] also, that the hearing upon which such an order was made was regular and upon sufficient notice to the complaining party.[84]

(III) *TRIAL BY REFEREE.* Upon a doubtful or incomplete record every reasonable presumption is in favor of the regularity of a trial, conducted by a referee and confirmed by the court, as to such referee's authority,[85] qualification,[86] conduct of the proceeding,[87] and report thereon.[88] Also, the correctness of a ref-

Midland R. Co. *v.* Crowder, (Tex. Civ. App. 1901) 64 S. W. 90; International, etc., R. Co. *v.* Newburn, (Tex. 1901) 60 S. W. 429 [*affirming* (Tex. Civ. App. 1900) 58 S. W. 542]; Galveston, etc., R. Co. *v.* Henning, 90 Tex. 656, 40 S. W. 392 [*affirming* (Tex. Civ. App. 1897) 39 S. W. 302]; McMahan *v.* Busby, 29 Tex. 191; Baker *v.* Kellogg, 16 Tex. 117).

83. Miscellaneous orders.—Striking a cause from the calendar (Carr *v.* Thomas, 34 Ind. 292); ordering a substitution of lost records (McElwee *v.* People, 77 Ill. 493); requiring security for costs (Farnsworth *v.* Agnew, 27 Ill. 42; Wagoner *v.* Busey, 75 Mo. App. 377); giving damages for frivolous demurrer (Frankfort Bank *v.* Countryman, 11 Wis. 398); issuing warrant for seizure under landlord's lien (Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98); refusing to dismiss for failure to give cost bond (Hickey *v.* Smith, 6 Ark. 456); appointment of a court reporter (Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894); ordering sheriff, holding attached property, to pay labor-claims (Rauer *v.* Silva, 128 Cal. 42, 60 Pac. 525).

See 3 Cent. Dig. tit. "Appeal and Error," § 3714 *et seq.*

84. Sufficient notice and regularity presumed.— Where the record is in doubt, or silent. Prestwood *v.* Tillis, 96 Ala. 181, 11 So. 283; Huellmantel *v.* Huellmantel, 124 Cal. 583, 57 Pac. 582; Kehm *v.* Mott, 187 Ill. 519, 58 N. E. 467 [*affirming* 86 Ill. App. 549]; Miller *v.* Shriner, 86 Ind. 493; Vance *v.* Workman, 8 Blackf. (Ind.) 306; Kroder *v.* Trout, 8 Kulp (Pa.) 179. From an exception to the ruling thereon. Rose *v.* Burr, 43 Nebr. 358, 61 N. W. 593. From a failure of the complaining party to seek redress in the lower court. McAllister *v.* Brooks, 22 Me. 80, 38 Am. Dec. 282; Halleran *v.* Field, 23 Wend. (N. Y.) 38; Taylor *v.* Carpenter, 2 Sandf. Ch. (N. Y.) 603. From a failure of a bill of exceptions to state that the evidence, relied on as insufficient, was all the evidence. Hyde *v.* Benson, 6 Ark. 396. In the absence of objection or exception. Pollard *v.* Lively, 2 Gratt. (Va.) 216. In the absence of the notice objected to. Mickel *v.* Hicks, 19 Kan. 578, 27 Am. Rep. 161; Hinckley *v.* Beckwith, 23 Wis. 328. From a failure of the record to show that a notice was not given. Hunt *v.* Downs, 50 Iowa 696.

Facts not rebutting presumption of regularity.— Taking of a deposition after the cause was set for hearing, where it may have been so taken for sufficient cause. Stubbs *v.* Burwell, 2 Hen. & M. (Va.) 536. Recital of notice of a motion in summary proceedings as having been given at a term preceding that of the decision of the motion. Garey *v.* Edwards, 15 Ala. 105. Hearing of receivership matter after final decree, both parties appearing, without objection. Sellers *v.* Stoffel, 139 Ind. 468, 39 N. E. 52. Failure to send cross-interrogatories with a commission to take depositions, where there was a possibility that they were not filed in time. McKinney *v.* O'Connor, 26 Tex. 5.

A complete record which fails to show notice rebuts the presumption that notice of hearing was given. Wright *v.* Stuart, 5 Blackf. (Ind.) 120.

85. Presumption of authority of referee.— That consent of parties, necessary to a reference, was given. Daley *v.* Legate, 169 Mass. 257, 47 N. E. 1013; De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526; Field *v.* Romero, 7 N. M. 630, 41 Pac. 517; Macy *v.* Nelson, 62 N. Y. 638; Jerauld *v.* Williams, 7 S. D. 196, 63 N. W. 905; Kent *v.* Dakota F. & M. Ins. Co., 2 S. D. 300, 50 N. W. 85; Duncan *v.* Erickson, 82 Wis. 128, 51 N. W. 1140; Dinsmore *v.* Smith, 17 Wis. 20. That the reference was one to which consent was not necessary. Schwartz *v.* Livingston, 18 N. Y. Suppl. 879, 46 N. Y. St. 477. That an order of reference was duly made. Lubliner *v.* Yeomans, 65 Ill. 305; Preston *v.* Hodgen, 50 Ill. 56; Wills *v.* Dunn, 5 Gratt. (Va.) 384. That an order of reference was made upon sufficient grounds, showing it to be a proper case for reference. Waugh *v.* Schlenk, 23 Ill. App. 433; Van Marter *v.* Hotchkiss, 4 Abb. Dec. (N. Y.) 484; Trummer *v.* Konrad, 32 Oreg. 54, 51 Pac. 447; Ferguson *v.* Harrison, 34 S. C. 169, 13 S. E. 332; Dinsmore *v.* Smith, 17 Wis. 20. That the referee has acted within his authority. Bender *v.* Matney, 122 Mo. 244, 26 S. W. 950; Girard L. Ins., etc., Co. *v.* Cooper, 51 Fed. 332, 4 U. S. App. 631, 2 C. C. A. 245.

86. Presumption of qualification.— That the referee was duly sworn or the oath waived. Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990; Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11, 28 N. E. 743; Duncan *v.* Fletcher, 1 Ill. 323; Young *v.* Young, 18 Minn. 90; Hatfield *v.* Malcolm, 71 Hun (N. Y.) 51, 24 N. Y. Suppl. 596, 53 N. Y. St. 863, 23 N. Y. Civ. Proc. 197; Bull's Appeal, 25 Pa. St. 286; Monitor Iron Works Co. *v.* Ketchum, 47 Wis. 177, 2 N. W. 80. That the referee possessed the statutory qualifications. Hickman *v.* Painter, 11 W. Va. 386.

87. Offeciers *v.* Dirks, 2 Tex. 468. See 3 Cent. Dig. tit. "Appeal and Error," § 3726 *et seq.*

88. Presumptions of regularity of report. — That the report of the referee was filed at the proper time. Montandon *v.* Walker, 2 Ida. 152, 9 Pac. 608; Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851. That no request

eree's report, which has been confirmed, will be presumed, in the absence of affirmative error,[89] and, where the report has been vacated, the same presumption obtains in favor of the order vacating it.[90] The compensation allowed to a referee will not be presumed to be excessive.[91]

(IV) *TRIAL BY JURY.* The fact of a trial by jury in the trial court appearing of record raises the presumption in the appellate court, in the absence of any showing to the contrary, that the jury was composed of the requisite number of persons,[92] qualified to sit as jurors,[93] who were duly selected, impaneled,[94] and

was made to report contested rulings on questions of law by the excepting party. Searles *v.* Churchill, 69 N. H. 530, 43 Atl. 184.

89. Every reasonable inference from the facts found by a referee will be presumed to have been drawn, and will be drawn in the appellate court, in favor of sustaining the judgment rendered thereon. Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511; Patee *v.* Pelton, 48 Vt. 182; Wills *v.* Judd, 26 Vt. 617.

Presumption that referee's report is correct upon the evidence.— In the absence of the reason of a motion to vacate it. Moore *v.* Emmert, 21 Kan. 1. In the absence of the evidence. Harris *v.* Ferris, 18 Fla. 84; Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; Foster *v.* Voigtlander, 36 Kan. 572, 13 Pac. 777; Bond *v.* Bond, 51 Hun (N. Y.) 507, 4 N. Y. Suppl. 569, 21 N. Y. St. 682. In the absence of exception. Shenandoah Valley Nat. Bank *v.* Shirley, 26 W. Va. 563. Upon conflicting evidence. Winter *v.* Banks, 72 Ala. 409; Mahone *v.* Williams, 39 Ala. 202; Christian *v.* Illinois Malleable Iron Co., 92 Ill. App. 320; Stimpson *v.* Green, 13 Allen (Mass.) 326. Upon an uncertainty as to whether certain necessary evidence was introduced. *In re* Heath, 58 Iowa 36, 11 N. W. 723.

A confirmation of a referee's report may be presumed from the failure of the trial court to make any findings. Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837; McEwen *v.* Loucheim, 115 N. C. 348, 20 S. E. 519; Barbee *v.* Green, 92 N. C. 471; Barcroft *v.* Roberts, 91 N. C. 363; Patee *v.* Pelton, 48 Vt. 182.

Where the referee has failed to make findings of fact, where findings are necessary, it has been held that a *pro forma* judgment upon his general conclusion does not raise the presumption that the conclusion is correct, so as to preclude a reversal upon the weight of the evidence. Needham *v.* Holt, 54 Vt. 326. *Compare* Lennon *v.* Smith, 161 N. Y. 661, 57 N. E. 1115 [*affirming* 23 N. Y. App. Div. 293, 48 N. Y. Suppl. 456]. Where the referee has made findings a *pro forma* judgment is presumed to be such only as to the law arising thereon. Patee *v.* Pelton, 48 Vt. 182.

There is no presumption that the court heard additional evidence to that upon which the findings of the referee are based, where the evidence upon which such findings are based is insufficient. Sims *v.* Charleston Bank, 8 W. Va. 274.

See also *infra*, XVII, E, 2, d, (V), (E).

90. Retrial by the court upon consent of parties.— Where, by agreement, a cause was submitted to be tried by the court on the evidence as taken and returned by a referee, and the court accordingly tried the case, finding the facts just as the referee had found them, exceptions to the referee's report will not be considered on appeal, as it will be presumed that the court tried the case independently of such report. Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min. etc., Co., 99 N. C. 445, 6 S. E. 735 [*affirmed* in 101 N. C. 679, 8 S. E. 361].

An apparent error on the face of an original report, which has been set aside, will be presumed to have been corrected by a second report which has not been excepted to. Shenandoah Valley Nat. Bank *v.* Shirley, 26 W. Va. 563.

An order vacating a reference may be presumed from a subsequent trial in another court, on a change of venue, without objection (Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119), or in the same court, after a reference upon a default (Cooke *v.* Williamson, 11 Ind. 242).

91. McCann's Appeal, (Pa. 1887) 9 Atl. 48. See also *infra*, XVII, E, 2, g, (V).

92. Presumption of requisite number of jurors.—*Alabama.*—Ellis *v.* Dunn, 3 Ala. 632; Foote *v.* Lawrence, 1 Stew. (Ala.) 483.

Arkansas.— Larillian *v.* Lane, 8 Ark. 372.

Indiana.— Durham *v.* Hudson, 4 Ind. 501.

Kansas.— Walker *v.* Monohon, (Kan. App. 1899) 58 Pac. 567.

Texas.— Foster *v.* Van Norman, 1 Tex. 636.

See 3 Cent. Dig. tit. "Appeal and Error," § 3722 *et seq.*

93. Presumption of qualification of jurors. — Jones *v.* State, 100 Ala. 209, 14 So. 115; Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Magee *v.* Troy, 48 Hun (N. Y.) 383, 1 N. Y. Suppl. 24, 16 N. Y. St. 336; Pauska *v.* Daus, 31 Tex. 67.

A presumption of disqualification follows the discharge of a juror, upon objection. Thomas *v.* Leonard, 5 Ill. 556; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245. *Aliter*, where a juror, who has been excused, afterward serves without objection. In such case the presumption is that he was not disqualified, but only temporarily excused. Douglas *v.* State, 18 Ind. App. 289, 48 N. E. 9.

Excusing a juror without challenge will, in the absence of a showing to the contrary, be presumed to have been based upon sufficient statutory grounds. Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

94. Presumption of due impaneling.—*Alabama.*— Jones *v.* State, 100 Ala. 209, 14 So. 115.

Illinois.— Chicago, etc., R. Co. *v.* Aldrich, 134 Ill. 9, 24 N. E. 763; People *v.* Madison

sworn,[95] and that their custody and conduct were regular.[96] And a trial by the court without apparent objection raises the presumption that a trial by jury was regularly waived,[97] provided that the law permits a waiver in the particular case.[98]

(v) *Conduct of Trial*—(a) *In General.* Proceedings and rulings upon the conduct of a trial will, in the absence of any showing to the contrary, be presumed to have been regular, and determined upon sufficient reasons[99]—as, for instance, such as relate to setting the case for trial.[1] the order of going for-

County, 125 Ill. 334, 17 N. E. 802; St. Louis, etc., R. Co. *v.* Wheelis, 72 Ill. 538; Martin *v.* Barnhardt, 39 Ill. 9.

Louisiana.— State *v.* Smith, 26 La. Ann. 62.

Wisconsin.— Osgood *v.* State, 64 Wis. 472, 25 N. W. 529.

United States.—Campbell *v.* Strong, Hempst. (U. S.) 265, 4 Fed. Cas. No. 2,367*a*.

See 3 Cent. Dig. tit. "Appeal and Error," § 3723.

95. Presumption that jury was duly sworn. — *Alabama.*— McRae *v.* Tillman, 6 Ala. 486.

Arkansas.— State *v.* Gibson, 21 Ark. 140.

Mississippi.—Furniss *v.* Meredith, 43 Miss. 302; Wilson *v.* Pugh, 32 Miss. 196.

Pennsylvania.—Williamson *v.* Fox, 38 Pa. St. 214.

West Virginia.—Wells *v.* Smith, (W. Va. 1901) 38 S. E. 547; Douglass *v.* Central Land Co., 12 W. Va. 502.

United States. — Dillingham *v.* Skein, Hempst. (U. S.) 181, 7 Fed. Cas. No. 3,912*a*.

A countervailing recital that the jury was sworn "to ascertain and assess the said plaintiff's damages" has been held to rebut the presumption of a proper oath (Townsend *v.* Jeffries, 17 Ala. 276); also, where the recital was that the jury returned their verdict "as a jury upon oath" (Wolfe *v.* Martin, 1 How. (Miss.) 30); but a recital that the jury was sworn "to sit as jurors" instead of "to try the issue" was held a mere clerical error, not rebutting the presumption (Furniss *v.* Meredith, 43 Miss. 302); and the same was held where the recital was that the jury was sworn "the truth to speak upon the issues joined in this case" (Wells *v.* Smith, (W. Va. 1901) 38 S. E. 547).

That the jury was resworn, if necessary because of an amendment bringing in an additional party after administration of the oath, held to be a proper presumption where only one oath appeared in the record, since the first oath need not have been noted. Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242.

96. Facts of regular custody and conduct presumed in the absence of any showing to the contrary.— That the members of the jury were duly polled. Parkison *v.* Boddiker, 10 Colo. 503, 15 Pac. 806. That the jury was accompanied while out of the presence of the court by a proper officer. Morris *v.* Graves, 2 Ind. 354. That the jury did not make up a quotient or compromise verdict, in disregard of the court's instructions. Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957; Cass *v.* Pride, 9 N. Y. St. 513. That the settlement of a disputed question was made in the jury-room, and not while the jury were temporarily separated. Gleason *v.* Strauss, 5 Kan. App. 80, 48 Pac. 881.

97. Presumption of waiver of jury by trial to the court, without objection.— *Arkansas.* —Willson *v.* Light, 4 Ark. 158.

California.— Leadbetter *v.* Lake, 118 Cal. 515, 50 Pac. 686.

Illinois.— Miller *v.* People, 156 Ill. 113, 39 N. E. 477; Henrichsen *v.* Mudd, 33 Ill. 476.

Iowa.— Hawkins *v.* Rice, 40 Iowa 435; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Saum *v.* Jones County, 1 Greene (Iowa) 165.

Louisiana.— Huppenbauer *v.* Durlin, 26 La. Ann. 540.

Nebraska.— Davis *v.* Snyder, 45 Nebr. 415, 63 N. W. 789.

New York.— Sayles *v.* Sims, 73 N. Y. 551.

United States.— *Contra,* Hodges *v.* Easton, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169, where the court, by Harlan, J., said: "It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

In the absence from the record of a court rule which is claimed to require demand for a jury at a certain time before trial, it has been held that the refusal of a jury upon demand on the day of trial could not be presumed to have been authorized by failure to observe the rule. Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737.

The presumption of waiver may be rebutted by the fact that defendant was not present, and had no opportunity to make demand for a jury. Paul *v.* People, 82 Ill. 82.

98. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873, where the distinction is drawn between the ability to waive a jury trial in civil cases and minor criminal cases, on the one hand, and criminal cases, triable by jury at common law, on the other.

99. Upon a confused record, which, however, shows an arraignment, plea, and verdict, no particular irregularities being shown as ground of error, all of the proceedings of the trial were presumed to be regular. State *v.* Dixon, 3 Iowa 416.

1. Case is presumed regularly set for trial and brought to a hearing in an orderly manner.

Colorado.— Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Connecticut.— Allen *v.* Adams, 17 Conn. 67.

Illinois.—Dickinson *v.* Bull, 72 Ill. App. 75.

Louisiana.—Allen *v.* Peytavin, 10 La. 40; Minor *v.* Lanbelle, 9 La. 323.

ward,[2] the examination of witnesses,[3] the production of evidence,[4] the reopening of a case once closed,[5] the argument of counsel,[6] the submission of the issues,[7]

Maryland.— Rigden *v.* Martin, 6 Harr. & J. (Md.) 403.

Mississippi.— Reynolds *v.* Nelson, 41 Miss. 83.

Missouri.—Blanchard *v.* Hunt, 18 Mo. App. 284.

Nebraska.— Bond *v.* Wycoff, 42 Nebr. 214, 60 N. W. 564; Brunck *v.* Wood, 33 Nebr. 639, 50 N. W. 960.

North Carolina.— Ledbetter *v.* Pinner, 120 N. C. 455, 27 S. E. 123.

Tennessee.— Sparks *v.* White, 7 Humphr. (Tenn.) 86.

West Virginia.— Gardner *v.* Landcraft, 6 W. Va. 36.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

See 3 Cent. Dig. tit. "Appeal and Error," § 3729 *et seq.*

Advancing a case on the docket will be presumed to have been upon sufficient reasons, in the absence of such reasons (Grundies *v.* Martin, 90 Ill. 552; Burr *v.* Honeywell, 6 Kan. App. 783, 51 Pac. 235); and, in the absence of any showing as to what disposition was made of the preceding cases, it will be presumed that the case was not advanced (Smith *v.* Barlow, 67 Ill. 519; Blanchard *v.* Hunt, 18 Mo. App. 284; Bond *v.* Wycoff, 42 Nebr. 214, 60 N. W. 564).

Entry on short-cause calendar will be presumed, in the absence of a contrary showing, to have been proper and for sufficient reasons. Ellinger *v.* Caspary, 76 Ill. App. 523.

2. Reverse order of going to trial presumed to have been warranted. Loudenback *v.* Lowry, 4 Ohio Cir. Ct. 65, 2 Ohio Cir. Dec. 422; McCardell *v.* Henry, 23 Tex. Civ. App. 383, 57 S. W. 908.

3. Proper method of examination will be presumed to have been followed. Mansur *v.* Bradley, 22 Ind. 476; Andrews *v.* Matthews, 124 Mass. 109; Kendall *v.* Brownson, 47 N. H. 186.

4. Presumptions as to production of evidence.— That the proper order of receiving evidence was observed. Onstatt *v.* Ream, 30 Ind. 259, 95 Am. Dec. 695; Piatt *v.* Dawes, 10 Ind. 60. That a refusal to order plaintiff to submit to a medical examination was not on the ground of a supposed want of authority. Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104. That the appointment of an interpreter was not necessary. McKinney *v.* O'Connor, 26 Tex. 5. That evidence was received upon which to base the judgment. North British, etc., Ins. Co. *v.* Crutchfield, 108 Ind. 518, 9 N. E. 458; Forelander *v.* Hicks, 6 Ind. 448. That the court properly proceeded to judgment upon the pleadings, without evidence. Belt *v.* Davis, 1 Cal. 134; Taylor *v.* Carpenter, 2 Sandf. Ch. (N. Y.) 603. That the trial was had upon written evidence. Bailey *v.* Landingham, 53 Iowa 722, 6 N. W. 76; Ryan *v.* Mullinix, 45 Iowa 631; Hammersham *v.* Fairall, 44 Iowa 462.

5. Sufficient cause for reopening case will be presumed. Bruce *v.* Smith, 44 Ind. 1; Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268; Morris *v.* Faurot, 21 Ohio St. 155, 8 Am. Rep. 45.

Sufficient cause for refusing to reopen case will be presumed. Morrison *v.* Welty, 18 Md. 169.

6. Presumptions as to orderly and proper arguments.— That the court did not fail to rebuke counsel for improper remarks to the jury, or to warn the jury to disregard them. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848; Warder, etc., Co. *v.* Jacobs, 58 Ohio St. 77, 50 N. E. 97. That a refusal to permit a counsel to argue the case to the jury was for sufficient cause. Smith *v.* Harris, 76 Ind. 104. That no new points requiring reply were made by plaintiff's counsel in his closing argument in reading and commenting upon the instructions. Wiseman *v.* Wiseman, 89 Ind. 479. That comments upon a document not in evidence were not prejudicial, or that the court warned the jury not to consider them. Clarke *v.* Fast, 128 Cal. 422, 61 Pac. 72; Perkins *v.* Ermel, 2 Kan. 325. That the court has not abused its discretion in refusing to permit counsel to read from scientific works. Wade *v.* DeWitt, 20 Tex. 398. That the court exercised a sound discretion in permitting additional authorities to be read by plaintiff's counsel in the closing argument. Dewitt *v.* Oppenheimer, 51 Tex. 103.

7. Presumptions as to regular submission of case.— That all objections to the submission of a case, at a place other than that agreed upon, were waived. Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467. That submission at a time and in a manner different from that agreed upon was upon consent. David *v.* Leslie, 14 Iowa 84. That all of the issues were submitted to the jury. Jennings *v.* Cummings, 9 Port. (Ala.) 309. That all issues except the general issue were waived. Feagin *v.* Pearson, 42 Ala. 332. That all of the issues of law and fact were submitted and decided, in a hearing to the court. Bradley *v.* State Bank, 20 Ind. 528; Buntin *v.* Weddle, 20 Ind. 449; Burton *v.* Cochran, 4 Ind. 289; Gardiner *v.* Miles, 5 Gill (Md.) 94; Bullitt *v.* Musgrave, 3 Gill (Md.) 31. That a case was submitted on its merits. McClure *v.* Bates, 12 Iowa 77. That issues in equity, not submitted to a jury, were reserved and decided by the court. Treadway *v.* Wilder, 16 Nev. 354. That improper issues were not submitted. Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Bunyea *v.* Metropolitan R. Co., 19 D. C. 76; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Harrison *v.* Newkirk, 20 N. J. L. 176. That a lost agreement for submission was observed in the submission of issues indicated by the character of the evidence. Johnson *v.* Allegheny City, 139 Pa. St. 330, 20 Atl. 999. That issues outside the pleadings, submitted without objection, were voluntarily litigated. Commercial Bank *v.* Redfield, (Cal. 1898) 55 Pac. 160 [*modified* in 55 Pac. 772]; Yorks *v.* St. Paul, 62 Minn. 250,

the receipt of the verdict,[8] and matters which arise upon the particular circumstances of the case.[9]

(B) *Admission and Exclusion of Evidence.* Rulings upon the admission or exclusion of evidence will be presumed to be correct, in the absence of specific error assigned or pointed out,[10] of sufficient grounds of objection,[11] of the ruling

64 N. W. 565; Ahlberg *v.* Swedish-American Bank, 51 Minn. 162, 53 N. W. 196. That only such issues as are made by the pleadings were submitted. McLendon *v.* Grice, 119 Ala. 513, 24 So. 846; Kavanagh *v.* Phelps, 36 Conn. 111; Lucas *v.* Farrington, 21 Ill. 31; Elston *v.* Fieldman, 57 Minn. 70, 58 N. W. 830. That a separate submission of issues, which should, ordinarily, have been tried together, was warranted by consent or otherwise. Maynard *v.* Penniman, 10 Mich. 153. That issues for the court and for the jury were properly submitted to each, and in their proper order. Fry *v.* Bennett, 9 Abb. Pr. (N. Y.) 45; Wall *v.* Fife, 37 Pa. St. 394. That a refused request to submit the case by special issues was made after a general submission. Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37. That special verdicts were returned upon proper request therefor and under sufficient instructions. Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775. That the withdrawal of special interrogatories, submitted to the jury, was upon sufficient reasons. Groscop *v.* Rainier, 111 Ind. 361, 12 N. E. 694. That the submission of questions, not objected to, was upon consent. Fisk *v.* Chicago, etc., R. Co., 83 Iowa 253, 48 N. W. 1081.

8. Presumptions of regularity in receiving verdict.—That the jury was present when the court opened the verdict and recommitted it for amendment. Fifield *v.* Adams, 3 Iowa 487. That the attorneys were present in court when the verdict was rendered. Parlin, etc., Co. *v.* Barnett, 35 Oreg. 568, 57 Pac. 625; Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937.

9. Bringing plaintiff into court on a cot, in an action for personal injuries, will be presumed to have been warranted by his physical condition, in the absence of a clear showing that this was done merely to arouse the sympathies of the court and jury. Sherwood *v.* Sioux Falls, 10 S. D. 405, 73 N. W. 913.

Consolidation of cross-actions was presumed to have been upon due notice and waiver of all objections thereto, the record showing no appearance by either party, nor any objection or exception. Shore *v.* White City State Bank, 61 Kan. 246, 59 Pac. 263.

10. *Arkansas.*—Bolinger *v.* Fowler, 14 Ark. 27.

Georgia.— Etheridge *v.* Hobbs, 77 Ga. 531, 3 S. E. 251.

Indiana.— Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792.

Missouri.— Smith *v.* Laumeier, 12 Mo. App. 546.

New Jersey.— Smith *v.* Williamson, 11 N. J. L. 313.

See 3 Cent. Dig. tit. "Appeal and Error," § 3735 *et seq.*

11. In the absence of objection, it will be presumed that evidence which might have been excluded upon proper objection was admitted by consent, or that the objection was waived.

Arkansas.— Molen *v.* Orr, 44 Ark. 486.

California.— Churchill *v.* Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43.

Indiana.— Strange *v.* Prince, 17 Ind. 524; Stephens *v.* Lawson, 7 Blackf. (Ind.) 275.

Kentucky.— Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401.

Mississippi.— Long *v.* Shackleford, 25 Miss. 559.

Nebraska.— Morgan *v.* Mitchell, 52 Nebr. 667, 72 N. W. 1055; Bartlett *v.* Bartlett, 15 Nebr. 593, 19 N. W. 691.

Nevada.— Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

North Carolina.— Kerchner *v.* Reilly, 72 N. C. 171.

Texas.— City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632; Hurst *v.* McMullen, (Tex. Civ. App. 1898) 47 S. W. 666 [*rehearing denied* in (Tex. Civ. App. 1899) 48 S. W. 744].

United States.— Shields *v.* Hanbury, 128 U. S. 584, 9 S. Ct. 176, 32 L. ed. 565.

An objection which does not point out a certain ground of inadmissibility will be presumed to have been properly overruled if no defect is patent which would be covered by the objection in general terms. Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Objections on untenable grounds raise the presumption that other and tenable grounds were waived, or did not exist.

Arkansas.— Blackburn *v.* Morton, 18 Ark. 384.

California.— Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Florida.— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Kentucky.— English *v.* Com., 6 Dana (Ky.) 234.

Louisiana.—Roberts *v.* Murray, 18 La. Ann. 572.

Missouri.— State *v.* Baker, 36 Mo. App. 58.

Nebraska.— Wright *v.* Greenwood Warehouse Co., 7 Nebr. 435.

New York.— Record *v.* Saratoga Springs, 46 Hun (N. Y.) 448.

Pennsylvania.— Sutton's Estate, 13 Pa. Super. Ct. 492.

Where no grounds of objection appear the presumption is that none sufficient were specified, if the admission of improper evidence is complained of, and that proper grounds were specified, if the exclusion of admissible evidence is complained of, and in either case

thereon,[12] of exceptions thereto,[13] or of a sufficient showing of the evidence claimed to have been improperly admitted or excluded.[14] Moreover, every reasonable contingency which could support the ruling will, upon an incomplete or a doubtful record, be presumed to have existed;[15] and substantial error will not

that the ruling was correct. Abshire *v.* Williams, 76 Ind. 97; Lee *v.* Hardgrave, 3 Mich. 77; Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751; Neal *v.* Minor, (Tex. Civ. App. 1894) 26 S. W. 882. *Contra,* Anderson *v.* Snow, 8 Ala. 504; Goodtitle *v.* Roe, 20 Ga. 135.

Where the facts underlying the ground of objection do not appear, it will be presumed that such facts did not exist, if the objection is upon the existence of certain facts, and that such facts did exist, if the objection is upon the non-existence thereof, and in either case that the objection is untenable.

Alabama.— Ward *v.* Cheney, 117 Ala. 238, 22 So. 996; Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749.

Florida.— Doe *v.* Latimer, 2 Fla. 71.

Georgia.— DePauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

Illinois.— Mt. Vernon *v.* Patton, 94 Ill. 65.

Iowa.— Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186; Higley *v.* Newell, 28 Iowa 516.

Louisiana.— Mortee *v.* Edwards, 20 La. Ann. 236; Towne *v.* Bossier, 19 La. Ann. 162; Roberts *v.* Murray, 18 La. Ann. 572.

Maryland.— Matthews *v.* Dare, 20 Md. 248.

Tennessee.— Perdue *v.* State, 2 Humphr. (Tenn.) 493.

Texas.— Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509.

Vermont.— Eames *v.* Brattleboro, 54 Vt. 471.

12. Where the grounds of exclusion do not appear, the ruling will be presumed to have been based upon any proper ground which may have appeared to exist.

Florida.— Coker *v.* Hayes, 16 Fla. 368.

Indiana.— Reese *v.* Beck, 9 Ind. 238; Ellis *v.* State, 2 Ind. 262.

Iowa.— Shields *v.* Guffey, 9 Iowa 322.

Kansas.— Robinson *v.* Blood, (Kan. App. 1900) 62 Pac. 677.

Maryland.— Baltimore, etc., R. Co. *v.* State, 41 Md. 268.

Missouri.— Smith *v.* Laumeier, 12 Mo. App. 546.

New York.— Miner *v.* Stolts, 11 Misc. (N. Y.) 338, 32 N. Y. Suppl. 2, 65 N. Y. St. 125.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368.

Pennsylvania.— McCaskey *v.* Graff, 23 Pa. St. 321, 62 Am. Dec. 336.

United States.— Mine, etc., Supply Co. *v.* Parke, etc., Co., 107 Fed. 881.

But where a certain ground is shown, and no other valid ground is apparent, the presumption is that the exclusion was only on the ground shown. Oppenheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95, U. S. *v.* Wilkinson, 12 How. (U. S.) 246, 13 L. ed. 974. *Aliter,* if another valid ground of exclusion is apparent. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246.

In the absence of a ruling, the presumption obtains that the objection was abandoned. Poledori *v.* Newman, 116 Cal. 375, 48 Pac. 325; Jenkins *v.* Merritt, 17 Fla. 304; Robinson *v.* Hartridge, 13 Fla. 501; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Rosenthal *v.* Bilger, 86 Iowa 246, 53 N. W. 255.

Reserved ruling which is never made raises the presumption that the evidence was received and the objection thereto overruled. Finnegan *v.* Sioux City, (Iowa 1900) 83 N. W. 907. *Compare* Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267, where it was held that a ruling was, by agreement of parties, made a prerequisite to the reception of the evidence.

Where a bond for deed as copied in the bill of exceptions displayed a variance from the bond declared on as to the time of maturity of a note, and the bond had been excluded for variance upon another and untenable ground, it was presumed that the date given in the copy was a clerical error, and the judgment was reversed. Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

13. In the absence of sufficient exceptions, the rulings will be presumed correct or acquiesced in. Dozier *v.* Joyce, 8 Port. (Ala.) 303; Plank-Road Co. *v.* Rineman, 20 Pa. St. 99; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568.

14. Admitted evidence not set out or sufficiently shown will be presumed to have been properly admitted.

Alabama.— Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410.

California.— Brind *v.* Gregory, 122 Cal. 480, 55 Pac. 250.

Indiana.— Boyd *v.* Wade, 58 Ind. 138.

Maryland.— McTavish *v.* Carroll, 17 Md. 1.

Missouri.— Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

Oregon.— Davis *v.* Emmons, 32 Oreg. 389, 51 Pac. 652.

An offer of excluded evidence being not sufficiently shown, the presumption is in favor of its having been properly excluded. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282; Dailey *v.* Fountain, 35 Ala. 26; Pennsylvania Co. *v.* Ebaugh, 144 Ind. 687, 43 N. E. 936; Union Pac. R. Co. *v.* Vincent, 58 Nebr. 171, 78 N. W. 457.

That a sufficient offer could have been made good will be presumed, in the absence of anything showing bad faith, and the case on appeal will be considered precisely as though the facts offered had been established. Ricketts *v.* Pendleton, 14 Md. 320; Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346; Hall *v.* Beston, 26 N. Y. App. Div. 105, 49 N. Y. Suppl. 811; Scotland County *v.* Hill, 112 U. S. 183, 5 S. Ct. 93, 28 L. ed. 692.

15. Evidence, admissible under any reasonable view of the case, will be presumed to have been properly admitted, under a correct view of existing circumstances.

Alabama.— Hill *v.* Smith, 48 Ala. 562; Smith *v.* Gaffard, 33 Ala. 168.

result from the admission or exclusion of evidence if there is reasonable ground for presumption that the complaining party has not been prejudiced thereby,[16] or

California.— Towdy *v.* Ellis, 22 Cal. 650.
Illinois.— Bullock *v.* Geomble, 45 Ill. 218; Thompson *v.* Schuyler, 7 Ill. 271.
Indiana.— Stoner *v.* Ellis, 6 Ind. 152; Shellenbarger *v.* Norris, 2 Ind. 285.
Kansas.— Barnhart *v.* Ford, 41 Kan. 341, 21 Pac. 239.
Louisiana.— Whittington *v.* Whittington, 24 La. Ann. 157.
Maine.— Fairfield *v.* Oldtown, 73 Me. 573.
Massachusetts.— Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088; Merritt *v.* Morse, 108 Mass. 270.
Michigan.— Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454; Friedland *v.* McNeil, 33 Mich. 40.
Texas.— Euless *v.* Russell, (Tex. Civ. App. 1895) 34 S. W. 176.
Vermont.— Harris *v.* Holmes, 30 Vt. 352; McCann *v.* Hallock, 30 Vt. 233.

Evidence which may have been inadmissible under certain circumstances will be presumed to have been properly excluded, and in view of such circumstances.

Alabama.— Kellar *v.* Taylor, 90 Ala. 289, 7 So. 907; Planters', etc., Ins. Co. *v.* Tunstall, 72 Ala. 142.
Illinois.— Bowers *v.* Block, 129 Ill. 424, 21 N. E. 807.
Indiana.— Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; White Water Valley Canal Co. *v.* Dow, 1 Ind. 141.
Iowa.— Bowers *v.* Hanna, 101 Iowa 660, 70 N. W. 745; Young *v.* Omaha, etc., R. Co., 92 Iowa 583, 61 N. W. 209; Stutsman *v.* School Dist. No. 2, 1 Iowa 94.
Kentucky.— Crowdus *v.* Hutchings, 7 J. J. Marsh. (Ky.) 43.
Michigan.— Mabley *v.* Kittleberger, 37 Mich. 360.
Mississippi.— Standard L., etc., Ins. Co. *v.* Tinney, 73 Miss. 726, 19 So. 662.
Missouri.— State *v.* Maloney, 113 Mo. 367, 20 S. W. 1064.
Tennessee.— Carlton *v.* State, 8 Heisk. (Tenn.) 16; Kincaid *v.* Meadows, 3 Head (Tenn.) 188.
Vermont.— French *v.* Ware, 65 Vt. 338, 26 Atl. 1096.
Virginia.— McDowell *v.* Burwell, 4 Rand. (Va.) 317.

Preliminary or collateral facts, rendering evidence admissible, may be presumed to have been sufficiently shown or waived.

Alabama.— Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Alexander *v.* Wheeler, 78 Ala. 167. *Contra,* Anderson *v.* Snow, 8 Ala. 504.
Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623; Ruddell *v.* Mozer, 1 Ark. 503.
California.— Fogel *v.* San Francisco, etc., R. Co., (Cal. 1895) 42 Pac. 565; Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.
Colorado.— Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152.
Connecticut.— Lee *v.* Stiles, 21 Conn. 500.
Florida.— Doe *v.* Latimer, 2 Fla. 71.
Georgia.— Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363.
Illinois.— Conway *v.* Case, 22 Ill. 127; Holmes *v.* Sinclair, 19 Ill. 71.
Indiana.— Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Darnell *v.* Sallee, 7 Ind. App. 581, 34 N. E. 1020.
Kansas.— Missouri Pac. R. Co. *v.* Chick, 6 Kan. App. 481, 50 Pac. 605.
Kentucky.—English *v.* Com., 6 Dana (Ky.) 234.
Louisiana.— Parham *v.* Ogle, 22 La. Ann. 73: Brown *v.* Caves, 19 La. Ann. 438.
Maine.—Dyer *v.* Fredericks, 63 Me. 173, 592.
Maryland.— Matthews *v.* Dare, 20 Md. 248.
Michigan.— Kermott *v.* Ayer, 11 Mich. 181.
Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.
Mississippi.— Doe *v.* Bernard, 7 Sm. & M. (Miss.) 319.
Missouri.— Holton *v.* Kemp, 81 Mo. 661.
New York.— Carpenter *v.* Carpenter, 9 N. Y. Suppl. 583, 30 N. Y. St. 955.
North Carolina.—Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322; Kaighn *v.* Kennedy, 3 N. C. 26.
Ohio.— Westerman *v.* Westerman, 25 Ohio St. 500.
Oregon.— Long *v.* Lander, 10 Oreg. 175; Tenny *v.* Mulvaney, 9 Oreg. 405.
Pennsylvania.— Hemphill *v.* McClimans, 24 Pa. St. 367; Newlin *v.* Newlin, 1 Serg. & R. (Pa.) 275.
Texas.— Blethen *v.* Bonner, (Tex. Civ. App. 1899) 52 S. W. 571.
Vermont.— Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230; Melendy *v.* Spaulding, 54 Vt. 517.
Virginia.—Wynn *v.* Harman, 5 Gratt. (Va.) 157.

Presumption as to interested witness when the matter is in doubt, see Reed *v.* Rice, 25 Vt. 171.

Presumption as to preliminary or collateral facts may be rebutted by failure of complete record to show that the original of an instrument introduced had been lost. Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540. That the agency of a person, whose declarations were introduced to bind his principal, was established. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396. That the subscribing witness to a sealed instrument, admitted upon secondary evidence of his signature, was without the state. Silverman *v.* Blake, 17 Wis. 213. That the execution of an admitted deed was properly proved. Wooten *v.* Dunlap, 20 Tex. 183.

16. Presumptions as to non-prejudicial admissions of inadmissible evidence.— That a withdrawal without objection was permitted by the court. Zoller *v.* Janvrin, 47 N. H.

if there is reasonable ground for the presumption that the objection has been cured[17] or waived.[18]

(c) *General Instructions.* In the absence from the record of the instructions, given or refused, or a sufficient showing thereof, it will be presumed that proper

324. That the erroneous ruling was not taken advantage of by the party in whose favor it was made. Knop *v.* Dechert, 7 N. Y. App. Div. 390, 39 N. Y. Suppl. 911. That evidence, admissible against one and not against another of defendants, was controlled in its application to the former. More *v.* Finger, 128 Cal. 313, 60 Pac. 933; Currier *v.* Silloway, 1 Allen (Mass.) 19; Long *v.* Maguire, 22 Pa. St. 163. That a witness, incompetent to testify upon certain points, was permitted to testify only upon such points as to which he was competent. Eaton *v.* Kirkman, 35 Ala. 272. That evidence, inadmissible for some purposes, was properly limited to purposes for which it was admissible.

Alabama.—New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325.

California.— Matter of Slade, 122 Cal. 434, 55 Pac. 158.

Connecticut.— Hoadley *v.* M. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997.

Iowa.— Lauman *v.* Nichols, 15 Iowa 161.

Kentucky.— Wicks *v.* Dean, 19 Ky. L. Rep. 1708, 44 S. W. 397.

Massachusetts.— Sweetser *v.* Bates, 117 Mass. 466.

Michigan.— Duflo *v.* Juif, 63 Mich. 513, 30 N. W. 105.

Minnesota.— Van Brunt *v.* Greaves, 32 Minn. 68, 19 N. W. 345.

North Carolina.—Riddle *v.* Germanton, 117 N. C. 387, 23 S. E. 332.

South Dakota.— St. Paul F. & M. Ins. Co. *v.* Dakota Land, etc., Co., 10 S. D. 191, 72 N. W. 460.

Texas.— Wilson *v.* Gordon, 20 Tex. 568; Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. 1086.

Vermont.— U. S. National Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756.

Doubt as to which party introduced improper evidence raises the presumption that it was not improperly considered against the party as to whom it would have been prejudicial, if the record showed clearly that the other had offered it and he had objected. Morgan *v.* Mitchell, 52 Nebr. 667, 72 N. W. 1055.

Exclusion of proper evidence will be presumed non-prejudicial where it fairly appears that, in any reasonable view of the case, the excluded evidence would not, if admitted, have altered the result. Starr *v.* Mayer, 60 Ga. 546; Pomeroy *v.* Heddles, 95 Wis. 453, 70 N. W. 557.

17. **Subsequent facts rendering evidence admissible** may be presumed to have been shown, or the admitted evidence to have been stricken out, or disregarded, where it has been admitted upon that condition.

California.— Jones *v.* Morse, 36 Cal. 205.

Indiana.— Stoner *v.* Ellis, 6 Ind. 152.

New York.— Wilson *v.* Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015, 24 N. Y. St. 81; Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009.

Tennessee.— Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. (Tenn.) 314.

Vermont.— Harris *v.* Holmes, 30 Vt. 352.

Aliter, upon a complete record which fails to show such facts or such action. Smith *v.* Maxwell, 1 Stew. & P. (Ala.) 221.

Subsequent facts showing evidence inadmissible raise no presumption of prejudicial error, though no instruction to the jury to disregard such evidence appears, for, in the absence of a showing to the contrary, such instruction will be presumed to have been given. Randall *v.* Doane, 9 Gray (Mass.) 408.

Doubt as to reading of improper document will be resolved in favor of correct action. Thus, where a deed was improperly admitted and not then read, and it appeared that another deed of the same description was afterward read without objection, it was presumed that the deeds were not the same. Ferguson *v.* Cochran, (Tex. Civ. App. 1898) 45 S. W. 30.

Presumption that erroneous view of the law was not changed.— Where the instructions are not in the record it has been held that it could not be presumed, in support of the judgment, that instructions were given, properly covering the law and withdrawing improper evidence from the consideration of the jury, but, on the contrary, that the court maintained its erroneous view of the law to the end of the case. Wood *v.* Willard, 36 Vt, 82, 84 Am. Dec. 659; Spokane, etc., Gold, etc., Co. *v.* Colfelt, (Wash. 1901) 64 Pac. 847.

18. **Presumption of estoppel to claim error.** — A party introducing evidence in chief, or drawing it out on cross-examination, thereby asserts its materiality and is estopped to deny it; and, where, upon the record, it is doubtful which party produced the evidence complained of, it may be presumed that it was produced by the party who complains of a refusal to strike it out. Hughes *v.* Taylor, 52 Ala. 518. Similarly, it has been held that a defendant may not claim the erroneous exclusion of answers offered in evidence unless it affirmatively appears that the exclusion was not on motion of defendant himself. Starr *v.* Mayer, 60 Ga. 546. And, again, where a document was appended to an answer to an interrogatory of plaintiff, it was presumed, in the absence of the interrogatory, that the answer was responsive thereto; and, hence, that plaintiff, being thus held to have called for the document, was estopped to object to its offer in evidence by defendant. Furlow *v.* Merrell, 23 Ala. 705.

Omission to offer evidence a second time, after subsequent evidence has shown the excluded evidence to be admissible, may be taken as an acquiescence in the ruling of exclusion

instructions were given on all material points.[19] In the absence of the facts shown in evidence, it will be presumed that the law as laid down in the instructions was applicable thereto,[20] or that the law as stated in a refused instruction was inappli-

where there is no ground for the presumption that the entire evidence was offered as a whole. Bryant *v.* Hutchinson, 30 Ala. 441.

A showing in the record that excluded evidence was afterward considered, by comments of counsel on both sides thereon in argument and without instruction to the jury to disregard it, has been held to raise the presumption that the adverse ruling and objection thereto were waived. Curtis *v.* Jackson, 13 Mass. 507.

19. *Arkansas.*— Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 225, 58 S. W. 252.

California.— Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458; Garrison *v.* McGlockley, 38 Cal. 78.

Colorado.— Halsey *v.* Darling, 13 Colo. 1, 21 Pac. 913.

Georgia.— Maddox *v.* Morris, 110 Ga. 309, 35 S. E. 170.

Indiana.— Ricketts *v.* Coles, 97 Ind. 602.

Iowa.— King *v.* Hart, 110 Iowa 618, 81 N. W. 769; Huff *v.* Altman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213.

Maine.— White *v.* Jordan, 27 Me. 370.

Massachusetts.— Randall *v.* Doane, 9 Gray (Mass.) 408.

New Hampshire.— Guerin *v.* New England Telephone, etc., Co., (N. H. 1900) 46 Atl. 185.

New Jersey.— Marsh *v.* Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 Atl. 481.

New York.— Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672, 45 N. Y. St. 33; Minster *v.* Benoliel, 32 Misc. (N. Y.) 630, 66 N. Y. Suppl. 493; Crouse *v.* Owens, 3 N. Y. Suppl. 863, 19 N. Y. St. 287.

Ohio.— Carlisle *v.* Foster, 10 Ohio St. 198.

Oregon.— Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638.

Tennessee.—Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Walsh *v.* Fitzmorris, 10 Heisk. (Tenn.) 55.

Texas.— Robinson *v.* Houston, etc., R. Co., 46 Tex. 540; Harlan *v.* Baker, Dall. (Tex.) 578.

Vermont.— Smith *v.* Anderson, 70 Vt. 424, 41 Atl. 441; Clary *v.* Willey, 49 Vt. 55.

Washington.— Hardy *v.* Hohl, 11 Wash. 1, 39 Pac. 277.

See 3 Cent. Dig. tit. "Appeal and Error," § 3749 *et seq.*

An unexplained alteration in an instruction will be presumed to have been made before the instruction was given, if the instruction is right with the alteration and wrong without it. Indiana, etc., R. Co. *v.* Hendrian, 190 Ill. 501, 60 N. E. 902. *Contra*, in a case where counsel immediately called the court's attention to the insufficiency and was allowed an exception on that ground, and the court afterward altered the report furnished by the stenographer, claiming that it was wrongly reported. *In re* Rosner, 5 Wash. 488, 32 Pac. 106.

Instructions, found in the record in their proper place, and containing proper indorsements and notations, may be presumed to have been properly filed. Hall *v.* State, 23 Ind. App. 521, 55 N. E. 798; Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9. *Compare* Killion *v.* Hulen, 8 Ind. App. 494, 36 N. E. 49.

Requested instructions, not shown to have been refused, will, if necessary to support the judgment, be presumed to have been given.

Alabama.— Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194.

South Dakota.— Myers *v.* Longstaff, (S. D. 1900) 84 N. W. 233.

Texas.— Seal *v.* State, 28 Tex. 491.

West Virginia.—Hood *v.* Maxwell, 1 W. Va. 219.

Wyoming.— Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162.

Compare Federal St., etc., R. Co. *v.* Gibson, 96 Pa. St. 83.

The granting of a new trial because of an erroneous instruction raises the presumption that the instruction was given, though the record does not otherwise show whether it was given or not. Swope *v.* Shafer, 15 Ky. L. Rep. 42, 22 S. W. 78.

Where no instructions are given or refused, in a trial to the court sitting as a jury, it will be presumed that the court correctly applied the law to the facts. Joseph Schnaider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233.

Where no written instructions were given and none are in the record, the presumption is that proper oral instructions were given, or that, by agreement, the case was submitted without instructions. Musselman *v.* Williams, 21 Ky. L. Rep. 1077, 54 S. W. 3.

Where only a portion of the instructions are shown, the presumption is that proper instructions were given as to all other points in the case (Hewey *v.* Nourse, 54 Me. 256; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149; Brabbits *v.* Chicago, etc., R. Co., 38 Wis. 289); and also that the refusal of correct instructions was justified by giving other instructions to the same effect (Hall *v.* State, 23 Ind. App. 521, 55 N. E. 798).

Where the substance only of an instruction is given, and it is left in doubt as to whether the judge transcended the limits of judicial discretion in expressing his opinion as to the weight which ought to be given to the statement of a witness, it will be presumed that he did not. Atchison, etc., R. Co. *v.* Howard, 49 Fed. 206, 4 U. S. App. 202, 1 C. C. A. 229.

20. *Alabama.*— Alexander *v.* Alexander, 71 Ala. 295.

Maryland.— Brice *v.* Randall, 7 Gill & J. (Md.) 349.

Michigan.— People *v.* McKinney, 10 Mich. 54.

cable or unnecessary.[21] In the absence of sufficient exceptions, it will be presumed that the giving or refusing to give an instruction was not objectionable.[22] In the absence of specific error assigned, the instruction or refusal to instruct will be presumed to be right.[23] In any doubtful case every reasonable presumption is in favor of the instruction or refusal to instruct.[24] And, in the absence of any

Missouri.— Stone *v.* Pennock, 31 Mo. App. 544.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

North Carolina.— Honeycut *v.* Angel, 20 N. C. 371.

Ohio.— Toledo, etc., R. Co. *v.* Marsh, 17 Ohio Cir. Ct. 379, 9 Ohio Cir. Dec. 548.

Pennsylvania.— Storch *v.* Carr, 28 Pa. St. 135; Gifford *v.* Gifford, 27 Pa. St. 202.

West Virginia.— Wise *v.* Postlewait, 3 W. Va. 452.

Facts or evidence assumed in an instruction will, in the absence of a complete record, or in case of doubt, be presumed to have existed by admission or proof.

Alabama.— McLemore *v.* Nuckolls, 37 Ala. 662; Fournier *v.* Black, 32 Ala. 41.

Arkansas.— McKinney *v.* Demby, 44 Ark. 74.

California.— Beckman *v.* McKay, 14 Cal. 250.

Georgia.— White *v.* Moss, 92 Ga. 244, 18 S. E. 13; Meekes *v.* Cottingham, 58 Ga. 559.

Indiana.— Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; Hinds *v.* Harbou, 58 Ind. 121.

Iowa.— Wood *v.* Porter, 56 Iowa 161, 9 N. W. 113; Mainer *v.* Reynolds, 4 Greene (Iowa) 187.

Maryland.— Livezy *v.* Miller, 61 Md. 336.

Michigan.— Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101.

Nebraska.— McGraw *v.* Chicago, etc., R. Co., 59 Nebr. 397, 81 N. W. 306.

Pennsylvania.— McNair *v.* McLennan, 24 Pa. St. 384; Cabarga *v.* Seeger, 17 Pa. St. 514.

Vermont.— Gates *v.* Bowker, 18 Vt. 23.

Wisconsin.— Buechel *v.* Buechel, 65 Wis. 532, 27 N. W. 318; West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292.

An admitted document will be presumed to have been read, where an instruction is based on its contents and the record does not show that it was not read. Atkinson *v.* Brown, 68 Mo. App. 618.

Where all the evidence is in the record, a fact not appearing cannot, in order to support an instruction which depends upon such fact, be presumed to have been proved. Lawler *v.* Norris, 28 Ala. 675.

21. Messer *v.* Reginnitter, 32 Iowa 312; Pettingill *v.* Jones, 28 Kan. 749; Whelan *v.* Kinsley, 26 Ohio St. 131.

22. *Louisiana.*— Bowman *v.* Ware, 18 La. 597.

Massachusetts.— Gardner *v.* Peaslee, 143 Mass. 382, 9 N. E. 833.

Michigan.— English *v.* Caldwell, 30 Mich. 362.

Nebraska.— Cooper *v.* Hall, 22 Nebr. 168, 34 N. W. 349.

New York.—Winterson *v.* Eighth Ave. R. Co., 2 Hilt. (N. Y.) 389; Meyer *v.* Suburban Home Co., 25 Misc. (N. Y.) 686, 55 N. Y. Suppl. 566 [*affirming* 25 Misc. (N. Y.) 311, 54 N. Y. Suppl. 568]; Harris *v.* Pryor, 18 N. Y. Suppl. 128, 44 N. Y. St. 495.

South Dakota.— Myers *v.* Longstaff, (S. D. 1900) 84 N. W. 233.

Tennessee.—Lane *v.* Keith, 2 Baxt. (Tenn.) 189.

A general exception raises only the question of the correctness of an instruction as embodying a correct proposition of law; wherefore, in such case, if correct in law, it is presumed that sufficient evidence was adduced to support it. Perrine *v.* Serrell, 30 N. J. L. 454.

Exceptions to some refusals raises the presumption that other instructions requested were given. Hood *v.* Maxwell, 1 W. Va. 219.

Issues, appearing not to have been submitted, may, in the absence of objection or special exception, be presumed to have been waived or agreed upon or found by the court.

Indiana.— Legget *v.* Harding, 10 Ind. 414; Cory *v.* Silcox, 6 Ind. 39.

Montana.— Taylor *v.* Stewart, 1 Mont. 316.

North Carolina.— Fagg *v.* Southern Bldg., etc., Assoc., 113 N. C. 364, 18 S. E. 655.

Texas.— Southern Cotton Oil Co. *v.* Wallace, (Tex. Civ. App. 1899) 54 S. W. 638.

Wisconsin.— Hall *v.* Stevens, 89 Wis. 447, 62 N. W. 81.

23. Perrine *v.* Serrell, 30 N. J. L. 454; Seal *v.* State, 28 Tex. 491; Emmons *v.* Dowe, 2 Wis. 322.

24. *Kansas.*— Pettingill *v.* Jones, 28 Kan. 749.

Maryland.— Sparrow *v.* Grove, 31 Md. 214; Bullitt *v.* Musgrave, 3 Gill (Md.) 31.

Michigan.— Angell *v.* Rosenbury, 12 Mich. 241.

Missouri.— Evans-Snyder-Buell Co. *v.* Turner, 143 Mo. 638, 45 S. W. 654.

New York.— Boughton *v.* Smith, 22 N. Y. Suppl. 148, 51 N. Y. St. 316.

A former determination by the appellate court that evidence upon a particular point was insufficient to warrant its submission to the jury does not preclude the submission of the same point on a second trial, as matter of law, for the appellate court cannot inspect the former record to determine that the evidence was the same; hence, it will be presumed "that the trial court, in passing upon the instructions requested, and having before it the evidence on both trials, found a material difference in the testimony in the last trial from that of the first, and therefore determined that the opinion regarding the matter announced in the first appeal did not apply to the testimony as then existing." Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

showing to the contrary, it will be presumed that statutory requirements as to giving or refusing instructions were complied with,[25] and that the ruling in question was otherwise regular.[26]

(D) *Peremptory Instruction, Dismissal, or Nonsuit.* If, upon any reasonable view of the whole case, a party has or might, if permitted, have established a *prima facie* cause of action or defense, a peremptory determination in favor of the other party is reversible error.[27] Therefore, on appeal from a peremptory instruction, dismissal, or nonsuit in favor of defendant, the truth of plaintiff's evidence, admitted or excluded, will be presumed, and if the most favorable inferences from relevant facts thus shown, which the court or jury might reasonably have drawn, make a *prima facie* case the court below will be reversed.[28] And

25. **That instructions were in writing** will be presumed where it is not clearly shown whether they were written or oral (Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634; Cook *v.* Piper, 79 Ill. App. 291; Citizens F. & M. Ins. Co. *v.* Short, 62 Ind. 316; Kent *v.* Favor, 3 N. M. 218, 5 Pac. 470; Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155; Meshke *v.* Van Doren, 16 Wis. 319); and where it is complained that the court made oral remarks in addition to written instructions, they will be presumed not to have been prejudicial if it is not shown what the court said (O'Hara *v.* King, 52 Ill. 303).

That special instructions were given upon request, where it is not shown that no request was made and the instruction was given. Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52; Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249.

That instructions were given upon written request will, in the absence of any showing to the contrary, be presumed from the fact that they were given. Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51; Myatts *v.* Bell, 41 Ala. 222; English *v.* McNair, 34 Ala. 40. *Aliter*, where the instruction is refused. Louisville, etc., R. Co. *v.* Orr, 94 Ala. 602, 10 So. 167; Turlington *v.* Slaughter, 54 Ala. 195; Lyon *v.* Kent, 45 Ala. 656; Milner *v.* Wilson, 45 Ala. 478; Broadbent *v.* Tuskaloosa Scientific, etc., Assoc., 45 Ala. 170.

The presumption of a written request is rebutted by a recital in the bill of exceptions which is irreconcilable with such presumption. Baker *v.* Russell, 41 Ala. 279.

That a request was not made at the proper time may be presumed where a refusal cannot be sustained on any other ground, the time of request not appearing. Jolly *v.* Terre Haute Drawbridge Co., 9 Ind. 417; Shelby County *v.* Blair, 8 Ind. App. 574, 36 N. E. 216; Sparrow *v.* Grove, 31 Md. 214.

That instructions were given as to answering special interrogatories, where the only evidence thereof in the record is the answer of the jury to such interrogatories. Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32.

26. **Presumptions of regularity.**— That counsel were present when additional instructions were given. Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256. That sufficient reasons existed for giving additional instructions in the absence of counsel. Colorado Cent. Consol. Min. Co. *v.* Turck, 50 Fed. 888, 4 U. S. App. 290, 2 C. C. A. 67.

27. **Both parties requesting a peremptory instruction** has been held equivalent to a withdrawal, by consent, of the case from the jury and a submission thereof to the court; so that, in such case, the direction of a verdict will be supported by all necessary facts and inferences which can reasonably be presumed to have been derived from the evidence of the case in favor of a party for whom the verdict is directed, thus reversing the rule of presumption which ordinarily makes in favor of the other party, in a similar manner. Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115 [*affirming* 39 N. Y. App. Div. 403, 57 N. Y. Suppl. 437]; Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805; Sutter *v.* Vanderveer, 122 N. Y. 652, 25 N. E. 907, 34 N. Y. St. 211 [*affirming* 47 Hun (N. Y.) 366]; Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 22 N. Y. St. 703, 3 L. R. A. 854; State Bank *v.* Southern Nat. Bank, 54 N. Y. App. Div. 99, 66 N. Y. Suppl. 349; O'Beirne *v.* Cary, 34 N. Y. App. Div. 328, 54 N. Y. Suppl. 337; Douai *v.* Lutjens, 21 N. Y. App. Div. 254, 47 N. Y. Suppl. 659; Victoria First Nat. Bank *v.* Hays, 64 Ohio St. 100, 59 N. E. 893; Church *v.* Foley, 10 S. D. 74, 71 N. W. 759; Yankton F. Ins. Co. *v.* Fremont, etc., R. Co., 7 S. D. 428, 64 N. W. 514. See 3 Cent. Dig. tit. "Appeal and Error," § 3748.

28. *Alabama.*— Ford *v.* Postal Tel. Cable Co., 124 Ala. 400, 27 So. 409.

California.— Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629.

Colorado.—Latham *v.* Gregory, 9 Colo. App. 292, 47 Pac. 975.

Minnesota.— Warner *v.* Rogers, 23 Minn. 34.

Montana.— Herbert *v.* King, 1 Mont. 475.

New York.— Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676 [*affirming* 89 Hun (N. Y.) 543, 35 N. Y. Suppl. 346, 69 N. Y. St. 733]; Monongahela Valley Bank *v.* Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; Ladd *v.* Ætna Ins. Co., 147 N. Y. 478, 42 N. E. 197, 70 N. Y. St. 69; Lane *v.* Lamke, 53 N. Y. App. Div. 395, 65 N. Y. Suppl. 1090; Steigerwald *v.* Manhattan R. Co., 50 N. Y. App. Div. 487, 64 N. Y. Suppl.

the same rule applies in case of a peremptory instruction or determination for plaintiff, upon the facts shown by defendant, to establish, if possible, a *prima facie* defense.[29] In either case, upon an incomplete record, every reasonable presumption as to omitted facts will be indulged to sustain a peremptory ruling, or refusal thereof, in the lower court.[30] And a peremptory ruling which would

125; Beck *v.* Buffalo, 63 N. Y. Suppl. 499; Lowy *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 775, 62 N. Y. Suppl. 743; Schaefer *v.* Central Crosstown R. Co., 30 Misc. (N. Y.) 114, 61 N. Y. Suppl. 806; Amer *v.* Folk, 28 Misc. (N. Y.) 508, 59 N. Y. Suppl. 532 [*reversing* 27 Misc. (N. Y.) 634, 58 N. Y. Suppl. 397].

North Carolina.— Cable *v.* Southern R. Co., 122 N. C. 892, 29 S. E. 377; Bazemore *v.* Mountain, 121 N. C. 59, 28 S. E. 17.

North Dakota.— Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209.

Pennsylvania.— Corbalis *v.* Newberry Tp., 132 Pa. St. 9, 25 Wkly. Notes Cas. (Pa.) 184, 19 Atl. 44, 19 Am. St. Rep. 588; Fox *v.* Lyon, 27 Pa. St. 9.

Wisconsin.— Nelson *v.* Shaw, 102 Wis. 274, 78 N. W. 417.

See 3 Cent. Dig. tit. "Appeal and Error," § 3748.

Upon assignment of a refusal to rule peremptorily for defendant, the same rule is applied to determine whether or not the refusal was right. Wilbor *v.* Ewen, 183 Ill. 626, 56 N. E. 342 [*reversing* 70 Ill. App. 153]; Hubbard *v.* Prather, 1 Bibb (Ky.) 178; McMillan *v.* Wilmington, etc., R. Co., 126 N. C. 725, 36 N. E. 129; Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953.

Where no evidence is heard it will be presumed that the allegations of plaintiff could have been sufficiently proved by competent evidence. Willetts *v.* Reid, 5 N. Y. St. 175.

When it appears that plaintiff has not made out a prima facie case, upon the most favorable view of the facts shown of which the pleadings and proof will reasonably admit, it must be presumed that a peremptory ruling in favor of defendant was right. Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778; Piehl *v.* Albany R. Co., 162 N. Y. 617, 57 N. E. 1122 [*affirming* 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755]; Cutler *v.* Hurlbut, 29 Wis. 152.

Evidence improperly excluded will be taken as admitted and presumed to be true in determining the correctness of a peremptory ruling for defendant (Sing Sing First Nat. Bank *v.* Chalmers, 120 N. Y. 658, 24 N. E. 848, 31 N. Y. St. 817; Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209); and evidence of doubtful admissibility appearing in the record will be presumed to have been admitted without objection, if no objection appears (Hubbard *v.* Prather, 1 Bibb (Ky.) 178); but it will not be presumed that plaintiff had other evidence in support of his cause of action unless he offers to produce it (Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778), unless a previous adverse ruling has rendered further evidence meaningless and without probative force (Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209).

29. Paxton *v.* State, 59 Nebr. 460, 81 N. W. 393, 80 Am. St. Rep. 689.

Inferences must be reasonably supported by sufficient facts in order to establish *a prima facie* defense; otherwise a peremptory ruling for plaintiff will not be disturbed. Hires *v.* Norton, 6 Pa. Super. Ct. 457.

30. **Essential facts presumed to sustain peremptory ruling for either party.**— In the absence of a bill of exceptions. Blair *v.* Ray, 103 Ill. 615; White *v.* Louisville, etc., R. Co., (Ky. 1901) 61 S. W. 279; Sweeney *v.* Pennsylvania Co., 4 Ky. L. Rep. 981. In the absence of all the evidence. Nashua Sav. Bank *v.* Anglo-American Land-Mortg., etc., Co., 108 Fed. 764. In the absence of a transcript of the record. Fahy *v.* Gordon, 133 Mo. 414, 34 S. W. 881. In the absence of the reasons for the ruling, if the ruling be not wholly unreasonable. Bondurant *v.* Sibley, 37 Ala. 565; Leonard *v.* The Times, 51 Ill. App. 427; Congressional Tp. No. 19 North, etc., *v.* Clark, 1 Ind. 139; Ross *v.* Misner, 3 Blackf. (Ind.) 362; Eddy *v.* Wilson, 1 Greene (Iowa) 259; Bonney *v.* Reardin, 6 Bush (Ky.) 34; Duncan *v.* McNeill, 31 Miss. 704; Knapp *v.* Winchester, 11 Vt. 351. In the absence of the opening statement of plaintiff's attorney, upon which a complaint is dismissed. Rolfs *v.* Leavenworth Rapid Transit R. Co., (Kan. 1898) 52 Pac. 863; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215. In the absence of a showing that important evidence was not struck out, pursuant to a motion therefor, the disposition of which motion does not appear except by a nonsuit for want of such evidence. Chesebrough *v.* Tompkins, 10 Abb. Pr. N. S. (N. Y.) 379. In the absence of the time of pleading, in case of a judgment of *non prosequitur* for failure to plead in time. Marsh *v.* Johns, 49 Md. 569.

Essential facts presumed to sustain refusal of peremptory ruling.— In the absence of the grounds of the motion. Samuels *v.* Blanchard, 25 Wis. 329. In the absence of a positive showing that documents, which were identified and referred to by the witness, were not in evidence. Day *v.* Backus, 31 Mich. 241. In the absence of a showing of the date of filing a claim against attached property. Chappell *v.* Ferrell, (Tex. Civ. App. 1899) 54 S. W. 1072. But see Cleveland Oil, etc., Mfg. Co. *v.* Norwich Union F. Ins. Soc., 34 Oreg. 228, 55 Pac. 435, for facts not presumed to sustain such a refusal.

A pleading sufficient on its face will be held to have been wrongfully dismissed unless appellee preserves in the record facts which show the contrary. Otherwise it will be presumed that such facts did not exist. Davis *v.* Harper, 14 App. Cas. (D. C.) 463; Brand *v.* Kleinecke, 77 Ill. App. 269; Floberg *v.* Joslin, 75 Minn. 75, 77 N. W. 557.

constitute reversible error will not be presumed to have been made where it does not affirmatively appear.[31] In the absence of a showing to the contrary, sufficient regularity of a peremptory proceeding will be presumed.[32]

(E) *Findings of Fact*—(1) Sufficiency of Record to Support Findings. It will be presumed by the appellate court that findings of fact by the court below were correct if there is any substantial legal evidence upon which it may be seen that the findings of fact in question, aided by every reasonable inference, could, with reason, have been based;[33] unless it also appears that the court below failed duly to consider proper evidence which was admitted,[34]

31. State *v.* Harbach, 78 Iowa 475, 43 N. W. 272.

A peremptory ruling may be inferred from a statement in a bill of exceptions that the judge declared the evidence sufficient to entitle plaintiff to recover, and with that left the cause to the jury. It was inferred that a positive direction to find for plaintiff was given. Fitzgerald *v.* Alexander, 19 Wend. (N. Y.) 402.

32. Presumption of regularity in the absence of any showing to the contrary.— That there was a formal joinder upon a demurrer to the evidence. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161. That a notice of dismissal was unnecessary, or, if necessary, was in fact given. Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109. That a nonsuit out of term-time was upon consent. Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706. That a motion for dismissal was regularly disposed of and at the proper term. Gordon *v.* Gordon, 25 Ill. App. 310. That a dismissal for failure to prosecute was ordered after plaintiff was regularly called, and had defaulted. New England Mortg. Security Co. *v.* Davis, 122 Ala. 555, 25 So. 42.

Fact not presumed to sustain peremptory ruling.— That two succeeding terms of a county court had been held since the dissolution of an injunction. Pitts *v.* Tidwell, 3 Munf. (Va.) 88.

33. *Alabama.*—Shelton *v.* St. Clair, 64 Ala. 565; Marlowe *v.* Benagh, 52 Ala. 112.

California.— Matter of Behrens, 130 Cal. 416, 62 Pac. 603; Matter of Slade, 122 Cal. 434, 55 Pac. 158.

Colorado.—Park County *v.* Jefferson County, 12 Colo. 585, 21 Pac. 912.

Florida.— McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Illinois.— Laird *v.* Mantonya, 83 Ill. App. 327.

Indiana.— Swales *v.* Grubbs, 6 Ind. App. 477, 33 N. E. 1124.

Michigan.— Nieb *v.* Hinderer, 42 Mich. 451, 4 N. W. 159.

Mississippi.— Effinger *v.* Richards, 35 Miss. 540; Crowder *v.* Shackelford, 35 Miss. 321.

Missouri.— Johnson *v.* Lullman, 88 Mo. 567 [*affirming* 15 Mo. App. 55]; Meyer *v.* Insurance Co. of North America, 73 Mo. App. 166.

New York.—Rollwagen *v.* Rollwagen, 3 Hun (N. Y.) 121, 5 Thomps. & C. (N. Y.) 402; People *v.* Contracting Board, 46 Barb. (N. Y.) 254; Biggart *v.* Manhattan R. Co., 16 Daly (N. Y.) 508, 12 N. Y. Suppl. 549, 35 N. Y. St. 381; Heroy *v.* Kerr, 8 Bosw. (N. Y.) 194; Johnson *v.* New York El. R. Co., 17 N. Y. Suppl. 944, 44 N. Y. St. 935.

Texas.— Durrell *v.* Farnwell, 88 Tex. 98, 30 S. W. 539, 31 S. W. 185.

United States.— Kunsemiller *v.* Hill, 86 Fed. 198, 57 U. S. App. 523, 29 C. C. A. 658.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

Presumption abrogated by statute in special cases.— The act establishing the city court of Birmingham, Ala., requires the appellate court to review the conclusions and judgment of that court on the evidence, "without any such presumption." Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

Upon an agreed statement of facts, in Indiana, the supreme court, "having the same means of arriving at a decision that was had by the trial court, will not indulge the presumptions which are indulged in favor of the decision of the trial court upon oral evidence, but will weigh the statement as if it were trying the case originally." Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115; Hannum *v.* State, 38 Ind. 32; Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402.

In a chancery cause, where the appellate court tries the case on the record, as the court below should have tried it, it has been held that there are no presumptions of fact in favor of the decree as in case of a judgment in a trial at law (Flagg *v.* Stowe, 85 Ill. 164; Faulkner *v.* Gardner, 10 Ill. App. 309); but, upon an incomplete record, it has been held that the same presumptions would prevail (Garner *v.* Pomroy, 11 Iowa 149; Heald *v.* Wells, 7 Wis. 149).

34. That all proper evidence was duly considered will be presumed in the absence of any showing to the contrary.

California.— Davis *v.* California Powder-Works, 84 Cal. 617, 24 Pac. 387; Mulford *v.* Estudillo, 32 Cal. 131.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Moss *v.* McCall, 75 Ill. 190.

Kentucky.—Sharp *v.* Carlile, 5 Dana (Ky.) 487.

Missouri.— Lee *v.* Dunn, 29 Mo. App. 467.

New York.— Lewis *v.* Greider, 49 Barb. (N. Y.) 606.

Tennessee.— Carlton *v.* State, 8 Heisk. (Tenn.) 16.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

Presumption of due consideration rebutted. — Where, upon the admission of proper evi-

or was unduly influenced by the admission of improper evidence.[35] In any doubtful case the correctness of findings of fact will be presumed in the absence from the record of the findings,[36] of sufficient objection and exception to such findings,[37] of a proper request for other special findings,[38] or of any essential facts in

dence, the court declares that it would have been improper for admission before a jury, it cannot be presumed that it was duly considered as proper evidence, but, on the contrary, that it was disregarded. Cooper *v.* Cooper, 86 Ind. 75. *Contra*, San Antonio *v.* Pizzini, (Tex. Civ. App. 1900) 58 S. W. 635.

35. Improper evidence received may be presumed to have been disregarded, if there is proper evidence sufficient to support the finding, and there is no reason to believe that the court did not know the objectionable character of the evidence.

Alabama.— Hurt *v.* Nave, 49 Ala. 459.

Arizona.— U. S. *v.* Marks, (Ariz. 1898) 52 Pac. 773.

Colorado.— Rollins *v.* Pueblo County, 15 Colo. 103, 25 Pac. 319; Browns *v.* Lutin, (Colo. App. 1901) 64 Pac. 674.

Illinois.— Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340 [*affirming* 86 Ill. App. 62]; Dunn *v.* Berkshire, 175 Ill. 243, 51 N. E. 770; Treleaven *v.* Dixon, 119 Ill. 548, 9 N. E. 189; Mallers *v.* Crane Co., 92 Ill. App. 514; Christian *v.* Illinois Malleable Iron Co., 92 Ill. App. 320.

Iowa.— Garmoe *v.* Windle, 76 Iowa 239, 40 N. W. 824; Frederick *v.* Cooper, 1 Iowa 100.

Kentucky.— Lancashire Ins. Co. *v.* Lucas, 17 Ky. L. Rep. 1324, 34 S. W. 899.

Nebraska.— Bolin *v.* Fines, 60 Nebr. 443, 83 N. W. 740; Chicago, etc., R. Co. *v.* Omaha First Nat. Bank, 58 Nebr. 548, 78 N. W. 1064.

Oklahoma.— Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780.

South Carolina.— Moses *v.* Sumter County, 55 S. C. 502, 33 S. E. 581.

Texas.— Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

Wisconsin.—Franke *v.* Neisler, 97 Wis. 364, 72 N. W. 887; Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262.

Wyoming.— Rock Springs Nat. Bank *v.* Luman, 6 Wyo. 123, 42 Pac. 874 [*reversing* 5 Wyo. 159, 38 Pac. 678].

See 3 Cent. Dig. tit. "Appeal and Error," § 3766.

Admitted evidence, improper for some purposes and proper for others, may be presumed to have been disregarded if the findings may be fully supported by proper evidence. Murray *v.* Fox, 104 N. Y. 382, 10 N. E. 864; Stowell *v.* Hazelett, 66 N. Y. 635; Frenkel *v.* Caddou, (Tex. Civ. App. 1897) 40 S. W. 638.

A ruling reserved upon the admission of improper evidence or a failure to make an express ruling of exclusion will be presumed to have resulted in the exclusion and disregard thereof, where no subsequent ruling is shown and there is evidence to support the finding. Titsworth *v.* Spitzer, 42 Ark. 310; Swift *v.* Castle, 23 Ill. 209; Wright *v.* Farmers Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 N. W. 308; Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769; Lee *v.* Dunn, 29 Mo. App. 467. *Aliter*, where there is little or none but the objectionable evidence to support the finding. Heartrunft *v.* Daniels, 43 Ill. 369.

Improper evidence, reported by a master, will be presumed to have been disregarded by the court in its decision thereon, if the judgment may be supported by other proper evidence. McCurtain *v.* Grady, 1 Indian Terr. 107, 38 S. W. 65; Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Where the finding cannot be sustained without the improper evidence, the presumption that it was not considered is, of course, rebutted; and this was held in a case where it was not shown under which of two defenses the finding was made, and the finding could have been sustained under one of them without the objectionable evidence. Freeman *v.* Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

Where the proper evidence favors a contrary finding or is strongly conflicting, the presumption is then reversed in favor of holding that the improper evidence was considered. Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659; Leasman *v.* Nicholson, 59 Iowa 259, 12 N. W. 270, 13 N. W. 289.

36. Matson *v.* Frazer, 48 Mo. App. 302.

37. *California.*— Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986; Clark *v.* Willett, 35 Cal. 534; Carpentier *v.* Small, 35 Cal. 346.

Connecticut.—Hurlbut *v.* McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17.

Illinois.— Andrews *v.* Donnerstag, 70 Ill. App. 236.

Missouri.— Carmack *v.* Dade County, 127 Mo. 527, 30 S. W. 162.

Oregon.— Wheeler *v.* Burckhardt, 34 Oreg. 504, 56 Pac. 644.

Texas.— Maverick *v.* Burney, (Tex. Civ. App. 1895) 30 S. W. 566.

38. Conner *v.* Marion, 112 Ind. 517, 14 N. E. 488; Neib *v.* Hinderer, 42 Mich. 451, 4 N. W. 159; New York Car Oil Co. *v.* Richmond, 6 Bosw. (N. Y.) 213; Yoakum *v.* Richards, (Tex. Civ. App. 1892) 24 S. W. 308.

A general finding in favor of the prevailing party raises the presumption that all facts necessary to support it were found to exist, unless the contrary clearly appears.

California.—Antonelle *v.* Board Com'rs New City Hall, 92 Cal. 228, 28 Pac. 270; Myers *v.* Tibbals, 72 Cal. 278, 13 Pac. 695.

Illinois.— Paddon *v.* People's Ins. Co., 107 Ill. 196.

Indiana.— Hosier *v.* Eliason, 14 Ind. 523; Williams *v.* Williams, Smith (Ind.) 339.

Iowa.— Switzer *v.* Davis, 97 Iowa 266, 66 N. W. 174.

evidence,[39] unless the findings of fact appear from the record to be at variance with the pleadings.[40]

(2) Sufficiency of Findings to Support Judgment. In favor of the correctness of the law applied in a judgment upon findings, every inference, not

Kansas.— Hudson *v.* Miller, (Kan. App. 1900) 63 Pac. 21.

Kentucky.— Coleman *v.* Meade, 13 Bush (Ky.) 358.

Michigan.— Delashman *v.* Berry, 20 Mich. 292, 4 Am. Rep. 392.

Missouri.— Hess *v.* Clark, 11 Mo. App. 492.

Montana.— Morse *v.* Swan, 2 Mont. 306; Thorp *v.* Freed, 1 Mont. 651.

New York.— Petrie *v.* Hamilton College, 158 N. Y. 458, 53 N. E. 216 [*reversing* 8 N. Y. App. Div. 371, 40 N. Y. Suppl. 781, 75 N. Y. St. 156]; New York Security, etc., Co. *v.* Lipman, 157 N. Y. 551, 52 N. E. 595 [*affirming* 91 Hun (N. Y.) 554, 36 N. Y. Suppl. 355, 71 N. Y. St. 193]; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602; Lennon *v.* Ingersoll, 61 N. Y. Suppl. 668.

Pennsylvania.— Williams' Appeal, 122 Pa. St. 472, 15 Atl. 912.

Texas.— Walker *v.* Cole, 89 Tex. 323, 34 S. W. 713; Denison *v.* Foster, (Tex. Civ. App. 1894) 28 S. W. 1052.

Wisconsin.— Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

Presumption as to fact of request.—Special findings will be presumed to have been made on request, unless the contrary appears. McCue *v.* Wapello County, 56 Iowa 698, 10 N. W. 248, 41 Am. Rep. 134; Corner *v.* Gaston, 10 Iowa 512; Otto *v.* Halff, (Tex. Civ. App. 1895) 32 S. W. 1052. *Compare* Smith *v.* Uhler, 99 Ind. 140. A request being shown, it will be presumed to have been properly and seasonably made. Clark *v.* Deutsch, 101 Ind. 491; Trentman *v.* Eldridge, 98 Ind. 525. *Compare* Brown *v.* Haak, 48 Mich. 229, 12 N. W. 219.

Refused finding embraced in other finding. — A refusal to find certain facts does not show error, though the facts are plain from the evidence, where there is ground for the presumption that such facts were embraced in other findings. Hadden *v.* Metropolitan El. R. Co., 75 Hun (N. Y.) 63, 26 N. Y. Suppl. 995, 58 N. Y. St. 163.

39. *Alabama.*— McRae *v.* Harmon, 98 Ala. 349, 13 So. 527.

California.—Brind *v.* Gregory, 122 Cal. 480, 55 Pac. 250; Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52.

Colorado.— Kester *v.* Jewell, 15 Colo. 220, 25 Pac. 315; Wilson *v.* Andrews, 5 Colo. App. 10, 36 Pac. 69.

Georgia.— Stuckey *v.* Watkins, 112 Ga. 268, 37 S. E. 401.

Illinois.— Atkinson *v.* Linden Steel Co., 138 Ill. 187, 27 N. E. 919; Binkert *v.* Wabash R. Co., 98 Ill. 205; Columbia Casino Co. *v.* World's Columbian Exposition, 85 Ill. App. 369; Pioneer Furniture Co. *v.* Langworthy, 84 Ill. App. 594.

Indiana.— Graham *v.* State, 66 Ind. 386; Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

Kentucky.— Bitzer *v.* Mercke, (Ky. 1901) 63 S. W. 771.

Maryland.— Horner *v.* O'Laughlin, 29 Md. 465.

Minnesota.— Sumner *v.* Sawtelle, 8 Minn. 309.

Mississippi.— Wells *v.* Smith, 44 Miss. 296.

New York.— Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 30 N. Y. Civ. Proc. 306, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187]; Drake *v.* Bell, 46 N. Y. App. Div. 275, 61 N. Y. Suppl. 657 [*affirming* 26 Misc. (N. Y.) 237, 55 N. Y. Suppl. 945]; Drake *v.* Port Richmond, 1 N. Y. App. Div. 243, 37 N. Y. Suppl. 191, 72 N. Y. St. 662; Kirby *v.* Carpenter, 7 Barb. (N. Y.) 373.

Ohio.— Haskins *v.* Alcott, 13 Ohio St. 210.

Oklahoma.— Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780.

Pennsylvania.— Brewing Co.'s License, 14 Pa. Super. Ct. 188.

South Dakota.— Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893; Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

Texas.— Love *v.* Breedlove, 75 Tex. 649, 13 S. W. 222; Graves *v.* George, (Tex. Civ. App. 1899) 54 S. W. 262; Seinsheimer *v.* Flanagan, 17 Tex. Civ. App. 427, 44 S. W. 30.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008; Farmington Gold-Min. Co. *v.* Rhymney Gold, etc., Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913; Snyder *v.* Emerson, 19 Utah 319, 57 Pac. 300.

Wisconsin.—Concordia F. Ins. Co. *v.* Pittelkow, (Wis. 1901) 86 N. W. 168.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

Where particular evidence referred to is not sufficient to sustain a special finding, it will be presumed to have been made upon other omitted evidence. Hughes *v.* Marquet, 85 Tenn. 127, 2 S. W. 20; Sweet *v.* Lowery, (Tex. Civ. App. 1901) 63 S. W. 166, 1022.

Upon an apparently complete record it cannot be presumed that there was other evidence introduced which would support the findings. Nephi Irrigation Co. *v.* Vickers, 20 Utah 310, 58 Pac. 836.

40. Parkhurst *v.* Race, 100 Ill. 558; Wheeler *v.* Floral Mill, etc., Co., 9 Nev. 254; Harkins *v.* Cooley, 5 S. D. 227, 58 N. W. 560; Morris *v.* Montgomery, 2 Tex. Unrep. Cas. 385. *Compare* Wyvell *v.* Jones, 37 Minn. 68, 33 N. W. 43, which holds that findings will be presumed correct, in the absence of the evidence, though some of them appear to be outside the issues raised.

In the absence of the pleadings the findings will be presumed to have been within the issues raised. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129.

contrary to the evidence or otherwise appearing to be unreasonable, will be drawn from the facts found;[41] and the judgment will be presumed to have been fully supported by express findings which are not in the record.[42] That sufficient findings to support the judgment were made will be implied if the record does not show that they were not or could not, upon the issues and the evidence, have been made;[43] and, in order to sustain the judgment, additional findings to those shown

41. *California.*— Kent *v.* San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620; Perkins *v.* West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397.

Indiana.— Hill *v.* Swihart, 148 Ind. 319, 47 N. E. 705.

Iowa.— Citizens' Bank *v.* Johnson, 107 Iowa 365, 77 N. W. 1046; Coffman *v.* Acton, 74 Iowa 147, 37 N. W. 121.

Louisiana.— Nicholls *v.* Bienvenue, 47 La. Ann. 355, 16 So. 811.

Massachusetts.— Jewett *v.* Morrison, 175 Mass. 161, 55 N. E. 890.

Michigan.— Hoffman *v.* Harrington, 28 Mich. 90.

Minnesota.— Ware *v.* Squyer, 81 Minn. 388, 84 N. W. 126.

Nebraska.— Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

New York.— Juliand *v.* Watson, 43 N. Y. 571; Rice *v.* Isham, 4 Abb. Dec. (N. Y.) 37; Johnson *v.* New York El. R. Co., 17 N. Y. Suppl. 944, 44 N. Y. St. 935.

Oregon.— Trummer *v.* Konrad, 32 Oreg. 54, 51 Pac. 447.

Pennsylvania.— Livingood *v.* Moyer, 2 Woodw. (Pa.) 65.

Texas.— San Antonio, etc., R. Co. *v.* Faires, (Tex. Civ. App. 1893) 26 S. W. 82.

Vermont.—Sowles *v.* St. Albans, 71 Vt. 418, 45 Atl. 1050.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

Findings capable of different constructions will be presumed to have been made upon that theory which the evidence will support as against that which cannot be thus supported (Brison *v.* Brison, 90 Cal. 323, 27 Pac. 186), and, where the evidence is not to be considered or is not conclusive, that construction will be presumed correct which supports the judgment, if possible (Drake *v.* Port Richmond, 157 N. Y. 706, 52 N. E. 1124 [*affirming* 1 N. Y. App. Div. 243, 37 N. Y. Suppl. 191, 72 N. Y. St. 662]; Hill *v.* Grant, 46 N. Y. 496; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Drake *v.* Port Richmond, 1 N. Y. App. Div. 243, 37 N. Y. Suppl. 191, 72 N. Y. St. 662; Jarrell *v.* Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904).

In case of insufficient counts or paragraphs, a finding will be presumed to have been based, if possible, upon a sufficient count, if one exists. Deweese *v.* Hutton, 144 Ind. 114, 43 N. E. 13; Hammons *v.* Espy, Wils. (Ind.) 536; St. Louis Rawhide Co. *v.* Hill, 72 Mo. App. 142. *Aliter,* where a had paragraph was previously held good on demurrer. Ethel *v.* Batchelder, 90 Ind. 520.

In order to infer a fact against the judgment, "the fact to be inferred must follow inevitably from the facts found; or, in other words, the non-existence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found." Emmal *v.* Webb, 36 Cal. 197.

Upon conflicting findings the presumption in favor of the judgment is reversed to the extent of allowing the defeated party the benefit of such as are most favorable to him in aid of his exceptions to conclusions of law. Bonnell *v.* Griswold, 89 N. Y. 122; Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415.

That the trial judge changed his views has been presumed where the judgment did not coincide with the findings and the evidence was conflicting. Condee *v.* Gyger, 126 Cal. 546, 59 Pac. 26; Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499.

Where no propositions of law are expressly announced, it will be presumed, if possible, that the law was correctly applied to the facts. Smith *v.* Barber, 145 Ill. 420 note, 34 N. E. 34; Atkinson Car Spring Works *v.* Barber, 145 Ill. 418, 34 N. E. 33; Boehm *v.* Griebenow, 78 Ill. App. 675; Stahl *v.* Pitney, 75 Ill. App. 649; Johnson *v.* Lullman, 88 Mo. 567 [*affirming* 15 Mo. App. 55]; Pearson *v.* Gillett, 55 Mo. App. 312; Zervis *v.* Unnerstall, 29 Mo. App. 474; Lee *v.* Mead, 9 Mo. App. 597. *Aliter,* where correct conclusions of law have been requested and refused, and no other sufficient conclusions have been declared upon the points in question. St. Louis Bolt, etc., Co. *v.* Buell, 8 Mo. App. 594; Eyermann *v.* Zeppenfeld, 6 Mo. App. 581.

42. Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530; Sadler *v.* State, 23 Nev. 141, 43 Pac. 915; Bonner *v.* Freedman, (Tex. Civ. App. 1900) 57 S. W. 306.

43. *Arkansas.*— Riggan *v.* Wolf, 53 Ark. 537, 14 S. W. 922.

California.— Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Hixon *v.* Brodie, 45 Cal. 275; Lovell *v.* Frost, 44 Cal. 471; Buckout *v.* Swift, 27 Cal. 432, 87 Am. Dec. 90.

Illinois.— Wood *v.* Price, 46 Ill. 435.

Indiana.— Huntington *v.* Drake, 24 Ind. 347.

Iowa.— Buford *v.* Devoe, 96 Iowa 736, 65 N. W. 413; Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581.

Montana.— Ingalls *v.* Austin, 8 Mont. 333, 20 Pac. 637; Princeton Min. Co. *v.* Butte First Nat. Bank, 7 Mont. 530, 19 Pac. 210.

Nevada.— Wilson *v.* Wilson, 23 Nev. 267, 45 Pac. 1009; More *v.* Lott, 13 Nev. 376.

New Mexico.— Lamy *v.* Remuson, 2 N. M. 245.

in the record, which may be supported by the evidence upon the issues, may be presumed to have been made.[44] And in case of a failure to make express

New York.— Viele *v.* Troy, etc., R. Co., 20 N. Y. 184; Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirming* 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513]; Harden *v.* Palmer, 2 E. D. Smith (N. Y.) 172; Myers *v.* Twelfth Ward Bank, 28 Misc. (N. Y.) 188, 58 N. Y. Suppl. 1065.

Ohio.— Gibsonburg Banking Co. *v.* Wakeman Bank, 20 Ohio Cir. Ct. 591, 10 Ohio Cir. Dec. 754.

Pennsylvania.—Com. *v.* Hart, 12 Pa. Super. Ct. 605.

Texas.— Craig *v.* Marx, 65 Tex. 649; Cabell *v.* Floyd, (Tex. Civ. App. 1899) 50 S. W. 478.

Vermont.— Spaulding *v.* Warner, 57 Vt. 654; Harriman *v.* School Dist. No. 12, 35 Vt. 311.

Wisconsin.— Smith *v.* Janesville, 26 Wis. 291.

See 3 Cent. Dig. tit. "Appeal and Error," § 3762 *et seq.*

An express finding, which is insufficient because it states two alternative facts disjunctively, precludes the appellate court from presuming the existence of the essential fact, though it might have been so found from the evidence adduced. Kley *v.* Healy, 9 Misc. (N. Y.) 93, 29 N. Y. Suppl. 3, 59 N. Y. St. 692.

Facts recited in a written decision as the basis of the judgment will be presumed to have been found by the court (Meek *v.* McClure, 49 Cal. 623); but countervailing language of a written opinion has been held not sufficient to rebut the presumption that all the material and necessary issues presented were properly decided (Phenix Ins. Co. *v.* Fuller, 53 Nebr. 811, 74 N. W. 268, 68 Am. St. Rep. 637, 40 L. R. A. 408).

Judgment by a court sitting as a jury must be presumed to have conclusively settled all controverted issues of fact, though no findings of fact be made. Montgomery *v.* Black, 124 Ill. 57, 15 N. E. 48. But where, in such case, proper declarations of law requested by appellant have been refused, it will not be presumed, in the absence of findings of fact, that the facts were determined adversely to appellant. State *v.* Finn, 11 Mo. App. 546; Eyermann *v.* Zeppenfeld, 6 Mo. App. 581.

44. *California.*— People *v.* Eaton, 46 Cal. 100.

Indiana.— Ohio, etc., R. Co. *v.* Vickery, 55 Ind. 509.

Iowa.— Phillips *v.* Phillips, 46 Iowa 703.

Kansas.— Pennell *v.* Felch, 55 Kan. 78, 39 Pac. 1023; Lysle *v.* Lingenfelter, 6 Kan. App. 871, 50 Pac. 503.

Missouri.— Hess *v.* Clark, 11 Mo. App. 492.

Montana.— Alder Gulch Consol. Min. Co. *v.* Hayes, 6 Mont. 31, 9 Pac. 581.

Nevada.— Welland *v.* Williams, 21 Nev. 230, 29 Pac. 403.

New York.— Gardiner *v.* Schwab, 110 N. Y. 650, 17 N. E. 732, 17 N. Y. St. 174; Hays *v.* Miller, 70 N. Y. 112; Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Texas.— Leary *v.* People's Bldg., etc., Assoc., (Tex. Civ. App. 1899) 49 S. W. 632.

Vermont.— Burton *v.* Barlow, 55 Vt. 434.

Wisconsin.— Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608.

Contra.— Benjamin *v.* Levy, 39 Minn. 11, 38 N. W. 702; Schneider *v.* Ashworth, 34 Minn. 426, 26 N. W. 233; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308; Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802; Justice *v.* Uhl, 10 Ohio St. 170. *Contra*, also, where the evidence is not in the record, wherefore the appellate court cannot determine that there was evidence to support additional findings, in which case it is presumed in New York that no such evidence existed (Rochester Lantern Co. *v.* Stiles, etc., Press Co., 135 N. Y. 209, 31 N. E. 1018, 47 N. Y. St. 842; Stoddard *v.* Whiting, 46 N. Y. 627; Bowen *v.* Webster, 3 N. Y. App. Div. 86, 38 N. Y. Suppl. 917; Comer *v.* Mackey, 73 Hun (N. Y.) 236, 25 N. Y. Suppl. 1023; Beard *v.* Sinnott, 35 N. Y. Super. Ct. 51); also, where the evidence is conflicting and no request for finding was made (Hollister *v.* Mott, 132 N. Y. 18, 29 N. E. 1103, 42 N. Y. St. 848), or where a request was made and refused (Meyer *v.* Amidon, 45 N. Y. 169).

See 3 Cent. Dig. tit. "Appeal and Error," § 3764.

An omitted finding may be presumed in accordance with the burden of proof — that is, the silence of the findings upon a material point has been taken, in some cases, as an express finding against the party with whom rests the *onus probandi* as to the matter in question.

California.— Steinback *v.* Krone, 36 Cal. 303.

Indiana.— Citizens State Bank *v.* Julian, 153 Ind. 655, 55 N. E. 1007; Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Noblesville Gas, etc., Co. *v.* Loehr, 124 Ind. 79, 24 N. E. 579; Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392.

Iowa.— Newlon *v.* Montrose Independent Dist., 109 Iowa 69, 80 N. W. 316.

Missouri.— Scheppelmann *v.* Fuerth, 87 Mo. 351.

New York.— Manley *v.* Insurance Co. of North America, 1 Lans. (N. Y.) 20.

Texas.—California Bank *v.* Marshall, (Tex. 1893) 22 S. W. 6.

See 3 Cent. Dig. tit. "Appeal and Error," § 3764.

Clearly insufficient evidence to support the omitted finding rebuts the presumption that such finding was made. Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737; Oberlander *v.* Spiess, 45 N. Y. 175; Zeiss *v.* American Wringer Co., 62 N. Y. App. Div. 463, 70 N. Y. Suppl. 1110; Rossi *v.* MacKellar, 13 N. Y.

findings, it may be presumed that such findings were waived,[45] except where express findings are required by statute.[46] A clearly erroneous finding will not be presumed to have been harmless.[47]

e. **Verdict** — (i) *Sufficiency of Record to Support Verdict.* A general verdict will be presumed to be right unless it clearly appears that a jury of reasonable men could not reasonably, upon the evidence, have returned the verdict in question;[48] that the instructions of the court upon a material matter have been

Suppl. 827, 37 N. Y. St. 503; Humason *v.* Lobe, 76 Tex. 512, 13 S. W. 382.

Findings inconsistent with a prior erroneous ruling on demurrer will not be presumed in order to render harmless such erroneous ruling; on the contrary, it will be presumed, in the absence of any showing to the contrary, that the theory upon which facts were held insufficient on demurrer was adhered to. Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947.

Findings inconsistent with those made cannot be supplied by presumption. Peabody *v.* McAvoy, 23 Mich. 526; Pratt *v.* Page, 32 Vt. 13; Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756.

In case of a judgment upon an auditor's report the appellate court declined to presume that the trial court made findings in addition thereto which are necessary to support the judgment, and not fairly to be inferred from the report itself. Corliss *v.* Putnam, 37 Vt. 119; Pratt *v.* Page, 32 Vt. 13.

45. A waiver of express findings which do not appear may be presumed, where there is no objection or exception or other fact to show that they were not waived.

California.— Benton *v.* Benton, 122 Cal. 395, 55 Pac. 152; Leadbetter *v.* Lake, 118 Cal. 515, 50 Pac. 686.

Idaho.— Bunnell, etc., Invest. Co. *v.* Curtis, (Ida. 1897) 51 Pac. 767; Parker *v.* Beagle, (Ida. 1895) 40 Pac. 61.

Montana.— Yellowstone Nat. Bank *v.* Gagnon, (Mont. 1901) 64 Pac. 664.

New York.— Bartlett *v.* Goodrich, 153 N. Y. 421, 47 N. E. 794 [*affirming* 36 N. Y. Suppl. 770, 72 N. Y. St. 1].

North Dakota.— Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867.

South Dakota.— Chandler *v.* Kennedy, 8 S. D. 56, 65 N. W. 439.

Texas.— Texas, etc., R. Co. *v.* Purcell, 91 Tex. 585, 44 S. W. 1058; Wynne *v.* Kennedy, 11 Tex. Civ. App. 693, 33 S. W. 298.

Utah.— Haynes *v.* Roberts, 4 Utah 405, 11 Pac. 512.

Vermont.— Pierce *v.* Pierce, 70 Vt. 270, 40 Atl. 728.

Washington.— Bard *v.* Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

See 3 Cent. Dig. tit. "Appeal and Error," § 3771.

Failure to specifically except raises the presumption that a defect in, or omission of, a finding was waived. Henry *v.* Everts, 30 Cal. 425.

46. Presumption abrogated by statute.— Where, by statutory requirement, the findings must contain all facts necessary to support the judgment, an essential finding which does not appear upon a complete record of the findings cannot be supplied by implication or presumption of waiver. Ball *v.* Kehl, 95 Cal. 606, 30 Pac. 780; North Pac. R. Co. *v.* Reynolds, 50 Cal. 90; Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654; Tomlinson *v.* New York, 23 How. Pr. (N. Y.) 452. *Aliter*, where the findings were made before the statute went into effect. Fratt *v.* Toomes, 48 Cal. 28. A reasonable inference from facts found may, however, even in case of such a mandatory statute, supply defects and omissions not constituting an entire lack of foundation for the judgment. Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654. And where, upon the record, it cannot be seen that such statute was not complied with, it will be presumed that it was. Schwartz *v.* Stock, (Nev. 1901) 65 Pac. 351. And in case of doubt or ambiguity as to such compliance the same rule obtains. Benton *v.* Benton, 122 Cal. 395, 55 Pac. 152.

47. Injurious consequences will be presumed to follow a clearly erroneous finding, although such injury is not apparent. To sustain the judgment in such case, lack of injury must affirmatively appear. That the erroneous finding was the result of inadvertence cannot be presumed. Murdock *v.* Clarke, (Cal. 1890) 24 Pac. 272.

48. *Alabama.*— Mallory *v.* Stodder, 6 Ala. 801.

Georgia.— Milledgeville *v.* Thomas, 69 Ga. 535.

Illinois.— Entwistle *v.* Meikle, 180 Ill. 9, 54 N. E. 217; Dunlap *v.* Taylor, 23 Ill. 440; Lake Shore Stone Co. *v.* East Tennessee Land, etc., Co., 90 Ill. App. 451; Bour *v.* Chicago, etc., Coal Co., 87 Ill. App. 592.

Iowa.— Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673.

Massachusetts.— Gardner *v.* Peaslee, 143 Mass. 382, 9 N. E. 833.

Minnesota.— Newell *v.* Houlton, 22 Minn. 19.

Mississippi.— Peck *v.* Thompson, 23 Miss. 367.

See 3 Cent. Dig. tit. "Appeal and Error," § 3755 *et seq.*

Every necessary fact, not wholly unsupported by the evidence, will be presumed to have been found by the jury in support of a general verdict, whenever the existence of such facts are drawn in question.

Alabama.— Evans *v.* State Bank, 15 Ala. §1.

California.— Caruthers *v.* Hensley, 90 Cal. 559, 27 Pac. 411.

Illinois.—Rhoads *v.* Metropolis, 36 Ill. App. 123.

Indiana.— Blew *v.* Hoover, 30 Ind. 450.

Iowa.— Helt *v.* Smith, 74 Iowa 667, 39 N. W. 81; McNally *v.* Shobe, 22 Iowa 49.

disregarded[49] or misunderstood,[50] or, being erroneous, resulted in prejudice;[51]

Kansas.—Nation *v.* Littler, (Kan. 1898) 52 Pac. 96.

Mississippi.— Thornton *v.* McNeill, 23 Miss. 369.

New Hampshire.— Allard *v.* Hamilton, 58 N. H. 416; Melcher *v.* Flanders, 40 N. H. 139.

New York.— Toplitz *v.* Bauer, 161 N. Y. 325, 55 N. E. 1059 [*affirming* 57 N. Y. Suppl. 1149]; Purvis *v.* Coleman, 21 N. Y. 111; Tripp *v.* Smith, 50 N. Y. App. Div. 499, 64 N. Y. Suppl. 94.

Pennsylvania.— Levistein *v.* Deal, 3 Phila. (Pa.) 413, 16 Leg. Int. (Pa.) 173.

Vermont.— Gates *v.* Bowker, 18 Vt. 23. *Compare* Bourne *v.* Merritt, 22 Vt. 429.

In the absence of the evidence, or any material portion thereof, it will be presumed to have been sufficient to support the verdict as to every essential fact.

Alabama.— De Mony *v.* Johnston, 7 Ala. 51.

California.— Caruthers *v.* Hensley, 90 Cal. 559, 27 Pac. 411.

Georgia.— Brown *v.* Atlanta, 66 Ga. 71.

Iowa.— Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162; Terpenning *v.* Gallup, 8 Iowa 74.

Kentucky.— Bard *v.* McElroy, 6 B. Mon. (Ky.) 416; Elswick *v.* Newsom, 9 Dana (Ky.) 260.

Maryland.— Cross *v.* Hall, 4 Md. 426.

Michigan.— Cappon, etc., Leather Co. *v.* Preston Nat. Bank, 114 Mich. 263, 72 N. W. 180.

Mississippi.— Gale *v.* Lancaster, 44 Miss. 413; Cowden *v.* Dobynes, 24 Miss. 486.

New York.— Meislahn *v.* Irving Nat. Bank, 62 N. Y. App. Div. 231, 70 N. Y. Suppl. 988; Campion *v.* Rollwagen, 43 N. Y. App. Div. 117, 59 N. Y. Suppl. 308.

North Carolina.— Honeycut *v.* Angel, 20 N. C. 371.

South Dakota.— Fodness *v.* Juelfs, 13 S. D. 145, 82 N. W. 396.

Wisconsin.— McHugh *v.* Chicago, etc., R. Co., 41 Wis. 75; McIntyre Will Case, 38 Wis. 318.

See 3 Cent. Dig. tit. "Appeal and Error," § 3755 *et seq.*

That theory of the case which will support the verdict will, if possible, be presumed to have been the one held by the jury.

Iowa.— Winney *v.* Sandwich Mfg. Co., (Iowa 1891) 50 N. W. 565.

Massachusetts.— Gardner *v.* Peaslee, 143 Mass. 382, 9 N. E. 833.

Missouri.— McGinnis *v.* St. Louis, 157 Mo. 191, 57 S. W. 755.

Nebraska.— Cooper *v.* Hall, 22 Nebr. 168, 34 N. W. 349.

New York.— Desmond-Dunne Co. *v.* Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995; Powers *v.* Prudential Ins. Co., 83 Hun (N. Y.) 254, 31 N. Y. Suppl. 626, 64 N. Y. St. 263; Lee Bank *v.* Satterlee, 1 Rob. (N. Y.) 1, 17 Abb. Pr. (N. Y.) 6; La Motte *v.* Archer, 4 E. D. Smith (N. Y.) 46.

Upon a complete record of the evidence, it cannot be presumed that there was other evidence given to support the verdict. Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25.

Verdict upon a feigned issue out of chancery raises no presumption of the existence of the facts found, where the appellate court reviews the proceedings in chancery the same as the trial court. Johnson *v.* Johnson, 4 Wis. 135.

Documents will be presumed to have been read to the jury, where they are shown to have been admitted, and an omission of a bill of exceptions to so state may be presumed to be a clerical error. Tentonic Ins. Co. *v.* Howell, 21 Ky. L. Rep. 1245, 54 S. W. 852.

49. That instructions of the court were followed will be presumed, unless the contrary affirmatively appears.

California.— Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

Indiana.— La Matt *v.* State, 128 Ind. 123, 27 N. E. 346; Westfield Bank *v.* Inman, 8 Ind. App. 239, 34 N. E. 21.

Iowa.— Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; Helt *v.* Smith, 74 Iowa 667, 39 N. W. 81.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

New York.— Purvis *v.* Coleman, 21 N. Y. 111; Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99; Schwann *v.* Clark, 9 Misc. (N. Y.) 117, 29 N. Y. Suppl. 289, 59 N. Y. St. 706 [*affirming* 7 Misc. (N. Y.) 242, 27 N. Y. Suppl. 262, 58 N. Y. St. 24]; Hackett *v.* Equitable Gas Light Co., 6 Misc. (N. Y.) 75, 26 N. Y. Suppl. 11, 55 N. Y. St. 492.

Texas.— Ashcroft *v.* Pouns, 1 Tex. 594.

Vermont.— Walworth *v.* Readsboro, 24 Vt. 252.

United States.— Harper, etc., Co. *v.* Wilgus, 56 Fed. 587, 15 U. S. App. 143, 6 C. C. A. 45.

See 3 Cent. Dig. tit. "Appeal and Error," § 3757.

50. That instructions were understood will be presumed if the instructions were proper and capable of being understood by the ordinary juror.

Georgia.— Georgia R., etc., Co. *v.* Baker, 88 Ga. 28, 13 S. E. 831.

Massachusetts.— Raymond *v.* Nye, 5 Metc. (Mass.) 151.

Pennsylvania.— Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

Texas.— East Line, etc., R. Co. *v.* Lee, 71 Tex. 538, 9 S. W. 604.

Vermont.— Walworth *v.* Readsboro, 24 Vt. 252.

See 3 Cent. Dig. tit. "Appeal and Error," § 3757.

51. A doubtful instruction may be presumed not to have misled the jury. Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. 216; Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 35 N. E. 27; Bundy *v.* McKnight, 48 Ind. 502; Million *v.* Riley, 1 Dana (Ky.) 359, 25 Am. Dec. 149; Heaton *v.* Manhattan F. Ins. Co., 7 R. I. 502.

Improper remarks, made during trial, may

that undue regard has been given by the jury to evidence which was improperly introduced and subsequently stricken out,[52] which was excluded by the court,[53] or which was never submitted;[54] that the verdict is at variance with the pleadings,[55]

be presumed to have been cured by instruction, where the instructions are not in the record. Yunker *v.* Marshall, 65 Ill. App. 667.

It will be presumed that the jury considered the whole charge, and were not misled by a single instruction, defective when standing alone. Stull *v.* Howard, 26 Ind. 456; Hart *v.* Newton, 48 Mich. 401, 12 N. W. 508; Missouri Pac. R. Co. *v.* James, (Tex. 1888) 10 S. W. 332.

That other instructions were given, explaining and curing a defective instruction which is capable of being explained and cured, has been presumed where such instructions did not appear and it did not appear that they were not given. Hawkins *v.* Collier, 106 Ga. 18, 31 S. E. 755; Marshall *v.* Lewark, 117 Ind. 377, 20 N. E. 253; Rogers *v.* Wallace, 10 Oreg. 387. *Contra,* Bryson *v.* Chisholm, 56 Ga. 596; Lower *v.* Franks, 115 Ind. 334, 17 N. E. 630.

The refusal of a correct instruction will be presumed to have been cured by another instruction which appears to have been given but is not in the record. Cooke *v.* Washington, 2 Tex. Unrep. Cas. 402. *Contra,* where the instruction refused was "quite unexceptionable and peculiarly proper to have been given," and it did not appear that "the right of the case had been attained by the verdict." Weisiger *v.* Chisholm, 22 Tex. 670.

Upon a complete record, it cannot be presumed that other instructions than those set out were given or refused. Garrott *v.* Ratliff, 6 Ky. L. Rep. 72.

A palpably erroneous instruction, relating to material matter, and not withdrawn or cured by additional instructions, cannot be presumed to have been disregarded by the jury.

Alabama.— Ware *v.* Dudley, 16 Ala. 742.

Illinois.— Tipton *v.* Schuler, 87 Ill. App. 517.

Iowa.— Lacey *v.* Straughan, 11 Iowa 258.

Missouri.— Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; Stegman *v.* Berryhill, 72 Mo. 307.

West Virginia.— Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

See also *supra,* XVII, E, 2, d, (v), (c).

52. Improper evidence will be presumed to have been disregarded, unless the contrary clearly appears, where the court has given proper instructions (Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99); and such instructions may be presumed where the objectionable character of the evidence is shown only by facts subsequent to its admission (Randall *v.* Doane, 9 Gray (Mass.) 408; Tucker *v.* Salem Flouring Mills Co., 13 Oreg. 28, 7 Pac. 53). *Aliter,* where the evidence was erroneously admitted. Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659; Spokane, etc., Gold, etc., Co. *v.* Colfelt, (Wash. 1901) 64 Pac. 847.

53. Evidence, objectionable upon a certain contingency, will be presumed to have been disregarded if the contingency was found not to exist, in accordance with instructions to that effect. Ayers *v.* Hartford Ins. Co., 21 Iowa 193.

Documents, admitted only for certain purposes, will not be presumed to have been considered by the jury for other purposes, though taken out upon retiring under instructions. New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325; Porter County First Nat. Bank *v.* Williams, 4 Ind. App. 501, 31 N. E. 370.

Excluded depositions, inadvertently taken out by the jury upon retiring to consider their verdict, were presumed not to have been tampered with or considered, in the absence of an affirmative showing to that effect. Phœnix Ins. Co. *v.* Underwood, 12 Heisk. (Tenn.) 424.

54. That the jury did not go outside the evidence will be presumed unless the contrary appears; and it was not presumed that they did so from the fact that an instruction upon a particular matter was broad enough to permit it. Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

Items withdrawn during trial will be presumed not to have been included in the verdict, if the verdict may be supported by remaining items, unless it affirmatively appears that the withdrawn items were included. McVey *v.* Johnson, 75 Iowa 165, 39 N. W. 249.

Documents in the record may be presumed to have been received in evidence, if the contrary does not appear. Ragsdale *v.* Barnett, 10 Ind. App. 478, 37 N. E. 1109; Powell *v.* Hopson, 14 La. Ann. 666.

Documents will be presumed to have been read to the jury, or to have reached the jury in some proper form, though the record does not specifically so state, where they have been offered and received in evidence.

Illinois.— Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424; Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611.

Indiana.— Leary *v.* New, 90 Ind. 502.

Missouri.— Webb *v.* Archibald, (Mo. 1894) 28 S. W. 80.

Nebraska.— Dawson *v.* Williams, 37 Nebr. 1, 55 N. W. 284.

New York.— Shaw *v.* Bryant, 90 Hun (N. Y.) 374, 35 N. Y. Suppl. 909, 70 N. Y. St. 612.

Documents, not introduced, but taken out by the jury upon retiring, were presumed to have been considered in arriving at a verdict, it appearing that the documents, if considered, had an important bearing upon the weight of the evidence in favor of the verdict. Nolan *v.* Vosburg, 3 Ill. App. 596.

55. Proof will not be presumed contrary to the pleadings; therefore, though the facts in evidence be not in the record, a verdict which is repugnant to admissions in the pleadings cannot stand. Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

Upon a doubtful pleading, which may be held to state a cause of action, it will be pre-

not responsive to the issues raised and submitted,[56] or contrary to special findings;[57] or that passion and prejudice contributed to the result.[58]

(11) *Sufficiency of Verdict to Support Judgment.* Upon an incomplete or doubtful record, every reasonable presumption will be indulged to the end that the judgment may be supported by the verdict,[59] with reference to the amount

sumed that the construction which will support the verdict was the one adopted on the trial and followed by the jury. Smith *v.* Cisson, 1 Colo. 29.

Specific grounds of relief alleged will, in the absence of the contrary, be presumed not to have been exceeded by the jury in the consideration of their verdict. Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, 9 N. W. 816.

Where no issue is tendered on a material matter, it cannot be presumed that the jury found as to such matter. Gifford *v.* Carvill, 29 Cal. 589.

Necessary party omitted.— Where a husband sued for slanderous words spoken of himself and wife, but did not join the wife, an entire verdict was presumed to have included damages for the slander of the wife, and the judgment was reversed. Johnson *v.* Dicken, 25 Mo. 580.

56. That the verdict was responsive to the issues will be presumed, in the absence of a showing as to what the issues were, if it could reasonably have been returned upon any issue which might have arisen in a case of the character tried. Sears *v.* Andrews, 1 Colo. 88.

A general verdict for "defendants," in a case where counsel appeared of record "for the defendants," will be presumed to mean all of defendants who joined issue. Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761.

That a counter-claim or set-off was deducted, where it has been established or admitted, will be presumed unless the contrary hypothesis is clearly apparent. Branger *v.* Buttrick, 30 Wis. 665.

Upon the blending of a pleaded issue with one not pleaded, a general verdict was presumed not intended to be responsive alone to the pleaded issue, in the absence of an affirmative showing that the jury were not misled. Cincinnati, etc., R. Co. *v.* Ward, 1 Cinc. L. Bul. 332.

Issues raised but not submitted will be presumed not to have been considered by the jury in arriving at its verdict, unless the contrary appears on the record. Davis *v.* Walter, 70 Iowa 465, 30 N. W. 804; Waxahachie *v.* Connor, (Tex. Civ. App. 1896) 35 S. W. 692. In such case it will not be presumed that the jury took the plaintiff's pleading out with them for consideration. North Chicago St., etc., R. Co. *v.* Hutchinson, 92 Ill. App. 567.

57. Special findings and the general verdict will be reconciled, if possible. Central Union Telephone Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64; Poseyville *v.* Lewis, 126 Ind. 80, 25 N. E. 593; Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241; Indianapolis Union R. Co. *v.* Neubacher, 16 Ind. App. 21, 44 N. E. 669; Johnson *v.* Miller, 82 Iowa 693, 47 N. W. 903, 48 N. W. 1081, 31 Am. St. Rep. 514; St. Louis, etc., R. Co. *v.* Noble, 43 Kan. 310, 23 Pac. 438.

In the absence of the special findings in question, or of the evidence, it must be presumed to be in accord with the general verdict. Dempsey *v.* Cogswell, 29 Minn. 100, 12 N. W. 148.

In the absence of a motion for judgment upon special findings, the action of the trial court overruling it will be presumed correct, since the motion may have contained something making such action proper. Lake Erie, etc., R. Co. *v.* Juday, (Ind. App. 1900) 56 N. E. 931.

Findings by the court in addition to special verdict.— Where certain questions are submitted and found by a jury, and the determination of other facts necessary to the judgment are not necessarily such as must have been submitted to the jury, where the evidence is not in the record, it will be presumed, in the absence of a showing to the contrary, that such facts not found by the jury existed and were found.

Indiana.— Langsdale *v.* Bonton, 12 Ind. 467.

Iowa.— Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162.

Minnesota.— McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895; Dempsey *v.* Cogswell, 29 Minn. 100, 12 N. W. 148.

Texas.— State Nat. L. & T. Co. *v.* Fuller, (Tex. Civ. App. 1901) 63 S. W. 552; Breneman *v.* Mayer, (Tex. Civ. App. 1900) 58 S. W. 725.

Wisconsin.— Batten *v.* Richards, 70 Wis. 272, 35 N. W. 542.

58. The remission of exemplary damages will not purge a grossly excessive verdict of the effect of passion and prejudice as to the remainder, but it will be presumed that the same motives influenced the entire verdict, unless it clearly appears that such remainder is amply supported by the evidence. Chicago City R. Co. *v.* Fennimore, 78 Ill. App. 478; Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695.

But a mere error in assessing the amount of damages, in a case where the evidence is conflicting and would have justified a verdict either way, does not raise the presumption that the verdict on the general facts was also erroneous, or the result of passion and prejudice. Stemmerman *v.* Nassau Electric R. Co., 36 N. Y. App. Div. 218, 56 N. Y. Suppl. 730.

59. A judgment contrary to the verdict, stated to have been so given "on points of law," was held erroneous, upon the presumption that the verdict was right, in the absence of an affirmative showing of good reasons why judgment was not rendered on the verdict. Evans *v.* Bell, 6 Dana (Ky.) 479.

thereof,[60] inaccuracies or mistakes,[61] insufficiency of form,[62] ambiguity or doubtful sufficiency of substance,[63] uncertainty as to which of several counts was made the basis of the verdict, where some portions of plaintiff's pleading are insufficient[64]

60. A verdict larger than the amount claimed does not raise the presumption that the jury intended to find double damages, in disregard of the court's instructions. Carpenter *v.* St. Louis, etc., R. Co., 20 Mo. App. 644.

Smaller verdict than could have been given under the instructions was presumed to have been an error in fixing the amount, not a virtual finding for defendant, in an action on an insurance policy, where the instruction was that, if fraud or perjury had been committed in making proof of loss, defendant would be entitled to a verdict. Wolf *v.* Goodhue F. Ins. Co., 43 Barb. (N. Y.) 400.

Treble damages was presumed to have been given by a general finding of damages where plaintiff was entitled to such recovery. Prignitz *v.* McTiernan, 18 Misc. (N. Y.) 651, 43 N. Y. Suppl. 974.

Verdict including interest.—Interest on the amount of a verdict cannot be upheld against the presumption that the jury included interest in their general verdict, where they were instructed that, if plaintiff recovered, he would be entitled to interest. Diedrich *v.* Northwestern Union R. Co., 47 Wis. 662, 3 N. W. 749.

61. A variance between verdict returned and that recited in judgment will be presumed to have been corrected by the jury by the return of the verdict recited in the judgment. Layman *v.* Hendrix, 1 Ala. 212.

One of two verdicts, which is correct, will be presumed to have been substituted by the jury for the other, which is incorrect. Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539.

62. If the form of the verdict depends upon the evidence, the verdict in question will be presumed to be in accordance with the evidence produced, where the evidence is not in the record. Caruthers *v.* Hensley, 90 Cal. 559, 27 Pac. 411.

In the absence of objection to the form of the verdict because it does not find special facts, the special form will be presumed to have been waived and the special facts found, if possible. Tripp *v.* Smith, 50 N. Y. App. Div. 499, 64 N. Y. Suppl. 94.

In the absence of a statement as to the form of the verdict, it will be presumed that the verdict was returned in proper form. Mattson *v.* Borgeson, 24 Ill. App. 79.

Rule requiring principal and interest to be found separately will be presumed not to have been violated by the return of a verdict for a single sum less than the amount claimed, if the deficiency is such that it may have been intended to include no interest in the finding. Lewis *v.* Allen, 68 Ga. 398.

Signing will be presumed in case the record does not show a failure to sign. Douglass *v.* Baker, 79 Tex. 499, 15 S. W. 801.

Variance between the bill and record proper, the former showing an informal verdict and the latter a formal one, was presumed to have been cured by putting the verdict in proper form, under direction of the court, before the discharge of the jury. Allmon *v.* Chicago, etc., R. Co., 155 Ill. 17, 39 N. E. 569.

An amendment may be presumed, where the form of the verdict is amendable, and the judgment has been properly entered. Shaw *v.* Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892.

63. A plat, as a part of the verdict, will be presumed to supply any deficiency in the verdict, such plat having been offered in evidence at the trial. Smith *v.* Fite, 98 N. C. 517, 4 S. E. 203. A dividing line on such map or plat, showing the method in which the verdict divides land, will be presumed not imaginary, but to have been based on monuments capable of exact location, in the absence of any showing to the contrary. Thompson *v.* Connolly, 42 Cal. 313.

64. That the verdict was based on a good count, if possible, will be presumed, unless the contrary appears, if one good count exists, though other insufficient counts also exist.

Connecticut.— Booth *v.* Northrop, 27 Conn. 325; Wolcott *v.* Coleman, 2 Conn. 324.

Delaware.— Ellis *v.* Culver, 2 Harr. (Del.) 129.

District of Columbia.— Bunyea *v.* Metropolitan R. Co., 19 D. C. 76.

Indiana.—Indianapolis, etc., R. Co. *v.* Taffe, 11 Ind. 458; Harvey *v.* Laflin, 2 Ind. 477.

Ohio.—Johnson *v.* Mullin, 12 Ohio 10; Case *v.* State, 1 Ohio Dec. (Reprint) 486.

Tennessee.—Pursell *v.* Archer, Peck (Tenn.) 317.

Wisconsin.— McPhee *v.* McDermott, 77 Wis. 33, 45 N. W. 808; Bushee *v.* Wright, 1 Pinn. (Wis.) 104.

Contra, in civil cases, unless each of the counts describe the same cause of action. Glines *v.* Smith, 48 N. H. 259. In Garr *v.* Gomez, 9 Wend. (N. Y.) 649, it was held that, notwithstanding the presumption that damages were assessed on the good counts only, in case of a general verdict on several counts, some good and some bad, the judgment should be reversed.

Improper allegations of aggravation may be presumed not to have entered into the assessment of damages, in the absence of a showing that they did. Richards *v.* Farnham, 13 Pick. (Mass.) 451.

Where a demurrer to the insufficient counts has been overruled, it cannot be presumed that the verdict was based exclusively on the good counts, but the contrary will be presumed in the absence of any affirmative showing on the record. Rowe *v.* Peabody, 102 Ind. 198, 1 N. E. 353; Pennsylvania Co. *v.* Holderman, 69 Ind. 18; Cook *v.* Hopkins, 66 Ind. 208. But this contrary rule is not applicable merely because a demurrer to the evidence has been overruled, unless the grounds of the rul-

or unproved,[65] uncertainty upon which of several defenses the verdict was based, where one or more are insufficient,[66] or unproved,[67] or insufficiency of special verdicts to support the general verdict or judgment.[68]

f. New Trial. An order granting a new trial, or a waiver of a motion therefor, may be presumed from subsequent proceedings inconsistent with the contrary;[69] and, in the absence of an affirmative showing that the hearing of a motion therefor was irregular, regularity thereof will be presumed.[70] Where the grounds for granting a new trial are not shown, sufficient grounds may be presumed;[71] and designated grounds, which might, in any reasonable view, have been sufficient, will be so presumed, unless the record clearly shows the contrary.[72]

ing show that the court thereby intended to hold a bad count or paragraph good. Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

65. That the verdict was based on a proved count will be presumed, if possible, and unless the contrary appears, where one or more of the counts appear not to have been proved or relied on at the trial. Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Hudson *v.* Matthews, Morr. (Iowa) 94; Pevey *v.* Schulenburg, etc., Lumber Co., 33 Minn. 45, 21 N. W. 844.

66. Where one of two defenses was clearly insufficient to support the verdict in the form in which it was rendered, the court declined to presume that the trial was confined to the other issue, in the absence of a showing to that effect. Gaines *v.* Tibbs, 6 Dana (Ky.) 143.

67. That a verdict was based on a proved defense will be presumed, where one is unproved, and it is not shown that it was based on the unproved defense. Hubbard *v.* Horne, 24 Tex. 270. *Contra*, especially where there are erroneous instructions upon the law of the unproved defense. Gay *v.* Lemle, 32 Miss. 309.

68. Failure to return an answer to a special interrogatory may not be ground for reversal. If possible upon the evidence, it will be presumed in favor of a general verdict that the facts in question were found. Huss *v.* Chicago, etc., R. Co., (Iowa 1901) 85 N. W. 627.

The burden of proof may, in some cases, be resorted to for the determination of essential facts as to which a special verdict is silent — that is, the silence of the special finding as to such fact may be presumed to be a finding against the party who has the burden of proving the fact in question. Citizens Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Nitche *v.* Earle, 88 Ind. 375.

69. Granting of new trial presumed, where no order appears and a new trial was had. McGehee *v.* Hansell, 13 Ala. 17; Fowler *v.* Equitable Trust Co., 141 U. S. 384, 12 S. Ct. 1, 35 L. ed. 786.

Waiver of motion presumed in the absence of an order thereon. Moore *v.* Gilbert, 46 Iowa 508; Darke *v.* Ireland, 4 Utah 192, 7 Pac. 714.

70. Presumption of regularity.— That an associate of the attorney of record had authority to accept service of a notice of motion. McCreery *v.* Everding, 44 Cal. 284. That counsel, by signing the settled statement on motion for new trial, waived want of notice of hearing. Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318. That sufficient notice of hearing was given. Gage *v.* Downey, 79 Cal. 140, 19 Pac. 113, 21 Pac. 527, 855; Baldwin *v.* Daniel, 69 Ga. 782; Beach *v.* Spokane Ranch, etc., Co., (Mont. 1901) 65 Pac. 106; Murray *v.* Hauser, 21 Mont. 120, 53 Pac. 99. That a motion to dismiss a motion for a new trial, for want of due service, was properly denied upon the record. Cothran *v.* Brower, 71 Ga. 357.

71. Any ground which may support the order will be presumed to have been the basis of the new trial, where no ground is specified.

California.— Newman *v.* Overland Pac. R. Co., 132 Cal. 73, 64 Pac. 110; Austin *v.* Gagan, (Cal. 1892) 30 Pac. 790.

Georgia.— Comer *v.* Grannis, 66 Ga. 255.

Indiana.— Waddle *v.* Megee, 81 Ind. 247; Haun *v.* Wilson, 28 Ind. 296.

Kansas.—Hawkins *v.* Skinner, (Kan. 1901) 64 Pac. 969; Eskridge *v.* Lewis, 51 Kan. 376, 32 Pac. 1104.

Montana.— Kircher *v.* Conrad, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 17 L. R. A. 471.

New York.—Young *v.* Stone, 77 Hun (N. Y.) 395, 28 N. Y. Suppl. 881, 60 N. Y. St. 419; Brown *v.* Martin, 27 N. Y. Wkly. Dig. 435.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lee, 90 Tenn. 570, 18 S. W. 268.

See 3 Cent. Dig. tit. "Appeal and Error," § 3772 *et seq.*

A new trial will be presumed to have been granted on the merits, so as to entitle the parties to a trial *de novo*, where the grounds of the order for a new trial do not appear. Brenner *v.* Coerber, 42 Ill. 497.

Where no errors were specified, the court declined to presume, in support of the order, that a specification of errors was waived by the opposite party. McWilliams *v.* Herschman, 5 Nev. 263.

Where specific grounds are shown it cannot be presumed, to sustain the order, that it was made on other grounds (Probst *v.* Braeunlich, 24 W. Va. 356); but where sufficient grounds are designated in the motion other than those insufficient grounds upon which the court acted, it will be presumed that the former grounds justified the order (Johnson *v.* Head, (Iowa 1900) 84 N. W. 678).

72. In the absence of exceptions to the granting of a new trial, or of the hearing of

The refusal of a new trial will be presumed correct, unless prejudicial error is shown by the record to have occurred on the trial,[73] and also that such error was properly brought to the attention of the trial court by a proper motion for new trial,[74]

a motion therefor upon an insufficient showing, the order will be presumed to be right, no substantial injustice appearing to have been done. Hornady *v.* Shields, 119 Ind. 201, 21 N. E. 554.

In the absence of the evidence, it must be presumed that the granting of a new trial, on the ground that the verdict was not supported by the evidence, was fully justified. Jones *v.* Jones, 4 Blackf. (Ind.) 140; Nudd *v.* Home Ins., etc., Co., 25 Minn. 100; Bradley *v.* Slater, 55 Nebr. 334, 75 N. W. 826; Robertson *v.* Harmon, 47 W. Va. 500, 35 S. E. 832.

Upon an incomplete record, the omitted portions will be presumed to sustain an order granting a new trial. Cody *v.* Gainesville First Nat. Bank, 99 Ga. 405, 27 S. E. 714.

Upon conflicting or doubtfully sufficient evidence the presumption obtains that, in granting a new trial for insufficient evidence, the trial court has committed no abuse of discretion. Loomis *v.* Perkins, 70 Conn. 444, 39 Atl. 797; Eickhof *v.* Chicago North Shore St. R. Co., 77 Ill. App. 196; Commonwealth Bank *v.* Hiles, 4 Dana (Ky.) 598; Phillpotts *v.* Blasdel, 8 Nev. 61.

That the court changed its opinion as to the sufficiency of the evidence may be presumed in a case where findings had been made on conflicting evidence, and a new trial was granted for insufficiency of the evidence; and this presumption was held not to have been rebutted by the fact that the motion for new trial was heard by a judge who did not try the case. Churchill *v.* Flournoy, 127 Cal. 355, 59 Pac. 791; Condee *v.* Gyger, 126 Cal. 546, 59 Pac. 26; Hammel *v.* Stone, (Cal. 1887) 14 Pac. 675.

A plain error of law in granting a new trial cannot be aided by any presumption of correct action. Santa Marina *v.* Connolly, 79 Cal. 517, 21 Pac. 1093.

Existence of record facts.— Upon a complete record, it cannot be presumed that record facts existed other than those shown, to sustain an order granting a new trial. And this rule was applied though the order appeared to have been based upon such other facts. Hoskins *v.* Hight, 95 Ala. 284, 11 So. 253.

73. All of the grounds will be presumed to have been considered on the overruling of a motion for a new trial, if the contrary be not clearly shown. Schwartz *v.* Reesch, 2 App. Cas. (D. C.) 440; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436.

Failure to file bill of exceptions was conclusively presumed to have been the ground of refusing a motion for new trial, where a motion to refuse was made and sustained upon this ground. Emery *v.* Emery, 54 Iowa 106, 6 N. W. 152.

If there is any evidence to support the verdict in reviewing a refusal of a new trial, the facts shown thereby will be presumed to have been established; and if such facts reasonably tend to support the verdict the order is presumed to be right. Turner *v.* Huggins, 14 Ark. 21; Beach *v.* Zimmerman, 106 Ind. 495, 7 N. E. 237; Gist *v.* Higgins, 1 Bibb (Ky.) 303.

In the absence of the evidence, or of specific exception that there was a failure of evidence to support the judgment, the presumption of a correct refusal of a new trial upon that ground becomes conclusive. Reed *v.* Moore, 25 N. C. 310.

Overruling motion upon reduction of verdict.— In the absence of the evidence and the instructions, it was presumed that an order, directing plaintiff to reduce his verdict and thereupon overruling a motion for new trial, was authorized by reason of error in the instructions as to certain items not recoverable, the amount of which was ascertainable from the proof. Johnson *v.* Johnson, 20 Ky. L. Rep. 890, 47 S. W. 883. And where the order of *remittitur* and setting aside an order for a new trial recited an agreement of the parties, it was presumed to have been in accordance with such agreement. Goss *v.* Pilgrim, 28 Tex. 263.

Statement that there was no evidence, contained in the motion for a new trial, was presumed by the appellate court to be not true where the trial court overruled the motion, which was "some evidence that the statement was not true," and the decision purported to have been rendered upon "the evidence in the cause, and the arguments of counsel therein." Tilton *v.* Knapp, 14 Kan. 310.

That the evidence was before the trial court, upon the overruling of a motion for a new trial, based on the insufficiency of the evidence, may be presumed. Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458; Morris *v.* Angle, 42 Cal. 236.

Upon a complete record of the evidence it cannot be presumed that there was other evidence not in the record to sustain the verdict and an order refusing a new trial. Anglin *v.* Bottom, 3 Gratt. (Va.) 1.

Where a plain proposition of law is alone presented, there is no especial presumption in favor of a refusal to grant a new trial upon such proposition. Byington *v.* Woodward, 9 Iowa 360.

74. Error not clearly specified in the motion will not be supplied in the appellate court by presumption or intendment. Mazkewitz *v.* Pimentel, 83 Cal. 450, 23 Pac. 527; Pico *v.* Cohn, 67 Cal. 258, 7 Pac. 680; Hoey *v.* Hoey, 36 Conn. 386.

Motion may be presumed not made where the only motion in the record is one entitled in a cause other than that on appeal (Giles *v.* Austin, 54 Kan. 616, 38 Pac. 811); or where none affirmatively appears (Evenson *v.* Webster, 3 S. D. 382, 53 N. W. 747, 44 Am. St.

or by a proper notice of a motion for new trial[75] filed within the time prescribed therefor.[76]

g. Rendition of Judgment — (1) *In General.* The existence of a judgment[77] raises the presumption (conclusive if not clearly rebutted) that the rendition was at a time when the judgment could legally be rendered;[78] also, that it

Rep. 802); otherwise than by an order overruling it, dated after judgment (Guetzkow *v.* Smith, 105 Wis. 94, 80 N. W. 1109); but, where no question of the existence of the motion is made, failure to set it out in the abstract has been held not to raise the presumption that no motion was made (Updyke *v.* Wheeler, 37 Mo. App. 680); and the recital of a motion in the bill of exceptions or decree has been held sufficient (Mesker *v.* Cutler, 51 Mo. App. 341; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595).

Motion may be presumed not in writing, where the record is silent upon the matter, for the purpose of upholding a refusal. Douglass *v.* Insley, 34 Kan. 604, 9 Pac. 475; Lucas *v.* Sturr, 21 Kan. 480; Rogers *v.* Bonnett, 4 Okla. 90, 46 Pac. 599.

Exclusion of witnesses on the hearing of a motion for a new trial will be presumed to have been proper, in the absence of a showing that they were competent and their testimony material (Davis *v.* Melvin, Smith (Ind.) 60); and the testimony of witnesses, for the exclusion of which a continuance on account of their absence was refused, will be presumed immaterial where the complaining party was accorded an opportunity to take the testimony of the witnesses for use at the hearing of a motion for new trial, and failed to do so (Wait *v.* Krewson, 59 N. J. L. 71, 35 Atl. 742).

75. **Striking out notice of motion** will be presumed correct in the absence of a contrary showing, and, if necessary, to have been done upon consent. Wilson *v.* Dougherty, 45 Cal. 34.

76. **An affirmative showing that the motion was filed in time is necessary,** else the presumption may follow that a refusal of a new trial was upon that ground, if necessary to sustain the refusal. Deford *v.* Orvis, 52 Kan. 432, 34 Pac. 1044; Eskridge *v.* Lewis, 51 Kan. 376, 32 Pac. 1104; Burtiss *v.* La Belle Wagon Co., 45 Kan. 413, 25 Pac. 852; Mills *v.* Vickers, 6 Kan. App. 884, 50 Pac. 976; Eldorado *v.* Drapeere, 5 Kan. App. 631, 47 Pac. 545; Taylor *v.* Genail, 10 Mo. App. 250; State *v.* Carondelet Sav. Bank, 6 Mo. App. 582; Masters *v.* Winfield, 7 Okla. 487, 54 Pac. 707. *Contra,* Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203.

Permission to file motion out of time will be presumed to have been for sufficient reasons, in the absence of the reasons. Fordyce *v.* Hardin, 54 Ark. 554, 16 S. W. 576. In the absence of objection, an extension of the time for filing motion may be presumed (Patrick *v.* Morse, 64 Cal. 462, 2 Pac. 49), or that the objection was waived (Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203), or that the time was extended by consent (Churchill *v.* Flournoy, 127 Cal. 355, 59 Pac. 791). *Contra,* that consent must be affirmatively shown. Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417.

That no special reasons exist for allowing a motion beyond time will be presumed where the motion is shown to have been filed beyond time and the trial court declines to consider it for that reason, and no special reasons, taking the case out of the general rule, appear. Anderson *v.* Sherwood, 9 N. Y. St. 636.

The entertaining of a motion may raise the presumption that it was filed within time, where the time is not shown, in order to support an order granting a new trial. Cottle *v.* Leitch, 43 Cal. 320; Cleveland, etc., R. Co. *v.* Davis, 10 Ind. App. 342, 37 N. E. 1069; Wichita, etc., R. Co. *v.* Johnson, 47 Kan. 351, 27 Pac. 980.

Where the time limit is the end of a term, and there is nothing to show when the term ended, and the motion has not been denied because filed out of time, it will be presumed to have been in time. Topeka Bank *v.* Miller, 59 Kan. 743, 54 Pac. 1070 [*affirming* 7 Kan. App. 55, 51 Pac. 964].

77. **In North Carolina the entry of a judgment will be presumed** where no judgment appeared to have been formally entered upon a verdict, the judgment presumed being such as the verdict, connected with the pleadings, would authorize. Barnard *v.* Etheridge, 15 N. C. 295.

78. **Presumption of legal time of rendition.** — That the rendition was before midnight of Saturday. Bishop *v.* Carter, 29 Iowa 165. That the cause was legally continued up to the time of judgment. Clemens *v.* Judson, Minor (Ala.) 395. That a case was taken under advisement until decision at a succeeding term. Brown *v.* Boles, (Tex. Civ. App. 1899) 52 S. W. 120; but *compare* Hann *v.* Field, Litt. Sel. Cas. (Ky.) 376. That the judgment was rendered in term-time. Minick *v.* Minick, 49 Nebr. 89, 68 N. W. 374. That an entry in vacation was pursuant to a rendition in term. Parker *v.* Slaughter, 23 Iowa 125. That the rendition was before adjournment. Weaver *v.* Cooledge, 15 Iowa 244. That the judgment of a justice of the peace was within the prescribed time after submission, though the contrary is indicated by unauthenticated words under his signature to the transcript. Benson *v.* Gutterman, 33 Misc. (N. Y.) 753, 67 N. Y. Suppl. 89. That the judgment was announced in the presence of counsel. Burden *v.* Stein, 25 Ala. 455. That a justice of the peace entered judgment upon receiving the verdict, where the trial was had the day before. Beattie *v.* Qua, 15 Barb. (N. Y.) 132.

See 3 Cent. Dig. tit. "Appeal and Error," § 3777 *et seq.*

was duly signed by the judge;[79] that it was in the form which would legally be sufficient in the particular action,[80] for the correct amount,[81] against or in favor of the proper parties,[82] and correctly describes the property involved;[83] that every essential fact prerequisite to its rendition existed;[84] that, in its rendition and

79. Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180; Arnold *v.* Sandford, 14 Johns. (N. Y.) 417; State *v.* Richter, 37 Wis. 275.

80. **In the absence of objection to the form** of a judgment or decree, it appearing on its face to be such as might have been rendered upon any reasonable view of the case, it will be presumed to be in the proper form according to the adjudication intended. J. V. Farwell Co. *v.* Zenor, 100 Iowa 640, 65 N. W. 317, 69 N. W. 1030; Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467; Hall *v.* Law, 2 Watts & S. (Pa.) 135.

Judgment for damages in replevin may be presumed to have been based upon a showing that the property in controversy could not be returned. Brown *v.* Johnson, 45 Cal. 76.

81. *California.*— People *v.* Otto, 77 Cal. 50, 18 Pac. 872.

Connecticut.— Lobdell *v.* Lake, 32 Conn. 16.

Illinois.— Camp *v.* Small, 44 Ill. 37.

Indiana.— Carter *v.* Hanna, 2 Ind. 45.

New Jersey.— Cook *v.* Brister, 19 N. J. L. 73.

Tennessee.— Williams *v.* State Bank, 1 Coldw. (Tenn.) 43.

Texas.— Henderson *v.* Banks, 70 Tex. 398, 7 S. W. 815; State *v.* Glaevecke, 33 Tex. 59.

United States.— Rush *v.* Newman, 58 Fed. 158, 12 U. S. App. 635, 7 C. C. A. 136.

See 3 Cent. Dig. tit. "Appeal and Error," § 3777 *et seq.*

82. **Designation of parties** in a judgment may be presumed correct. Thus, it has been presumed, in order to uphold a judgment, that a party has no other christian name than that by which he is designated. Fewlass *v.* Abbott, 28 Mich. 270; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867.

Consent to dismissal of some of defendants will be presumed, in the absence from the record of any showing of an objection by the other defendants, in a case where such consent alone could authorize the dismissal. Parker *v.* Altschul, 60 Cal. 380.

Slight variance between the judgment and the pleadings in the designation of a party does not rebut this presumption — as where the middle initial is different (Chandler *v.* Scherer, 32 Tex. 573); or where a designation in the pleadings "as guardian" is omitted from the judgment (Law *v.* Fletcher, 84 Ill. 45). In Morford *v.* Cook, 24 Pa. St. 92, the judgment was reversed upon a plea of death before impetration of the writ, the record showing a judgment for one as executor of the estate of his father, the father having the same name and dying four years before the action, brought by his son in the same name, but not as executor. Thereafter the judgment plaintiff was substituted "as executor," upon a suggestion of death, and from this fact it was presumed that he was not identical with the original plaintiff.

Time of the death of plaintiff not appearing affirmatively, it will be presumed that it occurred after judgment, where no substitution was made before judgment, though the representatives of plaintiff appeared on appeal. Rundles *v.* Jones, 3 Ind. 35.

83. **A description of the property** which coincides with the pleadings will be presumed correct, in the absence of a bill of exceptions (Carpy *v.* Dowdell, 131 Cal. 495, 63 Pac. 778), and, where the judgment included a bond not mentioned in the complaint, in the absence of specific objection, it was presumed that this was done by consent of all parties (Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980, 66 N. Y. St. 594). In case of doubt, it may be presumed that premises awarded are embraced in the description given in the complaint. Morgan *v.* Eggers, 127 U. S. 63, 8 S. Ct. 1041, 32 L. ed. 56. A discrepancy between the description in a judgment and a deed in the record will, in the absence of the evidence, be presumed to have been reconciled thereby. Bayha *v.* Kessler, 79 Mo. 555. In the absence of an exhibit referred to in the petition for recovery of land, it may be presumed that the judgment description was taken therefrom. DeHaven *v.* DeHaven, 20 Ky. L. Rep. 663, 47 S. W. 597 [*affirming* (Ky. 1898) 46 S. W. 215].

84. **Prerequisite facts presumed.**—The disposal of a motion for new trial, though an entry of final judgment was made in the journal on the date of the verdict, three months before disposition of the motion, this being presumed a mistake of the clerk. Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249. The setting aside a default against a defendant in whose favor judgment is rendered. Von Schmidt *v.* Von Schmidt, 104 Cal. 547, 38 Pac. 361; Pim *v.* St. Louis, 122 Mo. 654, 27 S. W. 525. The granting of an application to substitute the judgment plaintiff for the original plaintiff. Virgin *v.* Brubaker, 4 Nev. 31. The reinstatement of the judgment plaintiff's case, which had been dismissed. Mason *v.* Tiffany, 45 Ill. 392; Bloomfield R. Co. *v.* Burress, 82 Ind. 83. The filing of a declaration before judgment in accordance with an order therefor upon the setting aside of a nonsuit. Smith *v.* Robinson, 11 Ala. 270. The waiver of a special plea not shown to have been decided. Turner *v.* Clark, 18 Tex. Civ. App. 606, 46 S. W. 381. The entry of a *nolle prosequi* before judgment, the transcript in the case showing such entry after judgment was presumed a mere clerical informality. Love *v.* Howell, 20 N. C. 54. The abandonment of a motion to restore possession claimed to have been delivered under a habere facias possessionem pending a former appeal. Scott *v.* Means, etc., Iron Co., 13 Ky. L. Rep. 911, 18 S. W. 1012, 19 S. W. 189.

Presumptions of prerequisite facts not in-

entry, all statutory requirements have been complied with;[85] and that a *nunc pro tunc* entry thereof was warranted by the fact of omission to enter at the time when the judgment was actually rendered.[86]

(II) *AMENDING OR VACATING JUDGMENT.* The amendment or vacation of a judgment will, in the absence of a clear showing to the contrary, be presumed to have been regular[87] and upon sufficient reasons;[88] and the same presumption attends a failure or refusal to amend or vacate a judgment upon application.[89]

(III) *JUDGMENT BY DEFAULT.* In support of a judgment by default, unless the record shows the contrary, it will be presumed that sufficient proof of statutory notice to defendant was made;[90] that defendant was actually in default at

dulged.— That an order sustaining a demurrer to a complaint was set aside, in a case where judgment was for plaintiff. Seaver *v.* Cay, 9 Cal. 564. That a nonsuit was set aside before a judgment for plaintiff at a succeeding term. Foster *v.* Atkison, 1 Litt. (Ky.) 214. *Aliter*, where the judgment was rendered at the same term. Venable *v.* McDonald, 4 Dana (Ky.) 336.

Interlocutory or ancillary proceedings, which are necessary to sustain the judgment, may be presumed to have been had, if the contrary be not shown.

Alabama.— Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521.

California.— Meyer *v.* San Diego, 132 Cal. 35, 64 Pac. 942.

Iowa.— Cory *v.* Gillespie, 94 Iowa 347, 62 N. W. 837; Boardman *v.* Beckwith, 18 Iowa 292; Busick *v.* Bumm, 3 Iowa 63.

Michigan.— Schwab *v.* Coots, 48 Mich. 116, 11 N. W. 832.

New York.— Nellis *v.* McCarn, 35 Barb. (N. Y.) 115.

See 3 Cent. Dig. tit. "Appeal and Error," § 3714 *et seq.*

85. Williams *v.* Hutchinson, 26 Fla. 513, 7 So. 852; Thompson *v.* State, 31 Tex. 166.

86. Katzenberg *v.* Lehman, 80 Ala. 512, 2 So. 272; Bryan *v.* Streeter, 57 Ala. 104; Whitten *v.* Graves, 40 Ala. 578; Price *v.* Gillespie, 28 Ala. 279; Glass *v.* Glass, 24 Ala. 468; People *v.* Quick, 92 Ill. 580; Brooks *v.* Duckworth, 59 Mo. 48; Van Etten *v.* Test, 49 Nebr. 725, 68 N. W. 1023.

87. **An affirmative showing of error is necessary** to rebut the presumption that the vacation of a judgment at the term of its rendition was regular and proper. Venable *v.* McDonald, 4 Dana (Ky.) 336; Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685. *Aliter*, where the judgment is vacated at a succeeding term, which can be done only in certain cases and in a specified manner. Hettrick *v.* Wilson, 12 Ohio St. 136, 80 Am. Dec. 337.

In the absence of the date of adjournment of the term at which an order vacating a judgment was made, it will be presumed that, in making application therefor, defendant was not guilty of laches. Baker *v.* Knott, (Ida. 1893) 35 Pac. 172.

88. **In the absence of the reasons for an** amendment or vacation of a judgment, sufficient reasons will be presumed to have been shown.

Alabama.— Burdeshaw *v.* Comer, 108 Ala. 617, 18 So. 556.

California.— Crozier's Estate, (Cal. 1884) 4 Pac. 240.

Indiana.— Burnside *v.* Ennis, 43 Ind. 411; Winship *v.* Crothers, 20 Ind. 455.

Mississippi.— Benwood Iron Works Co. *v.* Tappan, 56 Miss. 659.

Missouri.— Harlan *v.* Moore, 132 Mo. 483, 34 S. W. 70.

Ohio.— Nye *v.* Stillwell, etc., Co., 12 Ohio Cir. Ct. 40.

An amendment to conform to the decision raises the presumption that the judgment in its amended form was the judgment rendered, and that the correction is a mere clerical mistake. Silveira *v.* Iverson, 125 Cal. 266, 57 Pac. 996; Loveland *v.* Union Nat. Bank, 25 Colo. 499, 56 Pac. 61; Crane *v.* Miller, 50 N. Y. Suppl. 675.

In the absence of findings made or requested from the evidence upon which a judgment was vacated, it will be presumed that complainant's objection is that, taking that view of the evidence most favorable to his adversary, the vacation was unwarranted; and if any reasonable view of the evidence will support the vacation it will be presumed correct. Holden *v.* Purefoy, 108 N. C. 163, 12 S. E. 848.

A conditional vacation (upon payment of costs) may be presumed to have become unconditional, so as to authorize an order absolute, where there is no indication that the condition was not fulfilled. Furman *v.* Furman, 9 N. Y. App. Div. 94, 41 N. Y. Suppl. 76.

89. **In the absence of the grounds of a motion to vacate** from which it may be seen that statutory grounds were alleged, the motion to vacate must be presumed to have been rightly denied. McIntyre's Will Case, 38 Wis. 318.

In the absence of the facts relied on by a party who complains of a refusal to amend a judgment, it must be presumed that the facts did not warrant the amendment requested. Hosea *v.* Talbert, 65 Ala. 173.

An undisposed-of application may be presumed to have been abandoned. Owen *v.* Arrington, 17 Ark. 530.

90. *Alabama.*— Cumming *v.* Richards, 32 Ala. 459.

Arkansas.— Hale *v.* Warner, 36 Ark. 217.

California.— Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220.

Illinois.— Domestic Bldg. Assoc. *v.* Nelson, 172 Ill. 386, 50 N. E. 194.

Indiana.— Stevens *v.* Helm, 15 Ind. 183.

Iowa.— State *v.* Elgin, 11 Iowa 216.

the time of the entry of default;[91] that everything prerequisite to the taking of a default had been done;[92] and that proof of plaintiff's claim, sufficient to warrant the judgment, was made.[93] In the absence of a plain abuse of discretion, the setting aside or refusal to set aside a default will be presumed to have been warranted,[94] as well, also, as a refusal to enter a default.[95]

(IV) *JUDGMENT BY CONFESSION.* The requisite authority to confess a judgment will be presumed to have been shown unless the record plainly shows that it was not,[96] it being required by statute to be made a part of the

Kansas.— McBride *v.* Hartwell, 2 Kan. 410.

Minnesota.— Skillman *v.* Greenwood, 15 Minn. 102; Gemmell *v.* Rice, 13 Minn. 400.

See also *supra*, XVII, E, 2, b, (II), (B); and see 3 Cent. Dig. tit. "Appeal and Error," § 3778.

91. **In the absence of the court rules,** the presumption in favor of a certificate of the trial court that the time to answer had expired under the rules is conclusive. Calwell *v.* Boyer, 8 Gill & J. (Md.) 136; Schoenpflug *v.* Ketcham, (Tenn. Ch. 1898) 52 S. W. 666. It will also be presumed that the rules were observed in setting the case for trial without special notice to defendant. Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

In the absence of the pleadings, a finding that defendant had failed to plead will be presumed to have been made in view of all the pleadings which were before the trial court, and that a failure to plead was fully shown. Utley *v.* Cameron, 87 Ill. App. 71.

Where the record shows an answer or plea filed, it may be presumed either that the pleading was withdrawn or that defendant failed to bring it to the attention of the court (Pierson *v.* Burney, 15 Tex. 272); or that the issues thus raised were properly disposed of (Woolley *v.* Sullivan, (Tex. Civ. App. 1897) 43 S. W. 919). *Contra*, that default in such case was entered through inadvertence. Miller *v.* Hoc, 1 Fla. 221. An answer in the record, filed after default, does not rebut the presumption of default. De Pedrorena *v.* Hotchkiss, 95 Cal. 636, 30 Pac. 787.

An answer on the day default is entered for want of an answer may be presumed to have been filed after the entry. Culbertson *v.* Ellison, 20 Tex. 101.

An entry of default on the last day allowed to plead may be presumed to have been after the hour fixed therefor, where the record shows that an hour certain was fixed. McKenzie *v.* McKenzie, 80 Ill. App. 31.

A clerical error should not be presumed, it has been held, for the purpose of sustaining a default judgment rendered on the day before the return-day of the writ. McKell *v.* Neil, Morr. (Iowa) 271.

92. **That defendant was duly called** will be presumed if the contrary is not shown. Mattoon *v.* Vanater, Morr. (Iowa) 492.

93. *California.*— Crane *v.* Brannan, 3 Cal. 192.

Illinois.— Moore *v.* Titman, 33 Ill. 358.

Indiana.— Huntington *v.* Cast, (Ind. App. 1900) 56 N. E. 949.

Iowa.— Parvin *v.* Hoopes, Morr. (Iowa) 294.

Kansas.— Goff *v.* Russell, 3 Kan. 212.

Louisiana.— Landry *v.* Jefferson College, 7 Rob. (La.) 179; Excurieux *v.* Chapduc, 4 Rob. (La.) 323.

Mississippi.— Barfield *v.* Impson, 1 Sm. & M. (Miss.) 326.

A special form of judgment — for example, against one defendant as principal and against his co-defendant as surety — may be presumed to have been rendered upon proof of facts justifying it. Andress *v.* Crawford, 11 Ala. 853; Kupfer *v.* Sponhorst, 1 Kan. 75.

The assessment of damages, the method of assessment not appearing in the record, will be presumed to have been in accordance with legal rules. Fairfield *v.* Burt, 11 Pick. (Mass.) 244.

94. Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946; Seiberling *v.* Schuster, 83 Iowa 747, 49 N. W. 844; Willett *v.* Millman, 61 Iowa 123, 15 N. W. 866.

Conditions, not clearly unreasonable, which are imposed as a prerequisite to the setting aside of a default, will be presumed to be just. Lichtenberger *v.* Worm, 41 Nebr. 856, 60 N. W. 93.

In the absence of the showing for the opening of a default, it must be presumed that the action of the court thereon was correct. Wright *v.* Griffey, 146 Ill. 394, 34 N. E. 941; Peterson *v.* Kittredge, 65 Miss. 33, 3 So. 65, 5 So. 824.

In the absence of objection for want of notice of a hearing of an application to open a default, the party's counsel being present at the hearing, sufficient notice will be presumed. Ballard *v.* Whitlock, 18 Gratt. (Va.) 235.

That ground which will support the order will be presumed to have been the one acted on, where several grounds for opening a default were alleged, some of which were insufficient, and the application was granted generally. Dinsmore *v.* Adams, 66 N. Y. 618.

95. **Refusal to enter default presumed correct,** in the absence of the grounds of the motion therefor (Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648), or the grounds of the refusal (Round *v.* State, 14 Ind. 493; Mason *v.* McLean, 6 Wash. 31, 32 Pac. 1006).

96. Boyles *v.* Chytraus, 175 Ill. 370, 51 N. E. 563; Farwell *v.* Meyer, 36 Ill. 510; Rising *v.* Brainard, 36 Ill. 79; Caruthers *v.* Niblack, 73 Ill. App. 197; Gibboney *v.* Gibboney, 2 Ill. App. 322; Applegate *v.* Mason, 13 Ind. 75; Missouri Pac. R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932. See 3 Cent. Dig. tit. "Appeal and Error," § 3779.

record;[97] and it may, also, be presumed that the judgment was rendered upon proper and sufficient evidence.[98]

(v) *Judgment For Costs.* The amount of costs taxed will be presumed correct and legal if the record does not positively show the contrary,[99] except in case of a retaxation, when the same presumption obtains in favor of the amount as retaxed,[1] and also in favor of the regularity of the proceeding for that purpose.[2] Similarly, it will be presumed that the costs were duly awarded against the proper party, and upon sufficient grounds.[3]

An ambiguous power of attorney may be presumed to have been explained by oral evidence, where the judgment by confession is made in open court. Links *v.* Mayer, 22 Ill. App. 489; Conklin *v.* Finnell, 12 Ind. 394.

A conditional power of attorney to confess judgment may, in the absence of a contrary showing, be presumed to have been shown to be unconditional by fulfilment of the condition. Rapley *v.* Price, 9 Ark. 428.

Authority of a partner to bind his copartners by a warrant of attorney to confess judgment, executed in the firm-name, or that the copartners adopted the warrant, may be presumed to have been shown. Bissell *v.* Carville, 6 Ala. 503.

97. In Illinois, when judgment has been confessed in open court, the authority will be presumed, but when it has been confessed in vacation the authority must be "preserved in the record." Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514.

98. Boyles *v.* Chytraus, 175 Ill. 370, 51 N. E. 563; Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195; Fish *v.* Glover, 154 Ill. 86, 39 N. E. 1081 [*affirming* 51 Ill. App. 566], where a judgment confessed was allowed to stand as security for the purpose of giving defendants an opportunity to prove any defense they might have, and, the defense having failed, the sufficiency of the original proof of the claim confessed was questioned on appeal.

99. *Alabama.*—Beadle *v.* Davidson, 75 Ala. 494.

Arizona.— Billups *v.* Utah Canal Enlargement, etc., Co., (Ariz. 1901) 63 Pac. 713.

California.— Meyer *v.* San Diego, 132 Cal. 35, 64 Pac. 942; Phelps *v.* Mayers, 126 Cal. 549, 58 Pac. 1048; Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766.

Illinois.— Governor *v.* Ridgway, 12 Ill. 14.

Indiana.— Smith *v.* Strain, 72 Ind. 600; Jamieson *v.* Cass County, 56 Ind. 466.

Louisiana.— Marks *v.* Stein, 11 La. Ann. 509.

Massachusetts.— Southworth *v.* Packard, 7 Mass. 95.

North Carolina.— Tilley *v.* Biveus, 110 N. C. 343, 14 S. E. 920.

North Dakota.— Gould *v.* Duluth, etc., Elevator Co., 3 N. D. 96, 54 N. W. 316.

South Carolina.— Maxwell *v.* Bodie, 56 S. C. 402, 34 S. E. 692; Moses *v.* Sumter County, 55 S. C. 502, 33 S. E. 581.

Wisconsin.—Abbott *v.* Johnson, 47 Wis. 239, 2 N. W. 332.

The amount of attorney's fees will be presumed to be reasonable and legal unless the contrary appears from the amount, or otherwise. Matter of Kasson, 119 Cal. 489, 51 Pac. 706; Trummer *v.* Konrad, 32 Oreg. 54, 51 Pac. 447.

1. England *v.* Roundtree, 19 Ky. L. Rep. 2003, 44 S. W. 951; State *v.* Hollenbeck, 68 Mo. App. 366; Watkins *v.* Atwell, 21 Tex. Civ. App. 193, 50 S. W. 1047.

2. Notice of the hearing will be presumed sufficient where the party complaining appeared and made no objection to the sufficiency of the notice. Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076.

3. Costs dependent upon amount of claim. —Where a statute required a plaintiff to pay costs of suit in a superior court where the "sum due or demanded," to be determined by the evidence, did not exceed a certain sum, and a judgment for a less sum with costs was awarded, in the absence of the evidence it was presumed that the amount was reduced by special matters of defense under the general issue, though it was certified that no evidence was given under a plea of set-off. Dayton *v.* Hall, 8 Blackf. (Ind.) 556. To similar effect, where the rule of costs depended upon the amount recovered, see Minich *v.* Minich, 33 Pa. St. 378; Power *v.* Rockwell, 39 Wis. 585.

Costs, dependent upon special circumstances, will be presumed to have been awarded in view of such circumstances, where the record thereupon is lacking or incomplete. Hunt *v.* Ohmertz, 15 Colo. 447, 24 Pac. 1047; Welch *v.* Wallace, 8 Ill. 490; Judah *v.* Stagg, 24 Wend. (N. Y.) 238.

Costs dependent upon an increase of judgment on appeal.— Where the legality of a judgment for costs in favor of appellant in an intermediate court, such appellant having obtained a judgment in the first court for a lesser sum, depends upon his being adjudged to recover a larger sum on appeal, exclusive of interest, to sustain the judgment for costs, it will be presumed, in the absence of a contrary showing, that a small increase of the principal judgment was not merely on account of interest. Crandall *v.* Colley, (Mass. 1901) 59 N. E. 844.

An apportionment of costs between the parties will be presumed correct where it appears that plaintiff's claim was reduced by counter-claim; and though the amount thus apportioned in favor of defendant, by comparison with the minimum sum which must have been allowed as a counter-claim, appeared to be excessive, yet where the maximum which might have been allowed would have been more than sufficient to justify the apportionment, in the absence of a clear

h. Orders After Judgment. Orders made after judgment, when questioned on appeal, are favored by rebuttable presumptions similar to those which are indulged to support the judgment proper — such as relate to executions,[4] supplementary proceedings,[5] writs of assistance,[6] and execution sales.[7]

F. Discretion of Lower Court — 1. Power to Review — a. In General. In the absence of a clear abuse of discretion, to the complaining party's prejudice, matters purely within the discretion of the trial court are not reviewable on appeal.[8]

showing that more than the minimum was not allowed, it was presumed that the facts justified the judgment. Minnesota Stoneware Co. *v.* Knapp, 75 Iowa 561, 39 N. W. 893.

Costs of receivership.— In the absence of the evidence it was presumed that the facts thereby disclosed warranted a taxation of the costs of a receivership against the defeated party. Highley *v.* Deane, 168 Ill. 266, 48 N. E. 50.

An agreement to award against the successful party the costs of the suit cannot be presumed in the absence of anything in the record to show it. Jones *v.* Johnston, 5 J. J. Marsh. (Ky.) 599.

4. Issuance of execution.— Where a bond is required as a condition to the issuance of an execution in attachment, it may be presumed that the execution did not issue until the bond was given. Rust *v.* Reives, 24 Ark. 359.

In scire facias against sureties, where the proceedings are not in the record, it will be presumed that a sufficient showing was not made by them why execution should not issue. Gutheil Suburban Invest. Co. *v.* Fahey, 12 Colo. App. 487, 55 Pac. 946.

Quashing execution.— The filing of a transcript of the judgment may be presumed, in support of the power to make an order quashing an execution issued to the sheriff on a district-court judgment, where otherwise the execution would have been to a constable, and the court in such case would have been without jurisdiction. Jackson *v.* Smith, 16 Abb. Pr. (N. Y.) 201.

Refusal to quash execution, in the absence of an exception or plain error on the transcript, will be presumed correct. Morrel *v.* Barner, 4 Litt. (Ky.) 10.

Staying execution.— In the absence of the reasons upon which an execution was stayed, the presumption is that the reasons were sufficient. Cake *v.* Cake, 192 Pa. St. 550, 44 Wkly. Notes Cas. (Pa.) 552, 43 Atl. 971.

Dismissal of an affidavit of illegality upon motion of the judgment plaintiff, so that execution could issue, may be presumed to have been done upon a hearing wherein the questions presented in the affidavit were correctly determined from proper evidence. Houstoun *v.* Bradford, 35 Fla. 490, 17 So. 664.

In favor of the moving affidavit.— Every reasonable presumption will be indulged to support an order granting a motion to set aside execution where it appears that no papers were read in opposition thereto. Jackson *v.* Smith, 16 Abb. Pr. (N. Y.) 201, 25 How. Pr. (N. Y.) 476.

5. The return of execution necessary to supplementary proceedings in aid of execution may be presumed from the fact of an order. Bean *v.* Tonnelle, 24 Hun (N. Y.) 353.

6. Granting writ of assistance.— Demand upon the husband alone being shown in a hearing on application for a writ of assistance against a husband and wife, it may be presumed in support of the writ that the wife appeared to have no such interest as required a demand on her. California Mortg., etc., Bank *v.* Graves, (Cal. 1900) 62 Pac. 259.

In the absence of the evidence upon which a writ of assistance was ordered, it will be presumed to have been proper. Daggs *v.* Wilson, (Ariz. 1899) 59 Pac. 150.

Upon a complete record, an order instructing the clerk to withhold, without apparent reason, a habere facias possessionem after judgment for recovery of land, cannot be presumed to have been for sufficient reasons. Cole *v.* Dameron, 3 J. J. Marsh. (Ky.) 314.

7. Granting an order of seizure and sale, upon evidence of special circumstances, will, in the absence of such evidence, be presumed to be right. Bloom *v.* Martin, 20 La. Ann. 256.

That the officer did his duty, in conducting a sale of land after foreclosure as a whole, will be presumed, in order to sustain a confirmation of the sale, where there is no record showing that the land consisted of separate tracts. Michigan Mut. L. Ins. Co. *v.* Richter, 58 Nebr. 463, 78 N. W. 932.

The manner of sale will be presumed to have been correct and according to the order thereof, in the absence of a specific objection thereto. Hardin *v.* Bond, (Ky. 1900) 56 S. W. 676.

A motion to set aside an execution sale may be presumed from the fact that the sale was set aside. White-Crow *v.* White-Wing, 3 Kan. 276.

Adequate grounds for setting aside sale will be presumed to have existed where the affidavits presenting such grounds are not in the record. Newland *v.* Gaines, 1 Heisk. (Tenn.) 720.

The abandonment of a sale, not of exceptions to a report thereof, will be presumed, where no further action was taken after a report showing failure to comply with the decree of sale, which was promptly met by exceptions. Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850.

Failure to determine a homestead claim, preliminary to an order of sale, rebuts the presumption that such order was justified. Bunch *v.* Keith, 64 Ark. 654, 44 S. W. 452.

8. *Alabama.*— Gayle *v.* Bancroft, 22 Ala. 316.

Arizona.—Solomon *v.* Norton, (Ariz. 1886) 11 Pac. 108.

b. Refusal to Exercise Discretion. The refusal of a trial court to exercise a discretion vested in it, such refusal being based on the ground of a want of power, is reviewable on appeal;[9] but where it appears that, had the trial court exercised its discretion and granted a motion, it would not have been a proper exercise of such discretion, its action will not be reversed on appeal.[10]

Arkansas.— Fleming *v.* Johnson, 26 Ark. 421.

California.— Schaake *v.* Eagle Automatic Can Co., (Cal. 1901) 63 Pac. 1025.

Colorado.— Byers *v.* McPhee, 4 Colo. 204.

Connecticut.—Hoxie *v.* Payne, 41 Conn. 539.

Delaware.—Valley Paper Co. *v.* Smalley, 2 Marv. (Del.) 289, 43 Atl. 176.

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

Georgia.— Hoyt Scale, etc., Co. *v.* Dillingham, 112 Ga. 663, 37 S. E. 885.

Idaho.— Pease *v.* Kootenai County, (Ida. 1901) 65 Pac. 432.

Illinois.— People *v.* Chytraus, 183 Ill. 190, 55 N. E. 666.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

Iowa.— Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921.

Kansas.— North American R. Constr. Co. *v.* Patry, (Kan. App. 1900) 61 Pac. 871.

Kentucky.— Donallen *v.* Lennox, 6 Dana (Ky.) 89.

Louisiana.— Seddan *v.* Templeton, 7 La. Ann. 126.

Maine.— Hayford *v.* Everett, 68 Me. 505.

Maryland.— Thomas *v.* Mohler, 25 Md. 36.

Massachusetts.— Rogers *v.* Ladd, 117 Mass. 334.

Michigan.— Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298.

Minnesota.—Marsh *v.* Webber, 13 Minn. 109.

Mississippi.—Pattison *v.* Josselyn, 43 Miss. 573.

Missouri.— Griffin *v.* Veil, 56 Mo. 310.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore-Purchasing Co., (Mont. 1898) 55 Pac. 112.

Nebraska.— Mulhollan *v.* Scoggin, 8 Nebr. 202.

Nevada.— Howe *v.* Coldren, 4 Nev. 171.

New Hampshire.— Riddle *v.* Gage, 37 N. H. 519, 75 Am. Dec. 151.

New Jersey.— Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 545.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac. 532.

New York.—White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956.

North Carolina.— Long *v.* Holt, 68 N. C. 53.

North Dakota.— Patch *v.* Northern Pac. R. Co., 5 N. D. 55, 63 N. W. 207.

Ohio.— Dobbins *v.* State, 14 Ohio St. 493.

Oklahoma.—Pierce *v.* Engelkemeier, (Okla. 1900) 61 Pac. 1047.

Oregon.— Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779.

Pennsylvania.— Zugsmith *v.* Rosenblatt, 15 Pa. Super. Ct. 296.

South Carolina.— Buttz *v.* Campbell, 15 S. C. 614.

South Dakota.—Evans *v.* Fall River County, 4 S. D. 119, 55 N. W. 862.

Tennessee.—Cone *v.* Paute, 12 Heisk. (Tenn.) 506.

Texas.— Lloyd *v.* Brinck, 35 Tex. 1.

Utah.— Funk *v.* Anderson, 22 Utah 238, 61 Pac. 1006.

Vermont.— Mosseaux *v.* Brigham, 19 Vt. 457.

Virginia.— Hill *v.* Postley, 90 Va. 200, 17 S. E. 946.

Washington.— Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

West Virginia.—Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Breed *v.* Ketchum, 51 Wis. 164, 7 N. W. 550.

United States.— Morsell *v.* Hall, 13 How. (U. S.) 212, 14 L. ed. 117.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3811, 3812.

Absolute and limited discretion.— In New York a distinction is attempted to be made between an absolute discretion in the lower court, and that which is governed by legal rules. The former is not reviewable, the latter is. Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; People *v.* Syracuse, 78 N. Y. 56; Anonymous, 59 N. Y. 313; Howell *v.* Mills, 53 N. Y. 322; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; People *v.* New York Superior Ct., 5 Wend. (N. Y.) 114.

9. *Arkansas.*— Gould *v.* Tatum, 21 Ark. 329.

Connecticut.—Van Epps *v.* Redfield, 68 Conn. 39, 35 Atl. 809, 34 L. R. A. 360

Michigan.— *Compare* Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 44.

Minnesota.—Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 58, 57 N. W. 1068; Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399; Russell *v.* Schurmeier, 9 Minn. 28.

New Hampshire.— Avery *v.* Bowman, 39 N. H. 393.

New York.— Richmond *v.* Second Ave. R. Co., 9 Misc. (N. Y.) 355, 29 N. Y. Suppl. 588, 60 N. Y. St. 629; Lake *v.* Sweet, 18 N. Y. Suppl. 342, 45 N. Y. St. 367.

North Carolina.— Marsh *v.* Griffin, 123 N. C. 660, 31 S. E. 840; Henderson *v.* Graham, 84 N. C. 496; McKinnon *v.* Faulk, 68 N. C. 279; Freeman *v.* Morris, 44 N. C. 287.

Virginia.— Tennent *v.* Pattons, 6 Leigh (Va.) 196.

Wisconsin.—Smith *v.* Dragert, 61 Wis. 222, 21 N. W. 46; Wallis *v.* White, 58 Wis. 26, 15 N. W. 767.

United States.— Felton *v.* Spiro, 78 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321.

See 3 Cent. Dig. tit. "Appeal and Error," § 3813.

10. Campbell *v.* Powers, 139 Ill. 128, 28 N. E. 1062 [*affirming* 37 Ill. App. 308.]

c. Burden of Showing Abuse of Discretion. It will be presumed, on appeal, in the absence of a showing to the contrary, that the discretionary powers of the lower court have been exercised without abuse. The burden of showing abuse is upon the party complaining.[11]

2. Questions Reviewable — a. Parties and Process. Amendments as to the parties or process are largely within the discretion of the lower court, and, consequently, reviewable only for abuse.[12]

b. Pleadings — (I) *Amendment.* The action of the trial court in amending, or refusing to amend, the pleadings is a matter within its sound discretion, and, in the absence of a clear abuse thereof, not reviewable on appeal;[13] but where

11. *California.*— Hobler *v.* Cole, 49 Cal. 250; Hall *v.* The Bark Emily Banning, 33 Cal. 522.

Kansas.— Byington *v.* Saline County, 37 Kan. 654, 16 Pac. 105; Krouse *v.* Pratt, 37 Kan. 651, 16 Pac. 103.

Kentucky.— Com. *v.* Runnion, 3 Metc. (Ky.) 2; Hunt *v.* Scobie, 6 B. Mon. (Ky.) 469.

Massachusetts.— Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22.

Minnesota.— Marsh *v.* Webber, 13 Minn. 109.

Missouri.— Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 335; Ensor *v.* Smith, 57 Mo. App. 584.

Nebraska.— Waldron *v.* Greenwood First Nat. Bank, 60 Nebr. 245, 82 N. W. 856.

New York.— Percival *v.* Percival, 124 N. Y. 637, 26 N. E. 540, 36 N. Y. St. 340.

Utah.—Wright *v.* Aschheim, 4 Utah 455, 11 Pac. 580.

Wisconsin.— Breed *v.* Ketchum, 51 Wis. 164, 7 N. W. 550.

See 3 Cent. Dig. tit. "Appeal and Error," § 3814.

12. *Connecticut.*—Hoxie *v.* Payne, 41 Conn. 539.

Maine.— Cameron *v.* Tyler, 71 Me. 27; Metcalf *v.* Yeaton, 51 Me. 198.

Massachusetts.—Hutchinson *v.* Tucker, 124 Mass. 240.

Mississippi.— Planters Bank *v.* Walker, 3 Sm. & M. (Miss.) 409.

Missouri.— Kitchen *v.* Reinsky, 42 Mo. 427.

North Carolina.— Henderson *v.* Graham, 84 N. C. 496.

Oklahoma.— Pierce *v.* Engelkemeier, (Okla. 1900) 61 Pac. 1047.

Rhode Island.— See National Exch. Bank *v.* Galvin, 20 R. I. 159, 37 Atl. 811.

South Carolina.—Lancaster *v.* Seay, 6 Rich. Eq. (S. C.) 111.

See, generally, Parties; Process; and 3 Cent. Dig. tit. "Appeal and Error," § 3824.

13. *Alabama.*— Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949.

Arkansas.— Mooney *v.* Tyler, 68 Ark. 314, 57 S. W. 1105.

California.— Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 94, 71 Am. St. Rep. 58.

Colorado.— Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826.

Connecticut.— Moran *v.* Bentley, 71 Conn. 623, 42 Atl. 1013.

Delaware.— Valley Paper Co. *v.* Smalley, 2 Marv. (Del.) 289, 43 Atl. 176.

District of Columbia.— Alexander *v.* Alexander, 13 App. Cas. (D. C.) 334, 45 L. R. A. 806.

Florida.— Stewart *v.* Bennett, 1 Fla. 487.

Georgia.— Mott *v.* Mustian, 43 Ga. 380.

Illinois.— Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314.

Indiana.— La Plante *v.* State, 152 Ind. 80, 52 N. E. 452.

Iowa.— Klos *v.* Zahorik, (Iowa 1901) 84 N. W. 1046.

Kansas.— Laird *v.* Farwell, 60 Kan. 512, 57 Pac. 98.

Kentucky.— Louisville Trust Co. *v.* Louisville Fireproof Constr. Co., (Ky. 1900) 57 S. W. 506.

Maryland.— Scarlett *v.* Academy of Music, 43 Md. 203.

Massachusetts.— Chelsea First Nat. Bank *v.* Hall, 170 Mass. 526, 49 N. E. 917.

Michigan.— Baker *v.* Michigan Mut. Protective Assoc., 118 Mich. 431, 76 N. W. 970.

Minnesota.— Butler *v.* Paine, 8 Minn. 324.

Mississippi.— Miller *v.* Northern Bank, 34 Miss. 412.

Missouri.— Carr *v.* Moss, 87 Mo. 447.

Nebraska.— Harrington *v.* Connor, 51 Nebr. 214, 70 N. W. 911.

New Hampshire.— Brown *v.* Fitzgerald, (N. H. 1900) 47 Atl. 415.

New Jersey.— Crawford *v.* New Jersey R., etc., Co., 28 N. J. L. 479.

New York.— Dudley *v.* Broadway Ins. Co., 42 N. Y. App. Div. 555, 59 N. Y. Suppl. 668.

North Carolina.—Smith *v.* Smith, 123 N. C. 229, 31 S. E. 471; Clark's Code Civ. Proc. N. C. (1900), pp. 296, 745.

North Dakota.— Q. W. Loverin-Browne Co. *v.* Buffalo Bank, 7 N. D. 569, 75 N. W. 923.

Ohio.— Clark *v.* Clark, 20 Ohio St. 128.

Oregon.—Garrison *v.* Goodale, 23 Oreg. 307, 31 Pac. 709.

Pennsylvania.— Ordroneaux *v.* Prady, 6 Serg. & R. (Pa.) 510.

Rhode Island.— Banigan *v.* Woonsocket Rubber Co., (R. I. 1900) 46 Atl. 183.

South Carolina.— Copeland *v.* Copeland, 60 S. C. 135, 38 S. E. 269.

South Dakota.— Cornwall *v.* McKinney, 9 S. D. 213, 68 N. W. 333.

Tennessee.— Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

Texas.— Dublin *v.* Taylor, etc., R. Co., 92 Tex. 535, 50 S. W. 120.

Vermont.— Probate Ct. New Haven Dist. *v.* Hall, 14 Vt. 159.

the trial court plainly exceeds its power in allowing an amendment, the error will be corrected on appeal.[14]

(II) *Pleading Over After Decision on Demurrer.* The action of the trial court in the allowance of an application to plead over after decision upon demurrer is within its sound judicial discretion, and, except where the right to plead over is given by statute, not reviewable save in cases of palpable abuse.[15]

(III) *Striking Out.* A motion to strike out a pleading is addressed to the discretion of the trial court, and, in the absence of a positive abuse of such discretion, its action on the motion is not reviewable on appeal.[16]

(IV) *Supplemental or Additional Pleadings.* The acceptance or rejection of a supplemental or additional plea is a matter within the discretion of the trial court, and will not be reviewed.[17]

(V) *Withdrawal and Pleading Anew.* It is within the discretion of the

Washington.— Dunlap *v.* Rauch, (Wash. 1901) 64 Pac. 870.

West Virginia.— Western Min, etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000.

United States.— Union Cent. L. Ins. Co. *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263.

See, generally, Pleading; and 3 Cent. Dig. tit. "Appeal and Error," § 3825.

As to sufficiency of record for review of order on application to amend pleadings see *supra*, XIII, L, 6, b.

14. Phillipse *v.* Higdon, 44 N. C. 380; Carpenter *v.* Cookin, 2 Vt. 495, 21 Am. Dec. 566.

Error of law.— An appellate court will not review the action of the trial court in granting or refusing leave to amend a pleading, except for error of law. Bloom *v.* Price, 44 Miss. 73.

15. *Alabama.*— Magruder *v.* Campbell, 40 Ala. 611; State Bank *v.* Ellis, 30 Ala. 478.

California.— Thornton *v.* Borland, 12 Cal. 438.

Illinois.— Herrington *v.* Stevens, 26 Ill. 298.

Kansas.— Brown *v.* App, McCahon (Kan.) 174.

Michigan.— Wyckoff *v.* Bishop, 98 Mich. 352, 57 N. W. 170.

Missouri.— Steamboat Reveille *v.* Case, 9 Mo. 502.

Ohio.— Beaumont *v.* Herrick, 24 Ohio St. 445.

See 3 Cent. Dig. tit. "Appeal and Error," § 3828.

16. *Alabama.*— Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867; Lankford *v.* Green, 62 Ala. 314.

Arkansas.— Trammell *v.* Bassett, 24 Ark. 499.

Indiana.— Scheible *v.* Law, 65 Ind. 332; Brinkmeyer *v.* Helbling, 57 Ind. 435.

Iowa.— Bolander *v.* Atwell, 14 Iowa 35; Buel *v.* Lake, 8 Iowa 551.

Massachusetts.— Bruce *v.* Fairbanks, 12 Cush. (Mass.) 273.

Minnesota.— Haug *v.* Haugan, 51 Minn. 558, 53 N. W. 874.

Mississippi.— Archer *v.* Stamps, 4 Sm. & M. (Miss.) 352.

New Jersey.— Camden, etc., R., etc., Co. *v.* Stewart, 21 N. J. Eq. 484.

New York.—Wehle *v.* Loewy, 2 Misc. (N. Y.) 345, 21 N. Y. Suppl. 1027, 50 N. Y. St. 760; Martin *v.* Kanouse, 2 Abb. Pr. (N. Y.) 327, 11 How. Pr. (N. Y.) 567.

North Carolina.— Piggott *v.* Cheers, 46 N. C. 356.

Wisconsin.— Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

See 3 Cent. Dig. tit. "Appeal and Error," § 3833.

As to sufficiency of record to review order on motion to strike see *supra*, XIII, L, 6, d.

17. *Alabama.*— Hill *v.* Bishop, 2 Ala. 320; Evans *v.* St. John, 9 Port. (Ala.) 186.

Arkansas.— Stillwell *v.* Badgett, 22 Ark. 164; Pennington *v.* Ware, 16 Ark. 120.

California.— Harding *v.* Minear, 54 Cal. 502.

Illinois.— Bryant *v.* Dana, 8 Ill. 343; Douglas *v.* Matson, 35 Ill. App. 538.

Indiana.—Lee *v.* Davis, 70 Ind. 464; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986.

Iowa.— State *v.* Williams, 90 Iowa 513, 58 N. W. 904.

Kentucky.— West *v.* McCord, 4 J. J. Marsh. (Ky.) 173; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

Maryland.— Frisby *v.* Parkhurst, 29 Md. 58, 96 Am. Dec. 503.

Massachusetts.— Looney *v.* Looney, 116 Mass. 283.

Mississippi.— Henderson *v.* Hamer, 5 How. (Miss.) 525.

Missouri.—Henderson *v.* Henderson, 55 Mo. 534.

New Jersey.— Bruch *v.* Carter, 32 N. J. L. 554.

New York.— Fleischmann *v.* Bennett, 79 N. Y. 579; Spears *v.* New York, 72 N. Y. 442.

North Carolina.— Hamilton *v.* Wright, 11 N. C. 283.

Vermont.— Dana *v.* McClure, 39 Vt. 197; Smith *v.* Wainwright, 24 Vt. 97.

United States.— Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

trial court to allow or deny a motion to withdraw a pleading and substitute another.[18]

c. Provisional Remedies — (I) *ARREST AND BAIL.* The discretion of the trial court upon an application to discharge, change, or reduce the amount of bail will only be interfered with on a showing of abuse.[19]

(II) *ATTACHMENTS.* An application to dissolve an attachment is often addressed to the discretion of the trial court, and, in such cases, its action thereon will only be disturbed in the appellate court on a showing of an abuse of this discretion.[20]

(III) *DISCOVERY.* The granting or denying of an order for discovery is within the discretion of the trial court, and not reviewable on appeal save in a case of patent abuse of discretion.[21]

(IV) *INJUNCTIONS.* In instances where the granting, refusing to grant, dissolving, or refusing to dissolve, an injunction is discretionary and not matter of right, the action of the court will not, in the absence of manifest abuse, be reviewed on appeal.[22]

See 3 Cent. Dig. tit. "Appeal and Error," § 3827.

18. *Alabama.*— Graham *v.* Chandler, 15 Ala. 342; Gaines *v.* Tombeckbee Bank, Minor (Ala.) 50.

Illinois.— Miles *v.* Danforth, 37 Ill. 156; Rowan *v.* Kirkpatrick, 14 Ill. 1.

Indiana.— Bash *v.* Evans, 40 Ind. 256; Hays *v.* Hynds, 28 Ind. 531; Morris *v.* Graves, 2 Ind. 354.

Massachusetts.— Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114.

Nebraska.— Hedges *v.* Roach, 16 Nebr. 673, 21 N. W. 404.

Vermont.— Bebee *v.* Steel, 2 Vt. 314.

See 3 Cent. Dig. tit. "Appeal and Error," § 3829.

19. *Georgia.*— Newton *v.* Bailey, 36 Ga. 180.

Illinois.— Walker *v.* Welch, 14 Ill. 364; Morrison *v.* Silverburgh, 13 Ill. 551; Adams *v.* Bartlett, 10 Ill. 169.

New York.— Hart *v.* Kennedy, 15 Abb. Pr. (N. Y.) 290, 24 How. Pr. (N. Y.) 425.

Vermont.— Colgate *v.* Hill, 20 Vt. 56.

United States.— Morsell *v.* Hall, 13 How. (U. S.) 212, 14 L. ed. 117.

See, generally, ARREST; BAIL; and 3 Cent. Dig. tit. "Appeal and Error," § 3817.

20. *Georgia.*— O'Connor *v.* Donaldson, 92 Ga. 342, 17 S. E. 270.

Kansas.— See Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; Robinson *v.* Melvin, 14 Kan. 484.

Kentucky.— Haynes *v.* Viley, 8 Ky. L. Rep. 606, 2 S. W. 681.

Minnesota.— Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Brown *v.* Minneapolis Lumber Co., 25 Minn. 461.

Missouri.— See Gilbert *v.* Gilbert, 33 Mo. App. 259.

Nebraska.— Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313; Smith *v.* Boyer, 35 Nebr. 46, 52 N. W. 581 [*reversing* 29 Nebr. 76, 45 N. W. 265, 26 Am. St. Rep. 373].

New York.— Brooks *v.* Mexian Nat. Constr. Co., 93 N. Y. 647; Everitt *v.* Park, 88 Hun (N. Y.) 368, 2 N. Y. Annot. Cas. 205, 34 N. Y. Suppl. 827, 68 N. Y. St. 765.

Ohio.— Harrison *v.* King, 9 Ohio St. 388; Sibley *v.* Condensed Lubricating Oil Co., 12 Cinc. L. Bul. 308, 9 Ohio Dec. (Reprint) 399.

Pennsylvania.— Omaha First Nat. Bank *v.* Crosby, 179 Pa. St. 63, 36 Atl. 155; Hoppes *v.* Houtz, 133 Pa. St. 34, 19 Atl. 312.

Texas.— See Messner *v.* Lewis, 20 Tex. 221.

Wisconsin.— Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459; Cohen *v.* Burr, 6 Wis. 200.

See, generally, ATTACHMENT; and 3 Cent. Dig. tit. "Appeal and Error," § 3816.

As to sufficiency of record to review orders relating to attachments see *supra*, XIII, L, 7, c.

Garnishment.— Relieving a garnishee for want of prosecution is within the discretion of the lower court. Noble *v.* Bourke, 44 Mich. 193, 6 N. W. 237. The same is true of questions as to the manner in which the disclosure of the garnishee was obtained or in which the examination was conducted. Peck *v.* Merrill, 26 Vt. 686.

A refusal of an attachment, which amounts to an abuse of discretion, may be reviewed. Seidentopf *v.* Annabil, 6 Nebr. 524. See also Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Falvey *v.* Adamson, 73 Ga. 493.

21. *Alabama.*— Pool *v.* Harrison, 18 Ala. 514; Mallory *v.* Matlock, 7 Ala. 757.

Iowa.— Allison *v.* Vaughan, 40 Iowa 421; Sheldon *v.* Mickel, 40 Iowa 19.

Louisiana.— Knight *v.* Murchison, 1 Rob. (La.) 31.

New York.— Finlay *v.* Chapman, 119 N. Y. 404, 23 N. E. 740, 29 N. Y. St. 579; Clyde *v.* Rogers, 87 N. Y. 625; Lichtenstein *v.* Lichtenstein, 6 Misc. (N. Y.) 629, 27 N. Y. Suppl. 136, 56 N. Y. St. 903; Kelly *v.* New York Cent., etc., R. Co., 23 N. Y. Civ. Proc. 67, 21 N. Y. Suppl. 190, 49 N. Y. St. 525.

Ohio.— Longstreth, etc., Mfg. Co. *v.* Halsey, 4 Ohio Cir. Ct. 307.

See 3 Cent. Dig. tit. "Appeal and Error," § 3839.

22. *Alabama.*—Bibb *v.* Shackelford, 38 Ala. 611; *Ex p.* Montgomery, 24 Ala. 98.

(v) *Receivers.* The appointment, refusal to appoint, removal, or refusal to remove, a receiver is usually a matter within the discretion of the trial court, and this discretion will not be interfered with on appeal except in case of its abuse.[23]

d. Depositions. The action of a trial court in taking or suppressing depositions is, ordinarily, largely one of pure discretion, and, in such cases, only reviewable in case of palpable abuse.[24]

Arkansas.— Hunter *v.* Gaines, 19 Ark. 92.

California.— Marks *v.* Weinstock, etc., Co., 121 Cal. 53, 53 Pac. 362; Grannis *v.* Lorden, 103 Cal. 472, 37 Pac. 375.

District of Columbia.— Standard Oil Co. *v.* Oeser, 11 App. Cas. (D. C.) 80.

Florida.— McKinne *v.* Dickenson, 24 Fla. 366, 5 So. 34.

Georgia.— Finney *v.* Davis, 113 Ga. 364, 38 S. E. 818; Floyd *v.* Floyd, 113 Ga. 143, 38 S. E. 328.

Idaho.— Washington, etc., R. Co. *v.* Cœur d'Alene R., etc., Co., 2 Ida. 405, 17 Pac. 142.

Illinois.— Marble *v.* Bonhotel, 35 Ill. 240.

Iowa.— Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231; Clark *v.* American Coal Co., 86 Iowa 451, 53 N. W. 281.

Kansas.— Mead *v.* Anderson, 40 Kan. 203, 19 Pac. 708; Wood *v.* Millspaugh, 15 Kan. 14.

Louisiana.— Bell *v.* Riggs, 37 La. Ann. 813.

Michigan.— Mactavish *v.* Kent Cir. Judge, 122 Mich. 242, 80 N. W. 1086; Kelsey *v.* Wayne Cir. Judge, 120 Mich. 457, 79 N. W. 694.

Minnesota.— Gorton *v.* Forest City, 67 Minn. 36, 69 N. W. 478; Myers *v.* Duluth Transfer R. Co., 53 Minn. 335, 55 N. W. 140.

Montana.— Heinze *v.* Boston, etc., Consol. Copper, etc., Min. Co., 20 Mont. 528, 52 Pac. 273; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924.

New Jersey.— Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 545.

New York.— Young *v.* Campbell, 75 N. Y. 525; Power *v.* Athens, 19 Hun (N. Y.) 165.

North Carolina.— See Heilig *v.* Stokes, 63 N. C. 612.

Oklahoma.— Couch *v.* Orne, 3 Okla. 508, 41 Pac. 368.

Pennsylvania.— Clark *v.* Luzerne, 196 Pa. St. 210, 46 Atl. 377.

South Carolina.— Jugnot *v.* Hale, 1 Hill Eq. (S. C.) 430.

South Dakota.— Scotland Bank *v.* Bliss, 10 S. D. 178, 72 N. W. 406.

Texas.— Hart *v.* Mills, 38 Tex. 517.

West Virginia.— Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285.

Wisconsin.—Tiede *v.* Schneidt, 99 Wis. 201, 74 N. W. 748.

United States.— Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189; New York Asbestos Mfg. Co. *v.* Ambler Asbestos Air-Cell Covering Co., 102 Fed. 890, 43 C. C. A. 46.

See, generally, Injunctions; and 3 Cent. Dig. tit. "Appeal and Error," § 3818.

As to sufficiency of record to review orders relating to injunctions see *supra*, XIII, L, 7, f.

Errors of law in granting or refusing to grant an injunction will be reviewed on appeal. Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 16; Head *v.* Bridges, 72 Ga. 30; Byrd *v.* Johnson, 38 Ga. 113; Summerville *v.* Reid, 35 Ga. 47; Selchow *v.* Baker, 93 N. Y. 59, 45 Am. Rep. 169.

23. *California.*— Tevis *v.* Butler, 103 Cal. 249, 37 Pac. 223.

Georgia.— Humphries *v.* Shockley, 110 Ga. 279, 34 S. E. 845; Cosby *v.* Weaver, 99 Ga. 143, 25 S. E. 16.

Illinois.—Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338; Naylor *v.* Sidener, 106 Ind. 179, 6 N. E. 345.

Michigan.— Albion Malleable Iron Co. *v.* Albion First Nat. Bank, 116 Mich. 218, 74 N. W. 515; Rolfe *v.* Burnham, 110 Mich. 660, 68 N. W. 980.

Montana.—Parrot Silver, etc., Co. *v.* Heinze, (Mont. 1901) 64 Pac. 326.

Nebraska.— Philadelphia Mortg., etc., Co. *v.* Oyler, (Nebr. 1901) 85 N. W. 899; State *v.* Nebraska Sav., etc., Bank, 60 Nebr. 190, 82 N. W. 625.

New York.— Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112, 22 N. Y. St. 979; Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272.

North Carolina.— See Coates *v.* Wilkes, 92 N. C. 376; Levenson *v.* Elson, 88 N. C. 182.

Tennessee.— Cone *v.* Paute, 12 Heisk. (Tenn.) 506.

Texas.— Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802.

Washington.— Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26.

West Virginia.— McEldowney *v.* Lowther, (W. Va. 1901) 38 S. E. 644; Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160.

Wyoming.— O'Donnell *v.* Rock Springs First Nat. Bank, (Wyo. 1901) 64 Pac. 337.

United States.— Coltrane *v.* Templeton, 106 Fed. 370, 45 C. C. A. 328.

See, generally, Receivers; and 3 Cent. Dig. tit. "Appeal and Error," § 3822.

As to sufficiency of record to review orders relating to receivers see *supra*, XIII, L, 7, b.

The compensation allowed a receiver will not be reviewed on appeal, as it is a matter within the discretion of the trial court. Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

Distribution of funds.— An interlocutory order, directing a receiver to make a partial distribution of the fund in his hands, will not be reviewed unless such order is shown to be improvident. Sykes *v.* Thornton, 152 Pa. St. 94, 25 Atl. 174.

24. *Alabama.*— Hicks *v.* Lawson, 39 Ala. 90; Parsons *v.* Boyd, 20 Ala. 112.

e. Impaneling Jury. The determination of the trial court of the facts as to the qualification, selection, and impaneling of jurors is within its sound discretion, and not reviewable on appeal unless manifestly erroneous.[25]

f. Reference — (I) *In General.* The grant or refusal to grant an order of reference, when, as a matter of law, the court is authorized to appoint one, is within the discretion of the trial court.[26]

Arkansas.— Clinton *v.* Estes, 20 Ark. 216; Nicks *v.* Rector, 4 Ark. 251.

Indiana.— Gemmill *v.* Brown, (Ind. App. 1900) 56 N. E. 691.

Iowa.— Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228.

Kansas.— Clark *v.* Ellithorp, (Kan. App. 1899) 59 Pac. 286.

Kentucky.— Taylor *v.* Knox, 5 Dana (Ky.) 466.

New York.— Matter of Plumb, 64 Hun (N. Y.) 317, 22 N. Y. Civ. Proc. 209, 19 N. Y. Suppl. 79, 46 N. Y. St. 362; Cope *v.* Sibley, 12 Barb. (N. Y.) 521; Burnell *v.* Coles, 23 Misc. (N. Y.) 260, 51 N. Y. Suppl. 172; Jones *v.* Hoyt, 10 Abb. N. Cas. (N. Y.) 324.

Pennsylvania.—McCormick *v.* Irwin, 35 Pa. St. 111. *Compare* Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291; Dennison *v.* Fairchild, 7 Watts (Pa.) 309.

Wisconsin.—Thayer *v.* Gallup, 13 Wis. 539.

See, generally, Depositions; and 3 Cent. Dig. tit. "Appeal and Error," § 3840.

The admission in evidence, without filing, of depositions taken between the same parties in a former action, will not be reviewed unless it has worked a surprise, or the discretion of the court has been manifestly abused. Murphy *v.* Creath, 26 Mo. App. 581.

Determination as to reasonableness of notice.— Where a statute provides that the adverse party shall have reasonable notice of the taking of a deposition, the determination of the trial court as to the reasonableness of the notice given is not subject to revision. Hough *v.* Lawrence, 5 Vt. 299.

25. *Arkansas.*— Lavender *v.* Hudgens, 32 Ark. 763.

California.— Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293; Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948; Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Georgia.— Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Illinois.—Knapp *v.* McCormick, 87 Ill. App. 288.

Indiana.— Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587; Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458.

Iowa.—Anson *v.* Dwight, 18 Iowa 241; Emerick *v.* Sloan, 18 Iowa 139.

Maine.— Snow *v.* Weeks, 75 Me. 105.

Minnesota.— Perry *v.* Miller, 61 Minn. 412, 63 N. W. 1040; Morrison *v.* Lovejoy, 6 Minn. 319.

Missouri.— McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536, 4 S. W. 516; State *v.* Chatham Nat. Bank, 80 Mo. 626.

Nebraska.— Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

New Hampshire.— Walker *v.* Kennison, 34 N. H. 257; Watson *v.* Walker, 33 N. H. 131.

New York.— Butler *v.* Glens Falls, etc., St. R. Co., 121 N. Y. 112, 24 N. E. 187, 30 N. Y. St. 678; Doherty *v.* Lord, 8 Misc. (N. Y.) 227, 28 N. Y. Suppl. 720, 59 N. Y. St. 445.

North Carolina.— See Sehorn *v.* Williams, 51 N. C. 575.

Ohio.— Dew *v.* McDivitt, 31 Ohio St. 139; Serviss *v.* Stockstill, 30 Ohio St. 418.

Pennsylvania.— Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543, 39 Am. Rep. 821.

South Carolina.— Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

Texas.— Galveston, etc., R. Co. *v.* Thornsberry, (Tex. 1891) 17 S. W. 521; Couts *v.* Neer, 70 Tex. 468, 9 S. W. 40.

United States.— Press Pub. Co. *v.* McDonald, 73 Fed. 440, 38 U. S. App. 557, 19 C. C. A. 516; Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 7 U. S. App. 84, 1 C. C. A. 416.

See, generally, Juries; and 3 Cent. Dig. tit. "Appeal and Error," § 3843.

As to sufficiency of record to review ruling see *supra*, XIII, L, 9, b.

Special jury.— Unless controlled by statute, a motion for a special jury is addressed to the discretion of the trial court. Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; Clingan *v.* East Tennessee, etc., R. Co., 2 Lea (Tenn.) 726; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348.

26. *Georgia.*—Stone *v.* Risner, 111 Ga. 809, 35 S. E. 648; Byrom *v.* Gunn, 102 Ga. 565, 31 S. E. 560.

Illinois.— Harding *v.* Harding, 180 Ill. 592, 54 N. E. 604; Kerr Thread Co. *v.* Star Knitting Works, 76 Ill. App. 544.

Kentucky.— McHenry *v.* Winston, 20 Ky. L. Rep. 1194, 49 S. W. 4.

Maine.— Clapp *v.* Hanson, 15 Me. 345.

New Hampshire.— Low *v.* Independent Christian Soc., 67 N. H. 488, 32 Atl. 762.

New York.— Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293, 34 N. Y. St. 850; De Witt *v.* Monjo, 46 N. Y. App. Div. 533, 61 N. Y. Suppl. 1046; Allentown Rolling Mills *v.* Dwyer, 26 N. Y. App. Div. 101, 49 N. Y. Suppl. 624.

North Carolina.— Cummings *v.* Swepson, 124 N. C. 579, 32 S. E. 966.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Pennsylvania.— Bellas *v.* Levy, 2 Rawle (Pa.) 21.

Tennessee.—Clark *v.* Carlton, 4 Lea (Tenn.) 452.

Texas.— Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

(11) *Recommitting Report.* The recommittal or refusal to recommit the report of a referee, master, auditor, or commissioner is within the discretion of the trial court, and can only be reviewed on appeal where an abuse of discretion clearly appears.[27]

g. Conduct of Trial — (1) *In General.* Matters relating to the conduct of the trial are, as a rule, within the discretion of the trial court, and are only reviewable on a showing of abuse of such discretion.[28]

Vermont.— Merriam *v.* Barton, 14 Vt. 501.

See, generally, References; and 3 Cent. Dig. tit. "Appeal and Error," § 3841.

As to sufficiency of record for review of orders relating to reference see *supra*, XIII, L, 10.

27. *Alabama.*— Nunn *v.* Nunn, 66 Ala. 35.

Iowa.— Jewell *v.* Reddington, 57 Iowa 92, 10 N. W. 306.

Massachusetts.—Carew *v.* Stubbs, 161 Mass. 294, 37 N. E. 171; Butterworth *v.* Western Assur. Co., 132 Mass. 489.

New Hampshire.— Knight *v.* Whitcher, 67 N. H. 593, 27 Atl. 140.

New York.— McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641, 44 N. Y. St. 89 [*affirming* 15 N. Y. Suppl. 602, 39 N. Y. St. 908]; Comins *v.* Hetfield, 80 N. Y. 261.

North Carolina.—Smith *v.* Smith, 101 N. C. 461, 8 S. E. 131; State *v.* Magnin, 85 N. C. 114.

Pennsylvania.— Thomas' Appeal, 124 Pa. St. 640, 23 Wkly. Notes Cas. (Pa.) 409, 17 Atl. 181; Bicking's Appeal, 2 Brewst. (Pa.) 202.

South Carolina.— Hubbard *v.* Camperdown Mills, 26 S. C. 581, 2 S. E. 576.

Vermont.— Wilkinson *v.* Wilkinson, 61 Vt. 409, 17 Atl. 795; Thayer *v.* Central Vermont R. Co., 60 Vt. 214, 13 Atl. 859; Lovejoy *v.* Churchill, 29 Vt. 151.

See 3 Cent. Dig. tit. "Appeal and Error," § 3842.

28. *Alabama.*— Sharp *v.* Burns, 35 Ala. 653.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

California.— People *v.* Gregory, 120 Cal. 16, 52 Pac. 41; Smith *v.* Billett, 15 Cal. 23.

Colorado.— Felt *v.* Cleghorn, 2 Colo. App. 4, 29 Pac. 813.

Georgia.— Johnson *v.* Winship Mach. Co., 108 Ga. 554, 33 S. E. 1013; Harrison *v.* Langston, 100 Ga. 394, 28 S. E. 162.

Illinois.— Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038 [*affirming* 82 Ill. App. 108].

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Jones *v.* Ahrens, 116 Ind. 490, 19 N. E. 334.

Iowa.— Hanan *v.* Hale, 7 Iowa 153.

Louisiana.— Rieger's Succession, 37 La. Ann. 104.

Massachusetts.— Spurr *v.* Shelburne, 131 Mass. 429; Mair *v.* Bassett, 117 Mass. 356.

Michigan.— Lathrop *v.* Sinclair, 110 Mich. 329, 68 N. W. 248.

Missouri.— Fulkerson *v.* State, 14 Mo. 49.

New York.— National Deposit Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820, 22 N. Y. St. 317.

North Carolina.— Morehead Banking Co. *v.* Walker, 121 N. C. 115, 28 S. E. 253; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.

Ohio.— Dallas *v.* Ferneau, 25 Ohio St. 635; Byrnes *v.* Painter, 2 Ohio Dec. (Reprint) 375.

Pennsylvania.— Long *v.* Milford Tp., 137 Pa. St. 122, 20 Atl. 425; Mendenhall *v.* Mendenhall, 12 Pa. Super. Ct. 290.

Tennessee.— Chrisman *v.* Curle, 10 Yerg. (Tenn.) 488.

Texas.— San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1900) 55 S. W. 517; Ostrom *v.* McCloskey, (Tex. Civ. App. 1899) 50 S. W. 1068.

Virginia.— Craig *v.* Sebrell, 9 Gratt. (Va.) 131.

Wisconsin.— West *v.* State, 1 Wis. 209.

United States.—Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; May *v.* International L. & T. Co., 92 Fed. 445, 63 U. S. App. 773, 34 C. C. A. 448.

See 3 Cent. Dig. tit. "Appeal and Error," § 3846.

As to conduct of trial, generally, see Trial.

Matters of practice and procedure are within the discretion of the trial court, and, consequently, not, as a rule, reviewable.

Arizona.— London, etc., Bank *v.* Abrams, (Ariz. 1898) 53 Pac. 588.

District of Columbia.— Robinson *v.* Parker, 11 App. Cas. (D. C.) 132; Bailey *v.* District of Columbia, 9 App. Cas. (D. C.) 360.

Indiana.— Clark *v.* Shaw, 101 Ind. 563; Grand Rapids, etc., R. Co. *v.* McAnnally, 98 Ind. 412.

New Mexico.— Lincoln Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

Pennsylvania.— Ramsey *v.* Ramsey, 15 Pa. Super. Ct. 214.

Tennessee.— Dews *v.* Eastham, 2 Yerg. (Tenn.) 462; Timmons *v.* Rainey, (Tenn. Ch. 1899) 55 S. W. 21.

Physical examination.— It is within the discretion of the trial court to allow an examination of the person of plaintiff in an action for damages for personal injuries. Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642.

Reopening case.— The order of a trial court reopening or refusing to reopen a case is within its sound judicial discretion, and only reviewable in case of abuse. Ward *v.* State, 112 Ga. 75, 37 S. E. 111.

The exclusion of witnesses from the courtroom is a matter within the discretion of the court and will not be reviewed on appeal. Benaway *v.* Conyne, 3 Pinn. (Wis.) 196.

(II) *ADVANCEMENT OF CAUSE.* The advancement of a cause on the docket is a matter of discretion, which will be reviewed only in case of manifest abuse.[29]

(III) *ARGUMENTS OF COUNSEL.* The discretion of the trial court as to the order of argument, and as to what shall be admitted in argument, is not, as a rule, reviewable.[30]

(IV) *CHANGE OF VENUE.* Applications for a change of venue are, in most cases, addressed to the discretion of the lower court, and then its order will not be disturbed except for abuse.[31]

29. *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613]; Smith *v.* St. Louis Third Nat. Bank, 79 Ill. 118; Clark *v.* Marfield, 77 Ill. 258. But see Kirkland *v.* Sullivan, 43 Tex. 233, wherein it was held that where a party to a suit, which is called out of the regular order and before the causes having precedence on the docket have been tried, postponed, or set, is arbitrarily required to go in to the trial, a judgment against him will be reversed.

Directing an issue to be placed at the head of the trial list, to be tried upon its merits without pleadings, is a matter within the discretion of the court. Pringle *v.* Pringle, 59 Pa. St. 281. See also Marseilles *v.* Kenton, 17 Pa. St. 238, wherein it was held that it is a proper exercise of the discretion of the court to postpone the determination of the issues in law until the issues of fact are found by the jury.

30. *Alabama.*— Chamberlain *v.* Masterson, 26 Ala. 371.

Illinois.— Chicago, etc., R. Co. *v.* Mehlsack, 33 Ill. App. 221.

Iowa.— Oxtoby *v.* Henley, (Iowa 1901) 84 N. W. 942; Hull *v.* Alexander, 26 Iowa 569; Preston *v.* Walker, 26 Iowa 205, 96 Am. Dec. 140; Woodward *v.* Laverty, 14 Iowa 381.

Kansas.— Swartzel *v.* Dey, 3 Kan. 244.

Kentucky.— Illinois Cent. R. Co. *v.* West, (Ky. 1901) 60 S. W. 290.

Maine.— Maxfield *v.* Jones, 76 Me. 135; Crosby *v.* Maine Cent. R. Co., 69 Me. 418.

Maryland.—Augusta Ins., etc., Co. *v.* Abbett, 12 Md. 348.

Massachusetts.— Rich *v.* Jones, 9 Cush. (Mass.) 329.

Michigan.— Barden *v.* Briscoe, 36 Mich. 254; Scripps *v.* Reilly, 35 Mich. 371, 24 Am. Rep. 575.

Minnesota.— Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305.

Missouri.—Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603; Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 2 S. W. 794; State *v.* Hamilton, 55 Mo. 520; Elder *v.* Oliver, 30 Mo. App. 575.

New York.— Fry *v.* Bennett, 28 N. Y. 324. *Compare* Millerd *v.* Thorn, 56 N. Y. 402; Murray *v.* New York Ins. Co., 9 Abb. N. Cas. (N. Y.) 309.

North Carolina.— Pearson *v.* Crawford, 116 N. C. 756, 21 S. E. 549; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328; Brooks *v.* Brooks, 90 N. C. 142.

Pennsylvania.— Blume *v.* Hartman, 115 Pa. St. 32, 8 Atl. 219, 2 Am. St. Rep. 525; Thompson *v.* Stevens, 71 Pa. St. 161.

Texas.— Edrington *v.* Rogers, 15 Tex. 188; Galveston, etc., R. Co. *v.* Wesch, (Tex. Civ. App. 1893) 21 S. W. 62.

Wisconsin.— Parker *v.* Kelly, 61 Wis. 552, 21 N. W. 539; Kaime *v.* Omro, 49 Wis. 371, 5 N. W. 838.

See 3 Cent. Dig. tit. "Appeal and Error," § 3847.

As to sufficiency of record to review questions relating to arguments of counsel see *supra*, XIII, L, 11, a.

Rebuking counsel.— Where counsel offered incompetent evidence which was rejected by the court, failure of the court to rebuke counsel is not reversible error. Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796.

Time of argument.— It is within the discretion of the trial court to determine what time shall be occupied in the argument, and if that discretion is not abused the appellate court will not interfere. Hill *v.* Colorado Nat. Bank, 2 Colo. App. 324, 30 Pac. 489; Cory *v.* Silcox, 5 Ind. 370; Trice *v.* Hannibal, etc., R. Co., 35 Mo. 416; Silver *v.* Hale, 2 Mo. App. 557.

31. *Alabama.*— Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

California.— Brown *v.* San Francisco Sav. Union, 122 Cal. 648, 55 Pac. 598; Bowers *v.* Modoc Land, etc., Co., 117 Cal. 50, 48 Pac. 979.

Colorado.— Black *v.* Bent, 20 Colo. 342, 38 Pac. 387; Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864.

Florida.—Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Stephens *v.* Bradley, 24 Fla. 201, 3 So. 415.

Idaho.— Hyde *v.* Harkness, 1 Ida. 601.

Indiana.— Ringgenberg *v.* Hartman, 102 Ind. 537, 26 N. E. 91; Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. 763.

Iowa.— Bigelow *v.* Wilson, 87 Iowa 628, 54 N. W. 465; Hamilton *v.* Des Moines, etc., R. Co., 84 Iowa 131, 50 N. W. 567.

Kansas.— Vaughn *v.* Hixon, 50 Kan. 773, 32 Pac. 358; Waterson *v.* Kirkwood, 17 Kan. 9.

Maryland.— Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 64 Md. 302, 1 Atl. 878.

Michigan.— Fellows *v.* Canney, 75 Mich. 445, 42 N. W. 958; Curtis *v.* Wilcox, 74 Mich. 69, 41 N. W. 863.

Minnesota.— Wilson *v.* Richards, 28 Minn. 337, 9 N. W. 872.

Missouri.— Blasland-Parcels-Jordon Shoe Co. *v.* Hicks, 70 Mo. App. 301; State *v.* Lubke, 29 Mo. App. 555.

Montana.—Harris *v.* Ramsey, 16 Mont. 302, 40 Pac. 589.

(v) *Consolidation of Causes.* The action of a trial court in consolidating or refusing to consolidate causes will not be disturbed, on appeal, in the absence of a manifest abuse of discretion.[32]

(vi) *Continuance.* A motion for a continuance or postponement is addressed to the sound discretion of the trial court, under all the circumstances of the case; and, although an appellate court will supervise the action of the court below on such motion, it will not reverse a judgment on that ground unless such action is plainly erroneous, and a clear abuse of its discretion.[33]

Nebraska.— Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289.

New Hampshire.— Tucker *v.* Lake, 67 N. H. 193, 29 Atl. 406.

New York.— Payne *v.* Eureka Electric Co., 88 Hun (N. Y.) 250, 34 N. Y. Suppl. 657, 68 N. Y. St. 620; McConihe *v.* Palmer, 76 Hun (N. Y.) 116, 27 N. Y. Suppl. 832, 57 N. Y. St. 380.

North Carolina.— Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 333; Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713.

Oklahoma.— Richardson *v.* Augustine, 5 Okla. 667, 49 Pac. 930.

Pennsylvania.— Jessop *v.* Ivory, 172 Pa. St. 44, 37 Wkly. Notes Cas. (Pa.) 265, 33 Atl. 352; Felts *v.* Delaware, etc., R. Co., 160 Pa. St. 503, 28 Atl. 838.

South Carolina.— McFail *v.* Barnwell County, 54 S. C. 368, 32 S. E. 417; Utsey *v.* Charleston, etc., R. Co., 38 S. C. 399, 17 S. E. 141.

Tennessee.— Greer *v.* Whitfield, 4 Lea (Tenn.) 85; Gasaway *v.* Smith, 3 Humphr. (Tenn.) 153.

Texas.— San Antonio *v.* Jones, 28 Tex. 19.

Virginia.— Boswell *v.* Flockheart, 8 Leigh (Va.) 364.

Washington.— State *v.* Superior Ct. Skagit County, 9 Wash. 673, 38 Pac. 155; Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466.

Wisconsin.— Erickson *v.* Shaw, 87 Wis. 187 note, 58 N. W. 241; Schafer *v.* Shaw, 87 Wis. 185, 58 N. W. 240.

United States.— Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. ed. 110.

See, generally, Venue; and 3 Cent. Dig. tit. "Appeal and Error," § 3836.

As to sufficiency of record to review order on application for change of venue see *supra*, XIII, L, 7, d.

32. Miles *v.* Danforth, 37 Ill. 156; Hill *v.* Posteley, 90 Va. 200, 17 S. E. 946; Wyatt *v.* Thompson, 10 W. Va. 645.

See, generally, Consolidation and Severance of Actions.

The order in which consolidated actions shall be tried is within the sound judicial discretion of the lower court, and its ruling thereon is not, as a rule, reviewable. Jones *v.* Jones, 94 N. C. 111.

33. *Alabama.*— Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422; Wimberly *v.* Windham, 104 Ala. 409, 16 So. 23, 53 Am. St. Rep. 70.

Arizona.— Solomon *v.* Norton, (Ariz. 1886) 11 Pac. 108.

Arkansas.— Davis *v.* Read, (Ark. 1889) 12 S. W. 558; Loftin *v.* State, 41 Ark. 153.

California.— Kneebone *v.* Kneebone, 83 Cal. 645, 23 Pac. 1031; People *v.* Gaunt, 23 Cal. 156.

Colorado.— Byers *v.* McPhee, 4 Colo. 204; Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Connecticut.— White *v.* Portland, 63 Conn. 18, 26 Atl. 342; Shaler, etc., Quarry Co. *v.* Campbell, 53 Conn. 327, 2 Atl. 755.

District of Columbia.— Foertsch *v.* Germuiller, 9 App. Cas. (D. C.) 351.

Florida.— Hardee *v.* Langford, 6 Fla. 13.

Georgia.— Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694; Champion *v.* Champion, 68 Ga. 835.

Idaho.— Cox *v.* North-Western Stage Co., 1 Ida. 376; Herron *v.* Jury, 1 Ida. 164.

Illinois.— Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; Cornelius *v.* Boucher, 1 Ill. 32.

Indiana.— Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Evansville, etc., R. Co. *v.* Hawkins, 111 Ind. 549, 13 N. E. 63.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, (Indian Terr. 1898) 47 S. W. 311.

Iowa.— Clinton Nat. Bank *v.* Torry, 30 Iowa 85; Snediker *v.* Poorbaugh, 29 Iowa 488.

Kansas.— Kansas City, etc., R. Co. *v.* Chamberlain, 61 Kan. 859, 60 Pac. 15; Westheimer *v.* Cooper, 40 Kan. 370, 19 Pac. 852.

Kentucky.— Smalley *v.* Anderson, 2 T. B. Mon. (Ky.) 56, 15 Am. Dec. 121; Chesapeake, etc., R. Co. *v.* Smith, 21 Ky. L. Rep. 175, 51 S. W. 12.

Louisiana.— Biernacki *v.* Mexia, 18 La. Ann. 86; Gillet *v.* Rachal, 9 Rob. (La.) 276.

Maine.— Lovell *v.* Kelley, 48 Me. 263; Campbell *v.* Thompson, 16 Me. 117.

Maryland.—Universal L. Ins. Co. *v.* Bachus, 51 Md. 28.

Massachusetts.— Reed *v.* Paul, 131 Mass. 129; Kittredge *v.* Russell, 114 Mass. 67.

Michigan.— Winklemeir *v.* Daiber, 92 Mich. 621, 52 N. W. 1036; Bussey *v.* Bussey, 71 Mich. 504, 39 N. W. 847.

Minnesota.— Carson *v.* Getchell, 23 Minn. 571; Allis *v.* Day, 14 Minn. 516.

Mississippi.— Hartford F. Ins. Co. *v.* Green, 52 Miss. 332; Bohr *v.* Steamboat Baton Rouge, 7 Sm. & M. (Miss.) 715.

Missouri.— Cooley *v.* Kansas City, etc., R. Co., 149 Mo. 487, 51 S. W. 101; Leabo *v.* Goode, 67 Mo. 126.

Nebraska.— Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020; McDonald *v.* McAllister, 32 Nebr. 514, 49 N. W. 377.

Nevada.— Choate *v.* Bullion Min. Co., 1 Nev. 73.

(VII) *CUSTODY AND CONDUCT OF JURY.* In the absence of manifest abuse of discretion, an appellate court will not review the action of the trial court with regard to the custody and conduct of the jury.[34]

(VIII) *ENFORCEMENT OF RULES.* An appellate court will not interfere with the action of the trial court in enforcing or disregarding its own rules if such rules are legal and there is no patent abuse of discretion.[35]

(IX) *EXTENSION OF TIME AND PROCEEDINGS NUNC PRO TUNC.* The allowance of, or a refusal to allow, an extension of time in which to plead, take testimony, or do other acts in the course of a trial, or the allowance of, or refusal to allow, proceedings *nunc pro tunc*, is within the discretion of the trial court, and only reviewable in case of a gross and palpable abuse of power.[36]

New Jersey.— Haines *v.* Roebuck, 47 N. J. L. 227; McCourry *v.* Doremus, 10 N. J. L. 245.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac. 532.

New York.— Paine *v.* Aldrich, 133 N. Y. 544, 30 N. E. 725, 44 N. Y. St. 308; Borley *v.* Wheeler, etc., Mfg. Co., 12 N. Y. Suppl. 45, 34 N. Y. St. 987.

North Carolina.— Piedmont Wagon Co. *v.* Bostic, 118 N. C. 758, 24 S. E. 525; McQueen *v.* Peoples Nat. Bank, 111 N. C. 509, 16 S. E. 270.

Ohio.— Diebold *v.* Powell, 32 Ohio St. 173.

Oklahoma.— Pierce *v.* Engelkemeier, (Okla. 1900) 61 Pac. 1047; Richardson *v.* Penny, 6 Okla. 328, 50 Pac. 231.

Oregon.— Lew *v.* Lucas, 37 Oreg. 208, 61 Pac. 344.

Pennsylvania.— Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Walthour *v.* Spangler, 31 Pa. St. 523.

South Carolina.— Trustees Wadsworthville Poor School *v.* Orr, 33 S. C. 273, 11 S. E. 830; Dial *v.* Valley Mut. L. Assoc., 29 S. C. 560, 8 S. E. 27.

South Dakota.— Nebraska Land, etc., Co. *v.* Burris, 10 S. D. 430, 73 N. W. 919; Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687.

Tennessee.— Rexford *v.* Pulley, 4 Baxt. (Tenn.) 364; Walt *v.* Walsh, 10 Heisk. (Tenn.) 314.

Texas.— Guy *v.* Metcalf, 83 Tex. 37, 18 S. W. 419; Hunt *v.* Makemson, 56 Tex. 9.

Vermont.— Brown *v.* Munger, 16 Vt. 12; Hickok *v.* Ridley, 15 Vt. 42.

Virginia.— Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195; Keesel *v.* Border Granger Bank, 77 Va. 129.

Washington.— Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

West Virginia.— Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953; Marmet Co. *v.* Archibald, 37 W. Va. 778, 17 S. E. 299.

Wisconsin.— Catlin *v.* Henton, 9 Wis. 476; Knox *v.* Arnold, 1 Wis. 70.

United States.— Cox *v.* Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. ed. 741; Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

See, generally, CONTINUANCES; and 3 Cent. Dig. tit. "Appeal and Error," § 3837.

As to sufficiency of record to present question for review see *supra*, XIII, L, 7, e.

34. *District of Columbia.*— Brien *v.* Beck, 2 Mackey (D. C.) 82.

Georgia.— Georgia Cent. R. Co. *v.* Hall, 109 Ga. 367, 34 S. E. 605.

Iowa.— Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Wood *v.* Wood, 47 Kan. 617, 28 Pac. 709.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., (Mo. 1893) 24 S. W. 57; Hamiltons *v.* Moody, 21 Mo. 79; Steinkamper *v.* McManus, 26 Mo. App. 51.

New York.— Harnett *v.* Garvey, 40 N. Y. Super. Ct. 96.

North Carolina.— State *v.* Grizzard, 89 N. C. 115.

Wisconsin.— Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 382, 80 N. W. 467.

See, generally, TRIAL; and 3 Cent. Dig. tit. "Appeal and Error," § 3844.

As to sufficiency of record for review of questions relating to the custody of the jury see *supra*, XIII, 11, c.

35. *Minnesota.*— Sheldon *v.* Risedorph, 23 Minn. 518.

Missouri.— State *v.* Smith, 44 Mo. 112; Funkhouser *v.* How, 18 Mo. 47.

Nevada.— Caples *v.* Central Pac. R. Co., 6 Nev. 265.

New York.— Martine *v.* Lowenstein, 68 N. Y. 456.

Pennsylvania.— Gannon *v.* Fritz, 79 Pa. St. 303; Wickersham *v.* Russell, 51 Pa. St. 71; Haines, etc., Co. *v.* Young, 13 Pa. Super. Ct. 303.

Tennessee.— Fanning *v.* Fly, 2 Coldw. (Tenn.) 486.

Vermont.— Carpenter *v.* Thayer, 15 Vt. 552.

Virginia.— Hudson *v.* Kline, 9 Gratt. (Va.) 379.

United States.— Manhattan L. Ins. Co. *v.* Francisco, 17 Wall. (U. S.) 672, 21 L. ed. 698.

See 3 Cent. Dig. tit. "Appeal and Error," § 3808.

36. *Alabama.*— Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333.

Arkansas.— Bernie *v.* Vandever, 16 Ark. 616; Norris *v.* Kellogg, 7 Ark. 112.

California.— Cole *v.* Wilcox, 99 Cal. 549, 34 Pac. 114.

Florida.— Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796.

Georgia.— Lewis *v.* Armstrong, 64 Ga. 645; Harris *v.* Breed, 38 Ga. 297.

(x) *Imposition of Terms.* The imposition of terms by a trial court, as a condition of granting some specific relief to a party, is within the discretion of that court, and will only be reviewed in case of a clear abuse of such discretion.[37]

(xi) *Instructions.* It is within the discretion of the trial court to recall the jury, after retirement, for further instructions; and the exercise of that discretion will not be reviewed on appeal except in cases where it results in a gross abuse of power.[38]

(xii) *Reception of Evidence.* Questions relating to the reception of evidence are within the sound discretion of the trial court, and not reviewable except in case of plain abuse of discretion.[39] Instances of such matters are the admission

Illinois.— Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

Indiana.— Tinkler *v.* Palin, 19 Ind. 240.

Iowa.— Clute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672; Kinyon *v.* Palmer, 20 Iowa 138.

Kentucky.— Adam *v.* Hodgen, 1 T. B. Mon. (Ky.) 87.

Missouri.— Cooney *v.* Murdock, 54 Mo. 349; Archer *v.* Merchants', etc., Ins. Co., 43 Mo. 434.

New Hampshire.—Nutter *v.* De Rochemont, 46 N. H. 80.

New Mexico.— Secou *v.* Leroux, 1 N. M. 388.

New York.— Goss *v.* Hays, 40 N. Y. App. Div. 557, 58 N. Y. Suppl. 35; Goings *v.* Patten, 17 Abb. Pr. (N. Y.) 339.

North Carolina.— Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321; Armour Packing Co. *v.* Williams, 122 N. C. 408, 30 S. E. 340.

Pennsylvania.— Ley *v.* Union Canal, 5 Watts (Pa.) 104; Funck's Estate, 16 Pa. Super. Ct. 434.

South Carolina.— White *v.* Coleman, 38 S. C. 556, 17 S. E. 21.

Tennessee.—Wyatt *v.* Richmond, 4 Humphr. (Tenn.) 364.

Texas.— Reid *v.* Allen, 18 Tex. 241; Yarborough *v.* Downes, 1 Tex. App. Civ. Cas. § 676.

Vermont.— Scott *v.* Moore, 41 Vt. 205, 98 Am. Dec. 581.

Washington.— Greeny *v.* Newcomb, 21 Wash. 357, 58 Pac. 216.

Wisconsin.— Cottrell *v.* Giltner, 5 Wis. 270.

See 3 Cent. Dig. tit. "Appeal and Error," § 3810.

37. *Alabama.*— Mahone *v.* Williams, 39 Ala. 202; McLane *v.* Riddle, 19 Ala. 180.

California.— Nicoll *v.* Weldon, 130 Cal. 666, 63 Pac. 63; Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932.

Georgia.— Jordan *v.* Gaulden, 73 Ga. 191.

Illinois.— Hovey *v.* Middleton, 56 Ill. 468; Odin Coal Co. *v.* Denman, 84 Ill. App. 190 [*affirmed* in 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45].

Iowa.— Harrison *v.* Colton, 31 Iowa 16.

Kentucky.— Myers *v.* Lummis, 80 Ky. 456.

Maine.— Bolster *v.* China, 67 Me. 551.

Maryland.— Wagner *v.* Shank, 59 Md. 313.

Michigan.— Jones *v.* Hobson, 37 Mich. 36; Tefft *v.* McNoah, 9 Mich. 201.

Minnesota.— Caldwell *v.* Bruggerman, 8 Minn. 286.

New York.— Symson *v.* Selheimer, 105 N. Y. 660, 12 N. E. 31; Matter of Waverly Water-Works Co., 85 N. Y. 478.

North Carolina.— Cannon *v.* Beemer, 14 N. C. 317.

Vermont.— Hale *v.* Griswold, 1 D. Chipm. (Vt.) 107.

Washington.— Greely *v.* Newcomb, 21 Wash. 357, 58 Pac. 216.

Wisconsin.— Hawkins *v.* Northwestern Union R. Co., 34 Wis. 302.

United States.— Dietz *v.* Lymer, 61 Fed. 792, 19 U. S. App. 663, 10 C. C. A. 71.

See 3 Cent. Dig. tit. "Appeal and Error," § 3809.

A refusal to impose terms on granting an injuction cannot be reviewed. Jordan *v.* Gaulden, 73 Ga. 191.

Failure to impose terms.—Where an amendment is allowed without the imposition of terms, when it is manifestly unjust not to impose terms, the appellate court will review the action of the court below. Cramer *v.* Lovejoy, 41 Hun (N. Y.) 581.

New trial.— The terms upon which to grant a new trial are peculiarly within the discretion of the trial court, and not to be reviewed save in a very clear case of abuse of power. Rice *v.* Gashirie, 13 Cal. 53.

Opening default.— In Hornthal *v.* Finelite, 9 Misc. (N. Y.) 724, 29 N. Y. Suppl. 686, 60 N. Y. St. 838, it was held that an order, which required an undertaking as a condition of opening a default, would not be disturbed unless it appeared that the judge acted unfairly, arbitrarily, or otherwise abused his discretion.

38. Lafoon *v.* Shearin, 95 N. C. 391; Scott *v.* Green, 89 N. C. 278. See also Viser *v.* Bertrand, 19 Ark. 487; Lorentz *v.* Robinson, 61 Md. 64; Byrne *v.* Smith, 24 Wis. 68.

See, generally, Trial; and 3 Cent. Dig. tit. "Appeal and Error," § 3848.

As to sufficiency of record to review instructions see *supra*, XIII, L, 13.

39. *California.*— Matter of Marchall, 126 Cal. 95, 58 Pac. 449; Grimbley *v.* Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19.

Colorado.— Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294; Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197.

Connecticut.— Hoadley *v.* M. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997; State *v.* Alford, 31 Conn. 40.

District of Columbia.— Throckmorton *v.*

of preliminary questions of fact,[40] the order in which the proof is admitted,[41] mat-

Holt, 12 App. Cas. (D. C.) 552; Davis *v.* Coblens, 12 App. Cas. (D. C.) 51.

Georgia.— Hilburn *v.* Hilburn, 105 Ga. 471, 30 S. E. 656.

Illinois.— Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 53 N. E. 572 [*affirming* 78 Ill. App. 661]; Washington Ice Co. *v.* Bradley, 171 Ill. 255, 49 N. E. 519 [*affirming* 70 Ill. App. 313].

Indiana.— Roush *v.* Roush, 154 Ind. 562, 55 N. E. 1017; Heberd *v.* Myers, 5 Ind. 94.

Iowa.— Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235; Kramer *v.* Messner, 101 Iowa 88, 69 N. W. 1142.

Kansas.— State *v.* Shive, 59 Kan. 780, 54 Pac. 1061.

Louisiana.— State *v.* Hillstock, 45 La. Ann. 298, 12 So. 352; Scuddy *v.* Shaffer, 14 La. Ann. 569.

Maine.— Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Goodwin *v.* Prime, 92 Me. 355, 42 Atl. 785.

Maryland.— Buschman *v.* Morling, 30 Md. 384.

Massachusetts.— Roberts *v.* New York, etc., R. Co., 175 Mass. 296, 56 N. E. 559; McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854.

Michigan.— Fye *v.* Chapin, 121 Mich. 675, 80 N. W. 797; Bellows *v.* Crane Lumber Co., 119 Mich. 424, 78 N. W. 536.

Minnesota.— Thiel *v.* Kennedy, (Minn. 1901) 84 N. W. 657.

Missouri.— Wilson *v.* Board of Education, 63 Mo. 137.

New Hampshire.— Willard *v.* Sullivan, 69 N. H. 491, 45 Atl. 400; State *v.* Collins, 68 N. H. 299, 44 Atl. 495.

New Jersey.— Enstice *v.* Courtright, 61 N. J. L. 653, 40 Atl. 676; Schenck *v.* Griffin, 38 N. J. L. 462.

New York.— Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670 [*affirming* 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572, 68 N. Y. St. 636]; Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400, 53 N. Y. St. 181.

North Carolina.— Waters *v.* Waters, 125 N. C. 590, 34 S. E. 548; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

Ohio.— Sullivan *v.* Fogarty, 6 Ohio Dec. 130.

Oregon.— Davis *v.* Emmons, 32 Oreg. 389, 51 Pac. 652.

Pennsylvania.— Rider *v.* Maul, 70 Pa. St. 15; Hill *v.* Canfield, 56 Pa. St. 454.

Rhode Island.— Lake *v.* Weaver, 20 R. I. 46, 37 Atl. 302.

South Carolina.— Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240; Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

South Dakota.— Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588; Pilcher *v.* Sioux City Safe Deposit, etc., Co., 12 S. D. 52, 80 N. W. 151.

Texas.— International, etc., R. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 500; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021.

Vermont.— Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

Wisconsin.— Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516, 17 N. W. 310.

United States.—Central Pac. R. Co. *v.* California, 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25 [*affirming* 90 Fed. 390].

See, generally, TRIAL; and 3 Cent. Dig. tit. "Appeal and Error," § 3849 *et seq.*

40. *Iowa.*— Farner *v.* Turner, 1 Iowa 53.

Massachusetts.— Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698.

Michigan.— Dubois *v.* Campau, 24 Mich. 360.

Minnesota.— Winona *v.* Huff, 11 Minn. 119.

Mississippi.— Meek *v.* Perry, 36 Miss. 190.

Missouri.— Webster *v.* Canmann, 40 Mo. 156.

New Hampshire.— Cook *v.* Bennett, 51 N. H. 85.

New York.— Carnes *v.* Platt, 36 N. Y. Super. Ct. 361.

North Carolina.— Creach *v.* McRae, 50 N. C. 122.

South Carolina.— Graham *v.* Nesmith, 24 S. C. 285.

See 3 Cent. Dig. tit. "Appeal and Error," § 3850.

41. *Alabama.*— Carter *v.* Wilson, 61 Ala. 434; Edgar *v.* McArn, 22 Ala. 796.

Arkansas.— Evans *v.* Rudy, 34 Ark. 383.

California.— Barkly *v.* Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; Miller *v.* Sharp, 49 Cal. 233.

Connecticut.— Gainty *v.* Russi, 40 Conn. 450.

District of Columbia.— Lansburgh *v.* Wimsatt, 7 App. Cas. (D. C.) 271; Le Cointe *v.* U. S., 7 App. Cas. (D. C.) 16.

Illinois.— Wickenkamp *v.* Wickenkamp, 77 Ill. 92; Chicago, etc., R. Co. *v.* Duggan, 60 Ill. 137.

Indiana.— Miller *v.* Coulter, 156 Ind. 290, 59 N. E. 853; Carter *v.* Zenblin, 68 Ind. 436.

Iowa.— Crane *v.* Ellis, 31 Iowa 510; Clinton Nat. Bank *v.* Torry, 30 Iowa 85.

Maryland.— Berry *v.* Derwart, 55 Md. 66; Schwartze *v.* Yearly, 31 Md. 270.

Massachusetts.— Reeve *v.* Dennett, 137 Mass. 315; Hodgkins *v.* Chappell, 128 Mass. 197.

Michigan.— Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225; Morse *v.* Hewett, 28 Mich. 481.

Minnesota.— Crandall *v.* McIlrath, 24 Minn. 127; Beaulieu *v.* Parsons, 2 Minn. 37.

Missouri.— Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Ashley *v.* Green, 38 Mo. App. 288.

Nebraska.— Pennsylvania Co. *v.* Kennard Glass, etc., Co., 59 Nebr. 435, 81 N. W. 372; McCleneghan *v.* Reid, 34 Nebr. 472, 51 N. W. 1037.

New Hampshire.—Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

ters relating to the examination of witnesses,[42] the allowance of, or the refusal to allow, the putting of leading questions to a witness,[43] the extent to which the cross-examination of a witness may be carried,[44] the impeachment of wit-

New Jersey.— Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792.

New York.— Wright *v.* Reusens, 133 N. Y. 298, 31 N. E. 215, 45 N. Y. St. 183; Neil *v.* Thorn, 88 N. Y. 270.

North Carolina.— Pain *v.* Pain, 80 N. C. 238.

Ohio.— Kane *v.* Wilson, etc., Stone Co., 4 Ohio Dec. (Reprint) 509; Byrnes *v.* Painter, 2 Ohio Dec. (Reprint) 375.

Pennsylvania.— Brown *v.* Finney, 67 Pa. St. 214; Finlay *v.* Stewart, 56 Pa. St. 183.

South Dakota.— Stringer *v.* Golden Gate Min., etc., Co., 13 S. D. 470, 83 N. W. 561.

Tennessee.— Hays *v.* Crawford, 1 Heisk. (Tenn.) 86; Smith *v.* Britton, 4 Humphr. (Tenn.) 200.

Texas.— Galveston, etc., R. Co. *v.* Pitts, (Tex. Civ. App. 1897) 42 S. W. 255.

Vermont.— Mattocks *v.* Stearns, 9 Vt. 326.

West Virginia.— Lewis *v.* Alkire, 32 W. Va. 504, 9 S. E. 890.

Wisconsin.— Hagerty *v.* White, 69 Wis. 317, 34 N. W. 92; Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

United States.— Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

See, generally, TRIAL; and 3 Cent. Dig. tit. "Appeal and Error," § 3851.

42. *Alabama.*— Taylor *v.* Corley, 113 Ala. 580, 21 So. 404.

Colorado.— Michigan F. & M. Ins. Co. *v.* Wich, 8 Colo. App. 409, 46 Pac. 687.

District of Columbia.— Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397.

Illinois.— Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251 [*affirming* 73 Ill. App. 48].

Indiana.— Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710; Ferguson *v.* Hirsch, 54 Ind. 337.

Iowa.— State *v.* Severson, 78 Iowa 653, 43 N. W. 533.

Kentucky.— Adams *v.* Louisville, etc., R. Co., 82 Ky. 603.

Maryland.— Swartz *v.* Chickering, 58 Md. 290.

Massachusetts.— Demerritt *v.* Randall, 116 Mass. 331; Kendall *v.* Weaver, 1 Allen (Mass.) 277.

Michigan.— Bissell *v.* Starr, 32 Mich. 297.

Minnesota.— Backus *v.* Barber, 75 Minn. 262, 77 N. W. 959.

Nebraska.— Schmelling *v.* State, 57 Nebr. 562, 78 N. W. 279; Chicago, etc., R. Co. *v.* Kellogg, 54 Nebr. 138, 74 N. W. 403.

New Jersey.— Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

New York.— Carrere *v.* Dun, 26 Misc. (N. Y.) 848, 55 N. Y. Suppl. 441.

North Carolina.— Perry *v.* Jackson, 88 N. C. 103.

Ohio.— Schaal *v.* Heck, 17 Ohio Cir. Ct. 38, 8 Ohio Cir. Dec. 596.

Pennsylvania.— Stern *v.* Stanton, 184 Pa. St. 468, 41 Wkly. Notes Cas. (Pa.) 541, 39 Atl. 404.

South Carolina.— Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392.

Wisconsin.— Kohler *v.* West Side R. Co., 99 Wis. 33, 74 N. W. 568.

United States.— Ross *v.* Raphael Tuck, etc., Co., 91 Fed. 128, 62 U. S. App. 317, 33 C. C. A. 405; Sutherland *v.* Round, 57 Fed. 467, 16 U. S. App. 30, 6 C. C. A. 428.

See, generally, WITNESSES; and 3 Cent. Dig. tit. "Appeal and Error," § 3853.

43. *Alabama.*—Blevins *v.* Pope, 7 Ala. 371.

California.— Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Connecticut.—Stratford *v.* Sanford, 9 Conn. 275.

Florida.— Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

Georgia.— Ewing *v.* Moses, 51 Ga. 410.

Illinois.— Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569 [*affirming* 89 Ill. App. 544]; Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166.

Maine.— Parsons *v.* Huff, 38 Me. 137.

Massachusetts.— York *v.* Pease, 2 Gray (Mass.) 282.

Minnesota.— Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76.

Missouri.— Coats *v.* Lynch, 152 Mo. 161, 53 S. W. 895; Wilbur *v.* Johnson, 58 Mo. 600.

Nebraska.— German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Kendall *v.* Brownson, 47 N. H. 186.

New York.— O'Neill *v.* Howe, 16 Daly (N. Y.) 181, 9 N. Y. Suppl. 746, 31 N. Y. St. 272; Lym *v.* Block, 32 Misc. (N. Y.) 692, 66 N. Y. Suppl. 503.

North Carolina.— Gunter *v.* Watson, 49 N. C. 455.

Vermont.— Hopkinson *v.* Steel, 12 Vt. 582.

Wisconsin.—Whiting *v.* Mississippi Valley Manufacturers' Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672; Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557.

See, generally, WITNESSES; and 3 Cent. Dig. tit. "Appeal and Error," § 3855.

44. *Alabama.*— Huntsville Belt Line, etc., R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Stoudenmeier *v.* Williamson, 29 Ala. 558.

Connecticut.— Steene *v.* Aylesworth, 18 Conn. 244.

District of Columbia.— Hardy *v.* Wise, 5 App. Cas. (D. C.) 108.

Illinois.— Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Wilson *v.* Genseal, 113 Ill. 403, 1 N. E. 905.

Indiana.— Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Home Ins. Co. *v.* Sylvester, (Ind. App. 1900) 57 N. E. 991.

Kansas.— Clark *v.* Phelps, 35 Kan. 43, 10 Pac. 107.

nesses,[45] the recall and reëxamination of a witness,[46] and the determination with regard to the competency of expert witnesses.[47]

(XIII) *SEVERANCE.* A statute providing that a separate trial between plaintiff and any one or all of several defendants may be allowed by the court wherever justice will thereby be promoted is permissive, and not mandatory. Accordingly, the action of the trial court in granting or refusing a severance will not be reviewed unless there is an abuse of discretion.[48]

(XIV) *SUBMISSION OF ISSUES OR QUESTIONS TO JURY*—(A) *Interrogatories or Special Verdicts.* It is within the sound judicial discretion of the trial judge to submit to, or withhold from, a jury interrogatories or questions for special findings, and his rulings in that regard will not be disturbed unless a clear case of abuse of discretion appears.[49]

Massachusetts.— Com. *v.* Nickerson, 5 Allen (Mass.) 518; Hutchinson *v.* Methuen, 1 Allen (Mass.) 33.

Michigan.— Gould *v.* Gregory, (Mich. 1901) 85 N. W. 1077; Campau *v.* Dewey, 9 Mich. 381.

Minnesota.— Lukens *v.* Hazlett, 37 Minn. 441, 35 N. W. 265; Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103.

Nebraska.— Stough *v.* Ogden, 49 Nebr. 291, 68 N. W. 516.

New Hampshire.— Free *v.* Buckingham, 59 N. H. 219.

New Mexico.— Orange County Fruit Exchange *v.* Hubbell, (N. M. 1900) 61 Pac. 121.

New York.— People *v.* Ct. Oyer and Terminer N. Y. County, 83 N. Y. 436; White *v.* McLean, 57 N. Y. 670.

Pennsylvania.— Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326.

South Dakota.— Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

Texas.— Texas Standard Oil Co. *v.* Hanlon, 79 Tex. 678, 15 S. W. 703.

Washington.— Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

Wisconsin.—McMahon *v.* Eau Claire Water Works Co., 95 Wis. 640, 70 N. W. 829.

United States.— Rea *v.* Missouri, 17 Wall. (U. S.) 532, 21 L. ed. 707; Seymour *v.* Malcolm McDonald Lumber Co., 58 Fed. 957, 16 U. S. App. 245, 7 C. C. A. 593.

See 3 Cent. Dig. tit. "Appeal and Error," § 3854.

45. Snow *v.* Grace, 29 Ark. 131; Spalding *v.* Merrimack, 67 N. H. 382, 36 Atl. 253; Rehberg *v.* New York, 99 N. Y. 652, 2 N. E. 11; Greton *v.* Smith, 33 N. Y. 245; Sharp *v.* Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Smith *v.* Winger, 3 Walk. (Pa.) 138.

See 3 Cent. Dig. tit. "Appeal and Error," § 3857.

46. *Alabama.*—Newbrick *v.* Dugan, 61 Ala. 251; Gayle *v.* Bishop, 14 Ala. 552.

Arkansas.— Smith *v.* Childress, 27 Ark. 328; Burr *v.* Daugherty, 21 Ark. 559.

Colorado.— Schaefer *v.* Gildea, 3 Colo. 15.

Indiana.— Williamson *v.* Yingling, 93 Ind. 42.

Michigan.— Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244.

Missouri.— Bailey *v.* Chapman, 41 Mo. 536.

New York.— Bissell *v.* Russell, 23 Hun (N. Y.) 659; Merrills *v.* Law, 9 Cow. (N. Y.) 65.

Texas.— Haney *v.* Clark, 65 Tex. 93; Marx *v.* Lange, 61 Tex. 547.

Virginia.— Fant *v.* Miller, 17 Gratt. (Va.) 187.

See 3 Cent. Dig. tit. "Appeal and Error," § 3856.

47. *Indiana.*—Buckeye Mfg. Co. *v.* Woolley Foundry, etc., Works, (Ind. App. 1900) 58 N. E. 1069.

Minnesota.— Fossum *v.* Chicago, etc., R. Co., 80 Minn. 9, 82 N. W. 979; Backus *v.* Ames, 79 Minn. 145, 81 N. W. 766.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445.

Utah.— Wright *v.* Southern Pac. Co., 15 Utah 421, 49 Pac. 309.

48. *Florida.*— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

Iowa.— Blades *v.* Walker, 36 Iowa 266.

Kansas.— North American R. Constr. Co. *v.* Patry, (Kan. App. 1900) 61 Pac. 871.

Louisiana.— Cunningham *v.* Erwin, 4 La. Ann. 198.

Missouri.— Hunt *v.* Missouri R. Co., 14 Mo. App. 160.

New York.— Belsena Coal Min. Co. *v.* Liberty Dredging Co., 27 Misc. (N. Y.) 191, 57 N. Y. Suppl. 739.

South Dakota.— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069.

See, generally, CONSOLIDATION AND SEVERANCE OF ACTIONS; and 3 Cent. Dig. tit. "Appeal and Error," § 3834.

49. *California.*— George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829; Broadus *v.* Nelson, 16 Cal. 79.

Colorado.— Denver, etc., R. Co. *v.* Pilgrim, 9 Colo. App. 86, 47 Pac. 657.

Indiana.— Killian *v.* Eigenmann, 57 Ind. 480; Fidelity Mut. L. Assoc. *v.* McDaniel, (Ind. App. 1900) 57 N. E. 645.

Indian Territory.— Adams Hotel Co. *v.* Cobb, (Indian Terr. 1899) 53 S. W. 478; Breedlove *v.* Dennie, (Indian Terr. 1899) 53 S. W. 436.

Massachusetts.— Hollingsworth, etc., Co. *v.* Foxborough Water Supply Dist., 171 Mass. 450, 50 N. E. 1037; Florence Mach. Co. *v.* Daggett, 135 Mass. 582.

Minnesota.—Hibbs *v.* Marpe, (Minn. 1901) 86 N. W. 612.

(B) *Issues Out of Chancery.* Whether a chancellor should direct, or refuse an issue, to be tried by a jury, is within his sound judicial discretion, and, consequently, not reviewable save in case of manifest abuse.[50]

(XV) *View by Jury.* An order granting or refusing a view by the jury is within the discretion of the trial court, and will only be interfered with on a showing of abuse.[51]

h. Form of Opinion. The form in which a trial court shall express its opinion is a matter to be settled by it, and is not reviewable by an appellate court.[52]

i. Dismissal and Nonsuit. An application to reinstate a cause after dismissal or nonsuit rests in the discretion of the trial court.[53]

Missouri.— Hall *v.* Harris, 145 Mo. 614, 47 S. W. 506.

Nebraska.— Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855 [*following* Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968]; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

New York.— Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192; Sheldon *v.* Fidelity Trust, etc., Co., 71 N. Y. Suppl. 65.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

Ohio.— See Adams, etc., Express *v.* Pollock, 12 Ohio St. 618.

Oregon.— Wild *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954; Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91; Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76.

South Carolina.—De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 365, 35 S. E. 441.

South Dakota.— National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

Texas.— Jordan *v.* Young, (Tex. Civ. App. 1900) 56 S. W. 762; Galveston, etc., R. Co. *v.* McGraw, (Tex. Civ. App. 1900) 55 S. W. 756.

West Virginia.—West Virginia Bldg. Co. *v.* Saucer, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822; Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

Wisconsin.—Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 382, 80 N. W. 467; Dewey *v.* Chicago, etc., R. Co., 99 Wis. 455, 75 N. W. 74.

United States.—W. B. Grimes Dry Goods Co. *v.* Malcolm, 164 U. S. 483, 17 S. Ct. 158, 41 L. ed. 524.

See 3 Cent. Dig. tit. "Appeal and Error," § 3858.

50. *Alabama.*— Mathews *v.* Forniss, 91 Ala. 157, 8 So. 661; Anonymous, 35 Ala. 226.

Colorado.—Abbott *v.* Monti, 3 Colo. 561.

Indiana.— Koons *v.* Blanton, 129 Ind. 383, 27 N. E. 334; Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756.

Kentucky.— See Hammon *v.* Pearl, 6 T. B. Mon. (Ky.) 410.

Massachusetts.— Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188; Harris *v.* Mackintosh, 133 Mass. 228.

New Jersey.—American Dock, etc., Co. *v.* Public School Trustees, 37 N. J. Eq. 266.

New Mexico.— Huntington *v.* Moore, 1 N. M. 489.

New York.—Wright *v.* Nostrand, 94 N. Y. 31; Brinkley *v.* Brinkley, 56 N. Y. 192; Clark *v.* Brooks, 2 Daly (N. Y.) 159, 2 Abb. Pr. N. S. (N. Y.) 385; Hays *v.* Moody, 2 N. Y. Suppl. 385.

North Carolina.— Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; Redman *v.* Redman, 65 N. C. 546.

Pennsylvania.— Neff *v.* Barr, 14 Serg. & R. (Pa.) 166.

South Carolina.— Blackwood *v.* Clawson, 2 S. C. 452; Charleston *v.* Hagermeyer, Riley Eq. (S. C.) 117.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

West Virginia.— Setzer *v.* Beale, 19 W. Va. 274.

Wisconsin.—Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

United States.— Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433.

See 3 Cent. Dig. tit. "Appeal and Error," § 3859.

51. Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986; Valley Turnpike, etc., Co. *v.* Lyons, (Ky. 1900) 58 S. W. 502; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.

As to view by jury, generally, see TRIAL.

As to sufficiency of record to review order on application for view by jury see *supra*, XIII, L, 11, d.

52. Smith *v.* Rathbun, 88 N. Y. 660.

53. *California.*— Seymour *v.* Wood, 63 Cal. 81.

Florida.— Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796.

Georgia.— Phillips *v.* Aycock, 89 Ga. 725, 15 S. E. 624; Central R., etc., Co. *v.* Folds, 86 Ga. 42, 12 S. E. 216; Platen *v.* Wilson, 60 Ga. 596; Rawson *v.* Powell, 36 Ga. 255.

Illinois.— Hinckley *v.* Dean, 104 Ill. 630; Ilett *v.* Collins, 103 Ill. 74.

Iowa.— Chapman *v.* Lobey, 21 Iowa 300.

Maine.— Leighton *v.* Manson, 14 Me. 208.

Michigan.— Hoffman *v.* St. Clair Cir. Judge, 37 Mich. 131.

Missouri.— Crane Co. *v.* Hawley, 54 Mo. App. 603.

New York.—Fowler *v.* Huber, 7 Rob. (N. Y.) 52.

Texas.— George *v.* Taylor, 55 Tex. 97;

j. Judgment — (I) *Amendment and Correction.* The amendment or correction of a judgment, so as to make it conform with the verdict of the jury, is a matter within the discretion of the trial court, and an order overruling a motion for such relief is not subject to review on appeal.[54]

(II) *Opening and Vacating* — (A) *In General.* Orders opening and vacating, or refusing to open and vacate, judgments or orders are, as a rule, within the sound judicial discretion of the trial court, and only reviewable in case of manifest abuse.[55]

(B) *Judgment by Default.* An order opening, or refusing to open, a judgment by default is generally within the sound judicial discretion of the trial court, and not reviewable on appeal in the absence of a manifest abuse of such discretion.[56]

Thiele *v.* Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Newell, 31 Vt. 364.

Washington.— Rinehart *v.* Watson, 11 Wash. 526, 40 Pac. 127.

United States.— Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902; Welch *v.* Mandeville, 7 Cranch (U. S.) 152, 3 L. ed. 299.

See 3 Cent. Dig. tit. "Appeal and Error," § 3838.

As to dismissal and nonsuit, generally, see Dismissal and Nonsuit.

As to sufficiency of record for review of questions relating to dismissal and nonsuit see *supra*, XIII, L, 8.

A demurrer to evidence is addressed to the discretion of the trial court. Van Stone *v.* Stilwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961. And the same is true of a motion to withdraw a demurrer to the evidence. Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356; Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

54. Gordon *v.* McCall, (Tex. Civ. App. 1900) 56 S. W. 219.

As to amendment and correction of judgment, generally, see Judgments.

55. *Alabama.*—Talladega Mercantile Co. *v.* McDonald, 97 Ala. 508, 12 So. 34.

California.— Mulholland *v.* Heyneman, 19 Cal. 605; Haight *v.* Green, 19 Cal. 113.

Colorado.— Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771.

District of Columbia.— District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497.

Illinois.— Bolton *v.* McKinley, 22 Ill. 203; Goodwillie *v.* Schauh, 93 Ill. App. 311.

Iowa.— Donahue *v.* Lannan, 70 Iowa 73, 30 N. W. 8; Brett *v.* Bassett, 63 Iowa 340, 19 N. W. 210.

Kansas.— Parsons First Nat. Bank *v.* Wentworth, 28 Kan. 183.

Massachusetts.— Stone *v.* St. Louis Stamping Co., 156 Mass. 598, 31 N. E. 654; Rugg *v.* Parker, 7 Gray (Mass.) 172.

Michigan.—Citizens' Commercial, etc., Bank *v.* Bay Cir. Judge, 110 Mich. 633, 68 N. W. 649; Mills *v.* McLeod, 94 Mich. 627, 54 N. W. 387.

Mississippi.— Perryman *v.* Gardner, 42 Miss. 548.

Missouri.— Craig *v.* Smith, 65 Mo. 536; Garesche *v.* Hill, 76 Mo. App. 659.

Nebraska.— See Smith *v.* Pinney, 2 Nebr. 139.

New York.— Matter of Peekamose Fishing Club, 151 N. Y. 511, 45 N. E. 1037; Peck *v.* New York, etc., R. Co., 85 N. Y. 246.

North Carolina.— Cowles *v.* Cowles, 121 N. C. 272, 28 S. E. 476; Albertson *v.* Terry, 108 N. C. 75, 12 S. E. 892.

Ohio.—Huntington *v.* Finch, 3 Ohio St. 445.

Oregon.— Lovejoy *v.* Willamette Locks Co., 24 Oreg. 569, 34 Pac. 660.

Pennsylvania.— Blauvelt *v.* Kemon, 196 Pa. St. 128, 46 Atl. 416; Rishel *v.* Crouse, 162 Pa. St. 3, 29 Atl. 123.

South Carolina.— Washington *v.* Hesse, 56 S. C. 28, 33 S. E. 787; *Ex p.* Carolina Nat. Bank, 56 S. C. 12, 33 S. E. 781.

Tennessee.— Edwards *v.* Turner, (Tenn. Ch. 1897) 47 S. W. 144.

Texas.— Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145; Viviola *v.* Kuezek, 1 Tex. App. Civ. Cas. § 634.

Vermont.— Williams *v.* Heywood, 41 Vt. 279.

Washington.— Bozzio *v.* Vaglio, 10 Wash. 270, 38 Pac. 1042.

Wisconsin.— Cleveland *v.* Hopkins, 55 Wis. 387, 13 N. W. 225.

United States.— Rio Grande Irrigation, etc., Co. *v.* Gildersleeve, 174 U. S. 603, 19 S. Ct. 761, 43 L. ed. 1103; Terry *v.* Commercial Bank, 92 U. S. 454, 23 L. ed. 620.

See, generally, Judgments; and 3 Cent. Dig. tit. "Appeal and Error," §§ 3878, 3879.

As to sufficiency of record to review order on application to open and vacate judgment see *supra*, XIII, L, 17, c, (I).

56. *Alabama.*— Colley *v.* Spivey, (Ala. 1900) 28 So. 574; Allen *v.* Lathrop-Hatton Lumber Co., 90 Ala. 490, 8 So. 129.

California.— Nicoll *v.* Weldon, 130 Cal. 666, 63 Pac. 63; Goodrich *v.* Loupe, (Cal. 1896) 46 Pac. 77.

District of Columbia.— Meyers *v.* Davis, 13 App. Cas. (D. C.) 361.

Florida.— Russ *v.* Gilbert, 19 Fla. 54; Tidwell *v.* Witherspoon, 18 Fla. 282.

Georgia.— Tower *v.* Ellsworth, 112 Ga. 460, 37 S. E. 736; Graham *v.* Atlanta Nat. Bldg., etc., Assoc., 110 Ga. 278, 34 S. E. 847.

k. Costs — (i) *In General.* An appellate court will not interfere with the exercise of the discretion of the trial court, in awarding costs or granting allowances, except where there clearly appears to have been an abuse of such discretion.[57]

Idaho.— Holland Bank *v.* Lieuallen, (Ida. 1898) 53 Pac. 398.

Illinois.— Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267; Palmer *v.* Harris, 98 Ill. 507.

Indiana.— Nash *v.* Cars, 92 Ind. 216; Blake *v.* Stewart, 29 Ind. 318.

Iowa.— Sitzer *v.* Fenzloff, (Iowa 1900) 84 N. W. 514; Hawarden First Nat. Bank *v.* Brown, (Iowa 1898) 77 N. W. 507.

Kansas.— Wilson, etc., Invest. Co. *v.* Hillyer, 50 Kan. 446, 31 Pac. 1064; Hopkins *v.* Hopkins, 47 Kan. 103, 27 Pac. 822.

Kentucky.— Carnahan *v.* Thompson, 21 Ky. L. Rep. 682, 52 S. W. 931.

Maryland.— Thomas *v.* Mohler, 25 Md. 36.

Massachusetts.— New England Mut. Acc. Assoc. *v.* Varian, 151 Mass. 17, 23 N. E. 579; Rogers *v.* Ladd, 117 Mass. 334.

Michigan.— People *v.* Saginaw Cir. Judge, 39 Mich. 123; Final *v.* Backus, 18 Mich. 218.

Minnesota.— Schuler *v.* Wood, 81 Minn. 372, 84 N. W. 121; Bausman *v.* Tilley, 46 Minn. 66, 48 N. W. 459.

Missouri.— Obermeyer *v.* Einstein, 62 Mo. 341; Kribben *v.* Eckelkamp, 34 Mo. 480.

Montana.— *In re* Davis, 15 Mont. 347, 39 Pac. 292; Whiteside *v.* Logan, 7 Mont. 373, 17 Pac. 34.

Nebraska.— Mercantile Trust Co. *v.* O'Hanlon, 58 Nebr. 482, 78 N. W. 925; Mulhollan *v.* Scoggin, 8 Nebr. 202.

Nevada.— Howe *v.* Coldren, 4 Nev. 171.

New York.— Vanderbilt *v.* Schreyer, 81 N. Y. 646; Ramsey *v.* Gould, 4 Lans. (N. Y.) 476.

North Carolina.— Marsh *v.* Griffin, 123 N. C. 660, 31 S. E. 840; Wyche *v.* Ross, 119 N. C. 174, 25 S. E. 878.

Oklahoma.— Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

Oregon.— Coos Bay, etc., R., etc., Co. *v.* Endicott, 34 Oreg. 573, 57 Pac. 61; Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779.

Pennsylvania.— La Roche Electric Works *v.* Emery, 173 Pa. St. 331, 34 Atl. 65; Horner *v.* Horner, 145 Pa. St. 258, 23 Atl. 441.

South Carolina.— Pelzer *v.* Morris, 56 S. C. 88, 34 S. E. 22; Bryson *v.* Whilden, 55 S. C. 465, 33 S. E. 558.

South Dakota.— Minnekahta State Bank *v.* Fall River County, 4 S. D. 124, 55 N. W. 863; Evans *v.* Fall River County, 4 S. D. 119, 55 N. W. 862.

Texas.— Goss *v.* McClaren, 17 Tex. 107, 67 Am. Dec. 646; Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249.

Utah.— Utah Commercial, etc., Bank *v.* Trumbo, 17 Utah 198, 53 Pac. 1033; Enright *v.* Grant, 5 Utah 334, 15 Pac. 268.

Vermont.— Chase *v.* Davis, 7 Vt. 476.

Virginia.— Alsop *v.* Catlett, 97 Va. 364, 34 S. E. 48.

Washington.— McCord *v.* McCord, (Wash. 1901) 64 Pac. 748; Livesley *v.* O'Brien, 6 Wash. 553, 34 Pac. 134.

Wisconsin.— Boutin *v.* Catlin, 101 Wis. 545, 77 N. W. 910; Elmer *v.* Mitchell, 75 Wis. 358, 44 N. W. 760.

See, generally, Judgments; and 3 Cent. Dig. tit. "Appeal and Error," § 3823.

As to presumption with regard to opening default see *supra*, XVII, E, 2, g, (III).

As to sufficiency of record to review order on motion to open default see *supra*, XIII, L, 17, c, (II).

57. *Alabama.*— Porter *v.* Williams, 22 Ala. 525.

Arkansas.— Irvin *v.* Real Estate Bank, 5 Ark. 30.

California.—Barnhart *v.* Kron, 88 Cal. 447, 26 Pac. 210.

Illinois.— Wallen *v.* Moore, 187 Ill. 190, 58 N. E. 392; Nelson *v.* Gibson, 92 Ill. App. 595.

Indiana.— Williams *v.* Williams, 81 Ind. 113.

Indian Territory.— Denison, etc., R. Co. *v.* Ranney-Alton Mercantile Co., (Indian Terr. 1899) 53 S. W. 496.

Iowa.— Ottumwa Screen Co. *v.* Stodghill, 103 Iowa 437, 72 N. W. 669; Bush *v.* Yeoman, 30 Iowa 479.

Michigan.— Smith *v.* Hubbard, 46 Mich. 306, 9 N. W. 427; Pettibone *v.* Maclem, 45 Mich. 381, 8 N. W. 84.

Minnesota.— Barman *v.* Miller, 23 Minn. 458; Turner *v.* Holleran, 8 Minn. 451.

Mississippi.— Bernheim *v.* State, (Miss. 1900) 28 So. 28; Sledge *v.* Obenchain, 59 Miss. 616.

Missouri.— State *v.* Hickman, 84 Mo. 74; Shields *v.* Bogliolo, 7 Mo. 134.

New Hampshire.— Harvey *v.* Reeds, 49 N. H. 531.

New York.— Morris *v.* Wheeler, 45 N. Y. 708; People's Trust Co. *v.* Harman, 43 N. Y. App. Div. 348, 60 N. Y. Suppl. 178.

North Carolina.— Parton *v.* Boyd, 104 N. C. 422, 10 S. E. 490; McRae *v.* Leary, 46 N. C. 91.

Ohio.— State *v.* Davis, 18 Ohio Cir. Ct. 479, 10 Ohio Cir. Dec. 203.

Oregon.— Dimmick *v.* Rosenfeld, 34 Oreg. 101, 55 Pac. 100.

Pennsylvania.—Miskey's Appeal, (Pa. 1886) 4 Atl. 744.

Vermont.— Bliss *v.* Little, 64 Vt. 133, 23 Atl. 725; Laclair *v.* Reynolds, 50 Vt. 418.

Washington.— Arey *v.* Arey, 22 Wash. 261, 60 Pac. 724.

Wisconsin.— Carrier *v.* Atwood, 63 Wis. 301, 24 N. W. 82; Speck *v.* Jarvis, 59 Wis. 585, 18 N. W. 478.

See, generally, Costs; and 3 Cent. Dig. tit. "Appeal and Error," § 3881.

As to sufficiency of record to review questions relating to costs see *supra*, XIII, L, 18.

(II) *EXTRA ALLOWANCE.* The granting of extra allowances in a cause, where permissible, is a matter within the sound discretion of the trial court, and only subject to review in case of patent abuse.[58]

(III) *LIMITATION, DIVISION, OR APPORTIONMENT.* The limitation, division, or apportionment of costs by the trial court will only be interfered with, on appeal, where there is an apparent abuse of discretion.[59]

(IV) *SUITS IN EQUITY.* The matter of costs and allowances in an equity case is peculiarly within the discretion of the chancellor, and his decision will only be disturbed for a plain abuse of discretion.[60]

1. New Trial or Rehearing. Unless manifest abuse is shown, an appellate court will not interfere with the discretionary power of the trial court in granting or refusing to grant a new trial or rehearing.[61] If, however, the record shows

Security for costs.— The question as to whether a plaintiff should be required to give security for costs is a matter for the sound discretion of the trial court, and in the absence of an abuse of such discretion the appellate court will not interfere.

California.— Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932.

Illinois.— Clement *v.* Brown, 30 Ill. 43; Selby *v.* Hutchinson, 9 Ill. 319; Roberts *v.* Brunz, 92 Ill. App. 479.

Massachusetts.— Petitcler *v.* Willis, 99 Mass. 460.

Missouri.— Stevens *v.* Sexton, 10 Mo. 30.

New York.— Briggs *v.* Vandenburgh, 22 N. Y. 467.

North Carolina.— Osborne *v.* Henry, 66 N. C. 354; State *v.* Cox, 46 N. C. 373.

58. Morgan *v.* Baltimore Fidelity, etc., Co., 101 Ga. 389, 28 S. E. 857; Quinn *v.* Sullivan, (Mich. 1899) 79 N. W. 570; Woodbridge *v.* Saratoga Springs First Nat. Bank, 166 N. Y. 238, 59 N. E. 836 [*affirming* 45 N. Y. App. Div. 166, 61 N. Y. Suppl. 258]; Adams *v.* Arkenburgh, 106 N. Y. 615, 13 N. E. 594; Syracuse *v.* Stacey, 45 N. Y. App. Div. 260, 60 N. Y. Suppl. 1106; Metropolitan L. Ins. Co. *v.* Standard Nat. Bank, 44 N. Y. App. Div. 319, 60 N. Y. Suppl. 666 [*affirming* 57 N. Y. Suppl. 797]; Ballenger *v.* Barnes, 14 N. C. 396.

See 3 Cent. Dig. tit. "Appeal and Error," § 3888.

59. *Georgia.*— Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867.

Illinois.— Howard *v.* Bennett, 72 Ill. 297.

Iowa.— Boone County *v.* Wilson, 41 Iowa 69.

Missouri.— Bobb *v.* Wolff, 54 Mo. App. 515.

New Hampshire.— Rochester *v.* Roberts, 29 N. H. 360; Janvrin *v.* Scammon, 29 N. H. 280.

New York.— New York *v.* Brady, 57 N. Y. Super. Ct. 14, 5 N. Y. Suppl. 179, 25 N. Y. St. 106.

Wisconsin.— Massing *v.* Ames, 38 Wis. 285.

See 3 Cent. Dig. tit. "Appeal and Error," § 3884.

60. *Alabama.*— Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138.

Arkansas.— Temple *v.* Lawson, 19 Ark. 148.

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

Connecticut.— Cowles *v.* Whitman, 10 Conn. 121, 25 Am. Dec. 60.

Illinois.— Wahls *v.* Brandt, 175 Ill. 354, 51 N. E. 707; Scott *v.* Beach, 172 Ill. 273, 50 N. E. 196.

Kentucky.— Hendrix *v.* Nesbitt, 20 Ky. L. Rep. 1666, 49 S. W. 963; Citizens Nat. Bank *v.* Calloway, 19 Ky. L. Rep. 1630, 44 S. W. 104.

Maryland.— Hamilton *v.* Schwehr, 34 Md. 107.

Missouri.— Holy Ghost Assoc. *v.* Fehlig, 72 Mo. App. 473.

New York.— Law *v.* McDonald, 9 Hun (N. Y.) 23.

Ohio.— Reed *v.* Cincinnati, 8 Ohio Cir. Ct. 393.

Oregon.— Leick *v.* Beers, 28 Oreg. 483, 43 Pac. 658; Lovejoy *v.* Chapman, 23 Oreg. 571, 32 Pac. 687.

Pennsylvania.— Pennsylvania L. Ins. Co. *v.* Philadelphia Nat. Bank, 195 Pa. St. 34, 45 Atl. 648; Grim *v.* Walbert, 155 Pa. St. 147, 25 Atl. 1077.

South Carolina.— McKenzie *v.* Sifford, 52 S. C. 104, 29 S. E. 388; Cunningham *v.* Cauthen, 44 S. C. 95, 21 S. E. 800.

Tennessee.— McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420; Gaines *v.* Fagala, (Tenn. Ch. 1897) 42 S. W. 462.

Vermont.— Flannery *v.* Flannery, 58 Vt. 576, 5 Atl. 507; Sanders *v.* Wilson, 34 Vt. 318.

Wisconsin.— *In re* Donges, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885.

See 3 Cent. Dig. tit. "Appeal and Error," § 3882.

61. *Alabama.*— Davis Wagon Co. *v.* Cannon, (Ala. 1901) 29 So. 841.

Arkansas.— Armstrong *v.* State, 54 Ark. 364, 15 S. W. 1036.

California.— McCarthy *v.* Phelan, 132 Cal. 404, 64 Pac. 570.

Colorado.— Monteith *v.* Union Pac., etc., R. Co., 13 Colo. App. 421, 58 Pac. 338.

Connecticut.— Hoyt *v.* Smith, 28 Conn. 466.

District of Columbia.— Thomas *v.* Presbrey, 5 App. Cas. (D. C.) 217.

Florida.— Reddick *v.* Joseph, 35 Fla. 65, 16 So. 781.

Georgia.— Flanders *v.* Wood, 113 Ga. 635, 38 S. E. 975.

Idaho.— Gray *v.* Pierson, (Ida. 1901) 64 Pac. 233.

Illinois.— Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 623.

that a new trial was granted because of an erroneous determination of a question of law, the order will be set aside, and judgment directed to be entered on the former verdict.[62]

m. Appeal or Other Proceeding For Review — (I) *In General.* In the absence of a manifest abuse of power, the exercise of its discretion by the trial court as to matters relating to the allowance and perfecting of an appeal, or other proceeding for review, is not revisable by the appellate court.[63]

(II) *Making and Filing Bill of Exceptions, Case, or Statement.* Unless controlled by positive law, matters relating to the making and filing of a bill of exceptions, case, or statement of facts — such as extending the time in

Indiana.— Prescott *v.* Haughey, 152 Ind. 517, 51 N. E. 1051, 53 N. E. 766.

Iowa.—Garner *v.* Mutual F. Ins. Co., (Iowa 1901) 86 N. W. 289.

Kansas.— Sanders *v.* Wakefield, 41 Kan. 11, 20 Pac. 518.

Kentucky.— Ellis *v.* Ellis, 20 Ky. L. Rep. 438, 46 S. W. 521.

Louisiana.— Sanchez *v.* Gonzales, 11 Mart. (La.) 207.

Maine.— Hewey *v.* Nourse, 54 Me. 256.

Maryland.— Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33.

Massachusetts.— Parker *v.* Griffith, 172 Mass. 87, 51 N. E. 462.

Michigan.— Raymond *v.* Day, 111 Mich. 443, 69 N. W. 832.

Minnesota.— American Electric Co. *v.* Clark, (Minn. 1901) 86 N. W. 342.

Mississippi.— Frizell *v.* White, 27 Miss. 198.

Missouri.— Farrar *v.* Midland Electric R. Co., (Mo. 1901) 63 S. W. 115.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.—Wheeler *v.* Olson, 37 Nebr. 562, 56 N. W. 309.

Nevada.— Tognini *v.* Kyle, 15 Nev. 464.

New Hampshire.— Abbott *v.* Concord, etc., R. Co., 69 N. H. 176, 44 Atl. 912.

New Jersey.—Delaware, etc., R. Co. *v.* Nevelle, 51 N. J. L. 332, 17 Atl. 836, 19 Atl. 538.

New Mexico.— Liverpool, etc., Ins. Co. *v.* Perrin, (N. M. 1900) 61 Pac. 124.

New York.— Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289, 53 N. Y. St. 63.

North Carolina.—Hardy *v.* Hardy, 128 N. C. 178, 38 S. E. 815.

North Dakota.— Magnusson *v.* Linwell, 9 N. D. 154, 82 N. W. 746.

Ohio.— Beatty *v.* Hatcher, 13 Ohio St. 115.

Oklahoma.— Ten Cate *v.* Sharp, 8 Okla. 300, 57 Pac. 645.

Oregon.— Houser *v.* West, (Oreg. 1901) 65 Pac. 82.

Pennsylvania.— De Grote *v.* De Grote, 175 Pa. St. 50, 34 Atl. 312.

South Carolina.— Wright *v.* Charleston, etc., R. Co., 59 S. C. 268, 37 S. E. 832.

South Dakota.— Finch *v.* Martin, 13 S. D. 274, 83 N. W. 263.

Tennessee.— Nashville, etc., R. Co. *v.* Lawson, (Tenn. 1900) 58 S. W. 480.

Texas.— Radford *v.* Lyon, 65 Tex. 471.

Utah.— Lehi Irrigation Co. *v.* Moyle, 4 Utah 327, 9 Pac. 867.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11.

Virginia.— Southwest Imp. Co. *v.* Andrew, 86 Va. 270, 9 S. E. 1015.

Washington.— Latimer *v.* Black, (Wash. 1901) 64 Pac. 176.

West Virginia.— Jones *v.* Singer Mfg. Co., 38 W. Va. 147, 18 S. E. 478.

Wisconsin.— Warder, etc., Co. *v.* Angell, 99 Wis. 298, 74 N. W. 789.

United States.— New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71.

See, generally, New Trial; and 3 Cent. Dig. tit. "Appeal and Error," § 3860 *et seq.*

As to sufficiency of record to review questions relating to new trial see *supra*, XIII, L, 19.

62. Crowley *v.* Louisville, etc., R. Co., 21 Ky. L. Rep. 1434, 55 S. W. 434.

63. *Indiana.*—Broden *v.* Thorpe Block Sav., etc., Assoc., 20 Ind. App. 684, 50 N. E. 403.

Iowa.— State *v.* Dillard, 52 Iowa 749, 3 N. W. 807.

Louisiana.— State *v.* Judge Sixth Dist. Ct., 9 La. Ann. 14.

Maine.— Emerson *v.* McNamara, 41 Me. 565.

Tennessee.— Sigler *v.* Vaughn, 11 Lea (Tenn.) 131; Crawford *v.* Ætna L. Ins. Co., 12 Heisk. (Tenn.) 154; Northman *v.* Insurance Companies, 1 Tenn. Ch. 324.

Wisconsin.— Deering Harvester Co. *v.* Johnson, 108 Wis. 275, 84 N. W. 426; Oakley *v.* Davidson, 103 Wis. 98, 79 N. W. 27.

United States.— The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3889, 3890; and *supra*, VII [2 Cyc. 789].

The amendment of an appeal bond is discretionary with the trial court, and not reviewable. Griffin *v.* Belleville, 50 Ill. 422; Crain *v.* Bailey, 2 Ill. 321.

As to amendment of appeal bond, generally, see *supra*, VII, D, 10 [2 Cyc. 847].

Sufficiency of appeal bond.— The discretion of the trial judge as to the sufficiency of an appeal bond is not reviewable on appeal. New Orleans Ins. Co. *v.* E. D. Albro Co., 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809; Jerome *v.* McCarter, 21 Wall. (U. S.) 17, 22 L. ed. 515.

As to necessity and requisites of appeal bond, generally, see *supra*, VII, D [2 Cyc. 818].

which to make and file, or with regard to amendments — are discretionary with the trial court.[64]

(III) *Supersedeas or Stay of Proceedings.* An appellate court will not interfere with the action of the trial court in allowing a supersedeas or stay, unless in a case of manifest and gross injustice.[65]

G. Questions of Fact — 1. Jurisdiction in General. Ordinarily, in the absence of controlling constitutional or statutory provision, questions of fact are to be tried and determined in the court of original jurisdiction, and not in an appellate court exercising strictly the functions of a court of review.[66] Where the appellate jurisdiction is confined to a review of the questions of law, a determination of questions of fact in the trial court is conclusive, and the findings cannot be reviewed.[67] But, under the chancery practice and also in equitable actions

64. *California.*— Banta *v.* Siller, 121 Cal. 414, 53 Pac. 935.

Illinois.— West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393.

Kentucky.— Hallowell *v.* Hallowell, 1 T. B. Mon. (Ky.) 130.

Minnesota.— Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 72, 59 N. W. 828; Irvine *v.* Myers, 6 Minn. 558.

Missouri.— Miller *v.* St. Louis R. Co., 5 Mo. App. 471; Saulsbury *v.* Alexander, 1 Mo. App. 209.

New York.— Barnard *v.* Gantz, 69 Hun (N. Y.) 104, 23 N. Y. Suppl. 260, 52 N. Y. St. 604; Canzi *v.* Conner, 4 Abb. N. Cas. (N. Y.) 148.

North Dakota.— *Compare* Moe *v.* Northern Pac. R. Co., 2 N. D. 282, 50 N. W. 715.

Oklahoma.—Pappe *v.* American F. Ins. Co., 8 Okla. 97, 56 Pac. 860.

South Carolina.—Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Wisconsin.— Schluckebier *v.* Babcock, 104 Wis. 293, 80 N. W. 435.

See 3 Cent. Dig. tit. "Appeal and Error," § 3891.

As to contents, making, and settlement of bill of exceptions, case, or statement of facts, generally, see *supra*, XIII, D, E.

65. *Nebraska.*— State *v.* Stull, 49 Nebr. 739, 69 N. W. 101.

New Jersey.— Allen *v.* Hopper, 24 N. J. L. 514; Ryerson *v.* Boorman, 7 N. J. Eq. 640.

New York.— Granger *v.* Craig, 85 N. Y. 619; Emigrant Mission Committee *v.* Brooklyn El. R. Co., 57 N. Y. Suppl. 624; Pach *v.* Geoffroy, 19 N. Y. Suppl. 583, 47 N. Y. St. 247.

Pennsylvania.— Weidknecht *v.* Boyer, 2 Wkly. Notes Cas. (Pa.) 638, 33 Leg. Int. (Pa.) 281.

Tennessee.— Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148.

See also *supra*, VIII, G, 1, b [2 Cyc. 892]; and 3 Cent. Dig. tit. "Appeal and Error," § 3892.

In Louisiana the action of the trial court in declaring an appeal to be devolutive merely, and not suspensive, is reviewable on a writ of prohibition. State *v.* Judge Second Dist. Ct., 28 La. Ann. 871; State *v.* Judge Super. Dist. Ct., 27 La. Ann. 697. See also State *v.* Judge Fourth Dist. Ct., 21 La. Ann. 735; State *v.* Judge Fifth Dist. Ct., 21 La. Ann. 113; State *v.* Judge Second Judicial Dist., 21 La. Ann. 64.

66. Storz *v.* Burragge, (N. M. 1901) 65 Pac. 162; Matter of Chapman, 162 N. Y. 456, 56 N. E. 994, in which last case the rule of the text is applied, under N. Y. Code Civ. Proc. § 1361, to a special proceeding on appeal from an order, to the same extent as on appeals from judgments. But see Teller *v.* Wetherell, 6 Mich. 46.

See 3 Cent. Dig. tit. "Appeal and Error," § 3893 *et seq.*

The common-law power of the early supreme court of New York to review the proceedings of all inferior tribunals and to pass upon the jurisdiction of such tribunals was held not to embrace the power to pass upon the determination of questions of fact by such inferior tribunals. Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

The "power to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction" under a constitutional provision, was held not to authorize the appellate court to take original jurisdiction and determine controverted matters of fact upon which the rights of the parties, and not the power or ability of the court to exercise its appellate jurisdiction, may depend. Wood *v.* Yarbrough, 41 Tex. 540.

67. *District of Columbia.*— U. S. *v.* Metropolitan Club, 11 App. Cas. (D. C.) 180; Brown *v.* Washington, etc., R. Co., 11 App. Cas. (D. C.) 37.

Massachusetts.— Schendel *v.* Stevenson, 153 Mass. 351, 36 N. E. 689; Barnacoat *v.* Six Quarter Casks Gunpowder, 1 Metc. (Mass.) 225.

New Hampshire.— Amoskeag Mfg. Co. *v.* Manchester, (N. H. 1900) 46 Atl. 470; Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

New Jersey.— Weger *v.* Delran Tp., 61 N. J. L. 224, 39 Atl. 730; Jersey City *v.* Tallman, 60 N. J. L. 239, 37 Atl. 1026.

South Carolina.— Cook *v.* Cooper, 59 S. C. 560, 38 S. E. 218; Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126.

Utah.— Ewell *v.* Joe Bowers Min. Co., (Utah 1901) 64 Pac. 367; Genter *v.* Conglomerate Min. Co., (Utah 1901) 64 Pac. 362.

United States.— Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 2 S. Ct. 932, 27 L. ed. 605;

under the code, the appellate court tries the whole cause anew on appeal — examines into the facts as well as the law, and determines the sufficiency of the facts to support the findings[68] — and in this connection the distinction is to be observed between the proper office of a writ of error — to present matters of law only — and that of an appeal — to take up the whole case for review on the law and the facts.[69] The extent of review, however, often depends upon the various statutory provisions regulating the general powers and duties of appellate courts and appellate proceedings, as well as the consideration of the inherent nature of the appellate tribunal as distinguished from that of the trial court, where greater opportunities are had for weighing the evidence,[70] and appellate courts are authorized and charged with the duty of examining the evidence and findings, upon proper exceptions reserved.[71]

New York Cent., etc., R. Co. *v.* Froloff, 100 U. S. 24, 25 L. ed. 531 — on error from the supreme court of the United States.

See also *infra*, XVII, G, 2.

68. See *infra*, XVII, G, 4, g.

69. Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408; Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130. The only jurisdiction of the supreme court of the United States to review judgments or decrees of a state court being by writ of error, and a writ of error bringing up only matters of law, the supreme court of the United States cannot review a decision of a state court on a question of fact, notwithstanding, according to the state practice, the law and the facts are tried together by a judge without a jury. Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305.

70. Thus, where, under the statute, the finding is conclusive if not attacked in the manner prescribed by the statute — as upon a motion for a new trial — the rule is applicable to legal and equitable actions alike, and the old chancery practice does not prevail. Ide *v.* Churchill, 14 Ohio St. 372; Murphy *v.* Plankinton Bank, 13 S. D. 501, 83 N. W. 575 [*quoting* Hayne New Tr. § 244]. See also Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208; Newman *v.* Mueller, 16 Nebr. 523, 20 N. W. 843; Fried *v.* Remington, 5 Nebr. 525 (wherein the rule that, unless the evidence manifestly preponderates against the finding, it will not be disturbed is applied to appeal and error cases alike); Catlin *v.* Henton, 9 Wis. 476 (referring to early Missouri cases); Freeland *v.* Eldridge, 19 Mo. 325 (wherein no distinction seems to have been made between actions at law and suits in equity as to the want of power in the court to review the facts); Skinner *v.* Elling, 15 Mo. 488.

71. *Alabama.*— Chandler *v.* Crossland, 126 Ala. 176, 28 So. 420; Quillman *v.* Gurley, 85 Ala. 594, 5 So. 345 — under code provision applying to special findings of a court trying case without a jury.

California.— Under the code provisions in California proceedings for a new trial are independent of the entry of the judgment, and an appeal from the order overruling a motion for a new trial involves only a reëxamination of the issues of fact. Owen *v.* Pomona Land, etc., Co., (Cal. 1900) 61 Pac. 472; Brisom *v.* Brisom, 90 Cal. 323, 27 Pac. 186.

Illinois.— The court of appeals may examine into the facts, but the supreme court may not. Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Calumet Electric St. R. Co. *v.* Lee, 90 Ill. App. 393; Western Electric Co. *v.* Parish, 83 Ill. App. 210. Mixed questions of law and fact cannot be reviewed by the supreme court. Cheney *v.* Cross, 181 Ill. 31, 54 N. E. 564.

New York.— Matter of Warner, 53 N. Y. App. Div. 565, 65 N. Y. Suppl. 1022; Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025, 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1060 (under code provision giving the appellate court power to determine the correctness of the decision of a surrogate on the facts); Schwarzschild, etc., Co. *v.* Mathews, 39 N. Y. App. Div. 477, 57 N. Y. Suppl. 338 (under code provision requiring the appellate division of the supreme court to review questions of fact whenever judgment is entered on a decision which does not state separately the facts found, and holding that a decision, merely stating the ground on which it is based, without stating separately the facts found, comes within the statute and is reviewable on the facts). In this state the jurisdiction of the court of last resort is restricted to a review of questions of law under the constitution and code provisions in pursuance thereof, though the court of intermediate appellate jurisdiction, from which the cause is removed to the court of last resort, examines the evidence for the purpose of ascertaining that the finding or verdict has evidence to support it or that the finding or verdict is not palpably against the weight and sufficiency of the evidence. See Townsend *v.* Bell, 167 N. Y. 462, 60 N. E. 757; Lamkin *v.* Palmer, 164 N. Y. 201, 58 N. E. 123; Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548; Otten *v.* Manhattan R. Co., 150 N. Y. 395, 44 N. E. 1033; Lamkin *v.* Palmer, 24 N. Y. App. Div. 255, 48 N. Y. Suppl. 427.

Ohio.— Ide *v.* Churchill, 14 Ohio St. 372. But see Finley *v.* Whitley, 46 Ohio St. 524, 22 N. E. 640.

South Dakota.— Randall *v.* Burk Tp., 4 S. D. 337, 57 N. W. 4.

Texas.— Choate *v.* San Antonio, etc., R. Co., 91 Tex. 406, 44 S. W. 69 [*affirming* (Tex. Civ. App. 1897) 43 S. W. 537], as to different extent of review in the supreme court from that in the court of civil appeals, un-

2. Legal Conclusions and Inferences From Facts. A finding of fact is not conclusive as to instructions and definitions under which it is made.[72] The reviewing court will, ordinarily, pass upon questions of fact to the extent of determining whether such facts amount, in law, to the ultimate legal condition necessary to support the particular cause of action or defense. Whether there is any evidence is thus considered to be a question of law,[73] and where the question is whether, on the undisputed evidence or the facts found, certain legal results follow, the judgment thereon is reviewable.[74] Where the judgment of the lower court has no

der a practice similar to that in Illinois and New York, *supra*, this note.

Washington.— Allen *v.* Swerdfiger, 14 Wash. 461, 44 Pac. 894, under statute requiring examination of evidence *de novo* in cause tried without jury.

Wisconsin.— Paige *v.* McMillan, 41 Wis. 337; Fisher *v.* Farmers' L. & T. Co., 21 Wis. 73.

See 3 Cent. Dig. tit. "Appeal and Error," § 3896; and *infra*, XVII, J.

72. Leovy *v.* U. S., 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914.

73. *Connecticut.*— Standard Cement Co. *v.* Windham Nat. Bank, 71 Conn. 668, 42 Atl. 1006.

Maine.— Hazen *v.* Jones, 68 Me. 343.

New York.— Pollock *v.* Pollock, 71 N. Y. 137.

Vermont.— Where the testimony is detailed and the court finds the facts proved as stated, but also finds that, upon the evidence certified, "there was not sufficient proof" of a particular fact, it is held that this finding refers to the character and competency of the proof, and not to the quantity. Commercial Bank *v.* Strong, 28 Vt. 316, 67 Am. Dec. 714.

United States.— Alexandre *v.* Machan, 147 U. S. 71, 13 S. Ct. 211, 37 L. ed. 84.

74. *California.*— Hedge *v.* Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106. A finding of an ultimate fact does not prevent a review of the sufficiency of the facts found to show such ultimate fact where the finding of the ultimate fact recites that it appears "by the acts, facts, and matters above found." People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22. But when ultimate facts found support the judgment, they cannot be overcome by the finding of probative facts tending to show that the ultimate facts were found against the evidence. Gill *v.* Driver, 90 Cal. 72, 27 Pac. 64.

Colorado.— People *v.* Court of Appeals, 24 Colo. 186, 49 Pac. 36; Hendrie, etc., Mfg. Co. *v.* Collins, 13 Colo. App. 8, 56 Pac. 815.

Connecticut.— Murphy *v.* Derby St. R. Co., (Conn. 1900) 47 Atl. 120; Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; Mead *v.* Noyes, 44 Conn. 487. Whenever the trial court has fully weighed the testimony, passed upon the credibility of the witnesses, and found, as a basis of judgment, the inferences produced by the testimony, so that the evidence "had exhausted itself in producing the facts thus found, nothing remained but for the court, in the exercise of its legal judgment, to draw its inferences from the facts," and in such a case the conclusion of the court can be reviewed. Hayden *v.* Allyn, 55 Conn. 280, 11 Atl. 31. But where the finding does not state ultimate facts, but recites only the evidential facts, the decision of the trial court will not be disturbed. Clark *v.* Whittlesey, 72 Conn. 734, 46 Atl. 552.

Idaho.— Work *v.* Kinney, (Ida. 1900) 63 Pac. 596.

Indiana.— New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774; American Carbon Co. *v.* Jackson, (Ind. App. 1900) 56 N. E. 862. Where the court makes special findings of fact and conclusions of law, and the former contain, as findings of fact, certain conclusions of law, such conclusions cannot be considered in testing the separate conclusions of law drawn from the legitimate facts found. Cleveland, etc., R. Co. *v.* Baker, (Ind. App. 1899) 54 N. E. 814.

Kansas.—Burnham *v.* Johnson, 5 Kan. App. 321, 48 Pac. 460.

Minnesota.— Kinney *v.* Mathias, 81 Minn. 64, 83 N. W. 497.

North Carolina.—Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462; Delozier *v.* Bird, 125 N. C. 493, 34 S. E. 643.

Tennessee.— Insurance Co. of North America *v.* East Tennessee, etc., R. Co., 97 Tenn. 326, 37 S. W. 225.

Texas.— West End Town Co. *v.* Grigg, 93 Tex. 451, 56 S. W. 49.

Wisconsin.—Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407.

United States.— Where there is no special finding of facts in the case tried before a court without a jury, the appellate court is precluded from inquiring into the special facts and conclusions of law on which such finding rests. Boardman *v.* Toffey, 117 U. S. 271, 6 S. Ct. 734, 29 L. ed. 898. See also Dickinson *v.* Planters' Bank, 16 Wall. (U. S.) 250, 21 L. ed. 278.

See also *infra*, XVII, G, 3, b, (II); XVII, G, 4, b, (II); XVII, G, 5, b.

Mixed questions of law and fact may be reviewed. Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462. See also Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701. But, on the other hand, if the trial court adopts correct general principles of law, and the error, if any, consists in ascertaining from the whole mass of evidence the precise character of the conduct of the parties under the particular circumstances of the case, and the reviewing court cannot say whether the error was in the inference of fact from the testimony or in the inference of law from the facts as they lay

evidence whatever to support it, the question then is one of law as distinguished from the question of fact arising upon the weight and sufficiency of competent evidence actually supporting the judgment.[75]

3. Verdicts — a. Conclusiveness in General. Findings of fact by a jury are not subject to review, but are conclusive on the appellate court, whose jurisdiction is confined to a review of questions of law arising from the record.[76] In some jurisdictions, appellate courts, in a measure, not only examine the evidence, but determine upon its weight and sufficiency (the duty of passing upon the facts as such being confined to certain courts of intermediate appellate jurisdiction in several of the states), and their power to reverse on the facts is not confined to cases where there is no evidence to support the verdict.[77]

b. Extent of Review — (i) *Where There Is Evidence in Support.* As a general rule, if there is any evidence which, standing alone or considered apart from opposing evidence,[78] is, if believed by the jury, legally sufficient, or might

in the mind of the trial court, the finding cannot be disturbed. Murphy *v.* Derby St. R. Co., (Conn. 1900) 47 Atl. 120; Fox *v.* Kinney, 72 Conn. 404, 44 Atl. 745.

75. *Maryland.*— Hopkins *v.* Adey, 92 Md. 1, 48 Atl. 41, 50 L. R. A. 498.

New Hampshire.— Neil *v.* Kelley, (N. H. 1900) 47 Atl. 412; Sanders *v.* Strafford Paper Co., (N. H. 1900) 46 Atl. 53; Pitman *v.* Mauran, 69 N. H. 230, 40 Atl. 392.

New Jersey.— Klotzbach *v.* Paterson R. Co., (N. J. 1899) 44 Atl. 933; Wilson *v.* Trenton, 61 N. J. L. 599, 40 Atl. 575, 68 Am. St. Rep. 714, 44 L. R. A. 540.

New York.— Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485; Yeomans *v.* Bell, 151 N. Y. 230, 45 N. E. 552.

South Carolina.— McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Utah.— Wild *v.* Union Pac. R. Co., (Utah 1901) 63 Pac. 886; Hill *v.* Southern Pac. Co., (Utah 1901) 63 Pac. 814.

United States.— Young *v.* Amy, 171 U. S. 179, 18 S. Ct. 802, 43 L. ed. 127; Eli Min., etc., Co. *v.* Carleton, 108 Fed. 24.

76. *California.*— Whitman *v.* Sutter, 3 Cal. 179.

District of Columbia.— U. S. *v.* Metropolitan Club, 11 App. Cas. (D. C.) 180 (holding that the effect of a verdict is the same as under the statute of 9 Anne, c. 20, § 2, in force in the District of Columbia); Barbour *v.* Moore, 10 App. Cas. (D. C.) 30.

Michigan.— Tyler *v.* Smith, 46 Mich. 292, 9 N. W. 421; Peck *v.* Snyder, 13 Mich. 21.

North Carolina.— Wheeler *v.* Gibbon, 126 N. C. 811, 36 S. E. 277.

South Carolina.— Cook *v.* Cooper, 59 S. C. 560, 38 S. E. 218.

Vermont.— Hannum *v.* Richardson, 48 Vt. 508, 21 Am. Rep. 152.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371; St. Louis Paper-Box Co. *v.* J. C. Hubinger Bros. Co., 100 Fed. 595, 40 C. C. A. 577; Great Northern R. Co. *v.* McLaughlin, 70 Fed. 669, 44 U. S. App. 189, 17 C. C. A. 330.

See 3 Cent. Dig. tit. "Appeal and Error," § 3912 *et seq.*

77. *Connecticut.*— Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074, under statute permitting a party, within a fixed time after judgment, to file a motion in the appellate court (similar to such motion in the lower court) to set aside a verdict on the ground that it was against the weight of evidence.

Idaho.— Ainslie *v.* Idaho World Printing Co., 1 Ida. 641.

Illinois.— Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276 (as to the difference between the extent of review in the supreme court and in the intermediate court of appeals); Illinois Steel Co. *v.* Kinnare, 93 Ill. App. 83; Calumet Electric St. R. Co. *v.* Lee, 90 Ill. App. 393. Where the appellate court must examine the evidence and exercise an independent judgment on the facts, it must also determine the inferences to be drawn from the facts proved. Peoria, etc., R. Co. *v.* Hardwick, 53 Ill. App. 161.

Kentucky.— Garrett *v.* Thomas, (Ky. 1900) 57 S. W. 611; Strother *v.* Jones, 20 Ky. L. Rep. 1369, 49 S. W. 335.

Louisiana.—Western Assur. Co. *v.* Uhlhorn, 41 La. Ann. 385, 6 So. 485; Hosea *v.* Miles, 13 La. 107.

New York.— Lamkin *v.* Palmer, 24 N. Y. App. Div. 255, 48 N. Y. Suppl. 427; McCready *v.* Lindenborn, 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54 [*affirmed* in (N. Y. 1901) 59 N. E. 1125].

Ohio.— Hunt *v.* Caldwell, 11 Ohio Cir. Dec. 562.

Texas.— Choate *v.* San Antonio, etc., R. Co., 91 Tex. 406, 44 S. W. 69 (as to difference between extent of review in court of civil appeals and in supreme court); Gulf, etc., R. Co. *v.* Wilson, (Tex. Civ. App. 1901) 60 S. W. 438.

West Virginia.— Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

78. *Georgia.*— Southern R. Co. *v.* Butler, 105 Ga. 509, 31 S. E. 146.

Illinois.— Betser *v.* Betser, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 703 [*affirming* 87 Ill. App. 399]; Keyes *v.* Kimmel, 186 Ill. 109, 57 N. E. 851.

Indiana.— Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365; Holliday *v.* Gardner, (Ind. App. 1901) 59 N. E. 686.

reasonably tend to support the verdict, though such evidence may not be of an entirely certain and satisfactory nature,[79] it will not be disturbed. For, upon the mere weight of evidence, the jury are the judges, and, though the evidence would not have satisfied the mind of the appellate court upon an original investigation, yet it will not sit to weigh conflicting testimony.[80] And, from the cases

Maine.— Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394.

New Mexico.— Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504.

Ohio.— Simon *v.* Mooney, 12 Ohio Cir. Dec. 73; Gates *v.* Merchants' Banking, etc., Co., 11 Ohio Cir. Dec. 721.

South Dakota.— Walker *v.* McCaull, 13 S. D. 512, 83 N. W. 578; Weiss *v.* Evans, 13 S. D. 185, 82 N. W. 388.

Virginia.— Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220; Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372.

Evidence viewed in favor of verdict.— In support of a verdict the appellate court will consider the evidence on behalf of appellee in its most favorable light. Chicago, etc., R. Co. *v.* Hines, 183 Ill. 482, 56 N. E. 177 [*affirming* 82 Ill. App. 488]; Illinois Cent. R. Co. *v.* Abernathey, (Tenn. 1901) 64 S. W. 3; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Nicoud *v.* Wagner, 106 Wis. 67, 81 N. W. 999.

Uncontradicted evidence.— Heinlin *v.* Fish, 8 Minn. 70; Myers *v.* Hunt, 17 N. Y. Suppl. 637, 44 N. Y. St. 273; McAfee *v.* Robertson, 41 Tex. 355; Scranton *v.* Tilley, 16 Tex. 183.

79. *Illinois.*— Marble *v.* Bonhotel, 35 Ill. 240.

Iowa.— Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

Kentucky.—Owings *v.* Gray, 2 A. K. Marsh. (Ky.) 520.

Michigan.— Stevens *v.* Pendleton, 94 Mich. 405, 53 N. W. 1108.

North Carolina.— Goodman *v.* Smith, 15 N. C. 450.

Texas.— Swinney *v.* Booth, 28 Tex. 113.

Utah.— Toponce *v.* Corinne Mill, etc., Co., 6 Utah 439, 24 Pac. 534.

But see *infra*, XVII, G, 3, b, (III).

80. *Alabama.*— Stiff *v.* Cobb, 126 Ala. 381, 28 So. 402; Southern R. Co. *v.* Wildeman, 119 Ala. 565, 24 So. 764.

Arizona.— U. S. *v.* Copper Queen Consol. Min. Co., (Ariz. 1900) 60 Pac. 885; Goldman *v.* Sotelo, (Ariz. 1900) 60 Pac. 696.

Arkansas.— Pape *v.* Steward, (Ark. 1901) 63 S. W. 47; Klein *v.* German Nat. Bank, (Ark. 1901) 61 S. W. 572; Phœnix Ins. Co. *v.* Hale, 67 Ark. 433, 55 S. W. 486; St. Louis, etc., R. Co. *v.* Osborn, 67 Ark. 399, 55 S. W. 142.

California.— Mabb *v.* Stewart, (Cal. 1901) 65 Pac. 1085; Donnolly *v.* Kelly, (Cal. 1900) 62 Pac. 513; Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948; Salida Bldg., etc., Assoc. *v.* Davis, (Colo. App. 1901) 64 Pac. 1046; Duncan *v.* Borden, 13 Colo. App. 481, 59 Pac. 66; Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Connecticut.— Sheldon *v.* Hartford F. Ins. Co., 22 Conn. 235, 58 Am. Dec. 420.

Georgia.— Palmer Mfg. Co. *v.* Drewry, 113 Ga. 366, 38 S. E. 837; Georgia Cent. R. Co. *v.* Woolsey, 112 Ga. 365, 37 S. E. 392; Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003; Travelers' Ins. Co. *v.* Wyness, 107 Ga. 584, 34 S. E. 113.

Idaho.— Bonner *v.* Powell, (Ida. 1900) 61 Pac. 138; Simpson *v.* Remington, (Ida. 1899) 59 Pac. 360; Sears *v.* Flodstrom, (Ida. 1897) 49 Pac. 11.

Illinois.— Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Birdsell Mfg. Co. *v.* Oglevee, 187 Ill. 149, 58 N. E. 231 (referring to review in supreme court of judgment of intermediate appellate court); People's Gas Light, etc., Co. *v.* Amphlett, 93 Ill. App. 194; Jordon *v.* Spalding Lumber Co., 78 Ill. App. 306.

Indiana.— Thompson *v.* Thompson, 156 Ind. 276, 59 N. E. 845; Chicago, etc., R. Co. *v.* Curless, (Ind. App. 1901) 60 N. E. 467; Hauck *v.* Mishawaka Woolen Mfg. Co., (Ind. App. 1901) 60 N. E. 162; Carrico *v.* Shepherd, (Ind. App. 1901) 59 N. E. 347; Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, (Indian Terr. 1898) 47 S. W. 311.

Iowa.—Johnson *v.* Sioux City, (Iowa 1901) 86 N. W. 212; Anderson *v.* Smyth, (Iowa 1901) 84 N. W. 1035; Carroll *v.* Chicago, etc., R. Co., (Iowa 1901) 84 N. W. 1035; Boyd *v.* Ames, 110 Iowa 749, 82 N. W. 774; Spafford *v.* Keenan, (Iowa 1899) 77 N. W. 1050.

Kansas.— McDonald *v.* Keller, (Kan. 1901) 64 Pac. 985; National Bank *v.* Gaylord, (Kan. 1899) 55 Pac. 848; St. Louis, etc., R. Co. *v.* Keller, (Kan. App. 1900) 62 Pac. 905; McCormick Harvesting Mach. Co. *v.* Hayes, (Kan. App. 1900) 62 Pac. 901; Kansas L. & T. Co. *v.* Love, 4 Kan. App. 188, 45 Pac. 953.

Kentucky.— Risk *v.* Ewing, (Ky. 1901) 60 S. W. 923; Cassell *v.* Mercer Nat. Bank, (Ky. 1900) 59 S. W. 504; Sharpe *v.* McCreery, 20 Ky. L. Rep. 911, 47 S. W. 1075; Alley *v.* Hopkins, 19 Ky. L. Rep. 1515, 43 S. W. 168.

Louisiana.— New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586; Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64.

Maine.— Hall *v.* Emerson-Stevens Mfg. Co., 94 Me. 445, 47 Atl. 924; Allen *v.* Boston, etc., R. Co., 94 Me. 402, 47 Atl. 917; Stafford *v.* Maine Cent. R. Co., 94 Me. 178, 47 Atl. 148; Pease *v.* Parsonsfield, 92 Me. 345, 42 Atl. 502; Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394.

Massachusetts.— Donahue *v.* Boston, etc., R. Co., (Mass. 1901) 59 N. E. 663; Whitney Electrical Instrument Co. *v.* Anderson, 172

cited, it will be seen that, where the question is merely one of the weight of evidence, the court refrain from usurping the functions of the jury in those jurisdic-

Mass. 1, 51 N. E. 182; Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622.

Michigan.— Boldman *v.* Leng, (Mich. 1901) 86 N. W. 148; Campbell *v.* Davidson-Martin Mfg. Co., (Mich. 1901) 85 N. W. 1093; Vining *v.* Detroit, etc., R. Co., 122 Mich. 248, 80 N. W. 1080; Tritt *v.* Hoover, 116 Mich. 4, 74 N. W. 177.

Minnesota.— Bathke *v.* Krassin, (Minn. 1901) 84 N. W. 796; Morrissey *v.* Guaranty Sav., etc., Assoc., 81 Minn. 426, 84 N. W. 219; Harding *v.* Great Northern R. Co., 77 Minn. 417, 80 N. W. 358.

Mississippi.—Cazeneuve *v.* Martinez, (Miss. 1900) 28 So. 788.

Missouri.— Hamburger *v.* Rinkel, (Mo. 1901) 64 S. W. 104; Feary *v.* Metropolitan St. R. Co., (Mo. 1901) 62 S. W. 452; Carter *v.* Current River R. Co., 156 Mo. 635, 57 S. W. 738; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Steube *v.* Christopher, etc., Architectural Iron, etc., Co., 85 Mo. App. 640.

Montana.—Anderson *v.* Cook, (Mont. 1901) 64 Pac. 873; Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183; Huston *v.* Nuss, 19 Mont. 113, 47 Pac. 634.

Nebraska.— Nebraska Telephone Co. *v.* Jones, 59 Nebr. 510, 81 N. W. 435, 60 Nebr. 396, 83 N. W. 197; German-American Bank *v.* Stickle, 59 Nebr. 321, 80 N. W. 910; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

Nevada.— Roberts *v.* Webster, 25 Nev. 94, 57 Pac. 180; McNamee *v.* Nesbitt, 24 Nev. 400, 56 Pac. 37; Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

New Jersey.— Hartung *v.* Erie R. Co., (N. J. 1900) 46 Atl. 783; Faulkner *v.* Paterson R. Co., (N. J. 1900) 46 Atl. 765.

New Mexico.— Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504; Rodey *v.* Travelers' Ins. Co., 3 N. M. 316, 9 Pac. 348.

New York.— Cosselmon *v.* Dunfee, 59 N. Y. App. Div. 467, 69 N. Y. Suppl. 271; People *v.* Feitner, 58 N. Y. App. Div. 594, 69 N. Y. Suppl. 410; McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996; Austin *v.* Slocum, 62 N. Y. Suppl. 383.

North Carolina.— Laudie *v.* Western Union Tel. Co., 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; Wilson *v.* Wilson, 125 N. C. 525, 34 S. E. 685.

North Dakota.— Heyrock *v.* McKenzie, 8 N. D. 601, 80 N. W. 762; Howland *v.* Ink, 8 N. D. 63, 76 N. W. 992; Muri *v.* White, 8 N. D. 58, 76 N. W. 503; McArthur *v.* Dryden, 6 N. D. 438, 71 N. W. 125.

Ohio.— Cleveland City R. Co. *v.* Ebert, 19 Ohio Cir. Ct. 725, 10 Ohio Cir. Dec. 291. When the verdict is upon evidence which is sufficient to sustain it upon either of two propositions, it will not be disturbed. Gates *v.* Merchants' Banking, etc., Co., 11 Ohio Cir. Dec. 721.

[XVII, G, 3, b, (I).]

Oklahoma.—Higgins *v.* Butler, (Okla. 1900) 62 Pac. 810; Kramer *v.* Ewing, (Okla. 1900) 61 Pac. 1064; Veseley *v.* Engelkemier, (Okla. 1900) 61 Pac. 924; Barnes *v.* Lynch, 9 Okla. 156, 59 Pac. 995; Lucas *v.* Brakefield, 8 Okla. 284, 57 Pac. 166; Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062.

Oregon.—Portland First Nat. Bank *v.* Philadelphia F. Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8.

Pennsylvania.— Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948; Sprout *v.* Eagal, 193 Pa. St. 389, 44 Atl. 453; Wall *v.* Royal Soc. Good Fellows, 192 Pa. St. 577, 44 Wkly. Notes Cas. (Pa.) 562, 44 Atl. 248; Troxell *v.* Malin, 9 Pa. Super. Ct. 483.

Rhode Island.— Struthers *v.* Peckham, (R. I. 1900) 45 Atl. 742; Jones *v.* Henault, 20 R. I. 465, 40 Atl. 6.

South Carolina.— Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51; McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

South Dakota.— Kielbach *v.* Chicago, etc., R. Co., 13 S. D. 629, 84 N. W. 192; Studebaker Bros. Mfg. Co. *v.* Zollars, 12 S. D. 296, 81 N. W. 292; Meyer *v.* Davenport Elevator Co., 12 S. D. 172, 80 N. W. 189; Richison *v.* Mead, 11 S. D. 639, 80 N. W. 131.

Tennessee.— Endowment Rank, K. of P. *v.* Steele, (Tenn. 1901) 63 S. W. 1126; Lowry *v.* Whitehead, 103 Tenn. 396, 53 S. W. 731; Bird *v.* Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856.

Texas.— Scrivner *v.* Paris, (Tex. Civ. App. 1901) 62 S. W. 1075; Missouri, etc., R. Co. *v.* Jordan, (Tex. Civ. App. 1900) 56 S. W. 619; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

Utah.— McCornick *v.* Magnum, 20 Utah 17, 57 Pac. 428; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; Scott *v.* Utah Consol. Min., etc., Co., 18 Utah 486, 56 Pac. 305; Connor *v.* Raddon, 16 Utah 418, 52 Pac. 764.

Virginia.— Meyer *v.* Falk, (Va. 1901) 38 S. E. 178; Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996; Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482; Riverview Land Co. *v.* Dance, 98 Va. 239, 35 S. E. 720.

Washington.— Miller *v.* Dumon, (Wash. 1901) 64 Pac. 804; Johnston *v.* McCart, (Wash. 1901) 63 Pac. 1121; Reiner *v.* Crawford, (Wash. 1901) 63 Pac. 516; Bussanicz *v.* Myers, 22 Wash. 369, 60 Pac. 1117.

West Virginia.— Maxwell *v.* Kent, (W. Va. 1901) 39 S. E. 174; Smith *v.* Norfolk, etc., R. Co., (W. Va. 1900) 35 S. E. 834; Young *v.* West Virginia, etc., R. Co., 44 W. Va. 218, 28 S. E. 932; Limer *v.* Traders' Co., 44 W. Va. 175, 28 S. E. 730.

Wisconsin.— Nicoud *v.* Wagner, 106 Wis. 67, 81 N. W. 999; Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118; Foley *v.* Southwestern Land Co., 94 Wis. 329, 68 N. W. 994.

United States.— Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364.

tions where they are not precluded from looking into the evidence as well as in those where the slightest evidence in support of the verdict precludes further inquiry.[81] Inferences of fact are to be deduced by the jury, and, whenever there is evidence from which an existence of facts sufficient to support a verdict might have been inferred, the verdict will not be disturbed.[82]

(II) *VERDICT UNSUPPORTED BY EVIDENCE.* On the other hand, a judgment based on a verdict which is altogether unsupported by evidence, or against the uncontradicted evidence and every legitimate inference deducible therefrom, will be reversed,[83] as also where the appellate court is confined to a review of questions of law. Findings of fact by a verdict are conclusive, unless entirely unsupported, and the objection is thus properly raised as a question of law.[84] For the

See 3 Cent. Dig. tit. "Appeal and Error," § 3935.

81. See *supra*, notes 77 and 80.

82. *District of Columbia.*— U. S. *v.* Metropolitan Club, 11 App. Cas. (D. C.) 180.

Georgia.— Wilson *v.* Iron Belt Mercantile Co., 105 Ga. 513, 31 S. E. 171; Mitchell *v.* Addison, 20 Ga. 50.

Indiana.— Louisville, etc., R. Co. *v.* Goodbar, 88 Ind. 213; Gaston *v.* Bailey, (Ind. App. 1899) 53 N. E. 1021; Pittenger *v.* Upland Land Co., 22 Ind. App. 76, 53 N. E. 193; Louisville, etc., Consol. R. Co. *v.* Berry, 9 Ind. App. 63, 36 N. E. 646.

Kentucky.— Price *v.* Evans, 4 B. Mon. (Ky.) 386.

Massachusetts.— Com. *v.* Fitchburg R. Co., 10 Allen (Mass.) 189.

Michigan.— Tunnicliffe *v.* Bay Cities Consol. R. Co., 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142.

Nebraska.— Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68; Kilpatrick *v.* Richardson, 40 Nebr. 478, 58 N. W. 932.

New York.—Silliman *v.* Albany, etc., Steamboat Co., 23 N. Y. Suppl. 195, 53 N. Y. St. 160.

South Carolina.— Miller *v.* Simpson, 2 Mill (S. C.) 431.

Inferential evidence is sufficient if not opposed to direct and positive testimony to the contrary. McDermott *v.* San Francisco, etc., R. Co., 68 Cal. 33, 8 Pac. 519; Young *v.* Silkwood, 11 Ill. 36; Williams *v.* Warfield, 12 La. 392; Holton *v.* Adcock, 27 Miss. 758; Matney *v.* Kansas City, etc., R. Co., 30 Mo. App. 507; Swaggerty *v.* Stokely, 1 Swan (Tenn.) 38. See also *infra*, note 86.

83. *Colorado.*— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Georgia.— Tompkins *v.* Corry, 14 Ga. 118. In an action against a railroad company for killing an animal belonging to plaintiff, the negligence presumed from the fact of the killing having been completely rebutted by uncontradicted evidence, a verdict in favor of plaintiff was held contrary to law, and, therefore, the appellate court set it aside. Georgia Cent. R. Co. *v.* Woolsey, 112 Ga. 365, 37 S. E. 392. But see, for a different decision in somewhat similar cases, St. Louis, etc., R. Co. *v.* Strotz, 47 Ill. App. 342; Nelson *v.* Chicago, etc., R. Co., 35 Minn. 170, 28 N. W. 215.

Illinois.— Belvidere Gas Light, etc., Co. *v.* Wayland, 77 Ill. App. 657; Peirce *v.* Rabberman, 77 Ill. App. 619.

Indiana.— Kitch *v.* Schoenell, 80 Ind. 74; Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843.

Iowa.— Waterbury *v.* Chicago, etc., R. Co., 104 Iowa 32, 73 N. W. 341.

Kansas.— Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204; Sullivan *v.* Cloud County, 5 Kan. App. 880, 47 Pac. 165; National Mortg., etc., Co. *v.* Lash, (Kan. App. 1897) 47 Pac. 548.

Kentucky.— McGrath *v.* Herndon, 4 T. B. Mon. (Ky.) 480.

Missouri.— Ettlinger *v.* Kahn, 134 Mo. 492, 36 S. W. 37; Roberts *v.* Quincy, etc., R. Co., 56 Mo. App. 60.

Nebraska.— Esterly Harvesting Mach. Co. *v.* Berg, 52 Nebr. 147, 71 N. W. 952.

Nevada.— Simon *v.* Matson, 25 Nev. 405, 61 Pac. 478.

New York.— Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485; Otten *v.* Manhattan R. Co., 150 N. Y. 395, 44 N. E. 1033; Strong *v.* Walton, 27 Misc. (N. Y.) 302, 58 N. Y. Suppl. 761.

North Dakota.— Roehr *v.* Great Northern R. Co., 7 N. D. 95, 72 N. W. 1084.

Ohio.— Woolley *v.* Staley, 39 Ohio St. 354.

West Virginia.—Vintroux *v.* Simms, 45 W. Va. 548, 31 S. E. 941; Black *v.* Thomas, 21 W. Va. 709.

Wisconsin.— Seymour *v.* Seymour, 64 Wis. 16, 24 N. W. 493.

See 3 Cent. Dig. tit. "Appeal and Error," § 3934.

Testimony of infamous witness.— A verdict based exclusively upon the testimony of an infamous witness should not be permitted to stand. Allen *v.* Young, 6 T. B. Mon. (Ky.) 136, 17 Am. Dec. 130.

84. *District of Columbia.*— U. S. *v.* Metropolitan Club, 11 App. Cas. (D. C.) 180.

Maryland.— Hopkins *v.* Adey, 92 Md. 1, 48 Atl. 41, 50 L. R. A. 498.

New Hampshire.— Sanders *v.* Strafford Paper Co., (N. H. 1900) 46 Atl. 53; Pitman *v.* Mauran, 69 N. H. 230, 40 Atl. 392; Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 41 Atl. 179; Fisher *v.* Carpenter, 67 N. H. 569, 39 Atl. 1018.

North Carolina.—Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141; Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

South Carolina.— McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Tennessee.— Illinois Cent. R. Co. *v.* Aber-

purpose of ascertaining how the fact is in this regard the court will look into the evidence.[85]

(III) *Verdict Must Be Palpably Wrong.* A verdict will not be set aside unless overwhelmingly against the weight of the evidence or so palpably unsupported by sufficient evidence as to clearly indicate that it is wrong, though, in such contingency[86] — as where all the reasonable probabilities and overwhelming weight of the evidence are against a verdict, or the testimony on one side is consistent and in harmony with known facts, and that on the other is inconsistent with itself and with such known facts,[87] or where the verdict is against admis-

nathey, (Tenn. 1901) 64 S. W. 3; Felton *v.* Clarkson, 103 Tenn. 457, 53 S. W. 733.

Texas.— Brush Electric Light, etc., Co. *v.* Lefevre, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771; Choate *v.* San Antonio, etc., R. Co., 91 Tex. 406, 44 S. W. 69.

Utah.— Ewell *v.* Joe Bowers Min. Co., (Utah 1901) 64 Pac. 367; Wild *v.* Union Pac. R. Co., (Utah 1901) 63 Pac. 886; Hill *v.* Southern Pac. Co., (Utah 1901) 63 Pac. 814.

United States.— Myers *v.* Brown, 102 Fed. 250, 42 C. C. A. 320; St. Louis Paper-Box Co. *v.* J. C. Hubinger Bros. Co., 100 Fed. 595, 40 C. C. A. 577; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; Commercial Travelers' Mut. Acc. Assoc. of America *v.* Fulton, 93 Fed. 621, 35 C. C. A. 493; Carter-Crume Co. *v.* Peurrung, 86 Fed. 439, 58 U. S. App. 388, 30 C. C. A. 174.

See also *supra*, XVII, G, 2; and *infra*, XVII, G, 4, d.

85. Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365; Holliday *v.* Gardner, (Ind. App. 1901) 59 N. E. 686.

86. *Alabama.*—Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160.

California.— Field *v.* Shorb, 99 Cal. 661, 34 Pac. 504; Dickey *v.* Davis, 39 Cal. 565.

Illinois.— Streator *v.* Chrisman, 182 Ill. 215, 54 N. E. 997; Maxwell *v.* Zdarski, 93 Ill. App. 334.

Kansas.— Streeter *v.* Dowell, 43 Kan. 545, 23 Pac. 599.

Kentucky.— Lexington Canning Co. *v.* Thomas, 21 Ky. L. Rep. 36, 50 S. W. 993.

Minnesota.— Badore *v.* Great Northern R. Co., (Minn. 1901) 86 N. W. 888; Dwelle *v.* Rahilly, 79 Minn. 314, 82 N. 479.

Nebraska.— Seymour *v.* Phillips, (Nebr. 1901) 85 N. W. 72; Elkhorn Valley Lodge No. 57, I. O. O. F., *v.* Hudson, 59 Nebr. 672, 81 N. W. 859; World Mut. Ben. Assoc. *v.* Worthing, 59 Nebr. 587, 81 N. W. 620; Stewart *v.* Smith, 50 Nebr. 631, 70 N. W. 235; Spurck *v.* Dean, 49 Nebr. 66, 68 N. W. 375.

New York.— Rosenstock *v.* Dessar, 33 Misc. (N. Y.) 419, 67 N. Y. Suppl. 657; Antony *v.* Dickel, 57 N. Y. Suppl. 1090.

Ohio.—Cincinnati, etc., R. Co. *v.* Thompson, 21 Ohio Cir. Ct. 778.

Texas.— Houston, etc., R. Co. *v.* Loeffler, (Tex. Civ. App. 1900) 59 S. W. 558; Johnson *v.* Lockhart, 20 Tex. Civ. App. 596, 50 S. W. 955.

Where there is doubt as to the preponderance of weight of conflicting evidence, the verdict will not be disturbed. Trump *v.* Tidewater Coal, etc. Co., 46 W. Va. 238, 32 S. E. 1035.

Substantial conflict.—*Generally.*—The rule that a verdict on conflicting evidence will not be disturbed relates only to a substantial conflict. Thomas *v.* Pocatello Power, etc., Co., (Ida. 1900) 63 Pac. 595; State *v.* Virginia, etc., R. Co., 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759. See also Chicago City R. Co. *v.* Peacock, 82 Ill. App. 241; St. Louis, etc., R. Co. *v.* Stapp, 53 Ill. App. 600; Getchell *v.* Hill, 21 Minn. 464; Kellegher *v.* Forty-second St. R. Co., 56 N. Y. App. Div. 322, 67 N. Y. Suppl. 767; Weiss *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 332, 60 N. Y. Suppl. 473; O'Dea *v.* Aldrich, 66 N. Y. Suppl. 1045; Gendron Iron Wheel Co. *v.* Sautschi, 17 Ohio Cir. Ct. 723, 8 Ohio Cir. Dec. 578; Hunt *v.* Caldwell, 11 Ohio Cir. Dec. 562; Texas Midland R. Co. *v.* Brown, (Tex. Civ. App. 1900) 58 S. W. 44.

Immaterial evidence cannot give rise to a material conflict. Quinn *v.* White, (Nev. 1901) 64 Pac. 818, 62 Pac. 995.

An immaterial issue cannot raise a substantial conflict. Ellwood *v.* Wilson, 21 Iowa 253.

Apparent want of affirmative proof.— The principle that a court may reverse because there is no evidence to support the verdict where the testimony is regarded by the appellate court as entirely insufficient, cannot be invoked except where there is an apparent want of affirmative proof on which the verdict can rest, and where judgment entered on the verdict has worked palpable injustice. Denver Dry-Goods Co. *v.* Martine, 12 Colo. App. 299, 55 Pac. 743.

Burden of proof.— Notwithstanding the jury are to draw all legitimate inferences from the evidence, facts necessary to a right of recovery must be shown by evidence having at least a preponderating influence, and a verdict resting merely on conjecture or an inference which may possibly be true will be set aside. Keaton *v.* Governor, 17 Ga. 228; Withers *v.* Kinser, 53 Ill. App. 87; Warren *v.* Gilman, 15 Me. 70; Moore *v.* Missouri Pac. R. Co., 28 Mo. App. 622; Lay *v.* Huddleston, 1 Heisk. (Tenn.) 167.

87. Gendron Iron Wheel Co. *v.* Sautschi, 17 Ohio Cir. Ct. 723, 8 Ohio Cir. Dec. 578; Hunt *v.* Caldwell, 11 Ohio Cir. Dec. 562; Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 382, 80 N. W. 467.

Unsupported testimony contradicted by physical facts.— Blakeslee's Express, etc., Co.

sions,[88] or where the preponderance is such as to indicate a mistake, or that the verdict was rendered under a misapprehension of the legal effect of the evidence, or material facts are mistakenly disregarded — the verdict will be set aside.[89] And, where the verdict is manifestly against the evidence, the judgment will be reversed notwithstanding the trial court had refused to set aside the verdict.[90] But, on the other hand, the verdict must be so clearly wrong and so manifestly against the weight of the evidence as to amount to a verdict upon failure of proof, or to raise a necessary inference that it was the result of passion or prejudice, and not of an intelligent or honest exercise by the jury of its proper and lawful functions. In such emergency, however, the verdict will be set aside.[91]

v. Ford, 90 Ill. App. 137; Holden *v.* Pennsylvania R. Co., 169 Pa. St. 1, 32 Atl. 103. See also Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365; Gulf, etc., R. Co. *v.* Wilson, (Tex. Civ. App. 1901) 60 S. W. 438.

88. *Georgia.*—Jones *v.* Farmer, 84 Ga. 296, 10 S. E. 626.

Illinois.— Holloway *v.* Johnson, 129 Ill. 367, 21 N. E. 798; Stanton *v.* Dudley, 64 Ill. 325; Roth *v.* Smith, 41 Ill. 314, where a verdict for plaintiff was set aside, it appearing that two witnesses testified to an admission of defendant which the jury must have disbelieved or disregarded, and which witnesses, by the record, stood unimpeached.

Indiana.— Shafer *v.* McGee, 52 Ind. 111.

Maine.— Palmer *v.* Pinkham, 33 Me. 32.

Maryland.— Hughes *v.* Howard, 3 Harr. & J. (Md.) 9.

Missouri.— Foley *v.* Alkire, 52 Mo. 317; Curtiss *v.* Driggs, 25 Mo. App. 175.

New York.— Gilbert *v.* Quinlan, 59 Hun (N. Y.) 508, 13 N. Y. Suppl. 671, 37 N. Y. St. 290.

Texas.—Allen *v.* Brown, 11 Tex. 520.

Virginia.— Preston *v.* Otey, 88 Va. 491, 14 S. E. 68.

89. *California.*— Minturn *v.* Burr, 20 Cal. 48.

Colorado.—Caldwell *v.* Willey, 16 Colo. 169, 26 Pac. 161; Lamar Milling, etc., Co. *v.* Craddock, 5 Colo. App. 203, 37 Pac. 950.

Indian Territory.— Citizens' Bank *v.* Carey, (Indian Terr. 1899) 48 S. W. 1012.

Louisiana.— Boon *v.* O'Neal, 33 La. Ann. 1187.

New York.— Doyle *v.* Albany R. Co., 32 N. Y. App. Div. 87, 52 N. Y. Suppl. 602.

If there is evidence warranting the verdict it does not matter that some of the jurors misunderstood it. Tucker *v.* South Kingstown, 5 R. I. 558. And when the facts are concluded by a verdict and the court cannot examine the evidence further than to see that some evidence to support the verdict was properly before the jury, whether the jury had mistaken its force will not be considered. Sheldon *v.* Hartford F. Ins. Co., 22 Conn. 235, 58 Am. Dec. 420. The verdict will not be disturbed because the jury misunderstood the evidential value of some of the facts. Chicago, etc., R. Co. *v.* Bock, 17 Ill. App. 17.

For impeachment of verdict see NEW TRIAL.

90. *Arkansas.*— Miller *v.* Ratliff, 14 Ark. 419.

Idaho.— Work *v.* Kinney, (Ida. 1900) 63 Pac. 596.

Illinois.— Keaggy *v.* Hite, 12 Ill. 99.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204; Challis *v.* Woodburn, 2 Kan. App. 652, 43 Pac. 792.

Utah.— Helfrich *v.* Ogden City R. Co., 7 Utah 186, 26 Pac. 295.

West Virginia.—Black *v.* Thomas, 21 W. Va. 709.

See also *infra*, XVII, G, 3, c.

91. *Colorado.*— Struby-Estabrook Mercantile Co. *v.* Keyes, 9 Colo. App. 190, 48 Pac. 663.

Georgia.— McLendon *v.* Kelly, 32 Ga. 464.

Illinois.— Chicago City R. Co. *v.* Peacock, 82 Ill. App. 241.

Indiana.— Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149.

Iowa.— Eastman *v.* Miller, (Iowa 1901) 85 N. W. 635. In Lovejoy *v.* Leonard, 51 Iowa 695, 1 N. W. 535, it was held that the court below in denying a motion for a new trial must necessarily have determined that the verdict was not the result of passion or prejudice, and that, under such circumstances, the appellate court could not interfere as to any question of fact determined by the jury.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Parks *v.* Libby, 92 Me. 133, 42 Atl. 318.

Missouri.— Coats *v.* Lynch, 152 Mo. 161, 53 S. W. 895; James *v.* Mutual Reserve Fund L. Assoc., 148 Mo. 1, 49 S. W. 978; Steube *v.* Christopher, etc., Architectural Iron, etc., Co., 85 Mo. App. 640; Snyder *v.* Wabash R. Co., 85 Mo. App. 495.

Nevada.— Covington *v.* Becker, 5 Nev. 281; Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.

New Hampshire.— Lawrence *v.* Towle, 59 N. H. 28.

New Jersey.— Faulkner *v.* Paterson R. Co., (N. J. 1900) 46 Atl. 765.

New Mexico.— Bádeau *v.* Baca, 2 N. M. 194.

New York.— Sawalsky *v.* Pennsylvania R. Co., 39 N. Y. App. Div. 661, 57 N. Y. Suppl. 775; Layman *v.* Anderson, 4 N. Y. App. Div. 124, 38 N. Y. Suppl. 883.

Ohio.— Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698.

South Carolina.— Robertson *v.* Lyon, 24 S. C. 266.

Texas.— Carter *v.* Carter, 5 Tex. 93.

West Virginia.— Young *v.* West Virginia, etc., Co., 44 W. Va. 218, 28 S. W. 932.

c. Approval by Trial Court. Ordinarily, if the judge before whom a case is tried is satisfied that the verdict is not warranted by the evidence, he should set it aside, upon proper motion,[92] and this must furnish the only remedy to one objecting to a verdict on the ground that it is not supported by sufficient evidence, where the appellate tribunal goes no further than to ascertain if, as a matter of law, the verdict is supported by any competent evidence.[93] But, on the other hand, the rule against interference with the verdict by the appellate court, when such verdict is based upon evidence, is applicable generally where the finding has been approved by the trial court.[94] And so, where the trial court has exer-

92. Patten *v.* Hyde, 23 Mont. 23, 57 Pac. 407. See also NEW TRIAL.

93. *District of Columbia.*—Washington, etc., R. Co. *v.* Adams, 11 App. Cas. (D. C.) 396.

Illinois.—Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276 [*affirming* 75 Ill. App. 468].

Maryland.— Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Missouri.— Ettlinger *v.* Kahn, 134 Mo. 492, 36 S. W. 37.

Pennsylvania.— Sprout *v.* Eagal, 193 Pa. St. 389, 44 Atl. 453.

Vermont.— Hannum *v.* Richardson, 48 Vt. 508, 21 Am. Rep. 152.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371; New York Cent., etc., R. Co. *v.* Traloff, 100 U. S. 24, 25 L. ed. 531.

94. *Alabama.*— Anderson *v.* English, 121 Ala. 272, 25 So. 748; Tennessee Coal, etc., Co. *v.* Stevens, 115 Ala. 461, 22 So. 80.

Arkansas.—Thompson *v.* Patterson, 23 Ark. 159.

California.— Dietz *v.* Kucks, (Cal. 1896) 45 Pac. 832; Baxter *v.* McKinlay, 16 Cal. 76.

Connecticut.—Where the statute permits a motion in the appellate court, to set aside a verdict, on the ground that it is against the weight of the evidence, great weight is due to the action of the trial court in denying the original motion, filed immediately upon the conclusion of the trial. Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074.

Florida.— Germania F. Ins. Co. *v.* Stone, 21 Fla. 555.

Georgia.— Phœnix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992; Palmer Mfg. Co. *v.* Drewry, 113 Ga. 366, 38 S. E. 837.

Illinois.— Stumps *v.* Kelley, 22 Ill. 140; Illinois Cent. R. Co. *v.* Hays, 19 Ill. 166; Mansur, etc., Implement Co. *v.* Atterbury, 92 Ill. App. 412; Probst Constr. Co. *v.* Foley, 63 Ill. App. 494.

Indiana.— Gilmore *v.* Steffey, 153 Ind. 33, 53 N. E. 1017; Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439; Pittsburgh, etc., R. Co. *v.* Carlson, (Ind. App. 1900) 56 N. E. 251; Steele *v.* Hinshaw, 14 Ind. App. 384, 42 N. E. 1034.

Iowa.— Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331.

Kansas.—Yadon *v.* Mackey, 50 Kan. 630, 32 Pac. 370; Hodgden *v.* Larkin, 46 Kan. 454, 26 Pac. 700; Hammond *v.* Guffey, (Kan. App. 1900) 59 Pac. 664; Thompson *v.* Webb, (Kan. App. 1897) 48 Pac. 752.

Kentucky.— Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; Young *v.* Young, 19 Ky. L. Rep. 53, 39 S. W. 23.

Louisiana.— Fox *v.* Jones, 39 La. Ann. 929, 3 So. 95; Riddle *v.* Kreinbiehl, 12 La. Ann. 297.

Minnesota.—Egan *v.* Faendel, 19 Minn. 231.

Missouri.— Chicago, etc., R. Co. *v.* George, 145 Mo. 38, 47 S. W. 11; Oakes *v.* Mound City Mut. L. Ins. Co., 52 Mo. 237; Graves *v.* Harrison, 84 Mo. App. 684; Wilson *v.* Gibson, 63 Mo. App. 656.

Montana.— Bradshaw *v.* Degenhart, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677; O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044.

Nebraska.— Davis *v.* Hilbourn, 41 Nebr. 35, 59 N. W. 379.

New Jersey.— Den *v.* Johnson, 5 N. J. L. 532, 8 Am. Dec. 610.

New Mexico.— Rodey *v.* Travelers' Ins. Co., 3 N. M. 316, 9 Pac. 348; Badeau *v.* Baca, 2 N. M. 194.

New York.— Cushman *v.* De Mallie, 46 N. Y. App. Div. 379, 61 N. Y. Suppl. 878; Halpin *v.* Finch, 6 N. Y. Suppl. 357, 24 N. Y. St. 884.

Ohio.— Dolittle *v.* McCullough, 7 Ohio St. 299.

Oklahoma.— Archer *v.* U. S., 9 Okla. 569, 60 Pac. 268.

Tennessee.— Louisville, etc., R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19; Sweany *v.* Bledsoe, 8 Humphr. (Tenn.) 611.

Texas.— Texas, etc., R. Co. *v.* O'Donnell, 58 Tex. 27; Meuley *v.* Meuley, 9 Tex. 60; Gulf, etc., R. Co. *v.* Buford, 2 Tex. Civ. App. 115, 21 S. W. 272.

Vermont.— Hannum *v.* Richardson, 48 Vt. 508, 21 Am. Rep. 152.

Virginia.— Michie *v.* Cochran, 93 Va. 641, 25 S. E. 884; Weaver *v.* Bliven, 82 Va. 53.

West Virginia.— Miller *v.* Franklin Ins. Co., 8 W. Va. 515.

Wisconsin.— Deuster *v.* Mittag, 105 Wis. 459, 81 N. W. 643; Bank of Commerce *v.* Ross, 91 Wis. 320, 64 N. W. 993.

See also 3 Cent. Dig. tit. "Appeal and Error," § 3948; and *supra*, note 90.

Sufficiency of approval.— Where it appears that the trial court, though of the opinion that the preponderance of the evidence was against the verdict, refuses to set it aside,

cised its discretion in setting aside a verdict upon the ground that it is against the preponderance of the evidence, or is not warranted by the evidence, its action will not be reviewed[95] unless the evidence plainly and palpably supports the verdict, or for errors of law, or where there is no basis in the evidence upon which a verdict for the unsuccessful party could be permitted to stand.[96]

d. Successive Verdicts. As a general rule, after two or more successive and concurrent verdicts, the appellate court will be strongly disinclined to interfere with the last verdict, and the findings under such circumstances are usually accepted as final,[97] if the evidence is conflicting and there is any tending to support the ver-

the judgment will be reversed. Turner *v.* Turner, 85 Tenn. 387, 3 S. W. 121. So, where the trial court overrules a motion *pro forma*, without approving or disapproving the verdict, it is held that the appellate court will do what the trial court should have done. Leavenworth, etc., R. Co. *v.* Cook, 18 Kan. 261. And where the trial judge, in overruling a motion for a new trial, said that it "was reluctantly overruled," it was held that the judgment should be reversed. Georgia Cent R. Co. *v.* Harden, 113 Ga. 453, 38 S. E. 949. But *compare* Ferst *v.* Hall, 108 Ga. 792, 33 S. E. 951. But the mere fact that the trial judge doubted the correctness of the verdict upon overruling a motion for a new trial was held not to be a ground for reversal. Miller *v.* Dumon, (Wash. 1901) 64 Pac. 804. And the mere fact that the court, in overruling the motion for a new trial, did so "without expressing any opinion as to whether or not said verdict was in accordance with a clear preponderance of the testimony," does not indicate that the trial court was of the opinion that the preponderance of the testimony was against the verdict. Magnusson *v.* Linwell, 9 N. D. 154, 82 N. W. 746.

95. *Alabama.*— Karter *v.* Peck, 121 Ala. 636, 25 So. 1012.

California.— Garton *v.* Stern, 129 Cal. 347, 53 Pac. 904, holding that the ruling will not be disturbed where the evidence was conflicting, notwithstanding the motion was granted by a judge other than the one who tried the cause.

Georgia.— McCain *v.* College Park, 112 Ga. 701, 37 S. E. 971.

Kansas.— Kansas City *v.* Frohwerk, (Kan. App. 1900) 62 Pac. 252.

Missouri.—Kuenzel *v.* Stevens, 155 Mo. 280, 56 S. W. 1076.

Montana.— Patten *v.* Hyde, 23 Mont. 23, 57 Pac. 407.

New York.—Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Reynolds *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 339, 46 N. Y. Suppl. 763.

South Carolina.—Stuckey *v.* Atlantic Coast Line R. Co., 57 S. C. 395, 35 S. E. 550; Chnr *v.* Keckeley, 1 Bailey (S. C.) 479.

96. Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153; Marshall *v.* Charlestown, etc., R. Co., 57 S. C. 138, 35 S. E. 497.

Where the preponderance of the evidence is against the verdict (Kansas City *v.* Frohwerk, (Kan. App. 1900) 62 Pac. 252), where the verdict is not demanded by the evidence (McCain *v.* College Park, 112 Ga. 701, 37 S. E. 971), where there is substantial evidence for a different verdict from that rendered (Kuenzel *v.* Stevens, 155 Mo. 280, 56 S. W. 1076), where there is not a preponderance of the evidence in favor of the verdict (Strobel *v.* Schulte, 79 Minn. 485, 82 N. W. 992), the action of the court in granting a new trial will not be disturbed.

97. *Colorado.*— Todd *v.* Demeree, 15 Colo. 88, 24 Pac. 563; Browns *v.* Lutin, (Colo. App. 1901) 64 Pac. 674.

Florida.— Jacksonville, etc., R. Co. *v.* Neff, 36 Fla. 584, 18 So. 765.

Georgia.— Windsor *v.* Crnise, 79 Ga. 635, 7 S. E. 14; Davis *v.* Smith, 30 Ga. 263.

Illinois.— Egbers *v.* Egbers, 177 Ill. 82, 52 N. E. 285; Wood *v.* Hildreth, 73 Ill. 525; Gruver *v.* Dixon, 85 Ill. App. 79; Chicago, etc., R. Co. *v.* Kelly, 80 Ill. App. 675. Where, in an action for personal injuries, two juries have found damages commensurate with plaintiff's claim that he had been permanently injured, the judgment will not be disturbed on the ground of excessive damages. Peoria, etc., R. Co. *v.* Rice, 46 Ill. App. 60. And a second verdict will not be set aside because it is smaller than the verdict on the first trial. Ohio, etc., R. Co. *v.* Cope, 36 Ill. App. 97.

Indiana.— Peacocke *v.* Manck, 42 Ind. 478.

Kentucky.— Ross *v.* Ross, 5 B. Mon. (Ky.) 20; Meguiar *v.* Fesler, 19 Ky. L. Rep. 1126, 42 S. W. 920; Haycroft *v.* Walden, 14 Ky. L. Rep. 892; Louisville, etc., R. Co. *v.* Connelly, 9 Ky. L. Rep. 993, 7 S. W. 914.

Louisiana.— Womack *v.* Fudikar, 47 La. Ann. 33, 16 So. 645; Bowman *v.* Flower, 11 La. 513; Shimmin *v.* Jones, 5 Mart. N. S. (La.) 463.

Massachusetts.— Where plaintiff at different trials obtained three verdicts for successively increased amounts, and the first two were set aside for errors in the instructions, the third will not be disturbed as excessive. Shaw *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 45.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880, under a statute providing that only one new trial shall be allowed to either party except where the triers of fact shall have erred as t matter of law, or where the jury shall be guilty of misconduct.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

New York.— Archer *v.* New York, etc., R.

dict, even though it may not be entirely satisfactory or such as would lead the appellate court to the same conclusion upon an original consideration,[98] unless it is plain that the verdict is founded upon evidence which does not tend to prove a material fact necessary to a recovery, or is in palpable disregard of the evidence.[99] But where the court examines the evidence to see if there is sufficient to support the verdict, it is no reason for refusing to disturb the verdict that, on previous trials, plaintiff had succeeded, if, in the case before the court, the evidence is insufficient.[1]

e. **Verdicts in Equity.** Under the chancery practice, error cannot be assigned on the trial of an issue out of chancery, but the case is decided upon the law and facts presented in the record, as if no issue had been submitted,[2] the verdict being merely advisory, binding neither upon the chancellor nor upon the appellate court; the same is true where issues of fact are tried by a jury in an equity suit,

Co., 106 N. Y. 589, 13 N. E. 318; Cole *v.* Fall Brook Coal Co., 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572, 68 N. Y. St. 636.

Rhode Island.— After three concurring verdicts the appellate court must assume, even though it may not be satisfied, that the last verdict is not against the evidence. McNeill *v.* Lyons, (R. I. 1900) 45 Atl. 739 [*distinguishing* Burnham *v.* New York, etc., R. Co., 17 R. I. 544, 23 Atl. 638, 18 R. I. 494, 30 Atl. 468].

Texas.— Duggan *v.* Cole, 2 Tex. 381.

The fact that a new trial was granted by the trial court after a first verdict does not show that a refusal to grant a new trial after a second verdict for the same party on the same evidence was erroneous. Buenemann *v.* St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379. See also City, etc., R. Co. *v.* Waldhaur, 84 Ga. 706, 11 S. E. 452; Nutting *v.* Kings County El. R. Co., 21 N. Y. App. Div. 72, 47 N. Y. Suppl. 327.

Contrary verdicts.— Where a bill of exceptions was taken to the grant of a new trial in a case in which the verdict was correct, and on the second trial an adverse verdict was rendered, it was held that the latter would be set aside. Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310. But where a verdict for defendant is set aside as contrary to the evidence, a verdict for plaintiff on a second trial, based upon similar evidence, will not be disturbed. Athens Foundry, etc., Works *v.* Bain, 77 Ga. 72. So, where the verdict is against the party having the burden of proof, it will not be disturbed where two juries have previously failed to agree, and two verdicts, including that sought to be set aside, have been rendered, one for, the other against, plaintiff. Johnson *v.* Blanchard, 5 R. I. 24.

Effect of prior cases.— When, to reverse a judgment, would require the overruling of previous decisions which approved similar findings of juries on the same state of facts, the judgment will not be reversed. Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008.

98. *California.*— Hogan *v.* Titlow, 14 Cal. 255.

Florida.— Pensacola, etc., R. Co. *v.* Nash, 12 Fla. 497.

Illinois.— Wolbrecht *v.* Baumgarten, 26 Ill. 291; Graham *v.* Sadlier, 60 Ill. App. 522.

Iowa.— Where, upon three trials in two different counties, the jury in each case found against defendant, and there was evidence to justify the verdict if believed by the jury, even though the facts relied on by plaintiff were unusual, the appellate court will not presume that the last jury was controlled by passion or prejudice, and their verdict will not be disturbed. McMurrin *v.* Rigby, 87 Iowa 18, 53 N. W. 1079.

Kansas.— Pacific R. Co. *v.* Nash, 7 Kan. 280.

Mississippi.— Turner *v.* Bird, 44 Miss. 449; Philbrick *v.* Holloway, 6 How. (Miss.) 91.

Pennsylvania.— Murray *v.* Simpson, 2 Phila. (Pa.) 174, 13 Leg. Int. (Pa.) 324.

99. Pensacola, etc., R. Co. *v.* Nash, 12 Fla. 497; Papot *v.* Southwestern R. Co., 74 Ga. 296; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316.

1. Georgia Cent. R. Co. *v.* Woolsey, 112 Ga. 365, 37 S. E. 392; Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003; Kennedy *v.* Davis, 82 Ga. 210, 8 S. E. 52; Delavigne *v.* Williamson, 11 La. Ann. 250; Lodge *v.* Railroad Co., 10 Phila. (Pa.) 153, 31 Leg. Int. (Pa.) 204. Thus, if the case presents a conflict of evidence, the verdict will not be disturbed; otherwise, if there is no conflict but only a deficiency of testimony to support the verdict. Gibson *v.* Hill, 23 Tex. 77. So, where there is a reversal because the evidence is not sufficient, a second verdict is no stronger than the first. McFarland *v.* Washburn, 26 Ill. App. 355. And where a verdict is set aside as excessive a second verdict for a larger amount, upon no stronger evidence, will be again set aside on appeal. Swan *v.* Long Island R. Co., 86 Hun (N. Y.) 265, 33 N. Y. Suppl. 190, 66 N. Y. St. 864. See also *infra*, XVII, G, 6, e, (II).

2. Willis *v.* Willis, 9 Ala. 330; Timmons *v.* Garrison, 4 Humphr. (Tenn.) 147. The validity of a decree is not determined according to the legality or illegality of proceedings on the trial of a feigned issue, because the verdict may or may not have been the ground of the decree; a bill of exceptions cannot be taken on the trial of a feigned issue, or, if taken, can be used only on a motion for a new trial, made to the court below. Watt *v.* Starke, 101 U. S. 247, 25 L. ed. 826; Johnson *v.* Harmon, 94 U. S. 371, 24 L. ed. 271.

in analogy to the practice upon a feigned issue.[3] In such cases the verdict is not regarded as a verdict in an action at law, but the court examines the evidence to determine if the decree is sufficiently supported.[4] On the other hand, the rule that the weight of evidence is the province of the court and jury, and that the appellate court will not interfere except where the verdict is the result of a blind disregard of the evidence, is much deferred to, even in equity trials,[5] and, when the verdict has been approved and the findings adopted by the presiding judge or chancellor, the decree will not be reversed unless it clearly appears to be erroneous.[6] In some jurisdictions a verdict in such cases is given the same force as a verdict of a properly instructed jury at law,[7] and, if the findings are not objected to by motion for a new trial, or set aside by the court, they become established facts, and cannot be questioned on appeal.[8] So, where, as under a code practice, all trials assume the features of trials at law, it has been held that the appellate court accepts the verdict of a jury as generally conclusive upon the facts.[9]

4. FINDINGS BY COURT — a. Of Like Effect as Verdict. Findings of fact, in a case tried to the court without a jury, are generally accorded the same effect as

3. Pence *v.* Garrison, 93 Ind. 345; Hall *v.* Harris, 145 Mo. 614, 47 S. W. 506; Hess *v.* Miles, 70 Mo. 203; Hulett *v.* Stockwell, 34 Mo. App. 599; Bevin *v.* Powell, 11 Mo. App. 216.

4. *Arkansas.*— Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

Colorado.— Tabor *v.* Sullivan, 12 Colo. 136, 20 Pac. 437; Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Kentucky.— McElwain *v.* Russell, 11 Ky. L. Rep. 649, 12 S. W. 777.

Maine.— Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905.

Missouri.— Lewis *v.* Rhodes, 150 Mo. 498, 52 S. W. 11; White *v.* Pendry, 25 Mo. App. 542.

Wisconsin.— Stanley *v.* Risse, 49 Wis. 219, 5 N. W. 467; Clegg *v.* Jones, 43 Wis. 482.

Finding of court against verdict.— Where the court referred questions of fact to the jury, but disregarded their verdict and made its own findings, the case will not be reviewed solely upon the findings and decision of the court. Carroll *v.* Deimel, 95 N. Y. 252. And where there is a conflict of evidence, the appellate court will not weigh the evidence to determine whether it preponderates in favor of the findings of the court or those of the jury. Stockman *v.* Riverside Land, etc., Co., 64 Cal. 57, 28 Pac. 116.

The court may instruct peremptorily what verdict the jury shall find, and, if the evidence is contradictory and the finding of the court is not so manifestly against the weight of the evidence as to clearly show it to be erroneous, the judgment will not be reversed. Hess *v.* Miles, 70 Mo. 203. See also Biggerstaff *v.* Biggerstaff, 180 Ill. 407, 54 N. E. 333.

5. Walker *v.* Owens, 25 Mo. App. 587.

6. *Kentucky.*— Johnson *v.* Johnson, (Ky. 1900) 56 S. W. 644; Lee *v.* Beatty, 8 Dana (Ky.) 204; Ford *v.* Ellis, 21 Ky. L. Rep. 1837, 56 S. W. 512.

Maine.— Webb *v.* Fuller, (Me. 1888) 12 Atl. 731.

Montana.—Anderson *v.* Cook, (Mont. 1901) 64 Pac. 873.

Oregon.— Swegle *v.* Wells, 7 Oreg. 222.

Pennsylvania.— See Tritt *v.* Crotzer, 13 Pa. St. 451.

South Carolina.— James *v.* Mickey, 26 S. C. 270, 2 S. E. 130; Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635.

South Dakota.— Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

Virginia.— Barnum *v.* Barnum, 83 Va. 365, 5 S. E. 372; Snouffer *v.* Hansbrough, 79 Va. 166; Almond *v.* Wilson, 75 Va. 613; Powell *v.* Manson, 22 Gratt (Va.) 177.

7. Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237; Entwistle *v.* Meikle, 180 Ill. 9, 54 N. E. 217; Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227; Callis *v.* Garrett, 20 Ky. L. Rep. 851, 47 S. W. 595; O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128.

8. Gagliardo *v.* Hoberlin, 18 Cal. 394; Duff *v.* Fisher, 15 Cal. 375; Whitmore *v.* Shiverick, 3 Nev. 288 (under the Nevada practice act, which was copied from the California statutes in effect when the above cases were decided); Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130; Land Mortg. Invest., etc., Co. *v.* Faulkner, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288 (in which last two cases it will be found that appellate jurisdiction of the supreme court to review findings of fact is confined by the constitution to chancery cases "except . . . where the facts are settled by a jury, and the verdict not set aside"); McElya *v.* Hill, 105 Tenn. 319, 59 S. W. 1025; Scruggs *v.* Heiskell, 95 Tenn. 455, 32 S. W. 386. See also Tiernay *v.* Claflin, 15 R. I. 220, 2 Atl. 762, where the court might have drawn a different conclusion from the evidence.

9. Gatting *v.* Newell, 9 Ind. 572.

Review confined to questions of law.— The extent to which the court of appeals of New York is authorized to review being confined to questions of law, generally, it was held that this applied to equitable and legal actions alike; that the findings of a jury are ancillary to the judgment of the court, as a substitute for the feigned issue in chancery under the old practice, and that such findings of fact, when made by the court, will not be reviewed. Vermilyea *v.* Palmer, 52 N. Y. 471.

verdicts,[10] and, when the trial court is properly the trier of the facts, or the appellate court is confined to a review of errors of law, a finding of an issue of fact is conclusive — unless the record discloses an error in law — if there is competent evidence to support the finding.[11] But, as has been shown, the right of the appellate

10. Waiver of jury. — *Alabama.* — McCarthy *v.* Zeigler, 67 Ala. 43; Stein *v.* Jackson, 31 Ala. 24.

Arkansas. — Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831; Bell *v.* Welch, 38 Ark. 139.

California. — Wheeler *v.* Hayo, 3 Cal. 284.

Georgia. — Johnston *v.* Smith, 83 Ga. 779, 10 S. E. 354; Phillips *v.* Adair, 59 Ga. 370.

Illinois. — Booth *v.* Rives, 17 Ill. 175; Harmon *v.* Thornton, 3 Ill. 351; Hinshaw *v.* People, 91 Ill. App. 64.

Indiana. — Priest *v.* Martin, 4 Blackf. (Ind.) 311.

Kansas. — Cheney *v.* Hovey, 56 Kan. 637, 44 Pac. 605; Briggs *v.* Brown, 53 Kan. 229, 36 Pac. 334.

Kentucky. — Freeman *v.* Lander, 3 Ky. L. Rep. 324.

Maine. — Hazen *v.* Jones, 68 Me. 343; Treat *v.* Gilmore, 49 Me. 34.

Maryland. — Taylor *v.* Turley, 33 Md. 500; Cross *v.* Kent, 32 Md. 581.

Massachusetts. — O'Connell *v.* Jacobs, 115 Mass. 21; Backus *v.* Chapman, 111 Mass. 386.

Mississippi. — Kelly *v.* Miller, 39 Miss. 17.

Missouri. — Handlan *v.* McManus, 100 Mo. 124, 13 S. W. 207, 18 Am. St. Rep. 533; Conrad *v.* Belt, 22 Mo. 166; Holt *v.* Johnson, 50 Mo. App. 373.

Nebraska. — Evans *v.* De Roe, 15 Nebr. 630, 20 N. W. 99.

New Jersey. — Mills *v.* Mott, 59 N. J. L. 15, 34 Atl. 947 (as to method of obtaining review being the same as in jury cases); Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

New Mexico. — Lynch *v.* Grayson, 7 N. M. 26, 32 Pac. 149 [*affirmed* in 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230]; Torlina *v.* Trorlicht, 6 N. M. 54, 27 Pac. 794.

New York. — Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

North Carolina. — Roberts *v.* Virginia L. Ins. Co., 118 N. C. 429, 24 S. E. 780; Nissen *v.* Genesee Gold Min. Co., 104 N. C. 309, 10 S. E. 512.

Ohio. — Merrick *v.* Boury, 4 Ohio St. 60; Gibsonburg Banking Co. *v.* Wakeman Bank Co., 20 Ohio Cir. Ct. 591, 10 Ohio Cir. Dec. 754.

Oregon. — Kyle *v.* Rippy, 19 Oreg. 186, 25 Pac. 141.

Pennsylvania. — Com. *v.* Westinghouse Electric, etc., Co., 151 Pa. St. 265, 24 Atl. 1107; Brown *v.* Susquehanna Boom Co., 109 Pa. St. 57, 1 Atl. 156, 58 Am. Rep. 708.

Rhode Island. — McCloskey *v.* Moies, 21 R. I. 79, 41 Atl. 1007; Hahn *v.* Billings, 18 R. I. 551, 28 Atl. 1027.

Tennessee. — Mabry *v.* Memphis, 12 Heisk. (Tenn.) 539; Folwell *v.* Laird, 12 Heisk. (Tenn.) 464.

Texas. — Rich *v.* Ferguson, 45 Tex. 396; Bird *v.* Pace, 26 Tex. 487; Gilliard *v.* Chessney, 13 Tex. 337.

Virginia. — Pryor *v.* Kuhn, 12 Gratt. (Va.) 615.

Wisconsin. — Evans *v.* Bennett, 7 Wis. 404; Kibbee *v.* Howard, 7 Wis. 150.

United States. — Bassett *v.* U. S., 9 Wall. (U. S.) 38, 19 L. ed. 548; State Nat. Bank *v.* Smith, 94 Fed. 605, 36 C. C. A. 412; Walker *v.* Miller, 59 Fed. 869, 19 U. S. App. 403, 8 C. C. A. 331; Bowden *v.* Burnham, 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248.

See 3 Cent. Dig. tit. "Appeal and Error," § 3955 *et seq.*

11. *Alabama.* — Chandler *v.* Crossland, 126 Ala. 176, 28 So. 420; Quillman *v.* Gurley, 85 Ala. 594, 5 So. 345.

Arkansas. — Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831.

Connecticut. — Cleveland's Appeal, 72 Conn. 340, 44 Atl. 476; Watson *v.* New Milford Water Co., 71 Conn. 442, 42 Atl. 265. Under a statute [Conn. Acts (1893), p. 318, §§ 6, 7] providing that on an appeal "all the evidence material to the questions of fact shall be made a part of the record," and permitting either party to appeal from any finding or refusal to find any fact "in the manner now by law provided," it was held that the court will not consider exceptions to the findings of the trial court or to its refusal to find other than those relating to matters affecting the admissibility of the evidence upon which such finding rests. Carroll *v.* Weaver, 65 Conn. 76, 31 Atl. 489; Meriden Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774; Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

Illinois. — Swafford *v.* Dovenor, 2 Ill. 165.

Maine. — Frank *v.* Mallett, 92 Me. 77, 42 Atl. 238; *In re* Mooers, 86 Me. 484, 30 Atl. 109. The findings of fact by a presiding justice to whom a case has been referred, with the right to except, cannot be reviewed by the law court. Shrimpton *v.* Pendexter, 88 Me. 556, 34 Atl. 417; Chase *v.* Jones, 84 Me. 107, 24 Atl. 744.

Maryland. — Thomas *v.* Hunter, 29 Md. 406.

Massachusetts. — Parks *v.* Smith, 155 Mass. 26, 28 N. E. 1044; Schendel *v.* Stevenson, 153 Mass. 351, 36 N. E. 689; Fernald *v.* Bush, 131 Mass. 591.

Michigan. — Johnson *v.* Crispell, 43 Mich. 261, 5 N. W. 299; Yelverton *v.* Steele, 40 Mich. 538.

Missouri. — Consent cannot confer jurisdiction on the supreme court to review a finding of fact. Kingman *v.* Waugh, 139 Mo. 360, 40 S. W. 884. And, where there is no request for declarations of law, the fact that the court has made special findings of fact, pursuant to the statute, does not change the

court to look at the evidence is, in most jurisdictions, denied only to the extent of permitting the court to weigh the evidence, the power to examine it not being completely taken away;[12] and often the appellate court may review findings of fact by the trial court, and is required to do so,[13] or to determine from a review of the evidence whether the judgment or finding has substantial support therein.[14]

rule that the supreme court will not review such findings. Sutter *v.* Raeder, 149 Mo. 297, 50 S. W. 813.

New Hampshire.— Kinsley *v.* Norris, 61 N. H. 639; Fox *v.* Tuftonborough, 58 N. H. 19. See also Bowman *v.* Sanborn, 25 N. H. 87.

New Jersey.— Weger *v.* Delran Tp., 61 N. J. L. 224, 39 Atl. 730; Jersey City *v.* Tallman, 60 N. J. L. 239, 37 Atl. 1026.

New York.— Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442; Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 28 N. Y. St. 843, 16 Am. St. Rep. 801, 7 L. R. A. 226 — as to the jurisdiction of the court of appeals of New York.

North Carolina.— Under the statute [Clark's Code Civ. Proc. N. C. (1900), pp. 747–750 and cases there cited], findings of fact of the trial judge will not be reviewed except in injunction proceedings, on the report of a referee, or proceedings of that nature. Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185; Baker *v.* Belvin, 122 N. C. 190, 30 S. E. 337; Crabtree *v.* Scheelky, 119 N. C. 56, 25 S. E. 707.

Ohio.— Benedict *v.* Schaettle, 12 Ohio St. 515; Hannel *v.* Smith, 15 Ohio 134.

Oregon.— Hutchcroft *v.* Herren, 33 Oreg. 1, 52 Pac. 692.

South Carolina.— Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126; Grant *v.* Ricker, 56 S. C. 476, 35 S. E. 132. Where the court sits as a jury, as in summary process, his finding is equivalent to a verdict. Tuten *v.* Stone, 12 Rich. (S. C.) 448; Ramey *v.* McBride, 4 Strobh. (S. C.) 12.

Vermont.— Wetherbee *v.* Ezekiel, 25 Vt. 47; Kirby *v.* Mayo, 13 Vt. 103.

United States.— Young *v.* Amy, 171 U. S. 179, 18 S. Ct. 802, 43 L. ed. 127; Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156; Eli Min., etc., Co. *v.* Carleton, 108 Fed. 24; Syracuse Tp. *v.* Rollins, 104 Fed. 958, 44 C. C. A. 277; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541.

See also *supra*, XVII, G, 2.

12. See *supra*, XVII, G, 1.

13. *Arkansas.*— White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060.

Colorado.— Hannan *v.* Anderson, (Colo. App. 1900) 62 Pac. 961.

Idaho.— Commercial Bank *v.* Lieuallen, (Ida. 1896) 46 Pac. 1020.

Illinois.— Lord *v.* Haufe, 77 Ill. App. 91.

Iowa.— Toothaker *v.* Moore, 9 Iowa 468; Snell *v.* Kimmell, 8 Iowa 281.

Minnesota.— Ware *v.* Squyer, 81 Minn. 388, 84 N. W. 126.

Nebraska.— Symns Grocery Co. *v.* Snow, 58 Nebr. 516, 78 N. W. 1066.

New York.— Moran *v.* McLarty, 75 N. Y. 25 (as to right of the general term to reverse a judgment of the special term); Schintzer *v.* Adelson, 8 Daly (N. Y.) 269. An appellate court may examine the evidence to support the conclusion of law, where all the evidence is contained in the appeal book. Page *v.* Metropolitan El. R. Co., 10 Misc. (N. Y.) 134, 30 N. Y. Suppl. 922, 62 N. Y. St. 502.

North Dakota.— Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58.

Ohio.— Coppin *v.* Herrmann, 9 Ohio Dec. 584, 7 Ohio N. P. 6, 528.

South Dakota.— Randall *v.* Burk Tp., 4 S. D. 337, 57 N. W. 4.

Texas.— Burgess *v.* Western Union Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, as to power of court of civil appeals.

Washington.—Allen *v.* Swerdfiger, 14 Wash. 461, 44 Pac. 894.

Wisconsin.— Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490. Though before Wis. Gen. Laws (1860), c. 264, in actions at law, tried by the court without a jury, findings were as conclusive as a verdict (Kibbee *v.* Howard, 7 Wis. 150, *supra*, note 10), by that statute actions at law and suits in equity were placed upon the same footing in respect to the power and duty of the supreme court to review the evidence. Sanford *v.* McCreedy, 28 Wis. 103.

14. See also *infra*, note 15.

In many of these cases the findings are taken to be conclusive, notwithstanding the court examines the evidence to see if they are supported. If they are supported the court refuses to interfere, but if not supported the result is the same as in those cases in which the court is precluded from examining the evidence except upon a proper showing that there is no legal evidence in the case to support the finding, thus raising a question of law. The reason of the rule against weighing the evidence in many of these cases depends in part upon the greater advantage possessed by the trial court by reason of having the witnesses personally before it. See Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720; Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097; Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Riley *v.* Riley, 14 Colo. 290, 23 Pac. 326; Sowles *v.* Raymer, 110 Mich. 189, 68 N. W. 121; Rosevear *v.* Sullivan, 47 N. Y. App. Div. 421, 62 N. Y. Suppl. 447. But where the course of the appellate court depends upon the inherent distinction of a jurisdictional nature between its functions and those of a lower court, the latter being the trier of facts and the former being the trier of the law, that reason would have no controlling effect. See Tombstone Mill, etc., Co. *v.* Way Up Min. Co., 1 Ariz. 426, 25 Pac. 794; Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208; Bauder *v.* Tyrrel, 59 Cal. 99; Reynolds *v.* Reynolds, 44 Minn. 132, 46 N. W. 236; Handlan *v.* McManus, 100 Mo. 124, 13 S. W. 207, 18 Am. St. Rep. 533.

b. Extent of Review — (i) *Where There Is Evidence to Support.* If the findings are supported by competent testimony they will not be disturbed as against the weight of the evidence, and the appellate court will not sit to weigh conflicting evidence, even though it may be such as to lead different minds to different conclusions.[15] So, the drawing of inferences of fact is within the

Findings based on inspection will not be disturbed. Leonard *v.* Shatzer, 11 Mont. 422, 28 Pac. 457; Winter *v.* Fulstone, 20 Nev. 260, 21 Pac. 201, 687; Van Bokkelen *v.* Taylor, 62 N. Y. 105. But where the inspection is not authorized by law it was held that it would not be regarded in considering the sufficiency of the evidence. Farwell *v.* Sturgis Water Co., 10 S. D. 421, 73 N. W. 916.

15. *Alabama.*— Callahan *v.* Nelson, (Ala. 1900) 29 So. 555; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914; Little *v.* Smith, 119 Ala. 461, 24 So. 427.

Arizona.— Miller *v.* Miller, (Ariz. 1901) 64 Pac. 415; Newhall *v.* Porter, (Ariz. 1900) 62 Pac. 689.

California.—Spitler *v.* Keading, (Cal. 1901) 65 Pac. 1040; Herd *v.* Tuohy, (Cal. 1901) 65 Pac. 139; Sonoma County *v.* Hall, (Cal. 1900) 62 Pac. 213.

Colorado.— Cheney *v.* Crandell, (Colo. 1901) 65 Pac. 56; Columbia Bldg., etc., Assoc. *v.* Clarke, 27 Colo. 103, 62 Pac. 944; Colby *v.* Thompson, (Colo. App. 1901) 64 Pac. 1053; Harper *v.* Lockhart, 9 Colo. App. 430, 48 Pac. 901.

Connecticut.— Oranstein *v.* Smith, (Conn. 1901) 48 Atl. 208; Bierce *v.* Sharon Electric Light Co., (Conn. 1900) 47 Atl. 324; Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488.

Idaho.—Chamberlain *v.* Woodin, 2 Ida. 609, 23 Pac. 177.

Illinois.—Wheeler, etc., Mfg. Co. *v.* Barrett, 172 Ill. 610, 50 N. E. 325; Bamberger *v.* Golden, 87 Ill. App. 156; Toborg *v.* Toborg, 63 Ill. App. 426; Davidson *v.* Colburn, 54 Ill. App. 636.

Indiana.— National State Bank *v.* Sandford Fork, etc., Co., (Ind. 1901) 60 N. E. 699; Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249; Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; Henry *v.* Adams, 126 Ind. 495, 26 N. E. 186.

Iowa.— Parno *v.* Iowa Merchants' Mut. Ins. Co., (Iowa 1901) 86 N. W. 210; Roe *v.* McCaughan, (Iowa 1901) 85 N. W. 21; Calhoun *v.* Garner, (Iowa 1900) 83 N. W. 788; Bowman *v.* Sedgwick, (Iowa 1900) 82 N. W. 491; Citizens' Bank *v.* Whinery, 110 Iowa 390, 81 N. W. 694.

Kansas.— Brewster *v.* Light, (Kan. 1901) 65 Pac. 248; Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33; Jefferson Lumber Co. *v.* Arkansas City Lumber Co., (Kan. 1898) 52 Pac. 860; Pearson *v.* Kingery, (Kan. App. 1900) 62 Pac. 543; Dechant *v.* Younger, (Kan. App. 1900) 60 Pac. 1095.

Kentucky.— Lucas *v.* Brand, (Ky. 1900) 58 S. W. 435.

Louisiana.— Wilson *v.* Hanna, 39 La. Ann. 610, 2 So. 101; Laforet *v.* Weber, 23 La. Ann. 253.

Michigan.— Jacobia *v.* Terry, 92 Mich. 275, 52 N. W. 629.

Minnesota.— Martin *v.* Walker, (Minn. 1901) 86 N. W. 467.

Missouri.— De Steiguer *v.* Martin, (Mo. 1901) 63 S. W. 107; Johnson *v.* Bowlware, 149 Mo. 451, 51 S. W. 109; Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258; Finley *v.* St. Louis Southwestern R. Co., 73 Mo. App. 643.

Montana.— Penn *v.* Oldhauber, 24 Mont. 287, 61 Pac. 649; Ingalls *v.* Austin, 8 Mont. 333, 20 Pac. 637.

Nebraska.—Orient Ins. Co. *v.* Hayes, (Nebr. 1901) 85 N. W. 57; Watson *v.* Cowles, (Nebr. 1901) 85 N. W. 35; Trenzer *v.* Phillips, 57 Nebr. 229, 77 N. W. 668.

Nevada.— Schwartz *v.* Stock, (Nev. 1901) 65 Pac. 351; Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151.

New Jersey.— Brown *v.* Ramsay, 29 N. J. L. 117.

New York.— Baird *v.* New York, 96 N. Y. 567; Kornder *v.* King's County El. R. Co., 61 N. Y. App. Div. 439, 70 N. Y. Suppl. 708; Jena *v.* Third Ave. R. Co., 50 N. Y. App. Div. 424, 64 N. Y. Suppl. 88.

Ohio.— Ide *v.* Churchill, 14 Ohio St. 372; Markle *v.* Akron, 14 Ohio 586.

Oklahoma.— Craggs *v.* Earls, 8 Okla. 462, 58 Pac. 637; Smith *v.* Spencer, 8 Okla. 459, 58 Pac. 638.

Oregon.— Justice *v.* Elwert, 28 Oreg. 460, 43 Pac. 649.

Pennsylvania.— Fuller *v.* Weaver, 175 Pa. St. 182, 38 Wkly. Notes Cas. (Pa.) 186, 34 Atl. 634; Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229; Overseers of Poor *v.* Overseers of Poor, 8 Pa. Super. Ct. 640.

Rhode Island.— Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989; Hahn *v.* Billings, 18 R. I. 551, 28 Atl. 1027.

South Dakota.— Teldman *v.* Trumbower, 7 S. D. 408, 64 N. W. 189.

Tennessee.— Morelock *v.* Barnard, (Tenn. 1886) 2 S. W. 32.

Texas.— Thomas *v.* Morrison, 92 Tex. 329, 48 S. W. 500 (as to jurisdiction of supreme court); Prescott *v.* Linney, 75 Tex. 615, 12 S. W. 1128; Burrow *v.* Zapp, 69 Tex. 474, 6 S. W. 783; Brin *v.* McGregor, (Tex. Civ. App. 1901) 64 S. W. 78.

Utah.— Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

Washington.— Ryan *v.* Northern Pac. R. Co., 19 Wash. 533, 53 Pac. 824; Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; Reynolds *v.* Horton, 2 Wash. 185, 26 Pac. 221, under Wash. Code (1881), § 247, finding of court stands as special verdict.

Wisconsin.— Duncan *v.* Duncan, (Wis. 1901) 86 N. W. 562; Coxe *v.* Milbrath, (Wis. 1901) 86 N. W. 174; Endress *v.* Shove, (Wis.

province of the trial court, and inferences so drawn from facts proven will not be disturbed on appeal.[16] If there is any competent evidence in the record, no question of law is presented upon the correctness of the finding in accordance with such evidence,[17] and the general rule in practically all the cases, upon the extent to which the appellate court shall go, is that, if there is any legal evidence touching the issues decided, the findings will not be disturbed, without regard to what other conclusions might be drawn from other evidence presented, and in this sense they are conclusive on appeal.[18]

1901) 85 N. W. 651; Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

Wyoming.— W. W. Kimball Co. *v.* Payne, (Wyo. 1901) 64 Pac. 673.

United States.— Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156; Snider *v.* Dobson, 74 Fed. 757, 40 U. S. App. 111, 21 C. C. A. 76.

Admission in pleading.— Where a defendant admits ownership of property he will be taken to be the owner for the purposes of an appeal, though there is a finding that other defendants were owners, upon an issue as to the ownership of such other defendants. Goss *v.* Helbing, 77 Cal. 190, 19 Pac. 277.

Opinion evidence.— The court's determination of the sufficiency or cogency of an expert's reasons for his opinions is as conclusive of the weight to be given to them as the determination of the court upon conflicting evidence. Barker *v.* Gould, 122 Cal. 240, 54 Pac. 845. And a finding of fact, based on evidence consisting largely of the opinion of a witness who was not cross-examined as to the facts on which his opinion was based, will not be disturbed. Burrow *v.* Zapp, 69 Tex. 474, 6 S. W. 783.

Successive findings.— Where, on two or more trials, successive and concurrent findings are made from the same facts, such findings will not be disturbed.

Indiana.— Silver Creek Cement Corp. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721.

Kansas.— Sanders *v.* Greenstreet, 23 Kan. 425.

New York.— Yeandle *v.* Yeandle, 16 N. Y. Suppl. 49, 40 N. Y. St. 791.

Ohio.— Eastman *v.* Wight, 4 Ohio St. 156.

South Carolina.—Gunter *v.* Gunter, 18 S. C. 193.

Excluded evidence.— In reviewing the sufficiency of the evidence on a question of fact the appellate court cannot consider excluded evidence. Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

16. *California.*— Cauhope *v.* Security Sav. Bank, 118 Cal. 82, 50 Pac. 310; Kelly *v.* Brown, (Cal. 1885) 8 Pac. 38; De Celis *v.* Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120.

Colorado.— Gwynn *v.* Butler, 17 Colo. 114, 28 Pac. 466.

Connecticut.— Ryan *v.* Chelsea Paper Mfg. Co., 69 Conn. 454, 37 Atl. 1062; Bonnell *v.* Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533.

Indiana.— Ohio, etc., R. Co. *v.* Steen, 57 Ind. 61.

Iowa — Sitzer *v.* Fenzloff, (Iowa 1900) 84 N. W. 514.

Massachusetts.— Gannon *v.* Shepard, 156 Mass. 355, 31 N. E. 296; Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.

Michigan.— Bateman *v.* Blaisdell, 83 Mich. 357, 47 N. W. 223.

Missouri.— State *v.* Ruggles, 23 Mo. 339; Pearce *v.* Roberts, 22 Mo. 582; Pearce *v.* Burns, 22 Mo. 577; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

New York.— Hoffeld *v.* Buffalo, 130 N. Y. 387, 29 N. E. 747, 42 N. Y. St. 379; Deuterman *v.* Gainsborg, 9 N. Y. App. Div. 151, 41 N. Y. Suppl. 185, 75 N. Y. St. 634.

Ohio.— Utter *v.* Walker, Wright (Ohio) 46.

Vermont.— Perlinau *v.* Phelps, 25 Vt. 478; Smith *v.* Day, 23 Vt. 656.

Wyoming.— Patterson *v.* Lee-Clark-Andreesen Hardware Co., 7 Wyo. 401, 52 Pac. 1085.

17. *Connecticut.*— Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

Louisiana.— Police Jury *v.* Bouanchaud, 51 La. Ann. 860, 25 So. 653.

Missouri.—Cornwall *v.* McFarland Real Estate Co., 150 Mo. 377, 51 S. W. 736.

Utah.— Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

Vermont.— Emerson *v.* Young, 18 Vt. 603.

United States.— Alexandre *v.* Machan, 147 U. S. 71, 13 S. Ct. 211, 37 L. ed. 84; Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156.

18. *Arizona.*— Shultz *v.* Goldman, (Ariz. 1901) 64 Pac. 425; London, etc., Bank *v.* Abrams, (Ariz. 1898) 53 Pac. 588.

Arkansas.—Gazzola *v.* Bartrow, (Ark. 1901) 64 S. W. 95; Garland County *v.* Hot Spring County, 68 Ark. 83, 56 S. W. 636; Bunch *v.* Potts, 57 Ark. 257, 21 S. W. 437.

California.— Hardison *v.* Davis, 131 Cal. 635, 63 Pac. 1005; Yore *v.* Seitz, (Cal. 1899) 57 Pac. 886.

Colorado.— Keely *v.* East Side Imp. Co., (Colo. App. 1901) 65 Pac. 456.

Illinois.— Wheeler, etc., Mfg. Co. *v.* Barrett, 172 Ill. 610, 50 N. E. 325; Coffeen *v.* Huber, 78 Ill. App. 455.

Indiana.— Hay *v.* Marsh, 152 Ind. 651, 51 N. E. 1053; Boyd *v.* Radabaugh, 150 Ind. 394, 50 N. E. 301. A judgment for plaintiff in an action to review a judgment will be treated as an order granting a new trial, and will not be reversed if there is some evidence showing a defense to the original action. Hoppes *v.* Hoppes, 123 Ind. 397, 24 N. E. 139.

Indian Territory.— Martin-Brown Co. *v.* Morris, 1 Indian Terr. 495, 42 S. W. 423.

Iowa.— Hertert *v.* Chicago, etc., R. Co., (Iowa 1901) 86 N. W. 266; Spencer *v.* Berns,

(11) *Finding Unsupported by Evidence.* Whether there is any evidence in support of a finding is a question of law,[19] and if the finding is unsupported by evidence, or if a fact material to a finding upon which the judgment is based is unsupported by evidence, the judgment will be reversed.[20]

(Iowa 1901) 86 N. W. 209; De Long *v.* Brown, (Iowa 1901) 85 N. W. 624.

Kansas.— Elliot *v.* Adams, (Kan. 1898) 54 Pac. 1050; Cooley *v.* Noyes, (Kan. App. 1899) 57 Pac. 257; Sheaff *v.* Husted, (Kan. App. 1898) 55 Pac. 507.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, (Mich. 1901) 85 N. W. 96. Special findings, when supported by testimony, stand the same as a verdict. Childs *v.* Nordella, 116 Mich. 511, 74 N. W. 713.

Minnesota.— Martin *v.* Walker, (Minn. 1901) 86 N. W. 467; Maxfield *v.* Seabury, 81 Minn. 327, 84 N. W. 42.

Missouri.— Clements *v.* Turner, (Mo. 1901) 63 S. W. 84; Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177; Kansas City, etc., R. Co. *v.* Southern R. News Co., 151 Mo. 373, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380; N. K. Fairbank Co. *v.* Belcher Cotton Oil Co., 81 Mo. App. 523.

Montana.— Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

Nevada.— Palmer *v.* Culverwell, 24 Nev. 114, 50 Pac. 1.

New Jersey.— Dilks *v.* Stathem, (N. J. 1899) 43 Atl. 663; Jersey City *v.* Tallman, 60 N. J. L. 239, 37 Atl. 1026.

New York.— Inge *v.* McCreery, 60 N. Y. App. Div. 557, 69 N. Y. Suppl. 1052; Deegan *v.* Kilpatrick, 54 N. Y. App. Div. 371, 66 N. Y. Suppl. 628; Klenke *v.* Standard Oil Co., 25 Misc. (N. Y.) 761, 54 N. Y. Suppl. 124; Ayvard *v.* Powers, 25 Misc. (N. Y.) 476, 54 N. Y. Suppl. 984.

North Dakota.— Under a statute requiring the appellate court to review questions of fact in cases tried by the court, the trial is not *de novo*, but the cause goes to the appellate court with a presumption in favor of the correctness of the finding, and the burden rests upon the party alleging error to clearly show that the finding is against the preponderance of the testimony. Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58.

Oklahoma.— Moore *v.* Bevis, 9 Okla. 672, 60 Pac. 503; Jenks *v.* McGowan, 9 Okla. 306, 60 Pac. 239; McKennon *v.* Pentecost, 8 Okla. 117, 56 Pac. 958.

Oregon.— Liebe *v.* Nicolai, 30 Oreg. 364, 48 Pac. 172.

Pennsylvania.— Columbia Ave. Sav. Fund, etc., Co. *v.* Sidebottom, 199 Pa. St. 470, 49 Atl. 305; Overseers of Poor *v.* Overseers of Poor, 9 Pa. Super. Ct. 204.

Rhode Island.— Peck *v.* Goff, (R. I. 1893) 28 Atl. 1029.

Tennessee.—Litterer *v.* Timmons, 106 Tenn. 201, 61 S. W. 72; Morelock *v.* Barnard, (Tenn. 1886) 2 S. W. 32.

Texas.— Neely *v.* Grayson County Bank, (Tex. Civ. App. 1901) 61 S. W. 559; Abeel *v.* Tasker, (Tex. Civ. App. 1898) 47 S. W. 738.

Vermont.— Hyde Park Lumber Co. *v.* Shepardson, 72 Vt. 188, 47 Atl. 826.

Wisconsin.— Conger *v.* Dingman, 98 Wis. 417, 74 N. W. 125.

Error in admitting evidence will not justify a reversal if there is legal evidence to sustain the judgment, though the rule is otherwise if the error consists in the exclusion of legal evidence.

Alabama.— Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

Colorado.— Livingston *v.* Swofford Bros. Dry-Goods Co., 12 Colo. App. 320, 56 Pac. 351.

Connecticut.— Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916.

Iowa.— Bowman *v.* Sedgwick, (Iowa 1900) 82 N. W. 491.

Nebraska.— Tolerton, etc., Co. *v.* McClure, 45 Nebr. 368, 63 N. W. 791.

New Mexico.— Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992.

As on demurrer to evidence.—The appellate court will regard the case as upon a demurrer to the evidence, and, therefore, the evidence will be interpreted most benignly in favor of the judgment. Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438; Hysell *v.* Sterling Coal, etc., Co., 46 W. Va. 158, 33 S. E. 95.

Judgment against party having burden.— The rule of the text applied where the judgment is against the party who holds the burden of proof. Lazarus *v.* Newman, 52 La. Ann. 1967, 28 So. 331; Charles *v.* Ashby, 14 Nebr. 251, 15 N. W. 222. See also:

Indiana.— Brannaman *v.* Wells, 54 Ind. 127.

Kentucky.— Boro *v.* Kline, 17 Ky. L. Rep. 1306, 34 S. W. 701.

Louisiana.— Naba *v.* Soubercase, 4 Mart. N. S. (La.) 493.

Missouri.— Carroll *v.* Frank, 38 Mo. App. 167; Ewing *v.* Phillips, 35 Mo. App. 144.

Pennsylvania.— Sheehan's Estate, 139 Pa. St. 168, 27 Wkly. Notes Cas. (Pa.) 530, 20 Atl. 1003.

Texas.— Murphy *v.* Levy, (Tex. Civ. App. 1895) 32 S. W. 723.

19. See *supra*, XVII, G, 2.

20. *Arkansas.*— Brooks *v.* Clifton, 22 Ark. 54; Johnson *v.* McDaniel, 15 Ark. 109.

California.— Hedge *v.* Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106; Crites *v.* Wilkinson, (Cal. 1884) 3 Pac. 130.

Connecticut.— Standard Cement Co. *v.* Windham Nat. Bank, 71 Conn. 668, 42 Atl. 1006.

Georgia.— Wiley *v.* Kelsey, 13 Ga. 223.

Illinois.— Ray *v.* Faulkner, 73 Ill. 469.

Indiana.—Michener *v.* Bengel, 135 Ind. 188, 34 N. E. 664, 816; Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698: A judgment against evidence, fairly amounting to proof without conflict, is not within the rule that the appellate court will not reverse on the mere weight of

(III) *FINDING MUST BE PALPABLY WRONG.* Where the trial court has the advantage of a better opportunity of judging correctly the credibility of witnesses and the weight of their testimony than that possessed by the reviewing court, the findings of fact by the lower court will not be reviewed unless they are clearly erroneous or so manifestly unsupported as to indicate a disregard of the evidence, passion, or prejudice.[21] This manifest error is sufficiently shown where the court may look into the evidence and finds the judgment unsupported by the

the testimony. Fulmer *v.* Packard, 5 Ind. App. 574, 32 N. E. 784.

Kansas.— Union Pac. R. Co. *v.* Convers, 4 Kan. 206.

Kentucky.—Kirtley *v.* Higdon, 6 Ky. L. Rep. 51.

Michigan.— Scofield *v.* Farmer, (Mich. 1901) 84 N. W. 723; Hilsendegen *v.* Scheich, 55 Mich. 468, 21 N. W. 894.

Minnesota.— McCormick Harvesting Mach. Co. *v.* Chesrown, 33 Minn. 32, 21 N. W. 846.

Missouri.— Moore *v.* Hutchinson, 69 Mo. 429; Schmeiding *v.* Ewing, 57 Mo. 78; Sandige *v.* Hill, 76 Mo. App. 540; Blackwell *v.* Adams, 28 Mo. App. 61.

Nebraska.— Ackerman *v.* Ackerman, (Nebr. 1900) 84 N. W. 598: Bradford *v.* Anderson, 60 Nebr. 368, 83 N. W. 173.

Nevada.— Ophir Silver Min. Co. *v.* Carpenter, 6 Nev. 393; Lockhart *v.* Mackie, 2 Nev. 294.

New Mexico.— Stamm *v.* Albuquerque, (N. M. 1900) 62 Pac. 973.

New York.— Carter *v.* Dallimore, 2 Sandf. (N. Y.) 222; Poen *v.* Scott, 4 Misc. (N. Y.) 603, 24 N. Y. Suppl. 574, 54 N. Y. St. 243.

Tennessee.— Glasgow *v.* Turner, 91 Tenn. 163, 18 S. W. 261.

Texas.— De Garcia *v.* Lozano, (Tex. Civ. App. 1899) 54 S. W. 280; Nunn *v.* McCausland, (Tex. Civ. App. 1893) 23 S. W. 418.

Utah.— Eastman *v.* Gurrey, 15 Utah 410, 49 Pac. 310.

Finding against admitted liability.—A finding by the court will not prevail against an admission of liability. Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Incompetent testimony.— If the only evidence upon which the finding of the court could be based is incompetent and inadmissible, the judgment based upon such finding must be reversed. Brinker *v.* Union Pac., etc., R. Co., 11 Colo. App. 166, 55 Pac. 207.

Testimony of discredited witness.— The testimony of a witness who is found to have sworn falsely on a material issue is held to have no legal force as to other matters sworn to, in respect of which he is contradicted; and if such witness is not corroborated, a judgment resting on his false testimony alone will be reversed as wholly without evidence. Morgenthan *v.* Walker, 2 Misc. (N. Y.) 245, 21 N. Y. Suppl. 936, 50 N. Y. St. 337.

Immaterial finding.— Whether an immaterial finding of fact is supported will not be considered on appeal. Union Sheet Metal Works *v.* Dodge, 129 Cal. 390, 62 Pac. 41.

Supplying findings.—Where the undisputed facts in evidence do not sustain the judgment the supreme court cannot supply findings for this purpose. White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060; Smith *v.* Los Angeles Immigration, etc., Assoc., 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; Kinney *v.* Mathias, 81 Minn. 64, 83 N. W. 497.

Finding unwarranted by rules of law.— Although findings of fact are not open for revision even where the evidence appears in the bill of exceptions, the court may determine, upon exceptions or other suitable proceedings, whether the findings of fact were warranted, under the rules of law applicable to the case, by the evidence before the trial court. Schendel *v.* Stevenson, 153 Mass. 351, 36 N. E. 689; Fernald *v.* Bush, 131 Mass. 591. See also:

Maryland.— Thomas *v.* Hunter, 29 Md. 406.

Minnesota.— Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Missouri.— Major *v.* Harrison, 21 Mo. 441.

Ohio.— Woolley *v.* Staley, 39 Ohio St. 354.

Oklahoma.— Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

Oregon.— Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057.

21. *Alabama.*— Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914; Scarbrough *v.* Borders, 115 Ala. 436, 22 So. 180; Simpson *v.* Golden, 114 Ala. 336, 21 So. 990; Dane *v.* Mobile, 36 Ala. 304.

Arizona.— Johnson *v.* Cummings, (Ariz. 1900) 60 Pac. 870.

Idaho.— Chamberlain *v.* Woodin, 2 Ida. 609, 23 Pac. 177.

Iowa.— Roe *v.* McCaughan, (Iowa 1901) 85 N. W. 21.

Kentucky.— Marks *v.* Owensboro Deposit Bank, 21 Ky. L. Rep. 117, 50 S. W. 1103; Johns *v.* Bolling, 20 Ky. L. Rep. 1989, 50 S. W. 683.

Louisiana.— Bagnetto *v.* Bagnetto, 51 La. Ann. 1200, 25 So. 987; Ayer *v.* Illinois Cent. R. Co., 47 La. Ann. 144, 16 So. 732; Harrison *v.* McCawley, 10 La. Ann. 270.

New York.— Snow *v.* Schlesinger, 14 Misc. (N. Y.) 627, 35 N. Y. Suppl. 122, 69 N. Y. St. 495.

Ohio.— Gibsonburg Banking Co. *v.* Wakeman Bank, 20 Ohio Cir. Ct. 591, 10 Ohio Cir. Dec. 754.

Oklahoma.—Ellison *v.* Beannabia, 4 Okla. 347, 46 Pac. 477.

Pennsylvania.—*In re* Barr, 188 Pa. St. 122, 41 Atl. 303.

Utah.— Schettler *v.* Lynch, (Utah 1901) 64 Pac. 955; Fissure Min. Co. *v.* Old Susan Min. Co., 22 Utah 438, 63 Pac. 587.

Virginia.— Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438.

West Virginia.—State *v.* Thacker Coal, etc., Co., (W. Va. 1901) 38 S. E. 539.

evidence.[22] Where, by statute, a particular appellate court is to review the facts as well as the law, it is held, on the one hand, that the rule that, upon conflicting testimony, the facts will not be reviewed does not apply, and that the court must examine the evidence and determine the facts.[23] But, on the other hand, it is generally held, in the cases in which the evidence is reviewed, that the conflict must be substantial to preclude interference; that the judgment will be reversed if the evidence clearly and overwhelmingly preponderates against it — otherwise not, the question not involving a mere consideration of the weight to be given legal and sufficient evidence on one side as opposed to legal and sufficient evidence on the other side.[24]

c. Refusal to Find Facts. Where a case is tried to the court without a jury, a refusal to find facts will not be reviewed if it is the exclusive province of the trial judge to pass upon the testimony presented,[25] or where the evidence from

United States.— U. S. *v.* Puleston, 106 Fed. 294, 45 C. C. A. 297; U. S. *v.* McGourin, 106 Fed. 288, 45 C. C. A. 291; *In re* Clark, 9 Blatchf. (U. S.) 379, 5 Fed. Cas. No. 2,802.

22. Southard *v.* Behrns, 52 Nebr. 486, 72 N. W. 860.

23. Moran *v.* McLarty, 75 N. Y. 25. See also Matter of Warner, 53 N. Y. App. Div. 565, 65 N. Y. Suppl. 1022, under N. Y. Code Civ. Proc. § 2586, providing that, on appeal on the facts from a surrogate's decree, the appellate court has the same power to decide questions of fact as the surrogate. But in Davis *v.* Clark, 87 N. Y. 623, it was held that this statute applied only to review by the supreme court, and not to review by the court of appeals.

24. *California.*— Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849; Carpentier *v.* Gardiner, 29 Cal. 160.

Colorado.— Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814 (wherein there was a reversal because the finding was based alone upon circumstances from which the trial court drew unauthorized inferences, as opposed to positive and uncontradicted testimony against the finding); Hannan *v.* Anderson, (Colo. App. 1900) 62 Pac. 961; Bandry *v.* El Paso Lumber Co., 13 Colo. App. 508, 58 Pac. 791; Cheney *v.* Woodworth, 13 Colo. App. 176, 56 Pac. 979.

Idaho.—Commercial Bank *v.* Lieuallen, (Ida. 1896) 46 Pac. 1020.

Illinois.— Lord *v.* Haufe, 77 Ill. App. 91.

Kentucky.—Bell *v.* Wood, 87 Ky. 56, 7 S. W. 550; Hale *v.* Hale, 21 Ky. L. Rep. 1847, 56 S. W. 503.

Minnesota.—Ware *v.* Squyer, 81 Minn. 388, 84 N. W. 126; Moran *v.* Small, 68 Minn. 101, 70 N. W. 850.

Missouri.— Meier *v.* Proctor, etc., Co., 81 Mo. App. 410.

Nebraska.— Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616.

New York.— Dresser *v.* Van Pelt, 1 Hilt. (N. Y.) 316 (positive testimony met by belief or impressions does not raise a conflict); Levene *v.* Laskaropulos, 23 Misc. (N. Y.) 759, 51 N. Y. Suppl. 237; Conroy *v.* Allen, 23 Misc. (N. Y.) 125, 50 N. Y. Suppl. 610; Greene *v.* Shain, 22 Misc. (N. Y.) 720, 49 N. Y. Suppl. 1061; Hirshkind *v.* Private Coachmen's Benev., etc., Assoc., 12 Misc. (N. Y.) 454, 33 N. Y. Suppl. 618, 67 N. Y. St. 324. When the advantage of observing witnesses on the trial is of minor importance — as where the truth must be ascertained by a careful consideration of many facts and circumstances — the appellate court should exercise its power to review the force and effect of such attendant circumstances. New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560, 48 N. Y. Suppl. 799.

Ohio.— Ide *v.* Churchill, 14 Ohio St. 372; Coppin *v.* Herrmann, 9 Ohio Dec. 584, 7 Ohio N. P. 6, 528.

Oklahoma.—Pinson *v.* Prentise, 8 Okla. 143, 56 Pac. 1049.

South Dakota.— Littlejohn *v.* County Line Creamery Co., (S. D. 1901) 85 N. W. 588; Elkton First State Bank *v.* O'Leary, 13 S. D. 204, 83 N. W. 45; Seim *v.* Smith, 13 S. D. 138, 82 N. W. 390.

Texas.— Smith *v.* Pierce, (Tex. Civ. App. 1901) 62 S. W. 1074; Talbot *v.* Dillard, 22 Tex. Civ. App. 360, 54 S. W. 406.

Washington.—Allen *v.* Swerdfiger, 14 Wash. 461, 44 Pac. 894.

West Virginia.— Kennewig Co. *v.* Moore, (W. Va. 1901) 38 S. E. 558; Whipkey *v.* Nicholas, 47 W. Va. 35, 34 S. E. 751; Hysell *v.* Sterling Coal, etc., Co., 46 W. Va. 158, 33 S. E. 95.

Wisconsin.— Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Seeman *v.* Biemann. 108 Wis. 365, 84 N. W. 490; Leedom *v.* H. B. Claflin Co., 104 Wis. 102, 80 N. W. 94. If the evidence is voluminous and conflicting, and the appellate court cannot say that the preponderance is so great against the finding that it could not be overcome by the appearance of the witnesses, etc., the finding will not be disturbed. Endress *v.* Shove, (Wis. 1901) 85 N. W. 651.

25. Beal *v.* Polhemus, 67 Mich. 130, 34 N. W. 532.

See 3 Cent. Dig. tit. "Appeal and Error," § 4019 *et seq.*

Where the trial court finds issues for one of the parties from the weight of competent evidence, and expressly refuses to find a fact in favor of the other party, the appellate court cannot correct the record by supplying the fact which the trial court refuses to find. Sullivan *v.* New York, etc., R. Co., (Conn. 1900)

which the fact is to be inferred may raise a contrary inference.[26] But if the court refuses to find a material fact established by uncontradicted evidence, this is equivalent to finding that the fact was immaterial, and is reviewable as a question of law.[27]

d. Direction of Verdict, Dismissal, or Nonsuit. The action of the court in giving a peremptory instruction directing a verdict or entering a nonsuit, or refusing to adopt such course, is reviewable, as the appellate court may determine whether such action is justified by the legal inferences to be deduced from the undisputed evidence. The appellate court does not weigh the evidence, however, but is confined to a determination of the question whether there is any evidence fairly tending to support a conclusion opposed to that involved in the action of the trial court in withdrawing the questions of fact from the jury.[28] And as the trial court is the proper tribunal to determine questions of fact upon conflicting evidence, error cannot be assigned on its refusal to dismiss.[29]

e. Demurrer to Evidence. Where the evidence does not support plaintiff's cause it is error to overrule a demurrer to such evidence;[30] but if there is any competent evidence tending to support the issues made by the pleadings the overruling of such a demurrer is proper.[31]

47 Atl. 131, for the reason that there may have been other evidence affecting the point than the facts before the appellate court, and there was no appeal from the refusal to find the particular fact.

26. Cohn *v.* Metropolitan El. R. Co., 136 N. Y. 646, 32 N. E. 763, 49 N. Y. St. 339.

Conflicting evidence.— Cheney *v.* Cross, 181 Ill. 31, 54 N. E. 564; People *v.* Gaylord, 52 Hun (N. Y.) 335, 5 N. Y. Suppl. 348, 23 N. Y. St. 711.

27. Alexandre *v.* Machan, 147 U. S. 71, 13 S. Ct. 211, 37 L. ed. 84. On the other hand, it is held that where, without excluding any evidence, the court finds that there is no evidence to prove an allegation, its finding cannot be reviewed. Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185.

Evidentiary facts.— But where the court is bound to find only the ultimate facts, a refusal to find merely incidental or evidentiary facts will not be reviewed. Wiser *v.* Lawler, (Ariz. 1900) 62 Pac. 695; Alexandre *v.* Machan, 147 U. S. 71, 13 S. Ct. 211, 37 L. ed. 84.

28. *California.*—The denial of a motion for a nonsuit will not be reviewed where, upon the testimony on both sides, the weakness of plaintiff's case has been cured. Scrivani *v.* Dondero, 128 Cal. 31, 60 Pac. 463.

Colorado.— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, holding that the appellate court will consider competent evidence which was offered and rejected, as well as that which had been actually received.

District of Columbia.— Adams *v.* Washington, etc., R. Co., 9 App. Cas. (D. C.) 26.

Georgia.— Davis *v.* Chaplin, 110 Ga. 322, 35 S. E. 312.

Illinois.— Chicago, etc., R. Co. *v.* Diehl, 52 Ill. 441 (holding that where an instruction to find for plaintiff did not enumerate an essential fact, and the evidence did not show such fact, the judgment must be reversed); Norton *v.* Nadebok, 92 Ill. App. 541.

Iowa.— Scott *v.* St. Louis, etc., R. Co., (Iowa 1900) 83 N. W. 818.

Massachusetts.—Robbins *v.* Potter, 98 Mass. 532; Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

Michigan.— Demill *v.* Moffat, 45 Mich. 410, 8 N. W. 79.

Missouri.— Dilly *v.* Omaha, etc., R. Co., 55 Mo. App. 123.

Montana.— Herbert *v.* King, 1 Mont. 475.

New Hampshire.— Lawrence *v.* Towle, 59 N. H. 28.

New York.— Flynn *v.* Harlow, 61 N. Y. Super. Ct. 293, 19 N. Y. Suppl. 705, 46 N. Y. St. 872; Haupt *v.* Pohlmann, 16 Abb. Pr. (N. Y.) 301.

North Carolina.—Dunn *v.* Wilmington, etc., R. Co., 124 N. C. 252, 32 S. E. 711.

Oregon.— Salomon *v.* Cress, 22 Oreg. 177, 29 Pac. 439.

Pennsylvania.— Bigley *v.* Jones, 114 Pa. St. 510, 7 Atl. 54; Angier *v.* Eaton, etc., Co., 98 Pa. St. 594.

Texas.— Irvin *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 661.

United States.— Nutt *v.* Minor, 18 How. (U. S.) 287, 15 L. ed. 378; Whitney *v.* New York, etc., R. Co., 102 Fed. 850, 43 C. C. A. 19, holding that, if, upon all the evidence, the verdict is one which must necessarily have been rendered, it must stand.

Presumptions and inferences.— See *supra*, XVII, E.

29. Monmouth Park Assoc. *v.* Warren, 55 N. J. L. 598, 27 Atl. 932; Blackford *v.* Plainfield Gaslight Co., 43 N. J. L. 438; Metcalf *v.* Mattisons, 32 N. Y. 464. See also *infra*, XVII, G, 4, g.

30. Wisner *v.* Bias, 43 Kan. 458, 23 Pac. 586; Archer *v.* U. S., 9 Okla. 569, 60 Pac. 268.

31. Patmor *v.* Rombauer, 46 Kan. 409, 26 Pac. 691; Missouri Pac. R. Co. *v.* Pierce, 39 Kan. 391, 18 Pac. 305; Miller *v.* Franklin Ins. Co., 8 W. Va. 515. The appellate court is governed by the same principles as apply

f. On Motion, Incidental Questions, or Other Special Proceedings — (I) *GENERALLY.* When the determination of questions in the course of a cause, of motions, or other special proceedings depends upon facts laid before the court, its decision is, ordinarily, governed by the same rules relating to findings of fact, generally. If the evidence is conflicting or there is evidence to sustain the finding the appellate court will not interfere[32] unless the finding is clearly erroneous,

to a judgment on verdicts or findings of a court. Hysell *v.* Sterling Coal, etc., Co., 46 W. Va. 158, 33 S. E. 95.

Subsequent finding in favor of demurrant. — But if, after overruling a demurrer to plaintiff's evidence (which is in effect that plaintiff has made out a *prima facie* case), the court subsequently finds for defendant, this is a reversal of its former ruling, without giving plaintiff a chance to ask for declarations at law, and the appellate court will consider the case as if the demurrer to the evidence had been sustained, and from that standpoint determine whether or not plaintiff's evidence showed a *prima facie* case. Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444. If, however, upon overruling such a demurrer, the case is submitted to a jury under proper instructions, a verdict for defendant will not be treated on appeal as though the demurrer had been sustained. Kenney *v.* Kansas City, etc., R. Co., 79 Mo. App. 204.

In equity.— The rule that, if there is some evidence tending to support plaintiff's case, a demurrer to the evidence should not be sustained does not apply in a suit in equity, as far as concerns the extent of review on appeal, but, as a demurrer to evidence is not proper in equity, the sustaining of it amounts only to a judgment that plaintiff has not sustained the allegations of his petition, and the appellate court will examine the record and determine whether the judgment of the lower court was proper. Baker *v.* Satterfield, 43 Mo. App. 591.

Presumptions and inferences.— See *supra*, XVII, E.

32. *Alabama.*— Totten *v.* Sale, 72 Ala. 488.

California.— Meux *v.* Trezevant, 132 Cal. 487, 64 Pac. 848; Slosson *v.* Glosser, (Cal. 1896) 46 Pac. 276; Hodgdon *v.* Southern Pac. R. Co., 75 Cal. 650, 21 Pac. 372.

Indiana.— Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 146 Ind. 673, 45 N. E. 1108; Cassell *v.* Cunningham, 121 Ind. 447, 23 N. E. 272.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, (Indian Terr. 1898) 47 S. W. 311.

Iowa.— Brody *v.* Chittenden, 106 Iowa 340, 76 N. W. 740.

Kansas.— Waltire *v.* Carriger, 5 Kan. 672.

Kentucky.— Morris *v.* McCadden, (Ky. 1901) 63 S. W. 435.

Montana.— Montana Ore-Purchasing Co. *v.* Butte, etc., Consol. Min. Co., (Mont. 1901) 65 Pac. 420.

Nebraska.— National Bank of Commerce *v.* Kinkead, (Nebr. 1901) 85 N. W. 70; Merrifield *v.* Farmers Nat. Bank, 59 Nebr. 602, 81 N. W. 611; Nelson *v.* Alling, 58 Nebr. 606, 79 N. W. 162; Commercial Bank *v.* Eastern Banking Co., 51 Nebr. 766, 71 N. W. 1024.

Nevada.— Bowker *v.* Goodwin, 7 Nev. 135.

New York.— Perrine *v.* Ransom Gas. Mach. Co., 60 N. Y. App. Div. 32, 69 N. Y. Suppl. 698; Shipherd *v.* Cohu, 56 N. Y. Super. Ct. 525, 4 N. Y. Suppl. 393, 23 N. Y. St. 599; Greenhall *v.* Unger, 20 Misc. (N. Y.) 412, 45 N. Y. Suppl. 1035; Johnson *v.* Sheridan, 5 N. Y. Suppl. 763, 25 N. Y. St. 1008; Journal Co. *v.* Thompson, 10 N. Y. St. 627; Faris *v.* Peck, 10 Abb. Pr. N. S. (N. Y.) 55; Skinner *v.* Oettinger, 14 Abb. Pr. (N. Y.) 109; Crouse *v.* Wheeler, 33 How. Pr. (N. Y.) 337, order at chambers requiring judgment debtor in supplementary proceedings to pay judgment.

Pennsylvania.— Jones *v.* English, 168 Pa. St. 438, 32 Atl. 39; Wallace *v.* McElevy, 2 Grant (Pa.) 44; Fishblate *v.* McCullough, 9 Pa. Super. Ct. 147.

Texas.— McLane *v.* Evans, (Tex. Civ. App. 1900) 57 S. W. 884.

See 3 Cent. Dig. tit. "Appeal and Error," § 4020 *et seq.*

Where facts cannot be reviewed in appellate court. State *v.* McIntyre, 53 Me. 214; Harrison *v.* Allen, 40 N. J. L. 556; Chisolm *v.* Propeller Towboat Co., (S. C. 1901) 38 S. E. 602; Townsend *v.* Sparks, 50 S. C. 380, 27 S. E. 801; Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156.

Matter within court's knowledge.—Whether the findings of a court have been surreptitiously altered is peculiarly within the knowledge of the court itself, and its determination of the fact one way or the other will rarely, if ever, be disturbed on appeal. Morrison *v.* McCue, 45 Cal. 118.

Where not entitled to weight of verdict.— A motion by a purchaser at execution sale for a writ of possession, when opposed on the ground that movant purchased on the agreement to hold in trust for defendant and to permit him to redeem, is triable by the chancellor, under a statute providing that proceedings in such a motion shall be heard and determined according to law and the rules of equity, and, therefore, the findings on questions of fact arising on the motion are not entitled to the weight of a verdict. Scott *v.* Mitchell, 19 Ky. L. Rep. 218, 39 S. W. 507.

Conflicting affidavits.— *California.*—People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Ludwig *v.* Harry, 126 Cal. 377, 58 Pac. 858.

Indiana.— Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 146 Ind. 673, 45 N. E. 1108.

Iowa.— Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

Minnesota.— Mankato First Nat. Bank *v.*

or so clearly against the evidence or the great weight thereof as to be manifestly wrong.[33] Thus, upon conflicting evidence as to the terms of a stipulation entered into in the trial court, the appellate court will not interfere with the finding of the trial court.[34] So, of the finding upon a challenge of a juror[35] and of the determination of facts upon conflicting evidence on a motion for a new trial.[36]

(II) *Competency or Admissibility of Evidence.* Where the competency or admissibility of testimony depends upon extrinsic facts, the determination of the question upon the evidence touching such facts is the province of the trial court, whose decision will not be disturbed.[37]

Buchan, 76 Minn. 54, 78 N. W. 878; Flanigan *v.* Duncan, 47 Minn. 250, 49 N. W. 981.

Missouri.— Kansas City Suburban Belt R. Co. *v.* McElroy, 161 Mo. 584, 61 S. W. 871.

Nebraska.— Johnson *v.* Steele, 23 Nebr. 82, 36 N. W. 358.

New York.—Reigner *v.* Spang, 5 N. Y. App. Div. 237, 39 N. Y. Suppl. 127; Tyler *v.* Hildreth, 77 Hun (N. Y.) 580, 28 N. Y. Suppl. 1042, 60 N. Y. St. 537. But see Brodsky *v.* Ihms, 16 Abb. Pr. (N. Y.) 251, 25 How. Pr. (N. Y.) 471.

See also *infra*, XVII, G, 6, b.

33. *California.*—People *v.* Findley, 132 Cal. 301, 64 Pac. 472.

Montana.—Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229, 353.

Nebraska.— Merrifield *v.* Farmers Nat. Bank, 59 Nebr. 602, 81 N. W. 611; Johnson *v.* Steele, 23 Nebr. 82, 36 N. W. 358.

New York.—Fuller *v.* Wise, 1 Misc. (N. Y.) 515, 21 N. Y. Suppl. 1133, 50 N. Y. St. 940.

Pennsylvania.— Wallace *v.* McElevy, 2 Grant (Pa.) 44.

Texas.— Galveston, etc., R. Co. *v.* Nicholson, (Tex. Civ. App. 1900) 57 S. W. 693.

34. Weaver *v.* Lock, 4 Kan. App. 335, 45 Pac. 1039; Jones *v.* Merchants' Nat. Bank, 1 N. Y. Suppl. 578, 16 N. Y. St. 1004. The supreme court will not revise the decision of a primary court upon a question of fact, as to whether or not a parol admission was made by the counsel in the progress of the trial. Price *v.* Branch Bank, 17 Ala. 374. See also Buttermore's Appeal, (Pa. 1888) 15 Atl. 686; Rivers *v.* Rivers, 36 S. C. 302, 15 S. E. 137.

35. Clawson *v.* State, 59 N. J. L. 434, 36 Atl. 886; Huntley *v.* Territory, 7 Okla. 60, 54 Pac. 314; Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188.

36. *Indiana.*— McDoel *v.* Gill, 23 Ind. App. 95, 53 N. E. 956.

Iowa.— Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

Kansas.—Wichita *v.* Stallings, (Kan. 1898) 54 Pac. 689; Casner *v.* Abel, (Kan. App. 1897) 49 Pac. 325.

Kentucky.—Brooks *v.* Crane, 19 Ky. L. Rep. 1120, 42 S. W. 337.

Missouri.— Kansas City Suburban Belt R. Co. *v.* McElroy, 161 Mo. 584, 61 S. W. 871.

Montana.— Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621.

North Carolina.— No power to review questions of fact. Rineheardt *v.* Potts, 29 N. C. 403.

Tennessee.— Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232.

Texas.— Moody *v.* Hahn, (Tex. Civ. 1901) 62 S. W. 940.

Motion to set aside default judgment.— Ukiah Bank *v.* Reed, (Cal. 1900) 63 Pac. 68.

Findings not conclusive.— The findings of fact required by the code of civil procedure are required only in trials on the merits, and findings on a motion for a new trial are not required; hence, though based on conflicting evidence, they are not conclusive on appeal. Wright *v.* Union Pac. R. Co., 22 Utah 338, 62 Pac. 317.

37. O'Brien *v.* Barry, 4 Gray (Mass.) 604 (holding that, so far as the judge acted and decided as to the competency of a book as evidence, upon an inspection of the book, the decision must be taken as made on a matter of fact, and is not open to reëxamination); State *v.* Scanlan, 58 Mo. 204 (as to the capacity of a child as a witness, which was held to be a question of fact, concluded by the determination of the trial judge upon personal inspection and oral examination); Proctor *v.* White Mountain Freezer Co., 70 N. H. 3, 45 Atl. 713; Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188 (holding that the determination by the trial court of the sufficiency of identification of photographs admitted in evidence cannot be reviewed on appeal. To the same point see Blair *v.* Pelham, 118 Mass. 420; Blair *v.* Groton, 13 S. D. 211, 83 N. W. 48); State *v.* Snowden, (Utah 1901) 65 Pac. 479 (holding that where the court determines, upon conflicting evidence as to the relation of the parties, whether testimony offered is within the inhibition of a statute against the introduction of confidential communications made by a client to an attorney, etc., the decision will not be disturbed unless it is clear that an erroneous conclusion was reached).

Expert testimony.— The decision of the trial court upon the competency of a witness to justify as an expert is reviewable, but the appellate court will not interfere unless it appears that there is a total lack of knowledge on the part of the witness, or that the trial court has palpably abused its discretion. Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 48, 51 Pac. 488, 65 Am. St. Rep. 215 [*following* Stillwell, etc., Co. *v.* Phelps, 130 U. S. 520, 9 S. Ct. 601, 32 L. ed. 1035]; Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92; Woodworth *v.* Brooklyn El. R. Co., 22 N. Y. App. Div. 501, 48 N. Y. Suppl. 80; Geer *v.* Durham Water Co., 127 N. C. 349, 37 S. E. 474 (hold-

g. In Equity — (1) *In General.* In equity the appellate court is not concluded by the findings of fact or the decree of the chancellor, but reviews the evidence or finds the facts according to the various provisions prevailing, or in accordance with the technical scope of an appeal as involving a trial *de novo*,[38] unless, under peculiar provisions of law, the appellate court is confined to a review of errors of law in equitable suits and actions at law indiscriminately, or is precluded from looking any further than to see if there is any evidence to sustain the judgment.[39]

ing that whether a witness is an expert presents a preliminary question of fact, to be found by the trial court, whose finding is conclusive if there is any evidence to sustain it); Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57. So, as to the competency of a non-expert witness to testify as to mental condition, the decision of the trial court is conclusive unless it transcends all bounds of reason. Hempton *v.* State, (Wis. 1901) 86 N. W. 596.

38. *Arkansas.*— Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Nolen *v.* Harden, 43 Ark. 307, 51 Am. Rep. 563; Miller *v.* Gibbons, 34 Ark. 212.

California.— Walker *v.* Sedgwick, 5 Cal. 192.

Illinois.— French *v.* Gibbs, 105 Ill. 523; Hughs *v.* Washington, 65 Ill. 245; Koeler *v.* Eaton, 52 Ill. 319.

Iowa.—Where the parties stipulate that the case is not to be tried *de novo* on appeal, the appellate court is not to determine the issues of fact upon the preponderance of the testimony, but is required only to decide whether there is sufficient evidence to justify the conclusion that the decree of the lower court is based upon intelligent, unprejudiced, and fair exercise of judgment and discretion. Doud *v.* Meighan, 51 Iowa 701, 1 N. W. 612.

Kentucky.—Perry *v.* Cornelius, (Ky. 1901) 63 S. W. 23; Wilson *v.* Bassett, 20 Ky. L. Rep. 1605, 49 S. W. 956. If it is necessary to pass upon a fact which a chancellor has refused to pass upon the court will weigh the evidence. Boswell *v.* Dennler, 13 Ky. L. Rep. 429.

Massachusetts.— Goodell *v.* Goodell, 173 Mass. 140, 53 N. E. 275; Reed *v.* Reed, 114 Mass. 372.

Mississippi.— Mississippi Cotton-Oil Co. *v.* Starling-Smith Co., (Miss. 1898) 23 So. 648; Partee *v.* Bedford, 51 Miss. 84.

Missouri.—Hoeller *v.* Haffner, 155 Mo. 589, 56 S. W. 312; Thomas *v.* Chicago, etc., R. Co., 49 Mo. App. 110. The supreme court must find the facts. Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884. And special findings are not conclusive. Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668.

Nebraska.— Furbush *v.* Barker, 38 Nebr. 1, 56 N. W. 996.

Nevada.— Feusier *v.* Sneath, 3 Nev. 120.

North Carolina.— Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163; Worthy *v.* Shields, 90 N. C. 192; Jones *v.* Boyd, 80 N. C. 190.

Pennsylvania.— Stockett *v.* Ryan, 176 Pa. St. 71, 34 Atl. 973; Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765.

South Carolina.— Finley *v.* Cartwright, 55 S. C. 198, 33 S. E. 359; Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130; Land Mortg. Invest., etc., Co. *v.* Faulkner, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288; Reagan *v.* Bishop, 25 S. C. 585. A defense of an estoppel being equitable in its nature, the facts relative to it may be reviewed by the supreme court. Quattlebaum *v.* Taylor, 45 S. C. 512, 23 S. E. 617.

Tennessee.— Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 532.

Utah.— Elliot *v.* Whitmore, (Utah 1901) 65 Pac. 70; Copper Globe Min. Co. *v.* Allman, (Utah 1901) 64 Pac. 1019.

Washington.— Roberts *v.* Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225, holding that the appellate court must examine the proofs *de novo*, and *overruling* Webster *v.* Thorndyke, 11 Wash. 390, 39 Pac. 677, in so far as that case held that, if the findings were supported by proof reasonably establishing the facts, they would not be disturbed because the appellate court might think testimony contrary to the findings entitled to greater weight.

Wisconsin.— Eldredge *v.* Austin, 38 Wis. 537.

United States.— Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3895, 3970.

The determination of a legal issue will not be reviewed as to findings of fact. Garvin *v.* Garvin, 55 S. C. 360, 33 S. E. 458. And where an action involving only legal issues is, on defendant's motion, transferred to equity without objection, the judgment of the chancellor will be treated as the verdict of a properly instructed jury. Matson *v.* Arnold, (Ky. 1900) 56 S. W. 709; Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush (Ky.) 451. But see Corbin *v.* Woodbine, 33 Iowa 297.

39. *Connecticut.*— Standard Cement Co. *v.* Windham Nat. Bank, 71 Conn. 668, 42 Atl. 1006; Watson *v.* New Milford Water Co., 71 Conn. 442, 42 Atl. 265.

Kansas.— Chicago, etc., R. Co. *v.* Moore, 60 Kan. 107, 55 Pac. 344; Cooley *v.* Noyes, (Kan. App. 1899) 57 Pac. 257.

Massachusetts.— Reed *v.* Reed, 114 Mass. 372, as to such practice before Mass. Stat. (1859), c. 237, on the decision of a single justice in suits in equity.

New Hampshire.— Pinkham *v.* Glover, 69 N. H. 463, 45 Atl. 239.

New York.— Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 28 N. Y. St. 843, 16 Am. St. Rep. 801, 7 L. R. A. 226, as to jurisdiction of court of appeals of this state.

Tennessee.— Conclusiveness upon the su-

(II) *When Decree Affirmed or Reversed in General.* When it appears that the decision is clearly erroneous, or the finding is against the preponderance of the evidence or is unsupported by the evidence, the decree will be reversed;[40] but, conversely, if the decree is supported by the evidence, or the court is satisfied that it is not against the weight of the evidence, it will not be disturbed.[41] If the evidence, on the whole, is sufficient the decree will be sustained, even if some allegations are not proved or the appellate court does not indorse some of the minor or incidental findings.[42]

(III) *Review With Deference to Findings of Chancellor* — (A) *In General.* But while it is held that the principle that a verdict will not be disturbed unless palpably against the weight of the evidence is not pertinent to the finding of a chancellor,[43] such findings, though not conclusive, are nevertheless held to be entitled to some consideration and weight, and, while the court will sift the whole evidence, it will do so with deference to the chancellor's decision, especially when the balance is nice.[44] So, where the evidence is such that reason-

preme court of finding of fact by the court of chancery appeals. Culbert *v.* Culbert, (Tenn. 1899) 52 S. W. 852; Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766.

40. *Arkansas.*— Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Haskell *v.* State, 31 Ark. 91.

Illinois.— Hecke *v.* Meyer, 68 Ill. App. 65.

Kentucky.— Duckworth *v.* Hisle, 14 Ky. L. Rep. 220, 19 S. W. 843, 20 S. W. 218.

Michigan.—Hanchett *v.* McKelvey, 32 Mich. 33.

Missouri.— Cornet *v.* Bertelsmann, 61 Mo. 118.

Nebraska.— Where a finding is entirely foreign to the issues made by the pleadings it has no weight in the supreme court; but, if such finding be essential to the decree, the decree must be set aside and the proper decree entered. Furbush *v.* Barker, 38 Nebr. 1, 56 N. W. 996.

New Mexico.— Stamm *v.* Albuquerque, (N. M. 1900) 62 Pac. 973.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Finley *v.* Cartwright, 55 S. C. 198, 33 S. E. 359.

Washington.— Ranahan *v.* Gibbons, (Wash. 1900) 62 Pac. 773; Roberts *v.* Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.

41. *Alabama.*— Spivey *v.* Allman, 82 Ala. 378, 3 So. 528.

Arkansas.— Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 56 S. W. 862; Whitehead *v.* Henderson, 67 Ark. 200, 56 S. W. 1065; Cagle *v.* Lane, 49 Ark. 465, 5 S. W. 790.

Illinois.— Commercial Nat. Bank *v.* Waggeman, 187 Ill. 227, 58 N. E. 339; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571; Wilson *v.* Scovel, 29 Ill. App. 98.

Iowa.— Ruppin *v.* Lee, 88 Iowa 742, 55 N. W. 338; Somers *v.* Wheeler, 45 Iowa 707; Gates *v.* Reynolds, 38 Iowa 691.

Kentucky.— Cotton *v.* Crawford, 19 Ky. L. Rep. 1967, 44 S. W. 954; Haddix *v.* Bailey, 19 Ky. L. Rep. 1911, 44 S. W. 963.

Michigan.— Bowler *v.* Bowler, 122 Mich. 698, 81 N. W. 968; Fyfe *v.* English, 116 Mich. 21, 74 N. W. 292; Uhl *v.* Faas, 115 Mich. 377, 73 N. W. 381.

New York.— Parfitt *v.* Ferguson, 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466; Neuman *v.* New York El. R. Co., 17 N. Y. Suppl. 955, 42 N. Y. St. 959.

Oregon.— Buchtel *v.* Bode, 24 Oreg. 587, 29 Pac. 438; Howard *v.* Howard, 24 Oreg. 459, 33 Pac. 682.

Utah.— Cavanaugh *v.* Salisbury, 22 Utah 465, 63 Pac. 39.

United States.— Tyler *v.* Campbell, 106 U. S. 322, 1 S. Ct. 293, 27 L. ed. 162.

42. Charleston Bank *v.* Dowling, 52 S. C. 345, 29 S. E. 788; Maxfield *v.* West, 6 Utah 379, 24 Pac. 98; Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531. If the finding is sufficient the court is not bound by it, but, if satisfied from the evidence that it is wrong, the judgment may be reversed; and so, on the other hand, if the finding is insufficient, upon the same principle, the appellate court may support the judgment if satisfied from the evidence that it is right. Catlin *v.* Henton, 9 Wis. 476.

43. Perry *v.* Cornelius, (Ky. 1901) 63 S. W. 23; Boli *v.* Irvin, 21 Ky. L. Rep. 366, 51 S. W. 444.

44. Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Nolen *v.* Harden, 43 Ark. 307, 51 Am. Rep. 563; Ringgold *v.* Patterson, 15 Ark. 209 (holding that the finding was entitled only to that degree of respect which was due to the opinion of the judge); Glasgow Milling Co. *v.* Burnes, 144 Mo. 192, 45 S. W. 1074; McElroy *v.* Maxwell, 101 Mo. 294, 14 S. W. 1; Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82 (wherein it is said that the statement that the supreme court will defer somewhat to the findings of a chancellor where the witnesses testify orally, applies only when the testimony is conflicting or evenly balanced, and the finding appears to be correct); Royle *v.* Jones, 78 Mo. 403; Harris *v.* Township Board, 22 Mo. App. 462; Beraw *v.* O'Connell, 80 Hun (N. Y.) 431, 30 N. Y. Suppl. 81, 61 N. Y. St. 821; Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

Where the testimony is conflicting.— Notwithstanding the court is not precluded from interfering unless the finding or decree is without testimony or is overwhelmingly against the weight of the testimony, if there

able minds might disagree as to the facts, or where the appellate court cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the decision of the lower court will not be disturbed.[45]

(B) *Same Rules Applied as in Other Actions* — (1) IN GENERAL. On the other hand, the extent of the review seems no greater in many cases than in other actions, generally, where the findings of fact are by the court, without the aid of a jury. Thus, the chancellor's decision will not be disturbed where there is any sufficient evidence in support thereof and where the testimony is conflicting, he being regarded as the more appropriate trier of the facts in such cases,[46] and a

is sufficient to sustain the chancellor's decision the appellate court is not bound to review the evidence. Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130; Land Mortg. Invest., etc., Co. *v.* Faulkner, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288. And upon such testimony, if the mind is left in doubt on the whole case the decree will not be disturbed. Burt, etc., Lumber Co. *v.* Bailey, (Ky. 1901) 60 S. W. 485; Campbell *v.* Trosper, (Ky. 1900) 57 S. W. 245; Thomas *v.* Chicago, etc., R. Co., 49 Mo. App. 110.

45. *Alabama.*— Lewis *v.* Teal, 82 Ala. 288, 2 So. 903.

Illinois.— Long *v.* Fox, 100 Ill. 43.

Kentucky.— Harris *v.* Ash, (Ky. 1894) 24 S. W. 868.

Mississippi.— Wilson *v.* Beauchamp, 50 Miss. 24.

Missouri.— Loring *v.* Atterbury, 138 Mo. 262, 39 S. W. 773.

Nebraska.— Boyd *v.* Mulvihill, (Nebr. 1901) 86 N. W. 922.

Ohio.— Clayton *v.* Freet, 10 Ohio St. 544.

Pennsylvania.— Order of Solon *v.* Folsom, 161 Pa. St. 225, 28 Atl. 1078.

Tennessee.— Ford *v.* Lawrence, (Tenn. Ch. 1898) 51 S. W. 1023.

Washington.— Preliminary orders for injunctions will not be disturbed, where there is a conflict of evidence, if there is any fairly tending to sustain the determination of the lower court, even though, upon final consideration, the appellate court should feel obliged to find differently upon the same proofs. West Coast Imp. Co. *v.* Winsor, 8 Wash. 490, 36 Pac. 411.

West Virginia.— Camden *v.* Dewing, 47 W. Va. 310, 34 S. E. 911; Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288; Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93.

United States.— Alviso *v.* U. S., 8 Wall. (U. S.) 337, 9 L. ed. 305; Snider *v.* Dobson, 74 Fed. 757, 40 U. S. App. 111, 21 C. C. A. 76; McKinley *v.* Williams, 74 Fed. 94, 36 U. S. App. 749, 20 C. C. A. 312.

Statement of account.— Where the testimony on which an account is stated is conflicting, an appeal affirming it will not be disturbed. Miller *v.* Whelan, 158 Ill. 544, 42 N. E. 59. See also Luckett *v.* Green, 1 App. Cas. (D. C.) 92.

46. *Alabama.*—Campbell *v.* Moore, 124 Ala. 236, 26 So. 906.

Arizona.— Main *v.* Main, (Ariz. 1900) 60 Pac. 888.

Arkansas.— Young *v.* Gaut, (Ark. 1901) 61 S. W. 372; Crabtree *v.* Bradbury, (Ark. 1890) 13 S. W. 935.

California.— Andrus *v.* Smith, (Cal. 1901) 65 Pac. 320; Springer *v.* Springer, (Cal. 1901) 64 Pac. 470; Yarwood *v.* West Los Angeles Water Co., 132 Cal. 204, 64 Pac. 275.

Colorado.— Finding on conflicting evidence conclusive. Mackey *v.* Magnon, (Colo. 1900) 62 Pac. 945; Cache la Poudre Reservoir Co. *v.* Windsor Reservoir, etc., Co., 25 Colo. 53, 52 Pac. 1104. Rule the same in legal and equitable actions. Hazeltine *v.* Brockway, 26 Colo. 291, 57 Pac. 1077. See also *infra*, XVII, G, 4, g, (III), (B), (2).

Florida.— Lewter *v.* Price, 25 Fla. 574, 6 So. 439.

Georgia.— Small *v.* Slocumb, 112 Ga. 279, 37 S. E. 481; Terrell *v.* Marietta Paper Mfg. Co., 99 Ga. 206, 24 S. E. 861.

Illinois.— Jenkins *v.* Cohen, 138 Ill. 634, 28 N. E. 792.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338; Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1. Under the code the rule forbidding the supreme court to disturb the findings of the trial court upon the weight of the evidence is the same in equity as at law. McConnell *v.* Huntington, 108 Ind. 405, 8 N. E. 620. See also *infra*, XVII, G, 4, g, (III), (B), (2).

Kansas.— Somers *v.* Somers, 39 Kan. 132, 17 Pac. 841; McCoy *v.* Hazlett, 14 Kan. 430.

Kentucky.— George *v.* Reams, 20 Ky. L. Rep. 857, 47 S. W. 758; Oman *v.* Oman, etc., Stone Co., 13 Ky. L. Rep. 735.

Massachusetts.— Bennett *v.* Littlefield, 177 Mass. 294, 58 N. E. 1011.

Michigan.— Reason *v.* Jones, 119 Mich. 672, 78 N. W. 899.

Mississippi.— Young *v.* Elgin, (Miss. 1900) 27 So. 595; Vaughan *v.* Commercial Bank, (Miss. 1895) 18 So. 270. The decision of the chancellor is presumptively right, and will stand unless opposed by the weight of the evidence. Partee *v.* Bedford, 51 Miss. 84 [*construing* Apple *v.* Ganong, 47 Miss. 189; Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732].

Missouri.—Strine *v.* Williams, 159 Mo. 582, 60 S. W. 1060; Bushong *v.* Taylor, 82 Mo. 660; Arn *v.* Arn, 81 Mo. App. 133.

Nebraska.— McCullough *v.* Dovey, (Nebr. 1901) 85 N. W. 893; Gurske *v.* Kelpin, (Nebr. 1901) 85 N. W. 557; Smith *v.* Perry, 52 Nebr. 738, 73 N. W. 282.

Nevada.— Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

decree involving the finding of fact upon conflicting evidence will not be disturbed unless it is clearly wrong,[47] or unless the findings are clearly against the preponderance of the evidence.[48]

New Hampshire.— Ricker *v.* Hall, 69 N. H. 592, 45 Atl. 556.

Ohio.— On proceedings in error. Fortman *v.* Goepper, 14 Ohio St. 558. As distinguished from appeals. Eleventh St. Church *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74. But where the affirmative of an issue requires clear and convincing proof the appellate court may review the evidence for the purpose of determining this question, where all the evidence is set forth in the bill of exceptions. Ford *v.* Osborne, 45 Ohio St. 1, 12 N. E. 526.

Oregon.— Browning *v.* Lewis, (Oreg. 1901) 64 Pac. 304; Willis *v.* Smith, 36 Oreg. 601, 58 Pac. 537.

Tennessee.— Green *v.* Huggins, (Tenn. Ch. 1898) 52 S. W. 675.

Utah.— Center Creek Water, etc., Co. *v.* Thomas, 19 Utah 360, 57 Pac. 30.

West Virginia.— Bell *v.* Peabody Ins. Co., (W. Va. 1901) 38 S. E. 541.

Wisconsin.— Spuhr *v.* Kolb, (Wis. 1901) 86 N. W. 562.

Wyoming.— Patterson *v.* Lee-Clark-Andreesen *v.* Hardware Co., 7 Wyo. 401, 52 Pac. 1085.

United States.— The dismissal of a bill on conflicting evidence will not be disturbed. Hewitt *v.* Campbell, 109 U. S. 103, 3 S. Ct. 68, 27 L. ed. 871. Decrees in admiralty will not be revised on the mere weight of conflicting evidence. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271.

47. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 94 Ala. 602, 10 So. 167; Spivey *v.* Allman, 82 Ala. 378, 3 So. 528; Lewis *v.* Teal, 82 Ala. 288, 2 So. 903.

Arkansas.— Gerson *v.* Pool, 31 Ark. 85.

Florida.— Jacksonville *v.* Huff, 39 Fla. 8, 21 So. 774; Dean *v.* Dean, 36 Fla. 492, 18 So. 592; Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Indiana.—Calkins *v.* Evans, 5 Ind. 441, giving such findings the weight of a verdict.

Maine.— Proctor *v.* Rand, 94 Me. 313, 47 Atl. 537; Duren *v.* Hall, (Me. 1888) 12 Atl. 736; Young *v.* Witham, 75 Me. 536.

Massachusetts.— Chase *v.* Hubbard, 153 Mass. 91, 26 N. E. 433; Francis *v.* Daley, 150 Mass. 381, 23 N. E. 218; Bacon *v.* Abbott, 137 Mass. 397; Boston Music Hall Assoc. *v.* Cory, 129 Mass. 435; Montgomery *v.* Pickering, 116 Mass. 227; Reed *v.* Reed, 114 Mass. 372.

Mississippi.— Fox *v.* Matthews, 33 Miss. 433. The findings are presumptively correct. Interstate Cattle Co. *v.* Lapsley, (Miss. 1899) 24 So. 532.

Missouri.— King *v.* Isley, 116 Mo. 155, 22 S. W. 634; Cornet *v.* Bertelsmann, 61 Mo. 118.

Nebraska.— May *v.* Cahn, 34 Nebr. 652, 52 N. W. 288.

Ohio.— Landis *v.* Kelly, 27 Ohio St. 567.

Pennsylvania.— Stockett *v.* Ryan, 176 Pa. St. 71, 34 Atl. 973; Piper's Appeal, 20 Pa. St. 67; Bannon *v.* Lincoln Nat. Bank, 14 Pa. Super. Ct. 566.

South Carolina.— Chalmers *v.* Kinard, 38 S. C. 126, 16 S. E. 778, 895.

Utah.— Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610, giving such finding a conclusive effect unless so plainly erroneous as to indicate oversight or mistake.

West Virginia.— Yoke *v.* Shay, 47 W. Va. 40, 34 S. E. 748.

Successive findings.— Rule stated in text applied to successive concurrent findings in equity. Towson *v.* Moore, 173 U. S. 17, 19 S. Ct. 332, 43 L. ed. 597. But where a decree is reversed for want of sufficient evidence and, on a second trial, additional evidence is introduced, a decree on the second trial is to be considered on the record as presented, uninfluenced by the prior decision. Sutton First Nat. Bank *v.* Grosshans, (Nebr. 1901) 85 N. W. 542.

48. *Arkansas.*— Mooney *v.* Tyler, 68 Ark. 314, 57 S. W. 1105; Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

Maine.— While, generally, the decision of facts by a single justice should not be interfered with unless it is clearly erroneous, still a hurried examination of a complicated case by the trial court may sometimes be less satisfactory than a deliberate reëxamination of the case with the aid of the printed record. Leighton *v.* Leighton, 91 Me. 593, 40 Atl. 671.

Massachusetts.— Gross *v.* Milligan, 176 Mass. 566, 58 N. E. 471.

Mississippi.— Dillard *v.* Wright, 11 Sm. & M. (Miss.) 455.

Nebraska.— Sutton First Nat. Bank *v.* Grosshans, (Nebr. 1901) 85 N. W. 542.

New Mexico.— Badaracco *v.* Badaracco, (N. M. 1901) 65 Pac. 153.

Ohio.— Chicago, etc., R. Co. *v.* Hamilton, 3 Ohio Cir. Ct. 455, 2 Ohio Cir. Dec. 259, on error.

Pennsylvania.— Com. *v.* Stevens, 178 Pa. St. 543, 36 Atl. 166.

South Carolina.—Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683.

South Dakota.— Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

Utah.— Dwyer *v.* Salt Lake City Copper Mfg. Co. 14 Utah 339, 47 Pac. 311.

Washington.—Ranahan *v.* Gibbons, (Wash. 1900) 62 Pac. 773.

Wisconsin.— Crawford *v.* Christian, 102 Wis. 51, 78 N. W. 406; Mankel *v.* Belscamper, 84 Wis. 218, 54 N. W. 500; Norris *v.* Persons, 49 Wis. 101, 5 N. W. 224.

West Virginia.— Camden *v.* Dewing, 47 W. Va. 310, 34 S. E. 911.

United States.— Lansing *v.* Stanisics, 94 Fed. 380, 36 C. C. A. 306; Dickey *v.* Dickey, 94 Fed. 231, 36 C. C. A. 211; Snider *v.* Dobson, 74 Fed. 757, 40 U. S. App. 111, 21 C. C. A. 76.

(2) When Witnesses Are Heard Orally. The rule of procedure against interference with the findings of fact made by the lower court is in many cases applied strictly where the trial of the suit proceeds upon oral examination of witnesses, upon the principle of the superior advantage of the trial court to weigh the evidence, as distinguished from cases where the evidence is contained in depositions.[49]

5. Findings by Master, Referee, Etc. — a. In General. Notwithstanding the findings of the court in an equity cause are received with due deference, findings of fact by a referee or master in equity are not conclusive on appeal,[50] as where the reference is — as under the old equity practice — merely to take and report evidence, without requiring the officer to report conclusions of law or fact.[51] And though the court may look into the evidence to ascertain if the equities of the bill have been sustained, or questions of fact may be reviewed upon exceptions taken,[52]

49. *Colorado.*— Riley *v.* Riley, 14 Colo. 290, 23 Pac. 326; Rust *v.* Strickland, 1 Colo. App. 215, 28 Pac. 141.

Illinois.— Kinnah *v.* Kinnah, 184 Ill. 284, 56 N. E. 376; Wall *v.* Stapleton, 177 Ill. 357, 52 N. E. 477; Salem *v.* Lane, etc., Co., 90 Ill. App. 560.

Indiana.— Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381. But see Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

Massachusetts.— The rule that a decree in equity by a single justice will not be reversed unless clearly erroneous applies when the principal witnesses testify orally before the justice, but is less applicable when all the testimony is taken by a commissioner, or is documentary, or both. Willwerth *v.* Willwerth, 176 Mass. 265, 57 N. E. 340; Chase *v.* Hubbard, 153 Mass. 91, 26 N. E. 433; Reed *v.* Reed, 114 Mass. 372.

Michigan.— Fix *v.* Soleau, (Mich. 1901) 86 N. W. 387; Sowles *v.* Raymer, 110 Mich. 189, 68 N. W. 121; Wooley *v.* Drew, 49 Mich. 290, 13 N. W. 594.

Mississippi.— Keaton *v.* Miller, 38 Miss. 630. So, if the decree is manifestly against the evidence which is contained in depositions, it will be reversed, as the chancellor did not have the advantage of hearing and seeing the witnesses. Mississippi Cotton-Oil Co. *v.* Starling-Smith Co., (Miss. 1898) 23 So. 648.

Missouri.— Bushong *v.* Taylor, 82 Mo. 660; Judy *v.* Farmers, etc., Bank, 81 Mo. 404. That deference which is accorded to the findings of the trial court, even though such findings are not conclusive, is based upon the fact that the testimony is oral. Shanklin *v.* McCracken, 151 Mo. 587, 52 S. W. 339.

Nebraska.— Griswold *v.* Hazel, 52 Nebr. 64, 71 N. W. 972; McConnell *v.* McConnell, 37 Nebr. 57, 55 N. W. 292.

New Jersey.—Riddle *v.* Clabby, (N. J. 1899) 44 Atl. 859, 46 Atl. 782.

New York.— Parfitt *v.* Ferguson, 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466; Berau *v.* O'Connell, 80 Hun (N. Y.) 431, 30 N. Y. Suppl. 81, 61 N. Y. St. 821.

Utah.— Elliot *v.* Whitmore, (Utah 1901) 65 Pac. 70; Miller *v.* Livingston, 22 Utah 174, 61 Pac. 569.

United States.— Metropolitan Nat. Bank *v.* Rogers, 53 Fed. 776, 3 U. S. App. 666, 3 C. C. A. 666.

Where the statute does not require findings of fact in an equity suit it does not follow that, if such findings are made, they are to be disregarded. Lyons *v.* Lyons, 18 Cal. 447. See also Wheeler *v.* Hays, 3 Cal. 284.

Waiver of jury.— Where a jury is waived and a cause is submitted to a court of chancery to be tried by him as an action at law, the findings will have the effect of a verdict.

Iowa.— Corbin *v.* Woodbine, 33 Iowa 297; Mallory *v.* Luscombe, 31 Iowa 269.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 96 Ky. 241, 28 S. W. 666.

Mississippi.— Walker *v.* Walker, 67 Miss. 529, 7 So. 491.

Missouri.— Swayze *v.* Bride, 34 Mo. App. 414.

South Carolina.— Rhodes *v.* Russell, 38 S. C. 421, 17 S. E. 222.

Tennessee.— Shaver *v.* Southern Oil Co., (Tenn. Ch. 1897) 43 S. W. 736; Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254; East Tennessee Iron, etc., Co. *v.* Walton, (Tenn. Ch. 1895) 35 S. W. 459.

50. *Illinois.*— A master's report in chancery is entitled to the same weight on review as the verdict of a jury, in the appellate court, but the appellate court has power to determine whether the same is supported by a preponderance of the evidence. Gould *v.* Wenstrand, 90 Ill. App. 127.

Iowa.—Todd *v.* Bailey, 55 Iowa 749, 8 N. W. 330.

Massachusetts.— Goodell *v.* Goodell, 173 Mass. 140, 53 N. E. 275, on appeal from decree of single justice.

Missouri.— Knapp *v.* Publishers George Knapp & Co., 127 Mo. 53, 29 S. W. 885; Bender *v.* Markle, 37 Mo. App. 234.

Oregon.— If, upon reviewing the evidence, the findings appear to be manifestly against the weight thereof, the judgment will be reversed. Marabitti *v.* Bagolan, 21 Oreg. 299, 28 Pac. 10

Pennsylvania.—Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765.

See also *supra*, XVII, G, 4, g, (I); and 3 Cent. Dig. tit. "Appeal and Error," § 3996 *et seq.*

51. Kimball *v.* Lyon, 19 Colo. 266, 35 Pac. 44; Sieber *v.* Frink, 7 Colo. 148, 2 Pac. 901; Miller *v.* Taylor, 6 Colo. 41.

52. Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671; Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58.

yet, where questions of fact are determined by a master, referee, or the like, who saw the witnesses and had the advantage of observing their manner, etc., and was therefore better able to determine the weight of the testimony than the appellate court,[53] such findings are rarely disturbed. Where there are concurrent findings of a master or referee and the chancellor or presiding judge, such findings will be taken as presumptively correct, and, unless there is obvious error or serious mistake, will not be disturbed.[54] Where questions of fact or issues are referred to a master or referee, to take testimony and report facts or to try the issues, as distinguished from a mere reference to an examiner to report the evidence,[55] such findings, or the judgment or decree based thereon, will not be disturbed if the evidence preponderates in favor of the decision, or the appellate court is satisfied of its correctness,[56] or if there is any competent evidence in support of such find-

53. *Alabama.*— Jones *v.* White, 112 Ala. 449, 20 So. 527; Vaughan *v.* Smith, 69 Ala. 92.

Colorado.— Kimball *v.* Lyon, 19 Colo. 266, 35 Pac. 44.

Illinois.— Carpenter *v.* Plagge, 93 Ill. App. 445. But the findings of a master are not entitled, as of course, to the same weight as a verdict of a jury at law, but such effect depends on the master's opportunity of hearing the witnesses and of observing their manner, etc. Fairbury Union Agricultural Board *v.* Holly, 169 Ill. 9, 48 N. E. 149.

Massachusetts.— Morse *v.* Hill, 136 Mass. 60.

Missouri.— Gimbel *v.* Pignero, 62 Mo. 240.

New Mexico.— Givens *v.* Veeder, 9 N. M. 256, 50 Pac. 316; Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671.

New York.— Bolles *v.* Hubbel, 8 N. Y. St. 560.

Pennsylvania.— Walker *v.* Gilliland, 197 Pa. St. 649, 47 Atl. 970.

Virginia.— Browning *v.* Browning, (Va. 1900) 36 S. E. 525; Magarity *v.* Shipman, 82 Va. 784, 1 S. E. 109.

United States.— The George L. Garlick, 107 Fed. 542.

54. *District of Columbia.*— York *v.* Tyler, 21 D. C. 265; Smith *v.* American Bonding, etc., Co., 12 App. Cas. (D. C.) 192; Richardson *v.* Van Auken, 5 App. Cas. (D. C.) 209.

Massachusetts.— Downey *v.* Lancy, (Mass. 1901) 59 N. E. 1015; S. K. Edwards Hall Co. *v.* Dresser, 168 Mass. 136, 46 N. E. 420.

Michigan.— Crawford *v.* Osmun, 90 Mich. 77, 51 N. W. 356.

Pennsylvania.— Wolf *v.* Augustine, 197 Pa. St. 367, 47 Atl. 199; Chambers *v.* Chatley, 15 Pa. Super. Ct. 540.

Tennessee.— Hicks *v.* Porter, 90 Tenn. 1, 15 S. W. 1071; Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891.

United States.— Furrer *v.* Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. ed. 649; Sanders *v.* Bluefield Waterworks, etc., Co., 106 Fed. 587, 45 C. C. A. 475.

55. Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681; Kimball *v.* Lyon, 19 Colo. 266, 35 Pac. 44; Jacksonville *v.* Huff, 39 Fla. 8, 21 So. 774 (holding that while findings of a chancellor, upon testimony taken before an examiner, are not of the weight of a verdict, they will not be disturbed unless clearly erroneous); Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328.

Consent reference.— Where the parties select and agree upon a special tribunal for a settlement of their controversy, as distinguished from a reference to a master or referee to take and report testimony, there is no reason why the decision of such tribunal with respect to the facts should be treated as of less weight than that of the court itself where the parties expressly waive a jury or the law declares that the appellate court shall act upon the findings of the subordinate court. Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764. To the same point see Harper *v.* Hendricks, 49 Kan. 718, 31 Pac. 734; Pray *v.* Brigham, 174 Mass. 129, 54 N. E. 338; Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., (Minn. 1901) 84 N. W. 724; Bennett *v.* Atwood, 57 N. H. 216; Children's Home Assoc. *v.* Hall, 47 N. J. L. 152 (under rule of court); Excelsior Carpet Lining Co. *v.* Potts, 36 N. J. L. 301; Nambe *v.* Romero, (N. M. 1900) 61 Pac. 122; Whithead *v.* Whitehurst, 108 N. C. 458, 13 S. E. 166.

56. Stein *v.* Abell, 24 Ill. App. 126; Todd *v.* Bailey, 55 Iowa 749, 8 N. W. 330; Skidmore *v.* Anchor Brewing Co., 21 N. Y. Suppl. 1125, 51 N. Y. St. 937; Snyder *v.* O'Connor, 3 N. Y. Suppl. 101, 19 N. Y. St. 821.

Successive concurrent findings.— Where an issue of fact has been determined in the same way by the court on a new trial after setting aside the finding of a referee, the general term may properly refuse to exercise its discretion and set aside the last judgment as against the evidence. Haag *v.* Hillemeier, 120 N. Y. 651, 24 N. E. 807, 31 N. Y. St. 593. Where conflicting decisions have been made in two cases on the same state of facts, one of which has been sustained on appeal, the appellate court are not bound by the former decision, but will examine the second to ascertain the causes of the difference in the decisions, and whether any improper elements have been allowed to enter, or the evidence has been weighed on erroneous principles. Liberty Ins. Co. *v.* Central Vermont R. Co., 19 N. Y. App. Div. 509, 46 N. Y. Suppl. 576.

Findings based on inspection will be conclusive on all facts which come within the officer's observation. Crouch *v.* Gutmann, 10 N. Y. Suppl. 275, 32 N. Y. St. 254; Clyde *v.* Richmond, etc., R. Co., 59 Fed. 394.

ings, including the legitimate inferences which may be drawn from the evidence presented. In this connection, as in the case of verdicts, the weight of the evidence is left to the triers of the facts below, and, to a greater or less extent, the findings are often regarded as of the weight of a verdict.[57] It is held, however,

57. *Alabama.*— Finding of register. American Pig-Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603; Jones *v.* White, 112 Ala. 449, 20 So. 527.

California.— Finding of referee. Jackson *v.* Puget Sound Lumber Co., 123 Cal. 97, 55 Pac. 788.

Colorado.— Finding of referee. Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681; Perdew *v.* Coffin, 11 Colo. App. 157, 52 Pac. 747 — holding such findings conclusive unless manifestly against the weight of the evidence. But if the trial court refuses to hear or read the testimony on motion for a new trial the referee's findings are not conclusive. Michael *v.* Tracy, (Colo. App. 1900) 62 Pac. 1048.

Connecticut.— Brady *v.* Barnes, 42 Conn. 512; Cook *v.* Weed, 38 Conn. 479; Knapp *v.* White, 23 Conn. 529.

District of Columbia.—Findings of auditor. Smith *v.* American Bonding, etc., Co., 12 App. Cas. (D. C.) 192.

Florida.— Finding of referee. Camp *v.* Hall, 39 Fla. 535, 22 So. 792; Barrs *v.* Brace, 38 Fla. 265, 20 So. 991.

Georgia.— Finding of auditor. Harrell *v.* Blount, 112 Ga. 711, 38 S. E. 56; Phillips *v.* De Bray, 112 Ga. 628, 37 S. E. 887.

Illinois.— Finding of master. Carpenter *v.* Plagge, 93 Ill. App. 445; Lindley *v.* English, 89 Ill. App. 538. The supreme court will not disturb such finding if it is not manifestly against the weight of the evidence. Siegel *v.* Andrews, 181 Ill. 350, 54 N. E. 1008. Finding of referee. Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74].

Indiana.— Where a commissioner has no right to report the evidence given before him, evidence so reported is not properly before the appellate court, and, therefore, it cannot be examined in that court. McClure *v.* McClure, 19 Ind. 185.

Indian Territory.— Findings of master. Carder *v.* Wallace, (Indian Terr. 1901) 61 S. W. 988.

Iowa.— Finding of referee, like a verdict, will not be set aside unless manifestly against the weight of the evidence. Whicher *v.* The Steamboat Ewing, 21 Iowa 240; Childs *v.* Shower, 18 Iowa 261.

Kansas.— Finding by referee. Harper *v.* Hendricks, 49 Kan. 718, 31 Pac. 734; Bryan *v.* Moore, 48 Kan. 217, 29 Pac. 318; Tulloss *v.* Richardson, (Kan. App. 1900) 61 Pac. 1096; Quinton *v.* Hornby, (Kan. App. 1899) 56 Pac. 1127.

Massachusetts.—Findings of master. Morse *v.* Hill, 136 Mass. 60. Where the master was not ordered to report the evidence, and the case was heard upon his report, the facts on appeal must be taken as found by the master. Brooks *v.* Brooks, 169 Mass. 38, 47 N. E. 448. The rule that findings of an auditor will not be disturbed on the evidence is peculiarly applicable where the decree of the court is founded partly upon oral evidence heard before it. Willwerth *v.* Willwerth, 176 Mass. 265, 57 N. E. 340; Chase *v.* Hubbard, 153 Mass. 91, 26 N. E. 433.

Michigan.— Finding of referee; on error the supreme court cannot interfere. Campau *v.* Brown, 48 Mich. 145, 11 N. W. 845; Terris *v.* Quimby, 41 Mich. 202, 2 N. W. 9.

Minnesota.—Finding of referee, where there is any evidence reasonably tending to support it. Sheffield *v.* Mullin, 27 Minn. 374, 7 N. W. 687; Kumler *v.* Ferguson, 7 Minn. 442.

Mississippi.—Findings of master. Millsaps *v.* Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 549.

Missouri.— Finding of referee. Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Gimbel *v.* Pignero, 62 Mo. 240; Bender *v.* Markle, 37 Mo. App. 234, as to difference between reference at law and in equity. In the supreme court the only question is whether or not there is evidence to support the conclusion reached by the trial court. Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928. So, in the court of appeals, it is also held that the finding of a referee has the force of a special verdict. State *v.* Elliott, 82 Mo. App. 458. But in Raines *v.* Lumpee, 80 Mo. App. 203, it was held that on a compulsory reference the trial court may examine the evidence reported without being bound by the finding of the referee, and that the court of appeals might examine the evidence without being bound either by the report of the referee or the action of the trial court.

Nebraska.— Findings of referee will not be disturbed unless manifestly against the weight of the evidence. State *v.* Commercial, etc., Bank, 37 Nebr. 174, 55 N. W. 640; Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

New Hampshire.— Findings of referee are conclusive where exceptions thereto are disposed of by the trial court, and a refusal to set aside a report as against the weight of the evidence raises no question of law. Neil *v.* Kelley, (N. H. 1900) 47 Atl. 412; Amoskeag Mfg. Co. *v.* Manchester, (N. H. 1900) 46 Atl. 470; Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

New Mexico.— Finding by master. Wells, etc., Express *v.* Walker, 9 N. M. 456, 54 Pac. 875; Givens *v.* Veeder, 9 N. M. 256, 50 Pac. 316. Finding by referee. Nambe *v.* Romero, (N. M. 1900) 61 Pac. 122.

New York.— The general term may review findings of a referee and reverse on the ground that they are not sustained by the testimony. Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476. But such findings will not be disturbed unless clearly against the weight of the evidence. Bolivar *v.* Bolivar Water Co., 62 N. Y. App. Div. 484, 70 N. Y. Suppl. 750; Richardson *v.* Emmett, 61 N. Y. App. Div.

that the rule of conclusiveness of the concurrent findings of the master and chancellor upon a reference has no application to the finding of a fact which is also found in the order of the chancellor directing the reference.[58]

b. Deductions From Undisputed Facts — Errors of Law. It must appear that the facts found justify the judgment, where proper exception is taken, and an

205, 70 N. Y. Suppl. 546. The court of appeals will consider the findings of the referee in the light of what was to be fairly implied from them and the evidence, as well as what is expressed, in order to give the decision its proper force and construction. Clark *v.* Howard, 150 N. Y. 232, 44 N. E. 695; Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476.

North Carolina.— Finding of referee reviewable on exceptions. Lawrence *v.* Hyman, 79 N. C. 209. But, if approved by the trial court, it is conclusive if there is evidence to sustain it. Cochran *v.* Linville Imp. Co., 127 N. C. 386, 37 S. E. 496; Dunn *v.* Beaman, 126 N. C. 764, 36 S. E. 174.

Oregon.— Findings of referee. Hummel *v.* Friese, 24 Oreg. 586, 29 Pac. 438; Bartel *v.* Mathias, 19 Oreg. 482, 24 Pac. 918.

Pennsylvania.— Findings of auditor have the force of a verdict. Walker *v.* Gilliland, 197 Pa. St. 649, 47 Atl. 970; Com. *v.* Order of Solon, 192 Pa. St. 487, 43 Atl. 1084; Sutton *v.* Guthrie, 188 Pa. St. 359, 41 Atl. 528. A writ of error to a reference, under the Pennsylvania act of April 22, 1874, brings up only questions of law arising on bills of exceptions to the rulings of the judge, and his conclusions of fact must be regarded as conclusive as the verdict of a jury. Gonser *v.* Smith, 115 Pa. St. 452, 8 Atl. 770.

South Carolina.—Finding by a referee, and action by a circuit judge thereon, is final and conclusive where the power to review findings of fact is confined to chancery cases. Gregory *v.* Cohen, 50 S. C. 502, 27 S. E. 920; Hendrix *v.* Harman, 19 S. C. 483. But where an order of reference provides that the special master's report shall have the same force and effect as in chancery, the supreme court may review the facts. Love *v.* Love, 57 S. C. 530, 35 S. E. 398. Where the report of a special master is confirmed the party appealing from the findings of fact must show, by a preponderance of evidence, that the circuit judge erred as alleged in the exceptions. Allen *v.* Petty, 58 S. C. 240, 36 S. E. 586.

South Dakota.— Finding of referee. Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297.

Tennessee.— Finding by master, confirmed by chancellor, not reviewed where there is some evidence in support. Dollman *v.* Collier, 92 Tenn. 660, 22 S. W. 741; Sutton *v.* Sutton, (Tenn. Ch. 1900) 58 S. W. 891; Rose *v.* Rainey, (Tenn. Ch. 1900) 58 S. W. 460.

Utah.— Finding of referee, like the findings of a court of equity, on conflicting evidence, will not be disturbed unless manifestly against the weight of the evidence. Dwyer *v.* Salt Lake City Copper Mfg. Co., 14 Utah 339, 47 Pac. 311.

Vermont.— Before the practice act in this state it was firmly settled that the master's report would be regarded as settling the facts which fell within his province to find, unless it affirmatively appeared that he found the facts without evidence or against the evidence. Rowan *v.* State Bank, 45 Vt. 160. By a statute regulating the practice in courts of chancery it was provided that controverted questions in chancery might be tried, as to matters of fact, by masters, etc., and that their report, unless good cause be shown, should, if accepted, be conclusive of all questions of fact in issue. Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131. Such findings are conclusive if there is any evidence tending to support them (Herrick *v.* McCawley, 72 Vt. 240, 47 Atl. 784), unless fraud or corruption is shown (Security Co. *v.* Bennington Monument Assoc., 70 Vt. 201, 40 Atl. 43). Findings of referee, where there is evidence to support them, are conclusive. Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130. It is not the province of the appellate court to deduce inferences of fact from an auditor's report. Abbott *v.* Camp, 23 Vt. 650.

Virginia.— Findings of commissioner. Browning *v.* Browning, (Va. 1900) 36 S. E. 525; Magarity *v.* Shipman, 82 Va. 784, 1 S. E. 109. Such findings must be palpably erroneous in order to justify interference. Kent *v.* Kent, (Va. 1899) 34 S. E. 32.

West Virginia.— Findings of commissioner. Dewing *v.* Hutton, (W. Va. 1900) 37 S. E. 670; Gillaspie *v.* James, (W. Va. 1900) 37 S. E. 598.

Wisconsin.— Finding of referee conclusive unless against clear preponderance of evidence. Wyss *v.* Grunert, 108 Wis. 38, 83 N. W. 1095; Zoesch *v.* Thielman, 105 Wis. 117, 80 N. W. 1107.

United States.— Findings of master will not be disturbed if based on evidence. Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Kilgour *v.* Scott, 107 Fed. 32; Singleton *v.* Felton, 101 Fed. 526, 42 C. C. A. 57. Finding of commissioner in proceedings to limit liability after collision. The George L. Garlick, 107 Fed. 542.

Where evidence is doubtful.— Notwithstanding evidence in support of the findings of a referee in stating an account is unsatisfactory, the findings will not be disturbed where there is no reason for belief that the appellate court could reach a more satisfactory conclusion. Conboy *v.* Cunningham, 24 N. Y. Suppl. 75. See also Faga *v.* Hemphill, 86 Iowa 713, 48 N. W. 731, 52 N. W. 561, on the report of a trial judge, acting as commissioner of the supreme court, in restating an opinion.

58. Tankesly *v.* Bell, (Tenn. Ch. 1896) 37 S. W. 1018.

erroneous conclusion of law drawn from the facts cannot be sustained.[59] And where the facts are undisputed or the findings are merely deductions from undisputed testimony, such findings are of no greater weight than conclusions of law.[60]

c. Where Court and Master or Referee Do Not Concur. Where the chancellor did not accept the master's results nor adopt his figures, but based the decision upon an entirely different theory from that acted upon by the master, there is no concurrence which will preclude the court from reviewing the evidence.[61] So, the rule that the findings of a master, referee, or the like, when approved by the court, will be regarded as in the nature of a verdict, has no application where the findings are overruled and disaffirmed by the lower court; but, in this event, the appellate court will determine for itself, from the facts disclosed by the record, whether they will sustain the conclusion of the master or referee, or that of the lower court.[62] But the court will, nevertheless, presume, *prima facie*, that the finding of the trial judge is correct,[63] and the findings of the court will not be reversed unless clearly opposed to the evidence.[64] On the other hand, if the findings of the master, upon testimony of witnesses heard by him, are fairly sustained by such evidence,[65] or unless such findings are manifestly opposed to the weight of the evidence, they will prevail over the judgment of the court as to the facts,

59. Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476.

60. Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819; Cake's Appeal, 110 Pa. St. 65, 20 Atl. 415; Milligan's Appeal, 97 Pa. St. 525; Moore's Estate, 12 Pa. Super. Ct. 599; Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844 (holding that the concurrence of the chancellor, in the mere estimate of the master in fixing a fee, being an opinion based upon the facts and record, is not binding as a finding of fact, and *overruling* the *dictum* in Hicks *v.* Porter, 90 Tenn. 1, 15 S. W. 1071, to the contrary); Sutton *v.* Sutton, (Tenn. Ch. 1900) 58 S. W. 891; Egan *v.* Yeaman, (Tenn. Ch. 1897) 46 S. W. 1012; Dillingham *v.* Moran, 101 Fed. 933, 42 C. C. A. 91.

Findings in effect unsupported.— Where the evidence is reviewed, though there may be some evidence, it may nevertheless be of such a nature as to amount to no evidence in support of the findings. Kennedy *v.* New York, etc., R. Co., 3 Duer (N. Y.) 69. See also Douglas *v.* Hastings First Nat. Bank, 17 Minn. 35; Townsend *v.* Peyser, 45 How. Pr. (N. Y.) 211.

Conclusion of fact reported as conclusion of law.— The report of a conclusion of fact as a conclusion of law is a mere irregularity and, on error, will not alter the conclusiveness of the finding. Ferris *v.* Quimby, 41 Mich. 202, 2 N. W. 9.

Inadmissible testimony.— A judgment will not be reversed because of erroneous admission of testimony when it is not possible, from the other undisputed evidence, to find against the judgment. McKeown *v.* Harvey, 40 Mich. 226.

Erroneous inference.— If the fact found by the auditor is a mere inference from other facts stated, and the officer has misapplied the law to the facts stated and thus erroneously inferred a fact to exist, the lower court may disregard the finding and make such inference as the law would warrant from the facts stated. Briggs *v.* Briggs, 46 Vt. 571. So, if the conclusion of fact is based in part upon facts, not proven, which may have influenced the referee's decision — as where he found facts from which he deduced an intent and some of the material facts found were unsupported or were against the evidence — it is held that as the judgment might have been influenced by facts not proven it cannot be sustained, though the deduction may be based upon other facts proven. Matthews *v.* Coe, 49 N. Y. 57.

61. Horne *v.* Green, (Tenn. Ch. 1897) 43 S. W. 774.

Master's findings not responsive.— So, the court of chancery appeals is not bound by a finding of the chancellor, upon overruling exceptions to the master's report, where the finding of the master is not responsive to the questions before him, as in such case there is no concurrent finding of fact such as is considered binding. Fowler *v.* Stone's River Nat. Bank, (Tenn. Ch. 1899) 57 S. W. 209.

62. Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328; Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115; Hughey *v.* Eichelberger, 11 S. C. 36; Roots *v.* Kilbreth, 32 W. Va. 585, 9 S. E. 927.

63. Young *v.* Young, 27 S. C. 201, 3 S. E. 202. Although the action of the court in setting aside a referee's finding of fact may, on exception, be reviewed, yet, where there is a mass of contradictory evidence, the appellate court will presume that the lower court properly weighed it in setting aside the findings. McHenry *v.* Moore, 5 Cal. 90. And, where there is conflicting evidence as to particular items of account, the appellate court will not disturb a judgment differing, as to some items, from the report of the commissioner. Reed *v.* Phelps, (Ky. 1886) 2 S. W. 486.

64. McJunkin *v.* Bright, 108 Ga. 816, 34 S. E. 132; Medler *v.* Albuquerque Hotel, etc., Co., 6 N. M. 331, 28 Pac. 551.

65. Williams *v.* Concord Cong. Church, 193 Pa. St. 120, 44 Atl. 272; Bugbee's Appeal, 110 Pa. St. 331, 1 Atl. 273.

much in the nature of a verdict of a jury.[66] Where an action which is tried by a referee is set aside and a new trial granted, the appellate court will not interfere unless the evidence manifestly preponderates in favor of the referee's decision.[67]

6. Considerations Applicable to Findings Generally — a. Matters Concluded by Findings. A verdict or finding is taken, necessarily, to find in favor of every averment, and the truth of all facts essential to sustain it, and to negative such averments and allegations as are favorable to the unsuccessful party, so as to conclude all such controverted facts.[68] If, without objection, the court restricts the issues, a general verdict is likewise final as to all issues of fact;[69] but it is not conclusive as to a point upon which evidence is introduced, but upon which the party was not allowed to rely.[70]

b. Depositions or Other Documentary Evidence. Where all the evidence is in the form of depositions, affidavits, or other documentary evidence, it is considered, in many cases, that the conditions are not the same as where the trial court hears the oral testimony of the witnesses in its presence and can consider their manner, tone, and appearance; that, therefore, the appellate court, having the same means of weighing the testimony as those possessed by the court below, will do so.[71] On the other hand, while the court inquires into the correctness of the findings,[72]

66. Givens *v.* Veeder, 9 N. M. 256, 50 Pac. 316. See also Vaughan *v.* Smith, 69 Ala. 92.

67. Koktan *v.* Knight, 44 Minn. 304, 46 N. W. 354. So, where, by statute, the court has the power to amend or reverse the report of the referee and make findings of fact, findings made by the court, opposed to those made by the referee, are entitled to the same weight as if the trial were originally by the court and, if supported by evidence, will not be reviewed. Liebe *v.* Nicolai, 30 Oreg. 364, 48 Pac. 172; Merchants', etc., Nat. Bank *v.* Kern, 193 Pa. St. 67, 44 Wkly. Notes Cas. (Pa.) 462, 44 Atl. 334.

Where the jurisdiction of the court is restricted to a review of questions of law, its action upon setting aside or modifying or confirming a referee's report is conclusive. Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384; Gregory *v.* Cohen, 50 S. C. 502, 27 S. E. 920.

68. *Florida.*— McMillan *v.* Lacy, 6 Fla. 526; Randall *v.* Parramore, 1 Fla. 458.

Iowa.— The evidence will not be resorted to on appeal to determine additional facts in aid of special findings, as against a general verdict, since the general verdict is decisive of all issues submitted and not specially found by the jury. Schulte *v.* Chicago, etc., R. Co., (Iowa 1901) 86 N. W. 63.

Kansas.—Begg *v.* Hoag, (Kan. App. 1898) 54 Pac. 1034; Parkinson Sugar Co. *v.* Topeka Sugar Co., (Kan. App. 1898) 54 Pac. 331; Parkhurst *v.* Walker, (Kan. App. 1898) 53 Pac. 765.

Louisiana.— Hosea *v.* Miles, 13 La. 107.

Michigan.— Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 204.

Missouri.— Millan *v.* Porter, 31 Mo. App. 563.

Nebraska.— Spirk *v.* Chicago, etc., R. Co., 57 Nebr. 565, 78 N. W. 272.

New York.— Mulholland *v.* New York, 9 N. Y. St. 85.

Oklahoma.— Schultz *v.* Barrows, 8 Okla. 297, 56 Pac. 1053; Tootle *v.* Brown, 4 Okla. 612, 46 Pac. 550.

South Dakota.— Farmers' Bank *v.* Canton Bank, 8 S. D. 210, 65 N. W. 1070.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

69. Bates *v.* B. B. Richards Lumber Co., 56 Minn. 14, 57 N. W. 218.

70. Jones *v.* Muldrow, Cheves (S. C.) 254.

71. *Alabama.*— Butler *v.* Hannah, 103 Ala. 481, 15 So. 641.

Colorado.—Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736; Jackson *v.* Allen, 4 Colo. 263; Stuart *v.* Asher, (Colo. App. 1900) 62 Pac. 1051.

Illinois.— Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456; McGuire *v.* Muhlenbach, 65 Ill. App. 38.

Kansas.— Hegwer *v.* Kiff, 31 Kan. 440, 2 Pac. 553; Durham *v.* Carbon Coal, etc., Co., 22 Kan. 232; Hatch *v.* Smith, (Kan. App. 1897) 50 Pac. 952.

Louisiana.— Osborn *v.* Moore, 12 La. Ann. 714; Hall *v.* Hill, 6 La. Ann. 745.

Massachusetts.— Olivieri *v.* Atkinson, 168 Mass. 28, 46 N. E. 422; Livingston *v.* Hammond, 162 Mass. 375, 38 N. E. 968.

New York.— Lavelle *v.* Corrignio, 86 Hun (N. Y.) 135, 33 N. Y. Suppl. 376, 67 N. Y. St. 122.

North Carolina.— Worthy *v.* Shields, 90 N. C. 192.

Texas.— Thorn *v.* Frazer, 60 Tex. 259. But *compare* Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3919, 3965.

72. Miller *v.* Gibbons, 34 Ark. 212.

If the evidence on the part of defendant is uncontradicted and of such character as to relieve him from liability, and the finding of the trial court is against him and the appellate court cannot see upon what theory of the evidence the finding of the trial court is based, and there is nothing to cast suspicion upon the credit of defendant's witnesses, the judgment will be reversed. Efron *v.* Wagner Palace Car Co., 59 Mo. App. 641.

the rule that the evidence will not be weighed is applied even where the evidence be contained in depositions, affidavits, etc., though sometimes it is considered as applicable to a more restricted extent than where the evidence is given orally in court.[73] Where some of the evidence is oral before the court, the rule that the verdict upon conflicting evidence will not be disturbed obtains, though some of the evidence is in the shape of *ex parte* affidavits and depositions.[74]

73. *Arkansas.*— Gaty *v.* Holcomb, 44 Ark. 216, holding that, while findings based upon evidence in this shape are not as conclusive as a verdict or the findings of fact by a court, founded upon oral testimony, if there is a conflict in the testimony which does not clearly preponderate against the findings, they will not be disturbed.

California.— The appellate court will no doubt look a little more closely into the evidence when it consists entirely of depositions or affidavits or notes of former testimony, but it cannot be taken as settled that in such case the rule as to conflicting evidence does not apply. Knox *v.* Moses, 104 Cal. 502, 38 Pac. 318; Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208. But see Wilson *v.* Cross, 33 Cal. 60.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338; Cabinet Makers' Union *v.* Indianapolis, 145 Ind. 671, 44 N. E. 757.

Kansas.— Where a jury find in favor of a defendant, and judgment is rendered thereon, and the finding is based upon depositions of two witnesses, one swearing to statements which, if true, would be sufficient to justify a finding for the other party, and the other denying such testimony, the judgment will not be disturbed. Chase *v.* Bonham, 42 Kan. 472, 22 Pac. 575.

Michigan.— Sager *v.* Tupper, 42 Mich. 605, 4 N. W. 555.

Minnesota.— Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., (Minn. 1901) 84 N. W. 724, holding that the rule as to the extent of review is the same when the witnesses are heard by the court as when the decision is based upon evidence taken by a referee, and the court will not weigh the evidence in either case. See also, as to finding of referee, Dayton *v.* Buford, 18 Minn. 126; Humphrey *v.* Havens, 12 Minn. 298.

Missouri.— Carroll *v.* Frank, 38 Mo. App. 167, holding that the appellate court will not weigh conflicting evidence, even if it is wholly by deposition, when there is evidence rebutting that of the party having the burden of proof, and the judgment is against him.

Oregon.— Liebe *v.* Nicolai, 30 Oreg. 364, 48 Pac. 172, holding that under the statute providing that the court may make another reference, or find the facts and determine the law for itself upon setting aside a report of a referee in an action at law, the court's findings of fact are entitled to every presumption that would arise if such findings were made by the court on the original trial, though the findings are based on the evidence reported by the referee.

South Carolina.— Where the testimony is conflicting and the circuit judge has, upon weighing it, reached a conclusion which can be supported by the testimony, the appellate court will not interfere. Visanska *v.* Workingmen's Bldg., etc., Assoc., 41 S. C. 546, 19 S. E. 202; Gary *v.* Burnett, 16 S. C. 632.

Texas.— The verdict of a jury or judgment of a court is not conclusive on the question of the credibility of witnesses where their testimony is by depositions; but, notwithstanding this, the appellate court has to defer to the judgment of the lower court in weighing the evidence, and if the finding is not against the preponderance of the evidence on the main issues, it will not be disturbed, even though the appellate court might have arrived at a different conclusion upon an original examination of the evidence. Stephens *v.* Summerfield, 22 Tex. Civ. App. 182, 54 S. W. 1088; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71.

West Virginia.— Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288; Smith *v.* Yoke, 27 W. Va. 639.

Wisconsin.— Conger *v.* Dingman, 98 Wis. 417, 74 N. W. 125, where, on appeal from a judgment of the municipal court, the circuit court heard the cause upon the evidence which had been taken by a shorthand writer at the trial, and the rule was applied that the fact that different minds might arrive at opposite conclusions upon consideration of the evidence would furnish no ground for reversal.

See also *supra*, XVII, G, 4, f; and XVII, G, 4, g.

The reason of the rule that the appellate court will not examine the evidence, founded on the principle that the lower court has the advantage of observing the appearance and bearing of the witnesses, is not the only reason of the rule against weighing testimony on appeal, but the rule is also founded on an essential distinction between the trial and appellate courts, growing out of considerations of jurisdiction, the province of the trial court being to decide questions of fact and that of the appellate court to decide questions of law. Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208. See also Crabtree *v.* Scheelky, 119 N. C. 56, 25 S. E. 707; Trull *v.* Rice, 92 N. C. 572.

74. Meyerink *v.* Barton, (Cal. 1900) 62 Pac. 505; Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229.

Evidence of former trials.— Where the evidence given at former trials was read to the court who had heard a part of the testimony orally given at the former trials, such evidence is not documentary, so as to authorize a reëxamination of it on appeal. Olivieri *v.* Atkinson, 168 Mass. 28, 46 N. E. 422. See also Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208, where only a part of the evidence on a second trial consisted of the reading of testimony

c. **Credibility of Witnesses.** The appellate court will not pass upon the credibility of witnesses, and, where there is evidence tending to prove a material issue, a verdict or finding will not be disturbed upon the ground that the evidence was false and fabricated, or where it depends upon the determination of the credibility of the witnesses.[75]

d. Number of Witnesses. A verdict or finding will not be disturbed on appeal though the testimony of a majority of the witnesses is against it — at least, if the circumstances do not render improbable the truth of the supporting testimony.[76]

taken at the first trial, but several of the witnesses were examined orally before the court, including some whose testimony at the first trial was read.

75. *Alabama.*— Camody *v.* Portlock, (Ala. 1893) 12 So. 871.

Arkansas.—Winchester *v.* Bryant, 65 Ark. 116, 44 S. W. 1124; Wilcox *v.* Boothe, 19 Ark. 684.

California.— Tibbet *v.* Sue, 125 Cal. 544, 58 Pac. 160; Hite *v.* Hite, (Cal. 1898) 55 Pac. 900; Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780; Fox *v.* Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948; Perry *v.* Lynch, 10 Colo. App. 549, 52 Pac. 219; De Remer *v.* Walker, 10 Colo. App. 448, 51 Pac. 437.

Connecticut.— Bierce *v.* Sharon Electric Light Co., (Conn. 1900) 47 Atl. 324.

Florida.— Maxwell *v.* Agnew, 21 Fla. 154; Shaw *v.* Newman, 14 Fla. 128.

Illinois.— Highley *v.* American Exch. Nat. Bank, 86 Ill. App. 48 [*affirmed* in (Ill. 1900) 57 N. E. 436]; Cottew *v.* Betz, 72 Ill. App. 661.

Indiana.— Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439; Durflinger *v.* Baker, 149 Ind. 375, 49 N. E. 276; Riley *v.* Butler, 36 Ind. 51; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864.

Iowa.— Spielman *v.* Dorf, (Iowa 1900) 82 N. W. 489; Cottrell *v.* Southwick, 71 Iowa 50, 32 N. W. 22.

Kansas.— Ott *v.* Cunningham, (Kan. App. 1899) 58 Pac. 126.

Kentucky.— Louisville, etc., R. Co. *v.* Slack, 20 Ky. L. Rep. 1200, 49 S. W. 3; Pace *v.* Isaac, 20 Ky. L. Rep. 282, 45 S. W. 884; McNeeley *v.* Blair, 19 Ky. L. Rep. 1755, 44 S. W. 631.

Louisiana.— Brown *v.* Sadler, 21 La. Ann. 182; Howe *v.* Manning, 13 La. 412.

Maine.— Dunning *v.* Staples, 82 Me. 432, 19 Atl. 912.

Maryland.— Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

Michigan.— Hyler *v.* Nolan, 45 Mich. 357, 7 N. W. 910.

Minnesota.— Wilcox *v.* Arbuckle, 50 Minn. 523, 52 N. W. 926; Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215.

Mississippi.— Wilson *v.* Horne, 37 Miss. 477; Standley *v.* Miles, 36 Miss. 434; Holden *v.* Bloxum, 35 Miss. 381.

Missouri.— Cox *v.* Cox, 91 Mo. 71, 3 S. W. 585; Robinson *v.* Springfield, 85 Mo. App. 259; Temple *v.* St. Louis, etc., R. Co., 83 Mo. App. 64. Though all the testimony is in favor of an acknowledgment of a debt by a decedent, the supreme court will affirm a judgment based on a finding that the acknowledgment was not made where there are circumstances justifying the court below in discrediting the testimony. Schulenberg *v.* Cordell, 71 Mo. 414.

Montana.—Anderson *v.* Cook, (Mont. 1901) 64 Pac. 873.

Nebraska.— Bartlett *v.* Scott, 55 Nebr. 477, 75 N. W. 1102; Phœnix Ins. Co. *v.* Readinger, 28 Nebr. 587, 44 N. W. 864.

Nevada.— Roberts *v.* Webster, 25 Nev. 94, 57 Pac. 180; Crawford *v.* Crawford, 24 Nev. 410, 56 Pac. 94.

New York.— Day *v.* Carmichael, 47 N. Y. App. Div. 4, 62 N. Y. Suppl. 142; Klenke *v.* Standard Oil Co., 25 Misc. (N. Y.) 761, 54 N. Y. Suppl. 124; Krause *v.* Abeles, 21 Misc. (N. Y.) 446, 47 N. Y. Suppl. 591 [*affirming* 20 Misc. (N. Y.) 697, 46 N. Y. Suppl. 531]; Richards *v.* Schiff, 60 N. Y. Suppl. 193. But where the court can see that the verdict has been obtained by transparent perjury, it is held that it should not permit the verdict to stand. People *v.* Bean, 88 Hun (N. Y.) 520, 34 N. Y. Suppl. 973, 69 N. Y. St. 36.

Ohio.— Simon *v.* Mooney, 12 Ohio Cir. Dec. 73.

Pennsylvania.— Waters *v.* Burgess, (Pa. 1888) 14 Atl. 398; Fehl *v.* Good, 2 Binn. (Pa.) 495.

South Carolina.— Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Davis *v.* Fowler, 17 S. C. 590.

Texas.— Sartor *v.* Bolinger, 59 Tex. 411; Texas, etc., R. Co. *v.* Maddox, (Tex. Civ. App. 1901) 63 S. W. 134; Wright *v.* Solomon, (Tex. Civ. App. 1898) 46 S. W. 58.

Virginia.— Dudleys *v.* Dudleys, 3 Leigh (Va.) 436; Chaney *v.* Saunders, 3 Munf. (Va.) 51.

Wisconsin.— Conger *v.* Dingman, 98 Wis. 417, 74 N. W. 125; Shekey *v.* Eldredge, 71 Wis. 538, 37 N. W. 820.

Wyoming.—Wyman *v.* Quayle, (Wyo. 1901) 63 Pac. 988.

United States.— The George L. Garlick, 107 Fed. 542.

See 3 Cent. Dig. tit. "Appeal and Error," § 3901 *et seq.*

Opinion witness.— Bosqui *v.* Sutro R. Co., (Cal. 1901) 63 Pac. 682; West Chicago Park Com'rs *v.* Metropolitan West Side El. R. Co., 182 Ill. 246, 55 N. E. 344.

76. *Alabama.*— Holloway *v.* Harper, 108 Ala. 647, 18 So. 663.

California.— Gibson *v.* Sterling Furniture Co., 113 Cal. 1, 45 Pac. 5.

Colorado.— California Ins. Co. *v.* Gracey,

e. Amount of Recovery — (i) *In General.* A finding of value or the amount of recovery is, ordinarily, so much a matter within the exclusive province of the trier or triers of the facts that it will not be disturbed, when within any of the evidence adduced,[77] unless it is manifestly against the weight of the

15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376; Brunk *v.* Staats, 8 Colo. App. 70, 44 Pac. 770.

Connecticut.— Condon *v.* Pomeroy-Grace, (Conn. 1901) 48 Atl. 756.

Georgia.— Palmer Mfg. Co. *v.* Drewry, 113 Ga. 366, 38 S. E. 837.

Illinois.— Bishop *v.* Busse, 69 Ill. 403; North Chicago St. R. Co. *v.* Fitzgibbons, 79 Ill. App. 632; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499.

Indiana.— Leak *v.* Galloway, 12 Ind. App. 700, 40 N. E. 929; Ohio, etc., R. Co. *v.* Hawkins, 1 Ind. App. 213, 27 N. E. 331.

Iowa.— Gradert *v.* Chicago, etc., R. Co., 109 Iowa 547, 80 N. W. 559.

Kansas.— Atchison, etc., R. Co. *v.* Swarts, 58 Kan. 235, 48 Pac. 953.

Kentucky.— Gayheart *v.* Patton, 14 Ky. L. Rep. 570, 20 S. W. 912.

Nebraska.— Names *v.* Names, 48 Nebr. 701, 67 N. W. 751; Fremont, etc., R. Co. *v.* French, 48 Nebr. 638, 67 N. W. 472.

New York.— Govers *v.* Hofstatter, 41 N. Y. App. Div. 384, 58 N. Y. Suppl. 550; O'Donnell *v.* American Sugar Refining Co., 41 N. Y. App. Div. 307, 58 N. Y. Suppl. 640; Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112; Hynnes *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 705, 65 N. Y. Suppl. 495 [*affirming* 64 N. Y. Suppl. 382]; Wheeler *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 764, 66 N. Y. Suppl. 477.

North Dakota.— Taylor *v.* Jones, 3 N. D. 235, 55 N. W. 593.

South Dakota.— Grewing *v.* Minneapolis Threshing-Mach. Co., 12 S. D. 127, 80 N. W. 176.

See 3 Cent. Dig. tit. "Appeal and Error," § 3900.

Burden of proof.— But, notwithstanding this general rule, if testimony of the party on whom rests the general burden of proof is overwhelmingly outweighed as to the number of credible witnesses opposed to his testimony, a verdict may be set aside. Illinois Cent. R. Co. *v.* Alexander, 46 Ill. App. 505; Chicago West Division R. Co. *v.* Conley, 43 Ill. App. 347; Chicago, etc., R. Co. *v.* Gill, 37 Ill. App. 61; Vanson *v.* Metropolitan St. R. Co., 66 N. Y. Suppl. 677; Mead *v.* Conroe, 113 Pa. St. 220, 8 Atl. 374.

Interest of witnesses.— Where the verdict is opposed to the testimony of defendant and other disinterested witnesses who contradict the testimony of plaintiff, upon which alone the verdict rests, it will be set aside. Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Chicago, etc., R. Co. *v.* Means, 48 Ill. App. 396; Bryan *v.* Wilson, 5 N. Y. St. 58; Missouri Pac. R. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779. But, though only three witnesses beside plaintiff and his companion testified for him, and they, according to defendant's witnesses, made contrary statements shortly after the accident, all the eight witnesses for defendant being employes of it, the verdict will not be disturbed. Edgerley *v.* Long Island R. Co., 44 N. Y. App. Div. 476, 60 N. Y. Suppl. 1062, 46 N. Y. App. Div. 284, 61 N. Y. Suppl. 677.

77. *Arkansas.*— St. Louis, etc., R. Co. *v.* Spann, 57 Ark. 127, 20 S. W. 914.

California.—Roche *v.* Baldwin, (Cal. 1901) 65 Pac. 459; Aigeltinger *v.* Whelan, (Cal. 1901) 65 Pac. 125; Purser *v.* Baker, (Cal. 1900) 62 Pac. 190 — as to recovery for less than amount claimed.

Colorado.—Mackey *v.* Magnon, (Colo. 1900) 62 Pac. 945; Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73.

Georgia.— Macon *v.* Wing, (Ga. 1901) 38 S. E. 392.

Illinois.— Phillips *v.* Kerr, 26 Ill. 213, finding of court on assessment of damages after default.

Indiana.—Wilson *v.* Vance, 34 Ind. 440 (judgment of court where amount depends on calculation based upon uncertain data); Jennings *v.* Kee, 5 Ind. 257 (amount awarded by decree); Trammel *v.* Briant, (Ind. App. 1900) 58 N. E. 206; Bain *v.* Trixler, (Ind. App. 1900) 56 N. E. 690; Muncie Pulp Co. *v.* Martin, 23 Ind. App. 558, 55 N. E. 796.

Louisiana.— Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64; Ayer *v.* Illinois Cent. R. Co., 47 La. Ann. 144, 16 So. 732; Redwitz *v.* Waggaman, 33 La. Ann. 26.

Maryland.— Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389, 33 Am. Rep. 264.

Michigan.— Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

Missouri.— Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; Harrison Wire Co. *v.* Hall, etc., Hardware Co., 97 Mo. 289, 10 S. W. 619; Helmkampf *v.* Wood, 85 Mo. App. 227.

Montana.— Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

Nebraska.— Seymour *v.* Phillips, (Nebr. 1901) 85 N. W. 72; South Omaha Lumber Co. *v.* Central Invest. Co., 32 Nebr. 529, 49 N. W. 429.

New Hampshire.— Merrill *v.* Perkins, 61 N. H. 262.

New York.— Lyon *v.* Hersey, 100 N. Y. 641, 3 N. E. 797 (as to right of the court of appeals to weigh the evidence); Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525 [*affirming* 30 Misc. (N. Y.) 650, 64 N. Y. Suppl. 262]; Galway *v.* Metropolitan El. R. Co., 13 N. Y. Suppl. 47, 35 N. Y. St. 628, 13 L. R. A. 788.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

Oklahoma.—Higgins *v.* Butler, (Okla. 1900) 62 Pac. 810.

South Carolina.— Aultman *v.* Salinas, 44 S. C. 299, 22 S. E. 465 (computation by court

evidence.[78] The amount need not be that stated in the testimony of the various witnesses,[79] as where the verdict is for less than the damages testified to by the witnesses,[80] or where the amount found is between the estimates of witnesses.[81] But, if plaintiff is entitled to a recovery only of the particular amount, according to his own testimony, or defendant is entitled to recover another amount, according to his testimony, it has been held that a judgment for any other amount than one of these two is altogether unsupported by evidence.[82]

(II) *EXCESSIVENESS.* A verdict will not be disturbed as excessive unless it is so grossly disproportionate to the measure of damages or so palpably against the evidence as to shock the conscience and raise an irresistible inference that it was influenced by passion, prejudice, or corruption, and especially so after the trial court has refused to set it aside.[83]

on question of damages); Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Steele *v.* Charlotte, etc., R. Co., 11 S. C. 589.

Tennessee.— Callender *v.* Turpin, (Tenn. Ch. 1901) 61 S. W. 1057.

Texas.— Fowler *v.* Burdett, 20 Tex. 34, (holding, upon a verdict which did not allow a set-off, that the evidence concerning the items set off was not of that forcible and pertinent character as to constrain the court to conclude that the jury did wrong in disregarding it); Gulf, etc., R. Co. *v.* Porter, (Tex. Civ. App. 1901) 61 S. W. 343 (recovery of less than sued for and less than that which would have been justified by the evidence); Texas Cent. R. Co. *v.* Fisher, 18 Tex. Civ. App. 78, 43 S. W. 584.

United States.— St. Louis, etc., R. Co. *v.* Spencer, 71 Fed. 93, 36 U. S. App. 229, 18 C. C. A. 114.

Finding of referee, auditor, etc.— Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358; Hamilton *v.* Doherty, 83 Md. 648, 34 Atl. 1132; Collier *v.* Rutledge, 136 N. Y. 621, 32 N. E. 626, 49 N. Y. St. 75; Platt *v.* Thorn, 8 Bosw. (N. Y.) 574; McHugh *v.* New York El. R. Co., 19 N. Y. Suppl. 744, 47 N. Y. St. 73; Morrisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754 (finding not reviewable); Wellborn *v.* Simonton, 88 N. C. 266.

78. Boyce *v.* Tallerman, 83 Ill. App. 575 [*affirmed* in 183 Ill. 115, 55 N. E. 703].

79. In condemnation proceedings, where the evidence showed the value of the whole property to be three thousand dollars, a verdict awarding more than one-third of the value for the taking of one-third is not so manifestly erroneous as to justify a reversal. New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586.

80. Macon *v.* Wing, (Ga. 1901) 38 S. E. 392. The fact that a referee awarded a less amount of damage than that fixed by the evidence offered by plaintiff will not warrant the court of appeals in drawing the inference that the evidence was wholly disregarded, but only that the referee may have considered it exaggerated. Collier *v.* Rutledge, 136 N. Y. 621, 32 N. E. 626, 49 N. Y. St. 75.

81. Chicago Sanitary Dist. *v.* Adam, 179 Ill. 406, 53 N. E. 743; Simmons *v.* Faulds, 20 Ky. L. Rep. 396, 46 S. W. 509; Maysville, etc., R. Co. *v.* Trustees Dover Christian Church, 18 Ky. L. Rep. 1111, 39 S. W. 35; Adams *v.* Cohn, (Tex. Civ. App. 1894) 28 S. W. 909; Davies *v.* Jeffris, 108 Wis. 244, 84 N. W. 153; Midlothian Iron Min. Co. *v.* Belknap, 108 Wis. 198, 84 N. W. 169.

82. King *v.* C. C. Bendell Commission Co., 7 Colo. App. 507, 44 Pac. 377, wherein it was said that if the judgment had been either for the amount to which plaintiff's testimony showed him to be entitled, or for the amount which defendant's testimony showed that defendant was entitled, the court could not reverse upon the ground that there was no evidence to sustain the finding. See also Kremer *v.* Murphy, 20 Ky. L. Rep. 548, 47 S. W. 230.

83. *Arkansas.*— Ayliff *v.* Hardy, 25 Ark. 49.

California.— Mize *v.* Hearst, 130 Cal. 630, 63 Pac. 30; Roche *v.* Redington, 125 Cal. 174, 57 Pac. 890.

Connecticut.— Rogers *v.* Fitzgerald, 72 Conn. 731, 43 Atl. 551.

District of Columbia.— Woodbury *v.* District of Columbia, 5 Mackey (D. C.) 127.

Idaho.— Horn *v.* Boise City Canal Co., (Ida. 1901) 65 Pac. 145.

Illinois.— Chicago, etc., R. Co. *v.* McKitrick, 78 Ill. 619; West Chicago St. R. Co. *v.* Shiplett, 85 Ill. App. 683; Doyle *v.* People, 68 Ill. App. 318.

Indiana.—Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Mt. Vernon *v.* Hoehn, (Ind. App. 1899) 53 N. E. 654; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864.

Iowa.— Riley *v.* Chicago, etc., R. Co., 104 Iowa 235, 73 N. W. 488.

Kansas.— Western Union Tel. Co. *v.* McCall, (Kan. App. 1899) 58 Pac. 797.

Kentucky.— Illinois Cent. R. Co. *v.* Stewart, (Ky. 1901) 63 S. W. 596; Louisville, etc., R. Co. *v.* Donaldson, 19 Ky. L. Rep. 1384, 43 S. W. 439; Louisville, etc., R. Co. *v.* Cox, 18 Ky. L. Rep. 1016, 38 S. W. 1042.

Maine.—Donnelly *v.* Booth Bros., etc., Granite Co., 90 Me. 110, 37 Atl. 874.

Michigan.— Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094.

Minnesota.— Koch *v.* St. Paul City R. Co., 45 Minn. 407, 48 N. W. 191.

Mississippi.— Mississippi Cent. R. Co. *v.* Caruth, 51 Miss. 77; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.— Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; Unterberger *v.* Scharff,

(III) *Remittitur.* Plaintiff may enter a *remittitur* as to a part of his recovery in the lower court, and, if there is evidence to sustain the balance of his recovery and that balance is approved by the trial court, a judgment for such balance will not be disturbed,[84] unless it is apparent to the appellate court, from the flagrant excessiveness of the verdict, that the jury were influenced by prejudice or passion, in which event a *remittitur* will not remove the taint of the

51 Mo. App. 102. In order that the court may say that the amount of the verdict indicates prejudice or passion on the part of the jury, the verdict must have been without the limit and beyond the range of the testimony. Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119.

New Jersey.—Merritt *v.* Harper, 44 N. J. L. 73; Ellsworth *v.* Central R. Co., 34 N. J. L. 93.

New York.— Braun *v.* Webb, 32 Misc. (N. Y.) 243, 65 N. Y. Suppl. 668 [*affirming* 31 Misc. (N. Y.) 794, 62 N. Y. Suppl. 1037]; Leber *v.* Campbell Stores, 31 Misc. (N. Y.) 474, 64 N. Y. Suppl. 464 [*affirming* 62 N. Y. Suppl. 1124]; Timpone *v.* Dry Dock, etc., R. Co., 27 Misc. (N. Y.) 826, 57 N. Y. Suppl. 827.

North Carolina.— The appellate court will not set aside a verdict because excessive or inadequate: that power rests in the discretion of the trial court. Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; Clark's Code Civ. Proc. N. C. (1900), pp. 736, 737, and cases there cited.

Oregon.—Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Pennsylvania.— McIntire *v.* Stringer, 3 Phila. (Pa.) 302, 17 Leg. Int. (Pa.) 379; Zimett *v.* Hollenback, 9 Kulp (Pa.) 564.

Rhode Island.— McDonald *v.* Postal Tel. Co., (R. I. 1900) 46 Atl. 407.

South Carolina.— Mayson *v.* Sheppard, 12 Rich. (S. C.) 254.

Tennessee.— Tennessee Coal, etc., Co. *v.* Roddy, 85 Tenn. 400, 5 S. W. 286 (notwithstanding the trial court stated that the verdict was excessive, but refused to set it aside); Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148.

Texas.— Sanders *v.* Hall, 22 Tex. Civ. App. 282, 55 S. W. 594.

Utah.— Budd *v.* Salt Lake City R. Co., (Utah 1901) 65 Pac. 486; Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737; Murray *v.* Salt Lake City R. Co., 16 Utah 356, 52 Pac. 596.

Virginia.— Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996; Bailey *v.* McCance, (Va. 1899) 32 S. E. 43; Barbour *v.* Melendy, 88 Va. 595, 14 S. E. 326.

Washington.— Washington *v.* Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

West Virginia.—Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

Wisconsin.— Dugan *v.* Chicago, etc., R. Co., 85 Wis. 609, 55 N. W. 894; Mechelke *v.* Bramer, 59 Wis. 57, 17 N. W. 682.

United States.— Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

Not reviewable.— On error from the supreme court of the United States, whether the order overruling the motion for a new trial, based upon the ground that the damages were excessive, was erroneous or not, it cannot be reviewed, as the power of that court is restricted to the determination of questions of law arising upon the record. Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 2 S. Ct. 932, 27 L. ed. 605. See also Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

Items allowed without evidence.— So, the fact that an item of expense of sickness is allowed, without evidence to sustain it, does not show the whole verdict to be influenced by prejudice. Ellsworth *v.* Fletcher, (Kan. 1898) 51 Pac. 904.

Appeal from order setting aside verdict.— But when the appellate court is asked to review the act of the trial court where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, every intendment is indulged in the appellate court in support of the action of the court below. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019.

84. Royal Ins. Co. *v.* Crowell, 77 Ill. App. 544; McGowan *v.* Giveen Mfg. Co., 54 N. Y. App. Div. 233, 66 N. Y. Suppl. 708. It is upon the ground that, as the trial court is in a better position to judge as to the propriety of the amount to be deducted from a verdict than the court of review, the latter will not disturb a verdict for excessiveness. McNulta *v.* Hendele, 92 Ill. App. 273.

85. Lœwenthal *v.* Streng, 90 Ill. 74; Chicago, etc., R. Co. *v.* Cummings, 20 Ill. App. 333; Steinbuchel *v.* Wright, 43 Kan. 307, 23 Pac. 560; Unterberger *v.* Scharff, 51 Mo. App. 102.

Excessiveness alone does not show prejudice, and the mere fact that a *remittitur* is required is not of itself sufficient to fix such objection upon the final judgment so as to require the case to be submitted to another jury. McNulta *v.* Hendele, 92 Ill. App. 273; Conrad Seipp Brewing Co. *v.* Doody, 25 Ill. App. 305; Galveston, etc., R. Co. *v.* Hynes, 21 Tex. Civ. App. 34, 50 S. W. 624, holding that the rule, that a verdict will not be disturbed for excessiveness unless it is the result of passion or prejudice, is not abrogated by a statute giving authority to the courts of appeals in Texas to suggest a *remittitur* and to affirm a judgment for the balance.

Excessive after remittitur.— If, after the *remittitur*, the verdict is grossly excessive, it will be set aside. Cartwright *v.* Elliott, 45 Ill. App. 458.

Second trial.— Where the general term of the supreme court of New York reduced a verdict, and ordered the original verdict to be set aside unless plaintiff should stipulate to

vice,[85] or unless the verdict is clearly and palpably wrong, as when entirely without evidence.[86]

(iv) *Gross Inadequacy.* But if the finding is for such an inadequate amount as to evince perversity or a gross misconception of the evidence,[87] or, as sometimes held, if the amount of the verdict is below the pecuniary loss established and is thus, manifestly and without reason, not in accordance with the evidence,[88] or violates the measure of damages given by law, the judgment will be reversed.[89] But the appellate court will not interfere with a substantial award of damages, especially in those cases in which the damages admit of no other test than the intelligence of the jury in view of the facts, unless its inadequacy be such as to shock the conscience and to clearly show that the jury were influenced by passion or prejudice, or proceeded upon an erroneous basis in arriving at their conclusion.[90]

H. Harmless Error — 1. Effect. A judgment will not be reversed for error which resulted in no prejudice to the party seeking to take advantage of it.[91]

take judgment for the reduced amount, it was held that, where defendant did not accept the suggestion of the court and there was a retrial, the action of the court in ordering the *remittitur* in the first appeal would not control as to the amount of the verdict on the appeal from the verdict in the second trial. Holmes *v.* Jones, 69 Hun (N. Y.) 346, 23 N. Y. Suppl. 631, 52 N. Y. St. 709. See also Patten *v.* Chicago, etc., R. Co., 36 Wis. 413.

86. Stocke *v.* Albert, 8 Mo. App. 577.

87. Gottfried Brewing Co. *v.* Szarkowski, 79 Ill. App. 583 (where it was held that a verdict for only one cent, in a case in which plaintiff was entitled to a substantial amount if he was entitled to anything, would be set aside); Watson *v.* Harmon, 85 Mo. 443. See also Morris *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 512, 64 N. Y. Suppl. 878, 30 N. Y. Civ. Proc. 371.

88. Spirk *v.* Chicago, etc., R. Co., 57 Nebr. 565, 78 N. W. 272.

89. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

90. McGowan *v.* Interstate Consol. St. R. Co., 20 R. I. 264, 38 Atl. 497. Where there was evidence that plaintiff's injuries were confined to a slight bruise, a verdict for one dollar, approved by the trial court, will not be set aside as the result of passion, prejudice, or mistake. Weinberg *v.* Metropolitan St. R. Co., 139 Mo. 286, 40 S. W. 882. See also McCormick *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1901) 61 S. W. 983.

91. *Alabama.*— Brock *v.* Forbes, 126 Ala. 319, 28 So. 590; Savage *v.* Atkins, 124 Ala. 378, 27 So. 514.

Arizona.— Pringle *v.* Hall, (Ariz. 1899) 56 Pac. 740.

Arkansas.— Murrell *v.* Pacific Express Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; Cole *v.* White County, 32 Ark. 45.

California.— Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113; Procter *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306.

Colorado.— Brown Hotel Co. *v.* Burckhardt, 13 Colo. App. 59, 56 Pac. 188; Davis *v.* Peck, 12 Colo. App. 259, 55 Pac. 192.

Connecticut.— Fish *v.* Smith, (Conn. 1900) 47 Atl. 711; Sullivan *v.* New York, etc., R. Co., (Conn. 1900) 47 Atl. 131.

District of Columbia.—Burke *v.* Claughton, 12 App. Cas. (D. C.) 182; Connor *v.* Meany, 8 App. Cas. (D. C.) 1.

Florida.— Livingston *v.* L'Engle, 27 Fla. 502, 8 So. 728; Mitchell *v.* Chaires, 2 Fla. 18.

Georgia.— Hartley *v.* McGee, 111 Ga. 882, 36 S. E. 926; Hunnicutt *v.* Chambers, 111 Ga. 566, 36 S. E. 853.

Idaho.— Smith *v.* Ellis, (Ida. 1900) 61 Pac. 695; Ollis *v.* Orr, (Ida. 1899) 56 Pac. 162.

Illinois.— Berkenfield *v.* People, 92 Ill. App. 400; Robertson *v.* Moir, 88 Ill. App. 355.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Lynch *v.* Leurs, 30 Ind. 411.

Indian Territory.— Davis *v.* Pryor, (Indian Terr. 1900) 58 S. W. 660; Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137.

Iowa.— Millard *v.* Webster City, (Iowa 1901) 84 N. W. 1044; German Sav. Bank *v.* Armour Packing Co., (Iowa 1898) 75 N. W. 503.

Kansas.— Brentnall *v.* Marshall, (Kan. App. 1900) 63 Pac. 93; Pittsburg *v.* Broderson, (Kan. App. 1900) 62 Pac. 5.

Kentucky.— Goodin *v.* Fuson, (Ky. 1900) 60 S. W. 293; Louisville *v.* Muldoon, 20 Ky. L. Rep. 1576, 49 S. W. 791.

Louisiana.— Regan *v.* Adams Express Co., 49 La. Ann. 1579, 22 So. 825; Creevy *v.* Cummings, 3 La. Ann. 163, 48 Am. Dec. 444.

Maine.— Look *v.* Norton, 94 Me. 547, 48 Atl. 117; Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Maryland.— Baltimore City Pass. R. Co. *v.* Coony, 87 Md. 261, 39 Atl. 859; Roloson *v.* Carson, 8 Md. 208.

Massachusetts.— Shattuck *v.* Eldredge, 173 Mass. 165, 53 N. E. 377; Kimball *v.* Hildreth, 8 Allen (Mass.) 167.

Michigan.— Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308; Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272.

Minnesota.— Anderson *v.* Burlington, etc., R. Co., (Minn. 1901) 84 N. W. 1021; Rosted *v.* Great Northern R. Co., 76 Minn. 123, 78 N. W. 971.

Mississippi.— Torre *v.* Jeanin, 76 Miss. 898, 25 So. 860; A. B. Smith Co. *v.* Jones, 75 Miss. 325, 22 So. 802.

The existence of non-prejudicial error in a case affords no ground for disturbing the judgment. There must be the element of prejudice. Errors discovered go for naught unless coupled with prejudice inseparably connected with it.[92]

2. Classes of Harmless Error — a. Errors Favorable to Party Complaining. One of the most frequent illustrations of errors for which a reversal will not be granted are errors which are favorable to the party complaining.[93] It is an invari-

Missouri.—State *v.* Elliot, 82 Mo. App. 458; Tyler *v.* Tyler, 78 Mo. App. 240.

Montana.— Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462, 56 Pac. 1079; White Sulphur Springs *v.* Pierce, 21 Mont. 130, 53 Pac. 103.

Nebraska.— Buck *v.* Stuben, (Nebr. 1900) 84 N. W. 595; Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81.

New Hampshire.— State *v.* Saidell, (N. H. 1900) 46 Atl. 1083; Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188.

New Jersey.—Vliet *v.* Simanton, 63 N. J. L. 458, 43 Atl. 738; Enstice *v.* Courtright, 61 N. J. L. 653, 40 Atl. 676.

New Mexico.— Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748; Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336.

New York.— Oneida Nat. Bank *v.* Stokes, 58 Barb. (N. Y.) 508; Newhall *v.* Appleton, 61 N. Y. Super. Ct. 251, 19 N. Y. Suppl. 701, 47 N. Y. St. 299.

North Carolina.—State *v.* Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14; Kerner *v.* Boston Cottage Co., 126 N. C. 356, 35 S. E. 590.

North Dakota.—Merchant *v.* Pielke, (N. D. 1900) 84 N. W. 574; Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Ohio.— Bear *v.* Knowles, 36 Ohio St. 43; Schaal *v.* Heck, 17 Ohio Cir. Ct. 38, 8 Ohio Cir. Dec. 596.

Oklahoma.— Pinson *v.* Prentise, 8 Okla. 143, 56 Pac. 1049; Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92.

Oregon.—Kimball *v.* Redfield, 33 Oreg. 292, 54 Pac. 216; Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

Pennsylvania.— Boynton *v.* Urian, 55 Pa. St. 142; Keystone Cycle Co. *v.* Jones, 12 Pa. Super. Ct. 134.

Rhode Island.—Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643; Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67.

South Carolina.— Allen *v.* Petty, 58 S. C. 240, 36 S. E. 586; McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

South Dakota.— Elkton First State Bank *v.* O'Leary, 13 S. D. 204, 83 N. W. 45; Taylor *v.* Neys, 11 S. D. 605, 79 N. W. 998.

Tennessee.— Endowment Rank, K. of P., *v.* Allen, 104 Tenn. 623, 58 S. W. 241; Leiper *v.* Earthman, (Tenn. Ch. 1897) 46 S. W. 321.

Texas.— San Antonio, etc., R. Co. *v.* Manning, 20 Tex. Civ. App. 504, 50 S. W. 177; San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147.

Utah.— Marks *v.* Taylor, (Utah 1901) 63 Pac. 897; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57; Randolph *v.* Woodstock, 35 Vt. 291.

Virginia.— McCoy *v.* Norfolk, etc., R. Co., (Va. 1901) 37 S. E. 788; Tate *v.* New York State Bank, 96 Va. 765, 32 S. E. 476.

Washington.— Robertson *v.* King County, 20 Wash. 259, 55 Pac. 52; Newberg *v.* Farmer, 1 Wash. Terr. 182.

West Virginia.— Fant *v.* Lamon, 27 W. Va. 229; Clark *v.* Johnston, 15 W. Va. 804.

Wisconsin.—State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942; Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870.

Wyoming.—Gramm *v.* Sterling, 8 Wyo. 527, 59 Pac. 156; Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

United States.— Rice *v.* Edwards, 131 U. S. clxxv, appendix, 25 L. ed. 976; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

See 3 Cent. Dig. tit. "Appeal and Error," § 4029 *et seq.*

92. Bindbeutal *v.* Street R. Co., 43 Mo. App. 463.

93. *Alabama.*— Bailey *v.* Selden, 124 Ala. 403, 26 So. 909; Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10.

Arkansas.— Riggin *v.* Southern Bldg., etc., Assoc., (Ark. 1899) 49 S. W. 1079; Tiner *v.* Christian, 27 Ark. 306.

California.— Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 1091; Anglo-Nevada Assur. Corp. *v.* Ross, 123 Cal. 520, 56 Pac. 335.

Colorado.— People *v.* Clough, (Colo. App. 1901) 63 Pac. 1066; Filley *v.* Montelius Piano Co., (Colo. App. 1900) 61 Pac. 483.

Connecticut.— Smith *v.* Lyon, 44 Conn. 175.

Delaware.— Wright *v.* Cannon, 3 Harr. (Del.) 487.

Georgia.— Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911; McCook *v.* Harp, 81 Ga. 229, 7 S. E. 174.

Idaho.— Knollin *v.* Jones, (Ida. 1900) 63 Pac. 638.

Illinois.— Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529; Glucose Sugar Refining Co. *v.* Finn, 184 Ill. 123, 56 N. E. 400.

Indiana.— Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Harris *v.* Pierce, 6 Ind. 162.

Indian Territory.— Shapard Grocery Co. *v.* Hynes, (Indian Terr. 1899) 53 S. W. 486.

Iowa.— Dashiel *v.* Harshman, (Iowa 1901) 85 N. W. 85; Lull *v.* Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784.

Kansas.— Starr *v.* Hinshaw, 23 Kan. 532.

Kentucky.— Trabue *v.* McKettrick, 4 Bibb (Ky.) 180; Kenton Ins. Co. *v.* Osborne, 21 Ky. L. Rep. 330, 51 S. W. 306.

Louisiana.—Kennedy *v.* Watson, 6 La. Ann. 807.

able rule that if a judgment is more favorable to the party complaining than he is entitled to, he cannot take advantage of it, because he is not injured by it.[94] It is not to be understood, however, that a party cannot complain merely because a judgment is rendered in his favor. There is a wide difference between a judgment in favor of a party and error in his favor. A man may be prejudiced by a judgment in his favor where it is not for the thing he asks or is for less than he asks.[95]

b. Errors Against Party Not Entitled to Succeed. So, there can be no reversal for errors committed against one who, it is apparent, is not entitled to succeed in his action or defense in any event.[96] Thus, errors in rulings against plaintiff will

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362; Rice *v.* Wallace, 30 Me. 252.

Maryland.— Smith *v.* Smith, 7 Md. 55; Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

Massachusetts.— Shepard *v.* Lawrence, 141 Mass. 479, 5 N. E. 854; Bishop *v.* Fahay, 15 Gray (Mass.) 61.

Michigan.— Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292; Sheehan *v.* Dalrymple, 19 Mich. 239.

Minnesota.— Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207; Huntsman *v.* Hendricks, 44 Minn. 423, 46 N. W. 910.

Mississippi.— Kansas City, etc., R. Co. *v.* Doggett, 67 Miss. 250, 7 So. 278; McNulty *v.* Lewis, 8 Sm. & M. (Miss.) 520.

Missouri.— Lebanon Light, etc., Co. *v.* Lebanon, (Mo. 1901) 63 S. W. 809; Bramell *v.* Adams, 146 Mo. 70, 47 S. W. 931.

Montana.— White Sulphur Springs *v.* Pierce, 21 Mont. 130, 53 Pac. 103.

Nebraska.— Davidson *v.* Gretna State Bank, 59 Nebr. 63, 80 N. W. 256; Blue Valley Lumber Co. *v.* Neuman, 58 Nebr. 80, 78 N. W. 374.

Nevada.— Smith *v.* Logan, 18 Nev. 149, 1 Pac. 678.

New Hampshire.— Mandigo *v.* Healey, 69 N. H. 94, 45 Atl. 318; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

New Jersey.— Willis *v.* Fernald, 33 N. J. L. 206; Rogers *v.* Colt, 21 N. J. L. 704.

New Mexico.— Orange County Fruit Exch. *v.* Hubbell, (N. M. 1900) 61 Pac. 121.

New York.— Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. 995; Desmond *v.* Crane, 39 N. Y. App. Div. 190, 57 N. Y. Suppl. 266.

North Carolina.— Cowles *v.* Hall, 90 N. C. 330; Hughes *v.* Debnam, 53 N. C. 127.

Ohio.— Ohio L. Ins., etc., Co. *v.* Goodin, 10 Ohio St. 557; Sterret *v.* Creed, 2 Ohio 343.

Oklahoma.— Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92.

Oregon.— MacMahon *v.* Duffy, 36 Oreg. 150, 59 Pac. 184; State *v.* Kraft, 18 Oreg. 550, 23 Pac. 663.

Pennsylvania.— Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948; Buchert *v.* Boyertown, (Pa. 1889) 17 Atl. 190.

Rhode Island.— Nelson *v.* Breman, (R. I. 1900) 47 Atl. 696.

South Carolina.— Sims *v.* Southern R. Co., 59 S. C. 246, 37 S. E. 836; Knobelock *v.* Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962.

South Dakota.— Bennett *v.* Darling, (S. D. 1901) 86 N. W. 751; Rudolph *v.* Hewitt, 11 S. D. 646, 80 N. W. 133.

Tennessee.— Harvey *v.* Consumers Ice Co., 104 Tenn. 583, 58 S. W. 316; Bradshaw *v.* Jones, 103 Tenn. 331 52 S. W. 1072, 76 Am. St. Rep. 655.

Texas.— Clemons *v.* Clemons, 92 Tex. 66, 45 S. W. 996; Warren *v.* Smith, 24 Tex. 484, 76 Am. Dec. 115.

Utah.— Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730.

Vermont.— Wait *v.* Bennington, etc., R. Co., 61 Vt. 268, 17 Atl. 284.

Virginia.— Martin *v.* Stover, 2 Call (Va.) 514; Hammitt *v.* Bullett, 1 Call (Va.) 567.

Washington.— Jose *v.* Stetson, 20 Wash. 648, 56 Pac. 397; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 231, 55 Pac. 630.

West Virginia.— Roberts *v.* Bettman, 45 W. Va. 143, 30 S. E. 95; Workman *v.* Doran, 34 W. Va. 604, 12 S. E. 770.

Wisconsin.— Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171.

Wyoming.—Gramm *v.* Sterling, 8 Wyo. 527, 59 Pac. 156; Johnson *v.* Golden, 6 Wyo. 537, 48 Pac. 196.

United States.— Bethell *v.* Mathews, 13 Wall. (U. S.) 1, 20 L. ed. 556.

England.— Gamon *v.* Jones, 4 T. R. 509.

See 3 Cent. Dig. tit. "Appeal and Error," § 4052 *et seq.*

94. Gamon *v.* Jones, 4 T. R. 509.

95. Sterret *v.* Creed, 2 Ohio 343. See also Cross *v.* U. S., 1 Gall. (U. S.) 26, 6 Fed. Cas. No. 3,434.

96. *Alabama.*— Rakes *v.* Pope, 7 Ala. 161; McKenzie *v.* Jackson, 4 Ala. 230.

California.— McCreery *v.* Wells, 94 Cal. 485, 29 Pac. 877.

Colorado.— Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749.

Florida.— Mitchell *v.* Chaires, 2 Fla. 18.

Georgia.— Nunnally *v.* Owens, 90 Ga. 220, 15 S. E. 765; Doe *v.* Roe, 20 Ga. 190.

Illinois.— Blanchard *v.* Lake Shore, etc., R. Co., 27 Ill. App. 22.

Indiana.— Ice *v.* Ball, 102 Ind. 42, 1 N. E. 66.

Iowa.— Wetmore *v.* Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465.

Maryland.— Roloson *v.* Carson, 8 Md. 208.

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray (Mass.) 92.

Michigan.— Barnum *v.* Stone, 27 Mich. 332.

Minnesota.— Dorr *v.* Mickley, 16 Minn. 20.

Mississippi.— Houston *v.* Smythe, 66 Miss. 118, 5 So. 520.

not be ground for reversal where the complaint states no cause of action.[97] So, rulings erroneous in respect to defendant will not operate to reverse where the evidence is such as to justify the court in directing a verdict for plaintiff.[98]

c. Other Errors. Other errors, considered harmless and which are closely allied to, if not practically the same as, those mentioned in the preceding paragraph, are technical or formal errors,[99] or errors which, on a consideration of the whole record, are shown not to have affected the judgment.[1]

3. Presumption in Respect of Error — a. View That Error Shown by Record Presumed Prejudicial. It is, of course, elementary law that the record itself must show error before there can be a reversal of a judgment or decree. There is no other method by which error can be shown.[2] The next question which arises is, how is the reviewing court to determine whether error shown by the record is harmless or prejudicial? The decisions are, at least apparently, very conflicting, but it is possible that the statements therein, when applied to the particular facts of the cases, may be harmonized. There are two rules promulgated by the decisions, and they seem to be radically opposed to each other. Thus, one line of decisions holds that, if there is error apparent on the face of the record, a presumption of prejudice arises which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial.[3] As was said in one of

Nebraska.— St. John *v.* Swanback, 39 Nebr. 841, 58 N. W. 288.

New Jersey.— Den *v.* Tunis, 25 N. J. L. 633.

North Carolina.—Lindsey *v.* Asheville First Nat. Bank, 115 N. C. 553, 20 S. E. 621.

Texas.— Ellis *v.* Mills, 28 Tex. 584; Bohanan *v.* Hans, 26 Tex. 445.

Virginia.— Boyce *v.* McCaw, 76 Va. 740.

West Virginia.— Mitchell *v.* Chancellor, 14 W. Va. 22.

United States.— U. S. *v.* Carlton, 1 Gall. (U. S.) 400, 25 Fed. Cas. No. 14,725.

See 3 Cent. Dig. tit. "Appeal and Error," § 4035.

97. Campbell *v.* Lunsford, 83 Ala. 512, 3 So. 522; Gilbert *v.* Allen, 57 Ind. 524; Gernau *v.* Oceanic Steam Nav. Co., 23 N. Y. Suppl. 1143, 54 N. Y. St. 936.

98. Cowen *v.* Eartherly Hardware Co., 95 Ala. 324, 11 So. 195; Pritchett *v.* Pollock, 82 Ala. 169, 2 So. 735; Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274; Watson *v.* Higgins, 7 Ark. 475; Rosenfield *v.* Goldsmith, 11 Ky. L. Rep. 662, 12 S. W. 928, 13 S. W. 3.

99. *Alabama.*— Phillips *v.* Jordon, 3 Stew. (Ala.) 38.

California.— Van Schmidt *v.* Huntington, 1 Cal. 55.

Georgia.— Laing *v.* Americus, 86 Ga. 756, 13 S. E. 107; Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198.

Illinois.— Richardson *v.* Mills, 66 Ill. 525.

Michigan.— Osten *v.* Jerome, 93 Mich. 196, 53 N. W. 7.

Virginia.— Goode *v.* Love, 4 Leigh (Va.) 635.

See 3 Cent. Dig. tit. "Appeal and Error," § 4063 *et seq.*

1. *Arkansas.*— Payne *v.* Brouton, 10 Ark. 53.

Connecticut.— Brown *v.* Keach, 24 Conn. 73.

Georgia.— Western, etc., R. Co. *v.* Lewis, 84 Ga. 211, 10 S. E. 736.

Louisiana.— Hood *v.* Knox, 8 La. Ann. 73.

Maryland.— Coale *v.* Harrington, 7 Harr. & J. (Md.) 147.

Massachusetts.— Kimball *v.* Hildreth, 8 Allen (Mass.) 167.

Pennsylvania.— Hopper *v.* Hopper, 146 Pa. St. 365, 23 Atl. 321.

Washington.— Delamater *v.* Smith, 14 Wash. 261, 44 Pac. 266.

West Virginia.— Huntington Bank *v.* Napier, 41 W. Va. 481, 23 S. E. 800.

Wisconsin.— Mather *v.* Hutchinson, 25 Wis. 27.

United States.— McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

See 3 Cent. Dig. tit. "Appeal and Error," § 4034.

2. Houghton *v.* Clarke, 80 Cal. 417, 22 Pac. 288; Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61; Cline *v.* Lindsey, 110 Ind. 337, 11 N. E. 441. See also Jackson *v.* Clopton, 66 Ala. 29.

3. *Alabama.*— Talladega First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80; David *v.* David, 66 Ala. 139.

California.— Taggart *v.* Bosch, (Cal. 1897) 48 Pac. 1092; Cleary *v.* City R. Co., 76 Cal. 240, 18 Pac. 269.

Colorado.— Smuggler Union Min. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; Florence Oil, etc., Co. *v.* Huff, (Colo. App. 1900) 59 Pac. 624.

Florida.— Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822.

Idaho.— Holt *v.* Spokane, etc., R. Co., (Ida. 1893) 35 Pac. 39.

Illinois.— Crist *v.* Wray, 76 Ill. 204; Tipton *v.* Schuler, 87 Ill. App. 517.

Indiana.— Houk *v.* Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; Kepler *v.* Conkling, 89 Ind. 392.

Iowa.— Loughran *v.* Des Moines St. R. Co., 107 Iowa 639, 78 N. W. 675; Podhaisky *v.* Cedar Rapids, 106 Iowa 543, 76 N. W. 847.

Kansas.— Shed *v.* Augustine, 14 Kan. 282; Union Pac. R. Co. *v.* Mills, 5 Kan. App. 478, 47 Pac. 623.

these decisions: "Error and prejudice go hand in hand, until the latter, which is the creature of presumption, is met and neutralized by something in the record. It follows, therefore, that the interference of the appellate court with the judgment of the lower court can be successfully invoked by showing an error in the record, for when the error is shown the law supplies and attaches the consequence of prejudice." The judgment will necessarily be reversed unless appellee (defendant in error) shows from the record that which clearly rebuts the presumption of prejudice.[4]

b. View That Record Must Show Prejudice as Well as Error. On the other hand, the rule announced by a large number of decisions is, that the record must not only show error, but also that the party complaining was prejudiced thereby.[5]

I. Waiver of Error in Appellate Court[6]— **1. Express Waiver.** An assign-

Kentucky.— Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89; Kentucky Cent. R. Co. *v.* Fox, 10 Ky. L. Rep. 399. See also Daniel *v.* Nelson, 10 B. Mon. (Ky.) 316.

Massachusetts.— See Thompson *v.* Lothrop, 21 Pick. (Mass.) 336.

Minnesota.— See Pinney *v.* First Div. St. Paul, etc., R. Co., 19 Minn. 251; Lowry *v.* Harris, 12 Minn. 255.

Mississippi.— Solomon *v.* City Compress Co., 69 Miss. 319, 10 So. 446, 12 So. 339; Jackson *v.* Jackson, 28 Miss. 674, 64 Am. Dec. 114.

Missouri.— State *v.* Waters, 144 Mo. 341, 46 S. W. 173; Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942.

Montana.— Parrin *v.* Montana Cent. R. Co., 22 Mont. 290, 56 Pac. 315.

Nebraska.— McConniff *v.* Van Dusen, 57 Nebr. 49, 77 N. W. 348.

New Jersey.— Bell *v.* Samuels, 60 N. J. L. 370, 37 Atl. 613; Ruckman *v.* Bergholz, 37 N. J. L. 437.

New York.— Furst *v.* Second Ave. R. Co., 72 N. Y. 542; Greene *v.* White, 37 N. Y. 405.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Lowe *v.* Lehman, 15 Ohio St. 179.

Oregon.— DuBois *v.* Perkins, 21 Oreg. 189, 27 Pac. 1044. See also Sayres *v.* Allen, 25 Oreg. 211, 35 Pac. 254.

South Dakota.— Wendt *v.* Chicago, etc., R. Co., 4 S. D. 476, 57 N. W. 226.

Tennessee.— Clark *v.* Rhodes, 2 Heisk. (Tenn.) 206.

Texas.— Gulf, etc., R. Co., *v.* Johnson, 91 Tex. 569, 44 S. W. 1067; Emerson *v.* Mills, 83 Tex. 385, 18 S. W. 805.

Vermont.— Wilson *v.* Blake, 53 Vt. 305.

Virginia.— Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207; Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587.

West Virginia.— Webb *v.* Big Kanawha, etc., Packet Co., 43 W. Va. 800, 29 S. E. 519; Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582.

Wisconsin.— Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729; Nickerson *v.* Morin, 3 Wis. 243.

United States.— Mexia *v.* Oliver, 148 U. S. 664, 13 S. Ct. 754, 37 L. ed. 602; Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 7 S. Ct. 118, 30 L. ed. 299.

See 3 Cent. Dig. tit. "Appeal and Error," § 4038 *et seq.*

4. Bindbeutal *v.* Street R. Co., 43 Mo. App. 463.

5. *Alabama.*— Stone *v.* Stone, 1 Ala. 582; Holmes *v.* Gayle, 1 Ala. 517.

California.— Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940; McGarrity *v.* Byington, 12 Cal. 426.

Florida.— Hooker *v.* Johnson, 10 Fla. 198.

Illinois.— Bettis *v.* Green, 171 Ill. 495, 49 N. E. 552; Bloomer *v.* Sherrill, 11 Ill. 483.

Indiana.— Cline *v.* Lindsey, 110 Ind. 337, 11 N. E. 441; Indianapolis Cabinet Co. *v.* Herrmann, 7 Ind. App. 462, 34 N. E. 579.

Iowa.— McKenna *v.* Hoy, 76 Iowa 322, 41 N. W. 29; Fulmer *v.* Fulmer, 22 Iowa 230.

Kentucky.— See Brown *v.* M'Connel, 1 Bibb (Ky.) 265.

Maine.— Wood *v.* Finson, 91 Me. 280, 39 Atl. 1007; Toole *v.* Bearce, 91 Me. 209, 39 Atl. 558.

Massachusetts.— Burghardt *v.* Van Deusen, 4 Allen (Mass.) 374; Fuller *v.* Ruby, 10 Gray (Mass.) 285.

New Hampshire.— Center *v.* Center, 38 N. H. 318; Winkley *v.* Foye, 33 N. H. 171, 66 Am. Dec. 715.

North Carolina.— State *v.* Cowan, 29 N. C. 239.

Ohio.— Hollister *v.* Reznor, 9 Ohio St. 1; Scovern *v.* State, 6 Ohio St. 288.

Pennsylvania.— Peterson *v.* Speer, 29 Pa. St. 478; Allegheny *v.* Nelson, 25 Pa. St. 332.

South Carolina.— Murphy *v.* Valk, 30 S. C. 262, 9 S. E. 101; Devereux *v.* Champion Cotton Press Co., 17 S. C. 66.

Texas.— Missouri Pac. R. Co. *v.* Edwards, 75 Tex. 334, 12 S. W. 853; Stonebraker *v.* Friar, 70 Tex. 202, 7 S. W. 799.

Washington.— Brown *v.* Forest, 1 Wash. Terr. 201.

West Virginia.— Reed *v.* Nixon, 36 W. Va. 681, 15 S. E. 416; Taylor *v.* Boughner, 16 W. Va. 327.

6. As to estoppel to allege error see *supra*, IV, B [2 Cyc. 643]; V, B, 2, k [2 Cyc. 739]; XI, L [2 Cyc. 1010]; XVII, C, 2.

As to waiver of: Defects in record, see *supra*, XIII, J, 3. Entry of appeal, see *supra*, VII, F, 3 [2 Cyc. 879]. Grounds for dismissal of appeal, see *supra*, XIV, E, 9. Notice of appeal, see *supra*, VII, E, 6 [2 Cyc. 874]. Objections as to parties, see *supra*, VI, H, 7 [2 Cyc. 788]. Objections to jurisdiction of appellate court, see *supra*, II, d [2 Cyc. 538]. Right of review, see *supra*, IV, B [2 Cyc. 643]. Security on appeal or defects therein, see *supra*, VII, D, 11 [2 Cyc. 850]; VIII, H, 1, c [2 Cyc. 897].

ment of error may be waived by an entry on the record, or by express waiver in the brief or oral argument.[7]

2. Implied Waiver — a. Failure to Urge Objection.[8] Except in cases where the question involved goes to the jurisdiction,[9] rulings to which assignments of error have been taken will not be considered on appeal, where such assignments are not discussed by counsel in brief or in argument, as it will be presumed that they are waived.[10]

7. Blackburn *v.* Morton, 18 Ark. 384; Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637; Goldstein *v.* Smith, 85 Ill. App. 588; Witt *v.* King, 56 Ind. 72; Trayser *v.* Indiana Asbury University, 39 Ind. 556; Turner *v.* Simpson, 12 Ind. 413. See 3 Cent. Dig. tit. "Appeal and Error," § 4253.

Agreement to argue on certain grounds only. — Where counsel agreed to argue an appeal on two grounds only, it was held to be a waiver of all other grounds of appeal. Cahoon *v.* Levy, 10 Cal. 216.

Waiver in brief. — In Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642, it was held that an error in overruling a demurrer to a complaint in an action for trespass upon land, which involved the question of title, was not available to defendant, where he admitted in his brief that the complaint was good as one to quiet title.

Waiver of record. — In Glotzback *v.* Foster, 11 Cal. 37, it was held that, where after notice of appeal, the parties waived, of record, all errors, the judgment should be affirmed.

8. As to failure to urge objections in briefs, generally, see *supra*, XII, C [2 Cyc. 1013].

9. Olmstead *v.* Thompson, 91 Ala. 127, 8 So. 346; Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Heady *v.* Brown, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85; Aberdeen First Nat. Bank *v.* Carter, 10 Wash. 11, 38 Pac. 877.

See also *supra*, XII, C, 2 [2 Cyc. 1014]; and 3 Cent. Dig. tit. "Appeal and Error," § 4257.

10. *Alabama.* — Pearson *v.* Adams, (Ala. 1901) 29 So. 977; Zirkle *v.* Jones, (Ala. 1901) 29 So. 681.

Arizona. — Pringle *v.* Hall, (Ariz. 1899) 56 Pac. 740.

Arkansas. — Blackburn *v.* Morton, 18 Ark. 384.

California. — Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. 1082; Holt *v.* Holt, 131 Cal. 610, 63 Pac. 912.

Colorado. — Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607; Fitzgerald *v.* Burke, 14 Colo. 559, 23 Pac. 993.

Dakota. — Franz Falk Brewing Co. *v.* Mielenz, 5 Dak. 136, 37 N. W. 728; McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Florida. — Armstrong *v.* Glenn, 34 Fla. 387, 16 So. 279; Hayes *v.* Todd, 34 Fla. 233, 15 So. 752.

Georgia. — Napier *v.* Burkett, 113 Ga. 607, 38 S. E. 941; Brooks *v.* Raiden, 113 Ga. 86, 38 S. E. 409.

Illinois. — Fischback *v.* People, 191 Ill. 171, 60 N. E. 887; Terre Haute, etc., R. Co. *v.* Peoria, etc., Union R. Co., 182 Ill. 501, 55 N. E. 377.

Indiana. — Pittsburgh, etc., R. Co. *v.* Hawks, 154 Ind. 547, 55 N. E. 258; Hilliker *v.* Citizens St. R. Co., 152 Ind. 86, 52 N. E. 607.

Iowa. — Butterfield *v.* Treichler, (Iowa 1901) 85 N. W. 19; Ottumwa *v.* Hodge, (Iowa 1900) 84 N. W. 533.

Kansas. — Schlatter *v.* Gibson, (Kan. 1901) 65 Pac. 232; Bailey *v.* Dodge, 28 Kan. 72.

Louisiana. — Barber Asphalt Paving Co. *v.* New Orleans, etc., R. Co., 49 La. Ann. 1608, 22 So. 955; Cannon *v.* White, 16 La. Ann. 85.

Maryland. — Gill *v.* Staylor, (Md. 1901) 49 Atl. 650; Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90.

Massachusetts. — Hadlock *v.* Brooks, (Mass. 1901) 59 N. E. 1009; Norwood *v.* Lathrop, (Mass. 1901) 59 N. E. 650.

Michigan. — Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645; Jackson *v.* Cole, 81 Mich. 440, 45 N. W. 826. *Compare* Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Minnesota. — Boe *v.* Irish, 69 Minn. 493, 72 N. W. 842; Minneapolis, etc., R. Co. *v.* Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902.

Mississippi. — See Shaw *v.* Brown, 42 Miss. 309; Trotter *v.* White, 26 Miss. 88.

Missouri. — Tuttle *v.* Davis, 48 Mo. App. 9.

Montana. — Mendenhall *v.* Lyon, (Mont. 1901) 65 Pac. 5; Murray *v.* Montana Lumber, etc., Co., (Mont. 1901) 63 Pac. 719.

Nebraska. — State *v.* German Sav. Bank, (Nebr. 1900) 84 N. W. 599; Mandell *v.* Weldin, 59 Nebr. 699, 82 N. W. 6.

Nevada. — Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139.

New Hampshire. — Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237; Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188.

New Jersey. — Lewis *v.* Lewis, (N. J. 1901) 49 Atl. 453.

New York. — Schiller *v.* Dry Dock, etc., R. Co., 26 Misc. (N. Y.) 392, 56 N. Y. Suppl. 184; Hardcastle *v.* Heine, 25 Misc. (N. Y.) 146, 54 N. Y. Suppl. 169 [*affirming* 23 Misc. (N. Y.) 772, 51 N. Y. Suppl. 1142].

North Dakota. — Schmitz *v.* Heger, 5 N. D. 165, 64 N. W. 943; Devils Lake First Nat. Bank *v.* Merchants Nat. Bank, 5 N. D. 161, 64 N. W. 941.

Ohio. — Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701.

Oklahoma. — Jay *v.* Zeissness, 6 Okla. 591, 52 Pac. 928; Provins *v.* Lovi, 6 Okla. 94, 50 Pac. 81.

Oregon. — Wood *v.* Rayburn, 18 Oreg. 3, 22 Pac. 521.

Pennsylvania. — Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 24 Wkly. Notes Cas. (Pa.) 165, 17 Atl. 608.

b. Proceedings Inconsistent With Objection. A waiver of error will be implied where a party to an appeal takes proceedings inconsistent with the particular error assigned.[11]

J. Decisions of Intermediate Courts — 1. Scope and Extent of Review — a. In General. The review of the decisions of intermediate courts by higher appellate tribunals is regulated and defined by constitutions and statutes. To these reference should be had for the determination of the scope of review on such appeals.[12]

b. Errors in Trial Court. On appeal from the judgment of an intermediate court, the higher court will not review errors that may have occurred in the trial court.[13]

South Carolina.— Comer *v.* Columbia, etc., R. Co., 52 S. C. 36, 29 S. E. 637; McFall *v.* McFall, 35 S. C. 559, 14 S. E. 985.

South Dakota.— Narregang *v.* Brown County, (S. D. 1901) 85 N. W. 602; Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194.

Texas.— Ackerman *v.* Huff, 71 Tex. 317, 9 S. W. 236; Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

Vermont.— Chamberlain *v.* Rankin, 49 Vt. 133.

Washington.— Shumway *v.* Orchard, 12 Wash. 104, 40 Pac. 634; Ferry *v.* King County, 2 Wash. 337, 26 Pac. 537.

West Virginia.— Logan *v.* Dills, 4 W. Va. 397.

Wisconsin.— Zielke *v.* Morgan, 50 Wis. 560, 7 N. W. 651.

Wyoming.— Boswell *v.* Bliler, (Wyo. 1900) 62 Pac. 350; Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

United States.— Home Ben. Assoc. *v.* Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. ed. 1160; Crawford *v.* Heysinger, 123 U. S. 589, 8 S. Ct. 399, 31 L. ed. 269.

See 3 Cent. Dig. tit. "Appeal and Error," § 4256 *et seq.*

As to sufficiency of discussion of objections in briefs see *supra*, XII, C, 4 [2 Cyc. 1016].

11. *California.*— Moore *v.* Murdock, 26 Cal. 514.

Colorado.— *In re* Thomas, 26 Colo. 110, 56 Pac. 907.

Illinois.— Anderson *v.* Thiele, 39 Ill. App. 476.

Indiana.— Trayser *v.* Indiana Asbury University, 39 Ind. 556.

Louisiana.— Francis *v.* Lavine, 26 La. Ann. 311.

Massachusetts.— James *v.* Southern Lumber Co., 153 Mass. 361, 26 N. E. 997; Pattee *v.* Harrington, 11 Pick. (Mass.) 221.

New York.— Cowenhoven *v.* Ball, 118 N. Y. 231, 23 N. E. 470, 28 N. Y. St. 870.

Ohio.— Potter *v.* Bunnell, 20 Ohio St. 150.

Texas.— Eddy *v.* Newton, (Tex. Civ. App. 1893) 22 S. W. 533.

United States.— Red Jacket Mfg. Co. *v.* Davis, 82 Fed. 432, 53 U. S. App. 478, 27 C. C. A. 204.

See 3 Cent. Dig. tit. "Appeal and Error," § 4254.

Asking affirmance as waiver of cross-errors. — Where an appellee assigns cross-errors, and in his brief asks the court to affirm the judgment appealed from, he will be deemed to have abandoned his assignment of cross-errors. Springfield Iron Co. *v.* McIntyre, 72 Ill. App. 444.

Request for decision in place of remandment.— Where an appellant prayed the court to decide the case before it, and not to remand it, his request was treated as a waiver of exceptions to rulings in the court below, the effect of sustaining which would have necessitated a remandment. Schlater *v.* Wilbert, 41 La. Ann. 406, 6 So. 127.

The filing of a brief, in which appellee discusses the merits of the case and at the same time insists that the appeal should be dismissed because defectively taken or prosecuted, is not an implied waiver of the motion to dismiss. Burdine *v.* Mustin, 33 Ala. 634.

12. See the constitutions and statutes of the several states, and the following cases:

Illinois.— Fitzpatrick *v.* Chicago, etc., R. Co., 139 Ill. 248, 28 N. E. 837.

Kansas.— Long *v.* Froman, 49 Kan. 360, 30 Pac. 461.

Missouri.— Estey *v.* Post, 76 Mo. 411.

New York.—Angevine *v.* Jackson, 103 N. Y. 470, 9 N. E. 56; Rust *v.* Hauselt, 69 N. Y. 485; Hone *v.* Joslien, 17 How. Pr. (N. Y.) 338.

Ohio.— Halderman *v.* Larrick, 44 Ohio St. 438, 8 N. E. 177; Rothwell *v.* Winterstein, 42 Ohio St. 249.

Texas.— Bomar *v.* West, 87 Tex. 299, 28 S. W. 519.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4263–4269.

13. *Connecticut.*— Humphrey *v.* Marshall, 15 Conn. 341.

Indiana.— Cox *v.* Lindley, 80 Ind. 327.

Kansas.— Thompson *v.* Brooks, 29 Kan. 504.

Mississippi.— Prewett *v.* Nash, 50 Miss. 584.

New Jersey.— Rodenbough *v.* Rosebury, 24 N. J. L. 491.

Ohio.— McKenzie *v.* Horr, 15 Ohio St. 478; Bartges *v.* O'Neil, 13 Ohio St. 72; Stetson *v.* New Orleans City Bank, 12 Ohio St. 577.

South Carolina.— Buttz *v.* Charleston County, 17 S. C. 586.

Tennessee.—Puckett *v.* Springfield, 97 Tenn. 264, 37 S. W. 2; Marshall *v.* Hill, 8 Yerg. (Tenn.) 101.

Wisconsin.— State *v.* Tall, 56 Wis. 577, 14 N. W. 596.

c. Questions Not Raised or Passed Upon in Intermediate Court. Questions not raised in nor passed upon by an intermediate court, except questions going to the jurisdiction, will not be considered on appeal from its judgment.[14] Thus, objections as to parties, or as to pleadings or evidence, which were not raised in an intermediate court, will not be considered on appeal.[15]

d. Refusal to Consider Question of Law. The refusal of an intermediate court to consider a question of law presented for its determination is, however, reviewable on appeal.[16]

See 3 Cent. Dig. tit. "Appeal and Error," § 4271.

On appeal from reversal.— In New York, on appeal to the court of appeals, by the party who was successful in the trial court, from a judgment of reversal of the general term, where such party desires alleged errors in adverse rulings on the trial reviewed, he should go back under the order for a new trial, and raise them on the retrial, and if defeated, present them on appeal from the judgment. Cooke *v.* Underhill Mfg. Co., 138 N. Y. 610, 33 N. E. 728, 51 N. Y. St. 657. *Compare* Holcombe *v.* Munson, 103 N. Y. 682, 9 N. E. 443.

14. *Alabama.*— Richards *v.* Griffin, 5 Ala. 195.

Connecticut.— Humphrey *v.* Marshall, 15 Conn. 341.

Illinois.— Strodtmann *v.* Menard County, 158 Ill. 155, 41 N. E. 778; North Chicago St. R. Co. *v.* Wrixon, 150 Ill. 532, 37 N. E. 895.

Indiana.— Patterson *v.* Scottish-American Mortg. Co., 107 Ind. 497, 8 N. E. 554; Rotach *v.* McCarty, 102 Ind. 461, 1 N. E. 288.

Iowa.— Barker *v.* Davis, 36 Iowa 692; Chapman *v.* Lobey, 21 Iowa 300.

Kansas.— Kykendall *v.* Clinton, 3 Kan. 85; Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444.

Kentucky.— Frazier *v.* Clark, 88 Ky. 260, 10 S. W. 806, 11 S. W. 83; Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262.

Michigan.— Pardee *v.* Smith, 27 Mich. 33.

Mississippi.— Coleman *v.* Gordon, (Miss. 1894) 16 So. 340; Leavenworth *v.* Crittenden, 62 Miss. 573.

Missouri.— Under the constitution, when a case is taken to the supreme court from a court of appeals, the parties are not restricted to the points raised in the court of appeals. Fulkerson *v.* Murdock, 123 Mo. 292, 27 S. W. 555. See also Danforth *v.* Lindell R. Co., 123 Mo. 196, 27 S. W. 715.

Nebraska.— Weeks *v.* Wheeler, 41 Nebr. 200, 59 N. W. 554; Madison First Nat. Bank *v.* Carson, 30 Nebr. 104, 46 N. W. 276.

New York.— People *v.* Dalton, 159 N. Y. 235, 53 N. E. 1113; Lake *v.* Gibson, 2 N. Y. 188.

Ohio.— Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961; Pollock *v.* Cohen, 32 Ohio St. 514.

Pennsylvania.— Dubosq *v.* Guardians of Poor, 1 Binn. (Pa.) 415.

South Carolina.— Farr *v.* Thompson, 1 Speer (S. C.) 93.

Texas.— Desmuke *v.* Houston, 89 Tex. 10, 32 S. W. 1025; Binion *v.* Seals, 82 Tex. 397, 18 S. W. 705. *Compare* Texas, etc., Coal Co. *v.* Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919.

Wisconsin.—West *v.* Vanden Brook, 71 Wis. 469, 37 N. W. 832; Schæffner's Estate, 45 Wis. 614.

United States.— Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265; Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

See 3 Cent. Dig. tit. "Appeal and Error," § 4281.

Appeal from territorial supreme court.— Where the territorial supreme court, on appeal, considers only a part of the errors assigned, the federal supreme court, on proceedings in error, is limited to a review of the errors considered by the territorial court, and it cannot consider the other assignments. Montana R. Co. *v.* Warren, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681.

Cross-errors.— Where appellee fails to file cross-errors in the appellate court, he will not be allowed to do so on an appeal from such court. Diversey *v.* Johnson, 93 Ill. 547.

Failure to renew objection in intermediate court.— An objection made in the trial court, but not renewed on appeal to an intermediate court, will not be considered on a review of the judgment of the latter. Cooper *v.* McKeen, 11 Colo. 41, 17 Pac. 97; Meyer *v.* McCabe, 73 Mo. 236. But see Cohn *v.* Goldman, 76 N. Y. 284, wherein it was held that the fact that an objection, distinctly presented to the trial court, was not raised in an intermediate appellate court will not prevent its being considered in the highest appellate court.

15. *Illinois.*— Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339.

Indiana.— Tucker *v.* Gardiner, 63 Ind. 299; Nelson *v.* Blakey, 47 Ind. 38.

Missouri.— Nelson Distilling Co. *v.* Lock, 59 Mo. App. 637.

Nebraska.— Levi *v.* Fred, 38 Nebr. 564, 57 N. W. 386; O'Leary *v.* Iskey, 12 Nebr. 136, 10 N. W. 576.

Ohio.— Davis *v.* Hines, 6 Ohio St. 473.

South Carolina.— *Ex p.* Turner, 24 S. C. 211.

See 3 Cent. Dig. tit. "Appeal and Error," § 4284.

16. Dorchester *v.* Dorchester, 121 N. Y. 156, 23 N. E. 1043, 30 N. Y. St. 498.

A refusal by an intermediate court to review the facts found in the court below is reviewable on appeal. Legnard *v.* Rhoades, 156 Ill. 431, 40 N. E. 964; Kyle *v.* Kyle, 67 N. Y. 400. So, where an intermediate court refuses to find facts, though properly requested so to

2. Nature and Grounds of Decision — a. In General. The nature and grounds of the decision of an intermediate court are of importance in determining the correctness of its decision, and the power and extent of review, by the appellate court.[17] Thus, the appellate court will look to the judgment of the intermediate court to determine whether the latter has examined the evidence,[18] to determine the grounds of a reversal,[19] and, in New York, to determine as to the unanimity of the decision of the appellate division on the evidence, where it affirms the judgment of the lower court.[20]

b. Erroneous Reason For Correct Decision. An appellate court is not concluded by the reasons assigned by an intermediate court for its decision. If the decision can be upheld on other grounds the fact that it is based on erroneous reasons is immaterial.[21]

c. Looking to Opinion to Ascertain Grounds. As a rule, the appellate court will not look to the opinion of the intermediate court to determine the grounds of its decision, but will look to the judgment or order itself; and, in the absence of a statement of the grounds upon which the intermediate court has based its action, the appellate court will affirm, if any ground for its support is discoverable in the

do, its action is reviewable on appeal. Kennedy *v.* Porter, 109 N. Y. 526, 17 N. E. 426, 16 N. Y. St. 613. See also National Harrow Co. *v.* Bement, 163 N. Y. 505, 57 N. E. 764. But see Otto *v.* Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56, in which it was held that the refusal of the court of appeals to find additional facts cannot be reviewed on writ of error.

17. Rowerdink *v.* Bitner, 92 Hun (N. Y.) 561, 36 N. Y. Suppl. 1027, 72 N. Y. St. 300; Smith *v.* Houston, etc., R. Co., 90 Tex. 123, 38 S. W. 985.

Failure of decision to disclose grounds.— In Powell *v.* Lamb, 15 Daly (N. Y.) 139, 3 N. Y. Suppl. 930, 22 N. Y. St. 233, it was held that, on appeal to the common pleas from an order of the general term of the city court of New York affirming an order of the trial term granting a new trial, where the order of the general term did not indicate on what ground the order of the trial term was affirmed, but the evidence was such that a new trial might have been granted on questions of fact, the order would be affirmed without review.

Recital of grounds in order of reversal.— Under Ohio Rev. Stat. § 6709, requiring the circuit court to state the grounds of reversal of a judgment before it on appeal, the supreme court will treat the grounds specified in the order of reversal as the only ones on which the reversal was placed. Wetzel *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

18. Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991; Judson *v.* Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514; Pool *v.* Harris, 9 N. Y. Suppl. 481, 28 N. Y. St. 170.

19. Matters examined to determine grounds for reversal.— In Field *v.* Anderson, 103 Ill. 403, it was held that, on appeal, the supreme court will not notice proceedings, had in the appellate court in a different case which was not presented in the transcript, to see on what ground the appellate court reversed the judgment.

20. Unanimous decision.— Under N. Y. Const. art. 6, § 9, as amended in 1894, and the laws made in pursuance thereof, no unanimous decision of the appellate division of the supreme court that there is evidence supporting, or tending to sustain, a finding of fact, or a verdict not directed by the court, shall be reviewed by the court of appeals. Johnston *v.* Dahlgren, 166 N. Y. 354, 59 N. E. 987; Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832; Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925; Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736; Aeschlimann *v.* Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723; Neuman *v.* New York Mut. Sav., etc., Assoc., 164 N. Y. 248, 58 N. E. 100; Lamkin *v.* Palmer, 164 N. Y. 201, 58 N. E. 123; Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24; Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, 57 N. E. 297.

Unanimous decision of quorum.— In Harroun *v.* Brush Electric Light Co., 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615, it was held that, under N. Y. Const. art. 6, § 2, which makes four justices of an appellate division of the supreme court a quorum, a decision in which all four justices sitting concur, is a unanimous decision within N. Y. Code Civ. Proc. § 191, subsec. 2, providing that a unanimous affirmance in certain cases shall be final, unless a question of law is certified or leave to appeal given.

21. *Illinois.*— West Chicago St. R. Co. *v.* Sullivan, 165 Ill. 302, 46 N. E. 234; Dunham Towing, etc., Co. *v.* Dandelin, 143 Ill. 409, 32 N. E. 258; Pennsylvania Co. *v.* Keane, 143 Ill. 172, 32 N. E. 260; Christy *v.* Stafford, 123 Ill. 463, 14 N. E. 680.

Indiana.— Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435.

Nebraska.— Andresen *v.* Carson, 54 Nebr. 678, 74 N. W. 1072; Denslow *v.* Dodendorf, 47 Nebr. 328, 66 N. W. 409.

New York.— Brown *v.* Wakeman, 18 N. Y. Suppl. 363, 45 N. Y. St. 671; Deland *v.* Richardson, 4 Den. (N. Y.) 95.

Texas.— Roller *v.* Reid, (Tex. 1894) 25 S. W. 624.

Utah.— Eureka City *v.* Wilson, 15 Utah 53, 67, 48 Pac. 41, 150, 62 Am. St. Rep. 904.

record.[22] Where, however, the judgment or order refers to the opinion for the grounds upon which it is based, the appellate court may look to the opinion for such grounds.[23]

d. Sustaining Judgment on Grounds Not Noticed. An appellate court is not confined to the grounds upon which an intermediate court has based its judgment, but, in order to uphold such judgment, may consider grounds not noticed by the intermediate court.[24]

3. Discretion of Intermediate Court — a. In General. Matters within the sound judicial discretion of an intermediate court will not be reviewed on appeal, except in case of manifest and gross abuse.[25] Thus, orders of an intermediate court dismissing or refusing to dismiss the appeal,[26] granting or refusing to grant a motion to vacate a dismissal,[27] or granting or refusing to grant a new

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4300, 4301.

22. Seaverns *v.* Lischinski, 181 Ill. 358, 54 N. E. 1043; Calumet Electric St. R. Co. *v.* Van Pelt, 173 Ill. 70, 50 N. E. 678; Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290; Cohn *v.* Baldwin, 141 N. Y. 563, 35 N. E. 1087, 60 N. Y. St. 337; Wheatland *v.* Pryor, 133 N. Y. 97, 30 N. E. 652, 44 N. Y. St. 311; National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524; Kamermann *v.* Eisner, etc., Co., 23 Misc. (N. Y.) 330, 51 N. Y. Suppl. 210; Kreizer *v.* Allaire, 16 Misc. (N. Y.) 6, 37 N. Y. Suppl. 687, 73 N. Y. St. 286; McLaughlin *v.* Wheeling, etc., R. Co., 61 Ohio St. 279, 55 N. E. 825.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4269, 4330; and *supra*, XIII, M, 4.

Absence of statement of grounds.—In Cohn *v.* Baldwin, 141 N. Y. 563, 35 N. E. 1087, 60 N. Y. St. 337, it was held that, where the grounds for denying defendant's motion for a bill of particulars did not appear from the order of the court below, and the denial might have been a proper exercise of discretion on the facts appearing, the court of appeals could not look to the opinion of the general term for the ground on which its decision was based, but must assume that the motion was denied in the exercise of its discretion. See also National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524.

Impeaching judgment by opinion.—Recitals in the judgment of the appellate court cannot be impeached by its opinion, as it is not a part of the record. Calumet Electric St. R. Co. *v.* Van Pelt, 173 Ill. 70, 50 N. E. 678; Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290. See also Seaverns *v.* Lischinski, 181 Ill. 358, 54 N. E. 1043.

The presumption that an order of affirmance was in the exercise of discretion cannot be overcome by anything in the opinion of the court. Kreizer *v.* Allaire, 16 Misc. (N. Y.) 6, 37 N. Y. Suppl. 687, 73 N. Y. St. 286.

23. Snyder *v.* Snyder, 96 N. Y. 88; Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353. And see Townsend *v.* Nebenzhal, 81 N. Y. 644, in which it was held that the opinion may be looked to where the terms of the order are ambiguous. See also Fisher *v.* Gould, 81 N. Y. 228; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337.

24. Commercial Nat. Bank *v.* Kirkwood, 184 Ill. 139, 56 N. E. 405; Ward *v.* Craig, 87 N. Y. 550. See 3 Cent. Dig. tit. "Appeal and Error," § 4299.

25. *Alabama.*— Adams *v.* Horsefield, 14 Ala. 223; Andress *v.* Longmire, 11 Ala. 166.

Illinois.— Baker *v.* Prebis, 185 Ill. 191, 56 N. E. 1110; Gadwood *v.* Kerr, 181 Ill. 162, 54 N. E. 906.

Kansas.— Gray *v.* Bryant, 46 Kan. 43, 26 Pac. 470.

Michigan.— Mann *v.* Tyler, 56 Mich. 564, 23 N. W. 314; Chicago, etc., R. Co. *v.* Edson, 41 Mich. 673, 3 N. W. 176.

Missouri.— St. Louis *v.* Murphy, 24 Mo. 41; Vastine *v.* Bailey, 46 Mo. App. 413.

Montana.— Meyers *v.* Gregans, 20 Mont. 450, 52 Pac. 83.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716; People *v.* Maynard, 160 N. Y. 453, 55 N. E. 9.

North Carolina.— Wiggins *v.* McCoy, 87 N. C. 499; Ingram *v.* McMorris, 47 N. C. 450.

Pennsylvania.— Caldwell *v.* Thompson, 1 Rawle (Pa.) 370; Morley's Appeal, 2 Pa. Co. Ct. 417.

South Dakota.— Starkweather *v.* Bell, 12 S. D. 146, 80 N. W. 183.

Vermont.— East Montpelier *v.* Montpelier, 65 Vt. 193, 26 Atl. 112; Munger *v.* Verder, 59 Vt. 386, 8 Atl. 154.

United States.— Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478.

See 3 Cent. Dig. tit. "Appeal and Error," § 4312 *et seq.*

26. *Georgia.*— Ayres *v.* Taylor, 54 Ga. 264.

Illinois.— Sheldon *v.* Reihle, 2 Ill. 519.

Nebraska.— *Compare* Dickerson *v.* Mechling, 30 Nebr. 718, 46 N. W. 1123.

New Jersey.— State *v.* Camp, 45 N. J. L. 293.

New York.— Chase *v.* Defendorf, 128 N. Y. 652, 28 N. E. 516, 40 N. Y. St. 433.

North Carolina.— Miller *v.* Clemmons, 94 N. C. 338; West *v.* Reynolds, 94 N. C. 333. *Compare* March *v.* Griffith, 53 N. C. 264.

Ohio.—Price *v.* Orange, Wright (Ohio) 568.

Washington.— State *v.* Camphell, 5 Wash. 517, 32 Pac. 97.

See 3 Cent. Dig. tit. "Appeal and Error," § 4315.

27. *Georgia.*— Strohecker *v.* Dessau, 72 Ga. 900.

Illinois.— Nispel *v.* Wolff, 74 Ill. 393; Allen *v.* Monmouth, 37 Ill. 372.

Indiana.— Mann *v.* Barkley, 21 Ind. App. 152, 51 N. E. 946.

trial,[28] are within the discretion of the intermediate court, and are not reviewable. The taxation and allowance of costs is also within the discretion of an intermediate court.[29]

b. Refusal to Exercise Discretion. The refusal of an intermediate court to exercise its discretion in a proper case will, however, be reviewed on appeal.[30]

4. PRESUMPTIONS. On appeal from the judgment of an intermediate court, everything necessary to uphold its jurisdiction and the correctness of its proceeding and decision will be presumed, in the absence of a clear showing to the contrary.[31] Thus, a ruling by an intermediate court, on a motion to dismiss the appeal, will be presumed, in the absence of a showing to the contrary, to be justified by the facts of the case.[32]

Iowa.— State *v.* Glass, 9 Iowa 325.

Michigan.— Chaffee *v.* Soldan, 5 Mich. 242.

Utah.— Henderson *v.* Higgins, 9 Utah 290, 34 Pac. 61.

See 3 Cent. Dig. tit. "Appeal and Error," § 4316.

28. Van Horne *v.* Campbell, 101 N. Y. 608, 3 N. E. 901; People *v.* Poucher, 99 N. Y. 610, 1 N. E. 151. *Compare* Griffin *v.* Marquardt, 17 N. Y. 28.

Rehearing.—Error cannot be assigned upon the action of an intermediate court as to granting a rehearing. Supreme Lodge, K. of H. *v.* Dalberg, 138 Ill. 508, 28 N. E. 785; Hooper *v.* Beecher, 109 N. Y. 609, 15 N. E. 742, 23 N. E. 1151, 14 N. Y. St. 16; Fleischmann *v.* Stern, 90 N. Y. 110; Schmidt *v.* Livingston, 20 Misc. (N. Y.) 324, 45 N. Y. Suppl. 915.

29. Dill *v.* Phillips, 13 Ala. 350; Hewitt *v.* Ingham Cir. Judge, 44 Mich. 153, 6 N. W. 217; Matter of Denton, 137 N. Y. 428, 33 N. E. 482, 51 N. Y. St. 60; Monroe *v.* White, 25 N. Y. App. Div. 292, 49 N. Y. Suppl. 517; Petty *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 517, 69 N. Y. Suppl. 1049; Clark *v.* Clark, 21 Vt. 490. See 3 Cent. Dig. tit. "Appeal and Error," § 4320.

The apportioning of costs, on an appeal from a justice, is the exercise of a discretion, not reviewable on error. Weigley *v.* Moses, 78 Ill. App. 471.

30. Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353; Matter of Harmony F. & M. Ins. Co., 45 N. Y. 310.

31. *Alabama.*— Heyman *v.* McBurney, 66 Ala. 511.

Arkansas.— Kincaid *v.* Halpern, 65 Ark. 616, 48 S. W. 87; St. Louis, etc., R. Co. *v.* Winfrey, (Ark. 1891) 16 S. W. 572.

Idaho.— Holt *v.* Gridley, (Ida. 1900) 63 Pac. 188.

Illinois.— Strodtmann *v.* Menard County, 158 Ill. 155, 41 N. E. 778; Montgomery *v.* Black, 124 Ill. 57, 15 N. E. 48.

Indiana.— Morris *v.* State, 115 Ind. 282, 16 N. E. 632, 17 N. E. 598; Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116.

Kansas.—Concordia First Nat. Bank *v.* Pulsifer, (Kan. App. 1898) 53 Pac. 771.

Maryland.— Cole *v.* Hynes, 46 Md. 181.

Massachusetts.— Cook *v.* Berth, 108 Mass. 73.

Minnesota.— Hemsted *v.* Cargill, 46 Minn. 141, 48 N. W. 686.

Missouri.— Ryder *v.* Roberts, 48 Mo. App. 132.

New York.— Dr. David Kennedy Corp. *v.* Kennedy, 165 N. Y. 353, 59 N. E. 133; Cuff *v.* Dorland, 57 N. Y. 560.

Ohio.— Allyn *v.* Depew, 28 Ohio St. 619.

Tennessee.—Webb *v.* Fritts, 8 Baxt. (Tenn.) 218.

Utah.— Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

Virginia.—McArter *v.* Grigsby, 84 Va. 159, 4 S. E. 369.

United States.— Texas Pac. R. Co. *v.* Murphy, 111 U. S. 488, 4 S. Ct. 497, 28 L. ed. 492.

See 3 Cent. Dig. tit. "Appeal and Error," § 4302 *et seq.*

In New York, upon an appeal to the court of appeals from a judgment reversing a judgment entered upon the report of a referee, or a determination in the trial court, or from an order granting a new trial upon such reversal, it must be presumed that the judgment was not reversed, or a new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. N. Y. Code Civ. Proc. § 1338; Queen *v.* Weaver, 166 N. Y. 398, 59 N. E. 1115; People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770; Dr. David Kennedy Corp. *v.* Kennedy, 165 N. Y. 353, 59 N. E. 133; People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151; De Klyn *v.* Gould, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. Rep. 719; Champlain *v.* McCrea, 165 N. Y. 264, 59 N. E. 83; National Harrow Co. *v.* Bement, 163 N. Y. 505, 57 N. E. 764; National Wall Paper Co. *v.* Sire, 163 N. Y. 122, 57 N. E. 293, 7 N. Y. Annot. Cas. 406; Petrie *v.* Trustees Hamilton College, 158 N. Y. 458, 53 N. E. 216; Snyder *v.* Seaman, 157 N. Y. 449, 52 N. E. 658; Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046. But, on appeal to the appellate term of the supreme court from an order of reversal by the general term of the New York city court, it will be assumed that the reversal was on the facts, where the order of reversal does not show that it was based on any question of law. Schmidt *v.* Livingston, 20 Misc. (N. Y.) 324, 45 N. Y. Suppl. 915.

32. *Arkansas.*— Thorn *v.* Provence, 31 Ark. 190.

Illinois.— Chicago, etc., R. Co. *v.* Calumet, 151 Ill. 512, 40 N. E. 625; Bulger *v.* Hoffman, 45 Ill. 352; De Leuw *v.* Carrigan, 19 Ill. App. 193.

5. Questions of Fact — a. In General. An appellate court will not review the judgment of an intermediate court, affirming or reversing the judgment of the trial court upon the facts, where there is any evidence to support the findings of the intermediate court.[33]

b. Suits in Equity. In Illinois, in a chancery case, the findings of fact by the appellate court are not conclusive upon the supreme court, which latter court may review the evidence as to the facts found, constituting the basis of the decree.[34]

Indiana.— Johnson County *v.* Mazingo, 7 Ind. 199.

Kentucky.— Hughes *v.* Merritt, 10 Ky. L. Rep. 543.

Missouri.— Kennedy *v.* McNichols, 29 Mo. App. 11.

Montana.—McMullen *v.* Armstrong, 1 Mont. 486.

Oregon.— *Compare* Moffitt *v.* McGrath, 25 Oreg. 478, 36 Pac. 578.

South Dakota.— Erpenbach *v.* Chicago, etc., R. Co., 11 S. D. 201, 76 N. W. 923.

Tennessee.— Chapman *v.* Howard, 3 Lea (Tenn.) 363.

A motion to dismiss an appeal will be presumed to have been made at the instance of appellee. Carter *v.* Pickard, 11 Ala. 673.

Presumption of notice.— An order of an intermediate court, dismissing an appeal from a justice for want of prosecution, will not be set aside because it does not appear in the record that notice of the motion to dismiss was given to the adverse party, in pursuance of a stipulation to that effect entered into by the parties, as, in the absence of any recital in the record, it will be presumed that the proper notice was given. Bishop *v.* Morris, 22 Ill. App. 564. See also Erpenbach *v.* Chicago, etc., R. Co., 11 S. D. 201, 76 N. W. 923.

33. *Colorado.*— X. Y. Irrigating Ditch Co. *v.* Buffalo Creek Irrigation Co., 25 Colo. 529, 55 Pac. 720.

Georgia.—McMillan *v.* Ambrose, 81 Ga. 196, 6 S. E. 467; Hill *v.* Johnson, 74 Ga. 362.

Illinois.—Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Singer, etc., Stone Co. *v.* Hutchinson, 184 Ill. 169, 56 N. E. 353; Chicago, etc., R. Co. *v.* Fell, 182 Ill. 523, 55 N. E. 554; Hight *v.* Walker, 179 Ill. 209, 53 N. E. 631.

Kentucky.— Barclay *v.* Russellville Deposit Bank, 18 Ky. L. Rep. 104, 35 S. W. 549.

Nebraska.—Mordhorst *v.* Reynolds, 23 Nebr. 485, 37 N. W. 80.

New York.—National Deposit Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805; McCann *v.* Albany, 158 N. Y. 634, 53 N. E. 673; Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567.

North Carolina.— Bagley *v.* Wood, 34 N. C. 90.

Ohio.— McLaughlin *v.* Wheeling, etc., R. Co., 61 Ohio St. 279, 55 N. E. 825; Smith *v.* Anderson, 20 Ohio St. 76.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Leary *v.* Peoples Building, etc., Assoc., 93 Tex. 1, 49 S. W. 632, 51 S. W. 836; Swayne *v.* Union Mut. L. Ins. Co., 92 Tex. 575, 50 S. W. 566; New York Mut. L. Ins. Co. *v.* Hayward, 88 Tex. 315, 30 S. W. 1049, 31 S. W. 507.

Wisconsin.— Lyle *v.* Dellinger, 54 Wis. 404, 11 N. W. 894.

See 3 Cent. Dig. tit. "Appeal and Error," § 4324 *et seq.*

In New York, when the appellate division reverses upon the facts, there is no constitutional inhibition to the court of appeals to look into the record to see whether there was any evidence to sustain the findings, and a question of law arises. If it appears that there was any material and controverted questions of fact, the decision thereof by the appellate division is final. The court of appeals cannot now review a decision upon a question of fact when the judgment is of reversal any more than it formerly could when it was of affirmance, except that, if there is no material question of fact appearing in the record, it has jurisdiction to review, because in that case the appellate division would have had no jurisdiction to reverse. Otten *v.* Manhattan R. Co., 150 N. Y. 395, 44 N. E. 1033.

As to the necessity of findings of fact, in Illinois, when the appellate court differs from the trial court in its findings of fact, see Scovill *v.* Miller, 140 Ill. 504, 30 N. E. 440; Siddall *v.* Jansen, (Ill. 1892) 30 N. E. 357; Hawk *v.* Chicago, etc., R. Co., 138 Ill. 37, 27 N. E. 450; Neer *v.* Illinois Cent. R. Co., 138 Ill. 29, 27 N. E. 705.

Judgment unsupported by any evidence.— The highest court cannot review a finding as being against the weight of the evidence, but may review a finding made without any evidence tending to sustain it, as it is a ruling upon a question of law. Healy *v.* Clark, 120 N. Y. 642, 24 N. E. 316, 30 N. Y. St. 897. See also Matter of Rogers, 153 N. Y. 316, 47 N. E. 589; Todd *v.* Nelson, 109 N. Y. 316, 16 N. E. 360, 15 N. Y. St. 270; Rathbone *v.* Stanton, 6 Barb. (N. Y.) 141; San Antonio Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368.

Scintilla of evidence.— Whether there is any evidence to support an issue is a question of law, and the decision of an intermediate court thereon is consequently reviewable. Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; Morris *v.* Murray, 22 Misc. (N. Y.) 697, 49 N. Y. Suppl. 1093; Choate *v.* San Antonio, etc., R. Co., 91 Tex. 406, 44 S. W. 69.

34. Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694; Tanton *v.* Keller, 167 Ill. 129, 47 N. E. 376; Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Rawson *v.* Corbett, 150 Ill. 466, 37 N. E. 994; People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038;

In New York and Texas, however, the rule is otherwise under the provisions of their respective codes.[35]

c. Suits in Federal Court. Where both the intermediate and trial courts have agreed as to the ultimate facts established by the evidence, their finding will be accepted on appeal, unless it clearly appears that they have erred as to the effect of the evidence.[36]

d. Suits in Probate Court. On appeal from the judgment of an intermediate court affirming or reversing a decree of a probate court on the facts, an appellate court will not, in most jurisdictions, review the facts.[37]

K. Subsequent Appeals — Former Decision as Law of Case — 1. In General. It is a rule of general application that the determination of an appellate court in a case is the law of that case. No question necessarily involved and decided on that appeal will be considered on a subsequent appeal or writ of error in the same case.[38] Consequently, where, after a definite determination, the court

Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019; French *v.* Gibbs, 105 Ill. 523; Moore *v.* Tierney, 100 Ill. 207; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21. See 3 Cent. Dig. tit. "Appeal and Error," § 4335.

In contested will cases the finding of the jury, adopted by the appellate court, is conclusive on appeal unless clearly against the weight of evidence. In this respect they are put upon the same footing with cases at law. Long *v.* Long, 107 Ill. 210. See also Calvert *v.* Carpenter, 96 Ill. 63; Meeker *v.* Meeker, 75 Ill. 260; Brownfield *v.* Brownfield, 43 Ill. 147.

35. Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Beer *v.* Landman, 88 Tex. 450, 31 S. W. 805.

36. Lockwood *v.* The Schooner Grace Girdler, 7 Wall. (U. S.) 196, 19 L. ed. 113; Baxter *v.* Camp, 1 Black (U. S.) 414, 17 L. ed. 217.

On an appeal from a territorial supreme court, the sufficiency of the evidence to support the findings of fact in the trial court cannot be reviewed. Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

37. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41; Steinman *v.* Steinman, 105 Ill. 348; Todd *v.* Terry, 26 Mo. App. 598; Matter of O'Brien, 145 N. Y. 379, 40 N. E. 18, 64 N. Y. St. 829; Matter of Flynn, 136 N. Y. 287, 32 N. E. 767, 49 N. Y. St. 388; Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845, 44 N. Y. St. 515; Rutland, etc., R. Co. *v.* Wales, 24 Vt. 299. *Compare* Stearns *v.* Fiske, 18 Pick. (Mass.) 24, in which it was held that the decision by a single judge of a question of fact, upon the hearing of a probate appeal, may be excepted to, and may be revised by the whole court, if the judge reports the evidence. It is, however, discretionary with the judge to report the evidence, or not. And see Matter of Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4336, 4337.

38. *Alabama.*— Red Mountain Min. Co. *v.* Jefferson County Sav. Bank, 113 Ala. 629, 21 So. 74, 59 Am. St. Rep. 151; Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Arizona.—Menager *v.* Farrell, (Ariz. 1899) 57 Pac. 607; Snyder *v.* Pima County, (Ariz. 1898) 53 Pac. 6.

Arkansas.— Eureka Springs *v.* Woodruff, 55 Ark. 616, 19 S. W. 15; Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13.

California.— Fox *v.* Hale, etc., Silver Min. Co., 122 Cal. 219, 54 Pac. 731; Woodside *v.* Tynan, (Cal. 1897) 50 Pac. 424.

Colorado.— Smith *v.* Smith, 24 Colo. 527, 52 Pac. 790, 65 Am. St. Rep. 251; Schmidt *v.* Denver First Nat. Bank, 10 Colo. App. 261, 50 Pac. 733.

Connecticut.— New Haven, etc., Co. *v.* State, 44 Conn. 376; Derby *v.* Alling, 43 Conn. 255.

District of Columbia.— Burgdorf *v.* U. S., 16 App. Cas. (D. C.) 140; Washington, etc., R. Co. *v.* Adams, 11 App. Cas. (D. C.) 396.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334; Wilson *v.* Fridenberg, 21 Fla. 386.

Georgia.— Little Rock Cooperage Co. *v.* Hodge, 109 Ga. 434, 34 S. E. 667; Norton *v.* Paragon Oil Can Co., 105 Ga. 466, 30 S. E. 437.

Illinois.— Dempster *v.* People, 183 Ill. 321, 55 N. E. 713; Smyth *v.* Neff, 123 Ill. 310, 17 N. E. 702.

Indiana.— Brunson *v.* Henry, (Ind. 1897) 47 N. E. 1063; Huntington County *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470.

Iowa.— Rice *v.* Grand Lodge, A. O. U. W., 103 Iowa 643, 72 N. W. 770; Garretson *v.* Merchants, etc., Ins. Co., 92 Iowa 293, 60 N. W. 540.

Kansas.—Headley *v.* Challiss, 15 Kan. 602; McCormick Harvesting Mach. Co. *v.* Hayes, (Kan. App. 1900) 62 Pac. 901.

Kentucky.— Butler *v.* Prewitt, (Ky. 1901) 62 S. W. 20; Simmons *v.* Samuels, (Ky. 1901) 61 S. W. 17.

Louisiana.— Roy *v.* Schuff, 51 La. Ann. 86, 24 So. 788; Gasquet *v.* Board of Directors, 45 La. Ann. 342, 12 So. 506.

Maine.— Bailey *v.* Myrick, 50 Me. 171.

Maryland.— Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982; Maryland Coal Co. *v.* Baker, 85 Md. 688, 36 Atl. 768.

Massachusetts.— Caverly *v.* McOwen, 126 Mass. 222; Bassett *v.* Granger, 103 Mass. 177.

Michigan.— Union Nat. Bank *v.* Rich, 116 Mich. 414, 74 N. W. 659; John A. Tolman Co. *v.* Reed, 115 Mich. 71, 72 N. W. 1104.

Minnesota.—Piper *v.* Sawyer, 78 Minn. 221,

has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or the propriety of the compliance with its mandate;[39] and, if the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal.[40]

80 N. W. 970; St. Paul Trust Co. *v.* Kittson, 67 Minn. 59, 69 N. W. 625.

Mississippi.— Bridgeforth *v.* Gray, 39 Miss. 136; Stewart *v.* Stebbins, 30 Miss. 66.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838; Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646.

Montana.—Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9; O'Rourke *v.* Schultz, 23 Mont. 285, 58 Pac. 712.

Nebraska.—Holt *v.* Schneider, (Nebr. 1901) 85 N. W. 280; State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733.

Nevada.—Wright *v.* Carson Water Co., 22 Nev. 304, 39 Pac. 872.

New Hampshire.— Wright *v.* Boynton, 40 N. H. 353.

New Mexico.—Crary *v.* Field, (N. M. 1900) 61 Pac. 118; Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 159, 42 Pac. 89.

New York.—People *v.* Queens School Board, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113 [*affirming* 44 N. Y. App. Div. 469, 61 N. Y. Suppl. 330]; Matter of Laudy, 161 N. Y. 429, 55 N. E. 914 [*reversing* 53 N. Y. Suppl. 1107].

North Carolina.— Wright *v.* Southern R. Co., 128 N. C. 77, 38 S. E. 283; Shoaf *v.* Frost, 127 N. C. 306, 37 S. E. 271.

Oregon.— North British, etc., Ins. Co. *v.* Lambert, 32 Oreg. 496, 52 Pac. 180; Applegate *v.* Dowell, 17 Oreg. 299, 20 Pac. 429.

Pennsylvania.— *In re* Melon St., 192 Pa. St. 331, 44 Wkly. Notes Cas. (Pa.) 361, 43 Atl. 1013; Cowen *v.* Pennsylvania Plate Glass Co., 188 Pa. St. 542, 41 Atl. 615.

South Carolina.— McAlister *v.* Hamilton, 61 S. C. 6, 39 S. E. 182; Worth *v.* Norton, 56 S. C. 479, 35 S. E. 135.

South Dakota.— Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937; Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239.

Texas.— Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599; Frankland *v.* Cassaday, 62 Tex. 418.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999; People's Bldg., etc., Assoc. *v.* Fowble, 18 Utah 206, 55 Pac. 57.

Vermont.— Saxe *v.* Burlington, 70 Vt. 449, 41 Atl. 438; Sherman *v.* Estey Organ Co., 69 Vt. 355, 38 Atl. 70.

Virginia.— Cottrell *v.* Watkins, 96 Va. 783, 32 S. E. 470; McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516.

Washington.— Dennis *v.* Kass, 13 Wash. 137, 42 Pac. 540; Wilkes *v.* Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809.

Wisconsin.— Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473, 80 N. W. 752.

United States.— Chamberlin *v.* Browning, 177 U. S. 605, 20 S. Ct. 820, 44 L. ed. 906; Ouray County *v.* Geer, 108 Fed. 478.

See 3 Cent. Dig. tit. "Appeal and Error," § 4358 *et seq.*

The "law of the case" is a phrase which has been formulated to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the right of the parties in and to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterward questioning its correctness. Klauber *v.* San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876.

In the United States' courts, the fact that the question therein determined was decided to the contrary in the state court is immaterial. Haley *v.* Kilpatrick, 104 Fed. 647, 44 C. C. A. 102.

39. *Arkansas.*—Walker *v.* Walker, 7 Ark. 542.

California.— Heidt *v.* Minor, 113 Cal. 385, 45 Pac. 700.

Illinois.—Walker *v.* Doane, 108 Ill. 236; Penn *v.* Schmisseur, 77 Ill. App. 526.

Indiana.— McKinney *v.* State, 117 Ind. 26, 19 N. E. 613; Willson *v.* Binford, 81 Ind. 588.

Louisiana.— Boisse *v.* Dickson, 32 La. Ann. 1150.

Maryland.— Reiff *v.* Horst, 55 Md. 42.

Missouri.— Stump *v.* Hornback, 109 Mo. 272, 18 S. W. 37; Gamble *v.* Gibson, 19 Mo. App. 531.

Utah.—Venard *v.* Green, 4 Utah 456, 11 Pac. 337.

West Virginia.— See Windon *v.* Stewart, (W. Va. 1900) 37 S. E. 603, wherein it is said that "where a question of law or fact is once definitely settled and determined by a court of last resort, and the cause is remanded for further proceedings, the conclusiveness of the questions determined cannot be called in question by subsequent pleadings" or new evidence.

United States.—U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769; Pearce *v.* Germania Ins. Co., 96 U. S. 461, 24 L. ed. 672.

40. *California.*—Smith *v.* San Luis Obispo, (Cal. 1893) 34 Pac. 830.

Illinois.— Roby *v.* Calumet, etc., Canal, etc., Co., 154 Ill. 190, 40 N. E. 293; Mix *v.* People, 122 Ill. 641, 14 N. E. 209; Osburn *v.* McCartney, 121 Ill. 408, 12 N. E. 72.

Kentucky.— Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Brown *v.* Crow, Hard. (Ky.) 443; Lewis *v.* Lewis, 11 Ky. L. Rep. 413, 12 S. W. 1134.

Maryland.—Hammond *v.* Inloes, 4 Md. 138; Hambleton *v.* Tenant, 4 Harr. & J. (Md.) 440.

2. Former Decision Erroneous. The rule just stated has been held to apply to a former determination, whether that determination was right or wrong,[41] the remedy of the party deeming himself aggrieved being to seek a rehearing.[42] Under some circumstances, however — as where there is apparent error,[43] a desire for a reargument of the questions is intimated by the court,[44] or consideration of the present appeal will be in some way controlled or affected by the previous decision[45] — an appellate court will review and reverse its former decision in the same case, more especially where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured far outweighs any injury that may be done in the particular case by overruling a prior decision.[46]

Michigan.—Warner *v.* Mason, 50 Mich. 53, 14 N. W. 697.

Missouri.— Lane *v.* Chicago, etc., R. Co., 35 Mo. App. 567; Teichman Commission Co. *v.* American Bank, 35 Mo. App. 472; Rimel *v.* Hays, 32 Mo. App. 177.

North Carolina.— Wright *v.* Southern R. Co., 128 N. C. 77, 38 S. E. 283; Shoaf *v.* Frost, 127 N. C. 306, 37 S. E. 271; Pretzfelder *v.* Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Bradsher *v.* Cheek, 112 N. C. 838, 17 S. E. 533.

United States.— Cook *v.* Porter, 11 Wall. (U. S.) 672, 20 L. ed. 84.

As to right of appeal from judgment entered on mandate see *supra*, III, D, 3, t [2 Cyc. 608].

41. *Alabama.*—Miller *v.* Jones, 29 Ala. 174; Gee *v.* Williamson, 1 Port. (Ala.) 313, 27 Am. Dec. 628.

Arkansas.— Rector *v.* Danley, 14 Ark. 304; Porter *v.* Doe, 10 Ark. 186.

California.— Reclamation Dist. No. 3 *v.* Goldman, 65 Cal. 635, 4 Pac. 676; Haynes *v.* Meeks, 20 Cal. 288.

Colorado.— Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858.

Georgia.— Pattillo *v.* Alexander, 105 Ga. 482, 300 S. E. 644; Southwestern R. Co. *v.* Wright, 68 Ga. 311.

Idaho.— Palmer *v.* Utah, etc., R. Co., 2 Ida. 350, 16 Pac. 553.

Illinois.— Chicago, etc., R. Co. *v.* Hoyt, 44 Ill. App. 48; Whitesides *v.* Cook, 43 Ill. App. 183.

Indiana.— Hawley *v.* Smith, 45 Ind. 183; Linton Coal, etc., Co. *v.* Persons, 15 Ind. App. 69, 43 N. E. 651.

Iowa.—Windsor *v.* Cobb, 74 Iowa 709, 39 N. W. 93; Babcock *v.* Chicago, etc. R. Co., 72 Iowa 197, 28 N. W. 644, 33 N. W. 628.

Kansas.— Norton *v.* Huntoon, 43 Kan. 275, 22 Pac. 565.

Kentucky.—Hopkins *v.* Adam Roth Grocery Co., 20 Ky. L. Rep. 1227, 49 S. W. 18; Brown *v.* Marion Nat. Bank, 18 Ky. L. Rep. 186, 35 S. W. 926.

Michigan.— Brown *v.* Pontiac Min. Co., 109 Mich. 535, 67 N. W. 546.

Missouri.— Redpath *v.* Lawrence, 48 Mo. App. 427.

Montana.— Barkley *v.* Tieleke, 2 Mont. 433.

Nebraska.— Meyer *v.* Shamp, 26 Nebr. 729, 42 N. W. 757, 51 Nebr. 424, 71 N. W. 57.

New York.— Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17, 70 N. Y. St. 56; Egerer *v.* New York Cent., etc., R. Co., 57 N. Y. Suppl. 133.

North Carolina.— Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927.

Oregon.— Powell *v.* Dayton, etc., R. Co., 14 Oreg. 22, 12 Pac. 83.

South Dakota.— State *v.* Ruth, (S. D. 1900) 84 N. W. 394; Sherman *v.* Port Huron Engine, etc., Co., 13 S. D. 95, 82 N. W. 413.

Virginia.— Turner *v.* Staples, 86 Va. 300, 9 S. E. 1123.

Washington.— Wilkes *v.* Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

Wisconsin.— Hungerford *v.* Cushing, 8 Wis. 324.

See 3 Cent. Dig. tit. "Appeal and Error," § 4360.

Reason for rule.— In Sherman *v.* Port Huron Engine, etc., Co., 13 S. D. 95, 82 N. W. 413, the reason assigned for this rule was that it would be unjust to litigants for the supreme court to express its opinion on a subject likely to arise on a second trial, and then adopt a different view on the second appeal.

42. *Illinois.*— Reed *v.* West, 70 Ill. 479; Owen *v.* Ætna Iron Works, 76 Ill. App. 325.

Kentucky.— Gray *v.* Dickinson, 11 Ky. L. Rep. 890, 13 S. W. 209.

Michigan.— Damon *v.* De Bar, 94 Mich. 594, 54 N. W. 300.

New Hampshire.— Weare *v.* Deering, 60 N. H. 56; Plaisted *v.* Holmes, 58 N. H. 619.

North Carolina.— Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927.

43. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

In Texas the decision of the court on a former appeal constitutes no bar to the consideration of the same question on a second appeal. The question is addressed to the discretion of the court, and is determinable according to the particular circumstances of the case. Kempner *v.* Huddleston, 90 Tex. 182, 37 S. W. 1066; Galveston, etc., R. Co. *v.* Faber, 77 Tex. 153, 8 S. W. 64; Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599; Burns *v.* Ledbetter, 56 Tex. 282; Mitchell *v.* Western Union Tel. Co., 23 Tex. Civ. App. 445, 56 S. W. 439.

44. Cassedy *v.* Bigelow, 27 N. J. Eq. 505.

45. Reinhardt *v.* Scarritt, 115 Mo. 51, 21 S. W. 1116.

46. *Alabama.*—Walker *v.* Forbes, 31 Ala. 9.

California.— Nieto *v.* Carpenter, 21 Cal. 455.

Maryland.— Dugan *v.* Hollins, 13 Md. 149; Hammond *v.* Inloes, 4 Md. 138.

Missouri.— Bealey *v.* Smith, 158 Mo. 515, 59 S. W. 984; Mountain Grove Bank *v.* Doug-

But this review of the court's former decision is considered a matter of grace rather than a matter of right.[47]

3. ERRORS EXISTING ON FORMER REVIEW. Though there are cases which hold that an appellate tribunal is bound by its prior decision only upon the points distinctly made and determined, and not upon points which might have been raised, but were not,[48] the general rule is that, on a second or subsequent appeal or writ of error, the court will not consider matters assigned as error which arose prior to the first appeal or writ of error and which might have been raised thereon, but were not, or matters appearing in the original record which might have been corrected on the first hearing, but were not urged.[49]

4. CROSS-APPEALS. Where, on an appeal or review, a party fails to prosecute a cross-appeal or to urge assignments of error which might have been effectively

las County, 146 Mo. 42, 47 S. W. 944; Bird *v.* Sellers, 122 Mo. 23, 26 S. W. 668; Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809; Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370; Francis *v.* Blair, 96 Mo. 515, 9 S. W. 894; Kiley *v.* Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Hamilton *v.* Marks, 63 Mo. 167.

Nebraska.— Hastings *v.* Foxworthy, 45 Nebr. 676, 63 N. W. 955, 34 L. R. A. 321.

Tennessee.— Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632.

Utah.—U. S. *v.* Elliot, 12 Utah 119, 41 Pac. 720.

In Alabama, by statute, it is the duty of the supreme court, on a second appeal, to disregard its former ruling, if it decrees it erroneous. Meyer *v.* Johnston, 64 Ala. 603; Moulton *v.* Reid, 54 Ala. 320. But the necessity of reconsidering its former decision does not devolve on the court unless properly presented (National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149); or where the same principles and questions decided on in the former appeal are involved and must necessarily be reconsidered (Stoudenmire *v.* De Bardelaben, 85 Ala. 85, 4 So. 723).

47. Bealey *v.* Smith, 158 Mo. 515, 59 S. W. 984, holding that on a second appeal of the same case the court may hear argument again upon the same proposition decided by it on the former appeal.

48. *California.*— Matter of Central Irrigation Dist., 117 Cal. 382, 49 Pac. 354.

Colorado.— Wilson *v.* Bates, 21 Colo. 115, 40 Pac. 351; Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858; Sprague Invest. Co. *v.* Mouat Lumber, etc., Co., (Colo. App. 1899) 60 Pac. 179.

Indiana.— Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

Maryland.— Tolson *v.* Tolson, 8 Gill (Md.) 376; Dnvall *v.* Farmers Bank, 9 Gill & J. (Md.) 31.

Missouri.—Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Keith *v.* Keith, 97 Mo. 223, 10 S. W. 597; Metropolitan Bank *v.* Taylor, 62 Mo. 338.

Montana.— Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9.

Tennessee.— Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593.

United States.— Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; Balch *v.* Haas, 73 Fed. 974, 36 U. S. App. 693, 20 C. C. A. 151.

Precise question must have been determined.— In order that a former decision shall operate as *res judicata* it must be certain and clear that the precise question was definitely and finally determined. It cannot be made out by inference or argument. Windon *v.* Stewart, (W. Va. 1900) 37 S. E. 603.

49. *Alabama.*— Bloodgood *v.* Grasey, 31 Ala. 575.

Arkansas.— Pelham *v.* Floyd, 9 Ark. 530.

Georgia.— Hodgkins *v.* Marshall, 102 Ga. 191, 29 S. E. 174; Story *v.* Brown, 98 Ga. 570, 25 S. E. 582.

Illinois.— Union Mut. L. Ins. Co. *v.* Kirchoff, 149 Ill. 536, 36 N. E. 1031; Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861.

Kentucky.— Thompson *v.* Louisville Banking Co., 21 Ky. L. Rep. 1611, 55 S. W. 1080; Ross *v.* Rees, 21 Ky. L. Rep. 856, 53 S. W. 271.

Louisiana.— Bushnell *v.* Brown, 8 Mart. N. S. (La.) 157.

Maine.— Bailey *v.* Myrick, 50 Me. 171.

Massachusetts.— Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Minnesota.—Tilleny *v.* Wolverton, 54 Minn. 75, 55 N. W. 822.

Mississippi.— Still *v.* Anderson, 63 Miss. 545.

Missouri.— Cooley *v.* Kansas City, etc., R. Co., 149 Mo. 487, 51 S. W. 101; Steele *v.* Thompson, 38 Mo. App. 312.

Nebraska.—Wittenberg *v.* Mollyneaux, 59 Nebr. 203, 80 N. W. 824; Hayden *v.* Frederickson, 59 Nebr. 141, 80 N. W. 494.

New Jersey.— Cassedy *v.* Bigelow, 27 N. J. Eq. 505.

New York.— Conable *v.* Smith, 19 N. Y. Suppl. 446, 46 N. Y. St. 2; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313.

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514.

Virginia.— Carter *v.* Hough, 89 Va. 503, 16 S. E. 665; Stuart *v.* Heiskell, 86 Va. 191, 9 S. E. 984.

Washington.— Smith *v.* Seattle, 20 Wash. 613, 56 Pac. 389.

Wisconsin.—Richter *v.* Leiby, 107 Wis. 404, 83 N. W. 694; South Bend Chilled Plow Co. *v.* George C. Cribb Co., 105 Wis. 443, 81 N. W. 675.

See 3 Cent. Dig. tit. "Appeal and Error," § 4355.

presented, he is precluded from such prosecution or presentation on a subsequent appeal.[50] It has been held, however, that, where a cause is reversed on cross-error, appellee is not estopped, on a subsequent appeal, from presenting errors which were assigned by him on the first appeal, but which he then waived by failure to argue them, where the first decision did not involve the merits of such errors.[51]

5. New Questions on Second Appeal. Where different questions arise on the second appeal, or the record presents a different state of facts, the former determination is not controlling.[52] The judgment of an appellate court can make *res judicata* only that which was in issue and decided.[53]

6. Subsequent Appeal in Court of Like Jurisdiction. Questions decided in the same case, on the same or substantially the same facts, by one appellate court, are binding on a subsequent appeal in another appellate court having like jurisdiction.[54] A change in the membership of the court since the first appeal,[55] or the creation or organization of a new court succeeding to the appellate jurisdiction of the court by which the first appeal was heard, will not affect the application of this rule.[56] Nor is it material that on the former appeal the members of

50. Montgomery *v.* Garr, 18 Ky. L. Rep. 607, 37 S. W. 580; Cameron *v.* Cates, 22 Tex. Civ. App. 577, 55 S. W. 980.

51. Cook *v.* Moulton, 64 Ill. App. 429; Smith *v.* Bogenschultz, 14 Ky. L. Rep. 305, 19 S. W. 667, 20 S. W. 390; Gates *v.* Pennsylvania R. Co., 154 Pa. St. 566, 32 Wkly. Notes Cas. (Pa.) 323, 26 Atl. 598; Ormsby *v.* Ihmsen, 34 Pa. St. 462.

52. *California.*—Tuffree *v.* Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Klauber *v.* San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876; Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

Colorado.— Doherty *v.* Morris, 17 Colo. 105, 28 Pac. 85; Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076.

Florida.— Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127.

Illinois.— Smith *v.* Brittenham, 98 Ill. 188; Henning *v.* Eldridge, 39 Ill. App. 273 [*affirmed* in 146 Ill. 305, 33 N. E. 754].

Indiana.— Cluggish *v.* Koons, 15 Ind. App. 599, 43 N. E. 158; Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646.

Iowa.— Bates *v.* Kemp, 13 Iowa 223.

Michigan.— Hardwick *v.* Bassett, 29 Mich. 17.

Nebraska.— State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733; Lane *v.* Starkey, 20 Nebr. 586, 31 N. W. 238.

Nevada.— Wright *v.* Carson Water Co., 22 Nev. 304, 39 Pac. 872.

Oregon.— Bloomfield *v.* Buchanan, 14 Oreg. 181, 12 Pac. 238.

Pennsylvania.— Whitaker's Estate, 14 Phila. (Pa.) 275, 38 Leg. Int. (Pa.) 140, holding that an appeal in which the only question disposed of is the standing of a contestant is not a bar to an appeal by another party to try the question of undue influence or mental unsoundness.

South Carolina.— State *v.* Tucker, 56 S. C. 516, 35 S. E. 215; Murray *v.* Aiken Min, etc., Co., 39 S. C. 457, 18 S. E. 5.

Tennessee.— Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632.

Texas.— Walker *v.* Cole, (Tex. Civ. App. 1894) 27 S. W. 882.

Utah.— Societe des Mines d'Argent, etc. *v.* Mackintosh, 7 Utah 35, 24 Pac. 669.

Wisconsin.—Wollman *v.* Ruehle, 104 Wis. 603, 80 N. W. 919; Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055.

United States.— The E. A. Packer, 58 Fed. 251, 14 U. S. App. 684, 7 C. C. A. 216.

See 3 Cent. Dig. tit. "Appeal and Error," § 4361; and *infra*, XVII, K, 10, b, c.

53. Rogerson *v.* Fanning, 38 Ill. App. 265; Gwin *v.* Waggoner, 116 Mo. 143, 22 S. W. 710; Case *v.* Hoffman, (Wis. 1897) 72 N. W. 390.

54. Feldman *v.* McGraw, 14 N. Y. App. Div. 631, 43 N. Y. Suppl. 885; Solomon *v.* Continental F. Ins. Co., 50 N. Y. Suppl. 922; Stokes *v.* Hyde, 48 N. Y. Suppl. 717; Burns *v.* Ledbetter, 56 Tex. 282. *Compare* Canadian, etc., Mortg., etc., Co. *v.* Edinburgh-American Land-Mortg. Co., (Tex. Civ. App. 1897) 42 S. W. 864.

55. Garrett *v.* Peirce, 84 Ill. App. 31; Ayer *v.* Stewart, 16 Minn. 89. But see Meyers *v.* Dittmar, 47 Tex. 373, wherein it was held that the doctrine that a decision of the appellate court on a first appeal forms the law of the case, from which the court will not depart on any second appeal, is not applicable where, between the two appeals, the membership of the court has been changed, and the former decisions under which the first appeal was determined have been overruled, in deference to an authoritative decision of the United States supreme court.

56. *District of Columbia.*— Holcomb *v.* Dearing, 8 App. Cas. (D. C.) 298.

Maryland.— Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522.

New York.—Van Winkle *v.* Constantine, 10 N. Y. 422.

South Dakota.— St. Croix Lumber Co. *v.* Mitchell, 4 S. D. 487, 57 N. W. 236; Plymouth County Bank *v.* Gilman, 3 S. D. 170, 62 N. W. 869, 44 Am. St. Rep. 782.

Utah.— Silva *v.* Pickard, 14 Utah 245, 47 Pac. 144.

Vermont.— Bigelow *v.* Middletown Cong. Soc., 15 Vt. 370.

Wisconsin.—Parker *v.* Pomeroy, 2 Wis. 112.

the court were not unanimous as to the decision, or did not concur in the reasoning.[57]

7. Subsequent Appeal to Intermediate Court. The determination of a court of last resort, on the review of a decision of an intermediate appellate court, cannot be questioned on a second appeal in the latter court,[58] unless a different question is presented.[59]

8. Suggestions and Statements on First Appeal. Mere expressions of opinion, or illustrations respecting matters not actually involved in the decision, have no binding force;[60] but suggestions or statements made on a former review will be regarded as the law of the case to the extent that they express the principles of law as they are applicable to the facts, although the determination is not dependent on the views thus expressed, especially where the rules of law as applied by the trial court have been expressly or impliedly approved.[61]

9. Parties Concluded. Questions presented, necessarily involved in, and decided on, an appeal by one of the parties to an action, cannot be urged on the second appeal by another party, whose interests are substantially the same.[62] So,

57. Oakley *v.* Aspinwall, 13 N. Y. 500; Dougherty *v.* Horseheads, 39 N. Y. Suppl. 447; Postlewaite *v.* Wise, 17 W. Va. 1.

58. *Illinois.*— Soucy *v.* People, 21 Ill. App. 370.

Kentucky.— Moore *v.* Powers, 4 Ky. L. Rep. 536.

Missouri.— Buchannan *v.* Cole, 65 Mo. App. 495; Anderson *v.* McPike, 41 Mo. App. 328; Hamilton *v.* Aurora F. & M. Ins. Co., 35 Mo. App. 263; Dowling *v.* Allen, 14 Mo. App. 590; St. Louis Gas Light Co. *v.* St. Louis, 12 Mo. App. 573.

New York.— Milbank *v.* Jones, 2 Misc. (N. Y.) 503, 22 N. Y. Suppl. 525, 51 N. Y. St. 616; Rose *v.* Hawley, 23 N. Y. Suppl. 373, 53 N. Y. St. 403; Crosby *v.* Delaware, etc., Canal Co., 21 N. Y. Suppl. 83, 49 N. Y. St. 1; Williams *v.* Hays, 20 N. Y. Suppl. 984, 49 N. Y. St. 916; Ruthven *v.* Patten, 2 Abb. Pr. N. S. (N. Y.) 121.

Texas.— Westchester F. Ins. Co. *v.* Wagner, (Tex. Civ. App. 1900) 57 S. W. 876; Stokes *v.* Mustain, (Tex. Civ. App. 1898) 44 S. W. 404; Houston, etc., R. Co. *v.* Shirley, (Tex. Civ. App. 1894) 24 S. W. 809.

United States.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 51 Fed. 929, 5 U. S. App. 97, 2 C. C. A. 542.

See 3 Cent. Dig. tit. "Appeal and Error," § 4364.

59. Wright *v.* Douglass, 10 Barb. (N. Y.) 97.

60. *California.*—Wixson *v.* Devine, 80 Cal. 385, 22 Pac. 224.

Florida.— Hart *v.* Stribling, 25 Fla. 435, 6 So. 455.

Indiana.— State *v.* Porter, 134 Ind. 63, 32 N. E. 1021, 33 N. E. 687; Ft. Wayne Water Power Co. *v.* Allen County, (Ind. App. 1900) 57 N. E. 146.

Kentucky.— Conwell *v.* Sandidge, 8 Dana (Ky.) 273.

Missouri.— Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534.

Nebraska.—Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842.

New York.— Holmes *v.* Jones, 69 Hun (N. Y.) 346, 23 N. Y. Suppl. 631, 52 N. Y. St. 709.

South Carolina.—Jacobs *v.* Mutual Ins. Co., 56 S. C. 558, 35 S. E. 221; Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445.

Texas.— Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

United States.— Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; The E. A. Packer, 58 Fed. 251, 14 U. S. App. 684, 7 C. C. A. 216.

See 3 Cent. Dig. tit. "Appeal and Error," § 4357.

The reasons of a judgment set forth in a supreme court opinion are not *res judicata*, as a judgment makes only that which was in issue and decided *res judicata*. Case *v.* Hoffman, (Wis. 1897) 72 N. W. 390.

61. *California.*— Faulkner *v.* Hendy, 123 Cal. 467, 56 Pac. 99; Matter of Lux, 114 Cal. 73, 45 Pac. 1023; Porter *v.* Muller, 112 Cal. 355, 44 Pac. 729; Leese *v.* Clark, 20 Cal. 387.

Indiana.— Greenwood *v.* Island Coal Co., (Ind. App. 1901) 59 N. E. 1071.

Maryland.— Eyler *v.* Hoover, 8 Md. 1.

Mississippi.— Menken *v.* Frank, 58 Miss. 283.

New York.— Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 42 N. Y. St. 879, 15 L. R. A. 138; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313.

Texas.— Though a judgment is reversed on a question of minor importance, the questions vital to the rights of the parties, which were carefully considered and determined on the appeal, must be deemed settled by that decision, and will not be reviewed on a second appeal. Adams *v.* Fisher, 75 Tex. 657, 6 S. W. 772.

Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.

Wisconsin.— Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 19 N. W. 56; Lampe *v.* Kennedy, 49 Wis. 601, 6 N. W. 311.

62. Bowen *v.* Hastings, 47 Wis. 232, 2 N. W. 301; Morrison *v.* Kuhn, 80 Fed. 740, 26 C. C. A. 130. See 3 Cent. Dig. tit. "Appeal and Error," § 4369.

A former adjudication as to who were proper parties in the action is conclusive. Vincent *v.* Philips, 48 La. Ann. 351, 19 So. 143.

new parties added because their presence is necessary,[63] or parties who claim in the same right as the original parties,[64] or persons whose rights were properly presented, or persons who were inadequately represented, and who sustained no injury, are bound by the first adjudication.[65] But parties added because of the decision on the first appeal are not precluded by the determination thereon.[66]

10. Questions Concluded — a. Jurisdiction. On a second appeal the court will not consider an objection that it had no jurisdiction on the first review,[67] nor, having decided that it was without jurisdiction, will it review its former determination, or examine questions relative thereto, though brought before it in another form.[68] Neither will the court pass on the jurisdiction of the trial court, when that question might have been raised on the prior appeal.[69]

b. Pleadings. Where the sufficiency of a pleading is determined on one appeal, the determination is conclusive when the same question is presented on a subsequent appeal,[70] although the grounds urged were not presented on the former

63. McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516.

64. Forgerson *v.* Smith, 104 Ind. 246, 3 N. E. 866; Musgrave *v.* Staylor, 36 Md. 123; Hammond *v.* Inloes, 4 Md. 138.

In Louisiana, in an appeal taken by motion in open court, all parties to the suit who are not appellants are appellees, and all are concluded by the judgment rendered on appeal. Conery *v.* New Orleans Waterworks Co., 42 La. Ann. 441, 7 So. 590.

Where parties defendant, equally interested, have previously appealed, and the question has been decided adversely to them, the decision will not be disturbed upon the appeal of other defendants which is prosecuted on the same grounds. Hunter *v.* Hubert, (Cal. 1895) 39 Pac. 534.

65. Rugely *v.* Robinson, 19 Ala. 404.

66. Robinson *v.* Kind, 25 Nev. 261, 50 Pac. 863.

67. Clary *v.* Hoagland, 6 Cal. 685; Hungerford *v.* Cushing, 8 Wis. 324; Washington Bridge Co. *v.* Stewart, 3 How. (U. S.) 413, 11 L. ed. 658. See also Martin *v.* Maxey, 14 Mont. 85, 35 Pac. 667, holding that, when the court has once entertained an appeal, it will not consider, on a subsequent appeal, questions of practice relative to the regularity of the prior appeal.

68. Matter of Southern Boulevard R. Co., 143 N. Y. 253, 38 N. E. 276, 62 N. Y. St. 150.

69. *Alabama.*—Mims *v.* Sturdevant, 36 Ala. 636.

Arkansas.— Pelham *v.* Floyd, 9 Ark. 530.

California.— Clary *v.* Hoagland, 6 Cal. 685.

Illinois.— Champaign County *v.* Reed, 106 Ill. 389; Semple *v.* Anderson, 9 Ill. 546.

Missouri.— Boone *v.* Shackleford, 66 Mo. 493.

See 3 Cent. Dig. tit. "Appeal and Error," § 4371.

70. *Alabama.*—Burgess *v.* Sugg, 2 Stew. & P. (Ala.) 341.

California.— Klauber *v.* San Diego St. Car Co., (Cal. 1893) 34 Pac. 516; Eversdon *v.* Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Givinn *v.* Hamilton, 75 Cal. 265, 17 Pac. 212.

Colorado.— Schiffer *v.* Adams, 13 Colo. 572, 22 Pac. 964.

Georgia.— Allen *v.* Schweigert, 113 Ga. 69, 38 S. E. 397.

Illinois.— Windett *v.* Ruggles, 151 Ill. 184, 37 N. E. 1021.

Indiana.— Hatfield *v.* Cummings, 152 Ind. 537, 53 N. E. 761; Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681 34 N. E. 569; Mason *v.* Burk, 120 Ind. 404, 22 N. E. 119.

Iowa.— Shropshire *v.* Ryan, 111 Iowa 677, 82 N. W. 1035.

Kentucky.— Bottoms *v.* Bruner's Chapel, etc., Turnpike Co., (Ky. 1901) 62 S. W. 20; Pentecost *v.* Manhattan L. Ins. Co., (Ky. 1901) 61 S. W. 29; Louisville, etc., R. Co. *v.* Mattingly, (Ky. 1900) 57 S. W. 620.

Michigan.— Moore *v.* Thompson, 108 Mich. 283, 66 N. W. 51.

Missouri.— Crecelius *v.* Bierman, 68 Mo. App. 34; Haseltine *v.* Ausherman, 29 Mo. App. 451.

Montana.— Yellowstone Nat. Bank *v.* Gagnon, (Mont. 1901) 64 Pac. 664.

New York.— Mahon *v.* Hall, 4 Thomps. & C. (N. Y.) 390; National Thread Co. *v.* Mansfield Silk, etc., Co., 4 N. Y. Suppl. 226, 21 N. Y. St. 977; Keteltas *v.* Myers, 1 Abb. Pr. (N. Y.) 403.

Ohio.— Pennsylvania Co. *v.* Platt, 47 Ohio St. 366, 25 N. E. 1028.

Tennessee.— Collins *v.* North British, etc., Ins. Co., 91 Tenn. 432, 19 S. W. 525; Grommes *v.* Theime, 13 Lea (Tenn.) 320; McNairy *v.* Nashville, 2 Baxt. (Tenn.) 251; Jameson *v.* McCoy, 5 Heisk. (Tenn.) 108.

Washington.— Dennis *v.* Kass, 13 Wash. 137, 42 Pac. 540.

Wisconsin.—Walker *v.* Daly, 84 Wis. 322, 54 N. W. 587.

See 3 Cent. Dig. tit. "Appeal and Error," § 4375.

Assumption of facts.— Where the supreme court determines a demurrer to a complaint, any judgment based on facts assumed to exist by the opinion, but which are not alleged in the complaint, is not *res judicata.* Case *v.* Hoffman, (Wis. 1897) 72 N. W. 390.

Evidence insufficient to sustain petition.— Where a petition has been held good as against a demurrer, and the evidence adduced on the trial does not sustain all of the material allegations thereof, and the decision on demurrer is not applicable to the case made by the facts proved, that decision is not con-

appeal.[71] However, if the pleading is amended so as to materially change the issue on the second trial, the former decision is not the law of the second appeal;[72] but amendments which do not substantially change the character of a pleading will not change the rule.[73]

c. Evidence. On a second appeal, the court will not reëxamine evidence, the sufficiency of which, or substantially the same, was passed upon on a former appeal, but will adhere to its former ruling.[74] Otherwise where the testimony on the second trial is materially different.[75]

trolling. Allen *v.* Schweigert, 113 Ga. 69, 38 S. E. 397.

Intimation as to sufficiency of pleading.— Where, on reversing the judgment on the first appeal, it was intimated that the petition did not state a cause of action, and it was also held that the proof was insufficient to authorize the instructions given or to sustain the verdict, and, on the second trial, the pleadings were not objected to, it was held that the court was not precluded from considering the sufficiency of the petition on a subsequent appeal. Louisville, etc., R. Co. *v.* Coppage, 10 Ky. L. Rep. 193.

Where a demurrer to a petition is overruled, and on error no question is raised as to the ruling, it cannot be raised on a subsequent writ of error. Oslin *v.* Telford, 108 Ga. 803, 34 S. E. 168.

71. Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Edmondson *v.* Kentucky Cent. R. Co., 20 Ky. L. Rep. 1296, 49 S. W. 200, 448; Smith *v.* Seattle, 20 Wash. 613, 56 Pac. 389.

72. Castagnino *v.* Balletta, (Cal. 1889) 21 Pac. 1097; Ft. Wayne Water-Power Co. *v.* Allen County, (Ind. App. 1900) 57 N. E. 146; Adams County *v.* Burlington, etc., R. Co., 55 Iowa 94, 2 N. W. 1054, 7 N. W. 471; Bridges *v.* McAlister, 21 Ky. L. Rep. 428, 51 S. W. 603, 45 L. R. A. 800; Ohio Valley R. Co. *v.* Com., 20 Ky. L. Rep. 1527, 49 S. W. 548; and *supra*, XVII, K, 5.

Where it is decided, on appeal, that the action is barred by limitation, and plaintiff amends his petition, pleading matters intended to show that it was not barred, the question of limitation on a second appeal will be decided on the pleadings and the record as then submitted. Harrison *v.* Hartford F. Ins. Co., (Iowa 1899) 80 N. W. 309.

73. Byrom *v.* Gunn, 111 Ga. 805, 35 S. E. 649; Newberry *v.* Blatchford, 106 Ill. 584; James *v.* Lake Erie, etc., R. Co., 148 Ind. 615, 48 N. E. 222; Jeffersonville Water Supply Co. *v.* Riter, 146 Ind. 521, 45 N. E. 697; Lillie *v.* Trentman, 130 Ind. 16, 29 N. E. 405; Brown *v.* Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; Logansport *v.* Humphrey, 106 Ind. 146, 6 N. E. 337; Pittsburgh, etc., R. Co. *v.* Noftsker, (Ind. App. 1901) 60 N. E. 372; Shirk *v.* Lingeman, (Ind. App. 1901) 59 N. E. 941; Lebanon Nat. Bank *v.* Clinton School Tp., (Ind. App. 1900) 56 N. E. 857; State *v.* Christian, 18 Ind. App. 11, 47 N. E. 395.

A decision on appeal holding a complaint defective for want of certain averments in effect holds it sufficient in all other respects, and, on an issue of the sufficiency of an amendment made pursuant to the decision, it becomes the law of the case. Phenix Ins. Co. *v.* Moffitt, (Ind. App. 1898) 51 N. E. 948.

Where an appeal from a decision sustaining a demurrer to a complaint has been dismissed on the ground that the right to appeal has been waived by filing an amended complaint, such decision cannot be reviewed on an appeal from a judgment on the amended complaint. Hooker *v.* Brandon, 75 Wis. 8, 43 N. W. 741.

74. *Alabama.*— Sanders *v.* Godley, 36 Ala. 50.

California.— Lassing *v.* Paige, 56 Cal. 139.

Colorado.— Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195; Doherty *v.* Morris, 17 Colo. 105, 28 Pac. 85.

District of Columbia.—Washington, etc., R. Co. *v.* Adams, 11 App. Cas. (D. C.) 396.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Illinois.— Elston *v.* Kennicott, 52 Ill. 272; Fellows *v.* St. Louis Bridge Co., 45 Ill. App. 589.

Kentucky.— Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 685, 871.

Louisiana.— Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003, 11 So. 707.

Massachusetts.— O'Malley *v.* Twenty-Five Associates, (Mass. 1901) 60 N. E. 387.

Michigan.— Feige *v.* Burt, 124 Mich. 565, 83 N. W. 367; Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718.

Missouri.— Bealey *v.* Smith, 158 Mo. 515, 59 S. W. 984; Boettger *v.* Scherpe, etc., Architectural Iron Co., 136 Mo. 531, 38 S. W. 298.

Nebraska.—Stockham Bank *v.* Alter, (Nebr. 1901) 85 N. W. 300; Todd *v.* Houghton, 59 Nebr. 538, 81 N. W. 508.

Nevada.— Wright *v.* Carson Water Co., 22 Nev. 304, 39 Pac. 872.

New Mexico.—Crary *v.* Field, (N. M. 1900) 61 Pac. 118.

New York.—Hart *v.* Thompson, 39 N. Y. App. Div. 668, 57 N. Y. Suppl. 334; Hartley *v.* Murtha, 36 N. Y. App. Div. 196, 56 N. Y. Suppl. 686.

Oregon.— Bloomfield *v.* Buchanan, 14 Oreg. 181, 12 Pac. 238.

Texas.— Walker *v.* Cole, (Tex. Civ. App. 1894) 28 S. W. 1012.

Utah.— Societe des Mines d'Argent, etc. *v.* Mackintosh, 7 Utah 35, 24 Pac. 669.

Virginia.— Carper *v.* Norfolk, etc., R. Co., 95 Va. 43, 27 S. E. 813; Wooldridge *v.* Green, (Va. 1897) 26 S. E. 578.

Wisconsin.— Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563; Meinzer *v.* Racine, 74 Wis. 166, 42 N. W. 230.

See 3 Cent. Dig. tit. "Appeal and Error," § 4376.

75. *Illinois.*— Ramsey *v.* Whitbeck, 81 Ill. App. 210.

d. Instructions. Instructions given in accordance with a decision rendered in the cause on a prior appeal will not be reëxamined on a subsequent appeal.[76] But the propriety of instructions given or refused which are based on principles which were not considered, or which could not have been considered on the first appeal, may be examined on the subsequent appeal.[77]

XVIII. DETERMINATION AND DISPOSITION OF CAUSE.

A. Necessity of Decision — 1. In General. Where a cause is properly brought up and duly presented to an appellate court having jurisdiction thereof, it is the duty of such court to decide it;[78] but, where the controversy is terminated finally by the decision of any one or more of the points raised in the record, it is not, usually, necessary for the court to decide the remaining questions.[79] And it is a general rule that appellate courts will not decide abstract or moot questions not essential to the determination of a controversy.[80]

Indiana.— Bluffton *v.* McAfee, (Ind. App. 1899) 53 N. E. 1058; Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646.

Kentucky.—Chesapeake, etc., R. Co. *v.* Judd, 20 Ky. L. Rep. 1978, 50 S. W. 539; Ohio Valley R. Co. *v.* Com., 20 Ky. L. Rep. 1527, 49 S. W. 548.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300.

Nebraska.— Sutton First Nat. Bank *v.* Grosshans, (Nebr. 1901) 85 N. W. 542; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

New York.— Douglass *v.* Northern Cent. R. Co., 59 N. Y. App. Div. 470, 69 N. Y. Suppl. 370.

United States.— Patton *v.* Texas, etc., R. Co., 95 Fed. 244, 37 C. C. A. 56.

See also *supra*, XVII, K, 5.

76. *Indiana.*—Evansville *v.* Senhenn, (Ind. App. 1901) 59 N. E. 863.

Kentucky.— Louisville, etc., R. Co. *v.* Blair, 12 Ky. L. Rep. 294.

Missouri.—Midland Elevator Co. *v.* Cleary, 77 Mo. App. 298; Maack *v.* Schneider, 57 Mo. App. 431; Nelson *v.* Wallace, 57 Mo. App. 397; Feurt *v.* Ambrose, 34 Mo. App. 360.

New York.— Kuhn *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 74, 36 N. Y. Suppl. 339, 71 N. Y. St. 233.

Texas.—Texas, etc., R. Co. *v.* Roberts, (Tex. Civ. App. 1897) 45 S. W. 218.

See 3 Cent. Dig. tit. "Appeal and Error," § 4377.

Where, on a retrial after reversal, appellant's counsel orally requested the court to follow the instructions given in a former trial, except certain instructions held to have been erroneous, without putting such request in writing and signing the same, and without knowledge that it contained an erroneous instruction which was given, appellant is not thereby precluded from claiming a reversal of the judgment against him on that ground. Heatherly *v.* Little, 21 Tex. Civ. App. 664, 52 S. W. 980.

77. Treusch *v.* Shryock, 55 Md. 330; New York L. Ins. Co. *v.* Clemmitt, 77 Va. 366.

78. Taylor *v.* Morton, 2 Black (U. S.) 481, 17 L. ed. 277.

As to the power of the appellate court to dismiss the appeal see *supra*, XIV.

Decree vacated by appeal.—When the decree of the court below is vacated by an appeal, the appellate court must make a new decree. Mathes *v.* Bennett, 21 N. H. 188.

That a cause is pending in the supreme court, involving a question decisive of the point at issue in the case at bar, is not a sufficient ground for delaying a decision in the court of appeals. Buckland *v.* Nies, 8 Mo. App. 587.

Trial de novo — Final judgment.— In some jurisdictions, where a cause is tried *de novo* in the appellate court, final judgment is rendered in that court. Davenport First Nat. Bank *v.* Baker, 60 Iowa 132, 14 N. W. 125; State *v.* Blum, 55 N. J. L. 518, 26 Atl. 861; Claflin *v.* Goebel, 7 Ohio Cir. Ct. 384.

79. Murphy *v.* Hobbs, 8 Colo. 130, 11 Pac. 55; Akers *v.* Clarkson, 6 Mo. App. 601.

Reasons urged for new trial.— The provision in the Indiana constitution which requires the supreme court to state in writing each question arising in the record, and its decision thereon, does not require it to examine all the reasons urged for a new trial where it has decided that the court below erred in refusing to grant a new trial. Judah *v.* Vincennes University, 23 Ind. 272.

Where an action was abated in the court below, it is not proper, if competent, for the appellate court to hear and determine the case on the merits, after deciding that there was no error in abating the cause below. Sevier *v.* Teal, 16 Tex. 371.

Where judgment affirmed.— Md. Acts (1831), c. 319, requiring the appellate court to decide all exceptions taken by either side in the trial below, relates only to cases sent back under a procedendo, and does not apply to cases where judgments are affirmed in the appellate court. Boehme *v.* Carr, 3 Md. 202.

80. See *supra*, II, A [2 Cyc. 533].

As to dismissal for want of actual controversy see *supra*, II, A, [2 Cyc. 533]; XIV.

As to affirmance for want of actual controversy see *infra*, XVIII, C.

2. On Cross-Appeals. When cross-appeals are pending together, neither should be decided till both are heard.[81]

B. General Matters Affecting Decision — 1. Decision on Consent. It is, generally, permissible for the appellate court to render its decision on the consent of the parties,[82] and, in pursuance of such consent, it will affirm[83] or reverse the judgment appealed from.[84] But it is the general rule that jurisdiction cannot be conferred by consent;[85] so, an appellate court will not go beyond its appellate jurisdiction and act as arbitrator between the parties.[86]

81. Hundhausen *v.* Atkins, 36 Wis. 518.

Where cause remanded for new trial.— When the effect of a judgment on appeal "is to leave the case to be again tried in the court below," questions raised, in a cross-bill of exceptions filed by defendant in error, relating to such matters as will probably arise at the next trial, will be decided. Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251.

Where both plaintiff and defendant appeal, raising the same questions, and a determination of one appeal disposes of all questions raised, the other appeal will be dismissed as having been improvidently taken. Burgess *v.* Kirby, 95 N. C. 276; State *v.* McKee, 94 N. C. 325.

When cross-exceptions considered first.— Where the questions raised by the cross-bill of exceptions are controlling upon the case as a whole, they will be first considered; and, if the decision of the trial court on such exceptions is reversed, the errors complained of in the main bill of exceptions will not be considered. Smith *v.* Van Hoose, 110 Ga. 633, 36 S. E. 77; Gay *v.* Gay, 108 Ga. 739, 32 S. E. 846; Cheshire *v.* Williams, 101 Ga. 814, 29 S. E. 191.

82. Hartsfield *v.* Chamblin, 44 S. C. 110, 21 S. E. 798; Missouri, etc., R. Co. *v.* Hodges, (Tex. Civ. App. 1899) 52 S. W. 624. And see, generally, Stipulations.

As to dismissal on consent see *supra*, XIV, C.

83. *Florida.*— Page *v.* Southern Bell Telephone, etc., Co., 40 Fla. 425, 25 So. 62.

Idaho.— Kelly *v.* Leachman, (Ida. 1895) 39 Pac. 1113.

Indiana.— Indianapolis Union R. Co. *v.* Holt, (Ind. 1895) 41 N. E. 522.

Kentucky.— Lindsey *v.* Jordan, Litt. Sel. Cas. (Ky.) 32.

Minnesota.— Sanborn *v.* Eads, (Minn. 1888) 36 N. W. 463.

Texas.—Ackerman *v.* Huff, 71 Tex. 317, 9 S. W. 236; Davis *v.* Hale, 49 Tex. 712.

Where a plaintiff in error dies before the return, the consent of his representative cannot authorize the affirmance of the judgment. *Ex p.* Norris, 2 Ala. 385.

84. Henry *v.* Travelers' Ins. Co., 16 Colo. 60, 26 Pac. 321; Frost *v.* Howard, 81 Ill. 602; Gardner *v.* Richardson, 14 Ky. L. Rep. 863; Hagan *v.* Ferres, 6 La. 525. But see Grinstead *v.* Richardson, 12 Ky. L. Rep. 986.

Correct judgment.— But it has been held that the court will not, even upon motion of all parties, reverse a correct judgment fixing the amount of an administrator's bond. Levy's Succession, 48 La. Ann. 1520, 21 So. 82.

Will not ignore injunction.— The supreme court will not, even with consent of parties, order a reversal which ignores an injunction issued by the district court. Dubuque Branch State Bank *v.* Rhomberg, 37 Iowa 664.

Where appellee confesses error, a judgment will be reversed.

Florida.— Gray *v.* Pensacola First Nat. Bank, 31 Fla. 590, 12 So. 215.

Illinois.— Mahony *v.* Mahony, 139 Ill. 14, 28 N. E. 915. An appellee can confess error only by appearing in open court, in person or by counsel. Snyder *v.* Snyder, 142 Ill. 60, 31 N. E. 303.

Indiana.—Mace *v.* Lowdermilk, 58 Ind. 596; Black *v.* State, 58 Ind. 589; Stout *v.* Albert, 57 Ind. 12.

Montana.— O'Donnel *v.* Gainan, 17 Mont. 490, 43 Pac. 713.

Washington.— Tacoma *v.* Dougan, 4 Wash. 796, 31 Pac. 325.

Confession on power of attorney.— In Alabama, the supreme court will not permit error to be confessed on a power of attorney from defendant in error, when such defendant is a female non-resident, and her attorney makes affidavit that he believes such power of attorney was fraudulently procured. Beavers *v.* Smith, 11 Ala. 20.

Request by appellee for conditional reversal.—A request for the reversal of a cause back to and including an error in sustaining a demurrer to a pleading, upon confession of the error by the party making the request, cannot be entertained unless notice has been given to the adverse party of the confession, or such adverse party has waived notice and consented to a conditional reversal. Alexander *v.* Alexander, 140 Ind. 560, 40 N. E. 55.

When no remand on confession of error.— A respondent cannot, by confessing certain errors, have a cause remanded for a new trial, without examination thereof by the appellate court, where appellant contends that the findings of fact made by the court below are such as to authorize the appellate court to direct a judgment to be entered in appellant's favor. Sun Ins. Co. *v.* White, 118 Cal. 468, 50 Pac. 546.

85. See *supra*, II, B [2 Cyc. 536].

86. **An agreement between counsel,** upon the reversing of a judgment rendered below, that the appellate court examine the evidence, and make a decision on the merits of the case which is to be entered as a final judgment below, will not be performed by the appellate court, as it has no authority to thus act as an arbitrator. Pearce *v.* Jordan, 9 Fla. 526.

2. Decision by Divided Court — a. Majority Decisions — (I) *In General.* As to how many concurring votes shall be necessary to a decision by an appellate court is a question depending upon statutes or constitutional provisions, but, ordinarily, a majority of the judges sitting is sufficient,[87] provided a quorum of the whole court be present.[88]

(II) *Concurrence Based on Different Reasons.* Where a majority of the judges agree in the decision to be rendered, it is not material that their conclusions are based on different reasons.[89]

b. Equal Division — (I) *In General.* It is a well-recognized rule of appellate practice, declared by statute in many jurisdictions, that, where the judges of the appellate court are equally divided in opinion, the judgment, order, or decree appealed from stands affirmed.[90] In other words, an equal division on a question

87. Beaulieu *v.* Furst, 2 La. Ann. 46; Smith *v.* Bell, Mart & Y. (Tenn.) 301, 17 Am. Dec. 798.

In Oklahoma three of the five judges of the supreme court must concur in order to reverse the decision of the lower court; and so, where two judges were disqualified and the others stood two for reversal and one for affirmance, the judgment was affirmed, by operation of law. Paine *v.* Foster, 9 Okla. 257, 59 Pac. 252.

United States supreme court — Constitutional questions.— The United States supreme court will not, except in cases of absolute necessity and unless a majority of the whole court concurs, deliver any judgment in cases where constitutional questions are involved. Briscoe *v.* Kentucky Com. Bank, 8 Pet. (U. S.) 118, 8 L. ed. 887.

88. Howard *v.* Walsh, 28 La. Ann. 847; Gibbons *v.* Ogden, 5 N. J. L. 1005; McFarland *v.* Crary, 6 Wend. (N. Y.) 297.

89. *Arkansas.*— Pollock *v.* C. Hennicke Co., 64 Ark. 180, 46 S. W. 185.

Kansas.— Foltz *v.* Merrill, 11 Kan. 479.

Mississippi.— Browning *v.* State, 33 Miss. 47; McNutt *v.* Lancaster, 9 Sm. & M. (Miss.) 570.

New York.— Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1.

United States.— Smith *v.* U. S., 5 Pet. (U. S.) 292, 8 L. ed. 130.

It is useless to give the opinions of the several judges, since no point of law is settled or decided thereby. Atchison, etc., R. Co. *v.* Hubbard, 16 Kan. 156.

Limits of rule.— But it has been held that, in order for a judgment to be reversed, a majority must concur on some one error — otherwise, the judgment must be affirmed, notwithstanding each of the judges finds error therein. Shollenberger *v.* Brinton, 52 Pa. St. 9. And see Browning *v.* State, 33 Miss. 47. But *compare* Smith *v.* U. S., 5 Pet. (U. S.) 292, 8 L. ed. 130.

90. *Delaware.*— Clark *v.* Kean, 1 Del. Ch. 114.

Florida.— Fraser *v.* Willey, 2 Fla. 116.

Georgia.— Durrett *v.* Rucker, 36 Ga. 272.

Illinois.— Kerr *v.* Whiteside, 1 Ill. 390; H. Channon Co. *v.* Hahn, 90 Ill. App. 256; McDonald *v.* Illinois Cent. R. Co., 83 Ill. App. 463.

Iowa.— Richards *v.* Burden, 59 Iowa 723, 7 N. W. 17, 13 N. W. 90.

Kansas.— Comer *v.* Knowles, 17 Kan. 436.

Kentucky.— Sterritt *v.* Lockhart, 7 J. J. Marsh. (Ky.) 554; Faris *v.* Shanks, 7 T. B. Mon. (Ky.) 133.

Louisiana.— Camp *v.* Wardens St. Louis Church, 7 La. Ann. 321; Fonda *v.* Beach, 7 La. Ann. 213. But it was formerly held that no judgment could be rendered in such case. Bowman *v.* Flower, 5 Mart. N. S. (La.) 407.

Maryland.— Gregg *v.* Baltimore, 14 Md. 479; Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522.

Massachusetts.— Rayne *v.* American Sugar Refining Co., (Mass. 1896) 44 N. E. 444; Shannon *v.* Shannon, 10 Allen (Mass.) 249.

Michigan.— McPherson *v.* Ryan, 59 Mich. 33, 26 N. W. 321; Dutch Reformed Church Cases, 52 Mich. 329, 17 N. W. 933.

Minnesota.—Gran *v.* Spangenberg, 53 Minn. 42, 54 N. W. 933.

New Jersey.— Huncke *v.* Francis, 27 N. J. L. 55.

New York.— Moss *v.* Averell, 10 N. Y. 449; Mason *v.* Jones, 3 N. Y. 375; Bridge *v.* Johnson, 5 Wend. (N. Y.) 342.

North Carolina.— Morehead Banking Co. *v.* Burlington, 124 N. C. 251, 32 S. E. 558; Puryear *v.* Lynch, 121 N. C. 255, 28 S. E. 410; Durham *v.* Richmond, etc., R. Co., 113 N. C. 240, 18 S. E. 208.

Pennsylvania.— Beltzhoover *v.* Darragh, 16 Serg. & R. (Pa.) 329.

Virginia.— Martin *v.* Welch, 4 Munf. (Va.) 60; Com. *v.* Beaumarchais, 3 Call (Va.) 122.

West Virginia.— Raines *v.* Watson, 2 W. Va. 371.

United States.— U. S. *v.* Reeside, 8 Wall. (U. S.) 302, 19 L. ed. 391: Coleman *v.* Hudson River Bridge Co., 2 Wall. (U. S.) 403, 17 L. ed. 876; Washington Bridge Co. *v.* Stewart, 3 How. (U. S.) 413, 11 L. ed. 658; Benton *v.* Woolsey, 12 Pet. (U. S.) 27, 9 L. ed. 987; Etting *v.* U. S. Bank, 11 Wheat. (U. S.) 59, 6 L. ed. 419; Texas, etc., R. Co. *v.* Gentry, 57 Fed. 422, 13 U. S. App. 531, 6 C. C. A. 413; Nicks *v.* Mathers, Hempst. (U. S.) 80, 18 Fed. Cas. No. 10,254*a*.

England.— Chapman *v.* Lamphire, 3 Mod. 155; Iveson *v.* Moore, 1 Salk. 17. Though it seems to have been the early practice in the English common-law courts that, where the

renders the appellate court powerless to take affirmative action, and, consequently, the case must be left *in statu quo*— not because it is deemed to be proper as it stands, but because the court cannot decide it to be improper.[91]

(II) *Effect of Decision.* A judgment rendered by an equally divided court is as binding and conclusive on the rights of the parties as if rendered upon the full concurrence of all the judges,[92] and bars another suit for the same cause.[93]

judges were equally divided in opinion upon an essential point of law, no judgment should be given. Proctor's Case, 12 Coke 117.

See 3 Cent. Dig. tit. "Appeal and Error," § 4421.

Constitutionality of statute.— In Mason *v.* Jones, 3 N. Y. 375, it was held that the provision of the New York code of 1849, authorizing the rendition of judgment of affirmance in cases where the judges were equally divided in opinion, was not liable to any constitutional objection.

Division as to part of judgment.—Where the court is equally divided as to part of the judgment or decree appealed from, it must be affirmed to that extent; but if they concur, as to the residue, that there should be a modification or reversal, judgment may be given accordingly. Nester *v.* Lockwood, 50 Mich. 42, 14 N. W. 692; Com. *v.* Beaumarchais, 3 Call (Va.) 122.

Under the California constitution a majority of all the judges of the supreme court is necessary to a decision, and, therefore, an equal division cannot of itself amount to an affirmance. But, for the sake of expediency, the court has been accustomed to affirm in cases of division, where there is no probability of any change in the opinions or personnel of the court, the judges in favor of reversal voting with their associates solely in order to end the litigation. Such decisions, however, are not regarded as settling the legal principles involved. Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710; Santa Rosa City R. Co. *v.* Central St. R. Co., 112 Cal. 436, 44 Pac. 733; Frankel *v.* Diedesheimer, 93 Cal. 73, 28 Pac. 794; Luco *v.* De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543.

91. Where evidence was admitted as competent by the trial court, and the members of the court, sitting on appeal, are equally divided on the question of its competency, the opinion of the trial court must prevail. Boone *v.* Peebles, 126 N. C. 824, 36 S. E. 193.

Where, on an application for a rehearing, the court is equally divided, the rehearing will be refused. Towner *v.* Lane, 9 Leigh (Va.) 262.

Where the court was equally divided as to whether the modification should be allowed, it was held, on an application for rehearing and modification of the judgment, that the application must be denied. People *v.* Brooks, 16 Cal. 11.

Where the court is divided on a motion to dismiss the appeal, the motion does not prevail. Hatton *v.* Weems, 12 Gill & J. (Md.) 83; State *v.* Hays, 30 W. Va. 107, 3 S. E. 177.

Where the justices were agreed on reversal, but were equally divided as to what order should be made in regard to the proceedings which should be had in the lower court upon such reversal, it was held that the only order which could be made was that the judgment of the lower court be reversed and the cause remanded for further proceedings, leaving the lower court to take such proceedings as it might deem proper under the circumstances. Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213.

Bill in chancery to obtain a new trial at law (Waddle *v.* U. S. Bank, 2 Ohio 336), or to enjoin a sale under execution from a court of law (U. S. Bank *v.* Schultz, 2 Ohio 471), will be dismissed when the court is equally divided.

Question certified to federal supreme court. —Where the United States circuit court, being equally divided on a jurisdictional question, certifies the case to the supreme court, which is also equally divided, the case will be remitted, without instructions, to enable the circuit court to take such action as it may deem best, and the parties aggrieved may appeal from the final decree. Hannauer *v.* Woodruff, 10 Wall. (U. S.) 482, 19 L. ed. 991; Silliman *v.* Hudson River Bridge Co., 1 Black (U. S.) 582, 17 L. ed. 81; Somerville *v.* Hamilton, 4 Wheat. (U. S.) 230, 4 L. ed. 558. The proper course for the circuit court, where a cause is thus sent back, is to enter a decree dismissing the bill. Coleman *v.* Hudson River Bridge Co., 5 Blatchf. (U. S.) 56, 6 Fed. Cas. No. 2,983.

92. *Delaware.*— Clark *v.* Kean, 1 Del. Ch. 114.

Kentucky.— Smith *v.* Brannin, 79 Ky. 114.

Michigan.— Lyon *v.* Ingham County Cir. Judge, 37 Mich. 377.

South Carolina.— Johnson *v.* Charleston, etc., R. Co., 58 S. C. 488, 36 S. E. 851.

Virginia.— Philips *v.* Williams, 5 Gratt. (Va.) 259.

United States.— Durant *v.* Storrow, 101 U. S. 555, 25 L. ed. 961; Durant *v.* Essex Co., 7 Wall. (U. S.) 107, 19 L. ed. 154; Washington Bridge Co. *v.* Stewart, 3 How. (U. S.) 413, 11 L. ed. 658.

Power to grant rehearing.—A judgment of affirmance rendered by a divided court is as much under the control of the court, for the purpose of rehearing, as any other judgment. Zeigler *v.* Vance, 3 Iowa 528.

93. Durant *v.* Essex Co., 8 Allen (Mass.) 103, 85 Am. Dec. 685.

Affirmance "without prejudice."— In Martin *v.* Welch, 4 Munf. (Va.) 60, it was held that, where a decree in chancery was affirmed by an equally divided court, it should be "without prejudice to the legal remedies of the parties."

But such judgment stands only as the decision in that particular case, and not as a precedent.[94]

3. Death of Party Pending Appeal — a. Before Submission. The effect of the death of a party before the submission of the cause on appeal need not be discussed here, having been fully treated elsewhere.[95]

b. After Submission. When a cause has been argued and submitted on appeal, it is, until the decision, properly under advisement; and the death of a party between the submission and decision does not impair the validity of a judgment rendered in the names of the original parties.[96] But it is customary for the court, on a suggestion of the death of a party, to order its judgment entered *nunc pro tunc* as of a date anterior to such death.[97]

4. Change in Law Pending Appeal. It is the general rule — although not invariably accepted[98] — that an appellate court must decide and dispose of the case in accordance with the laws existing at the time of its own decision,[99] even

94. Bridge *v.* Johnson, 5 Wend. (N. Y.) 342; Morehead Banking Co. *v.* Burlington, 124 N. C. 251, 32 S. E. 558; Puryear *v.* Lynch, 121 N. C. 255, 28 S. E. 410; Durham *v.* Richmond, etc., R. Co., 113 N. C. 240, 18 S. E. 208.

Florida — Opinions need not be filed.— Where the court is equally divided in opinion, and the judgment is affirmed, the court are not obliged, by statute, to file their opinions as in other cases. Fraser *v.* Willey, 2 Fla. 116.

95. As to the effect of death pending appeal or writ of error see *supra*, VI, B [2 Cyc. 769]. See also Abatement and Revival, III, A, 18 [1 Cyc. 79].

96. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418.

Arkansas.— Cunningham *v.* Ashley, 13 Ark. 653; Pool *v.* Loomis, 5 Ark. 110.

California.— Black *v.* Shaw, 20 Cal. 68.

Indiana.— Lockenour *v.* Sides, 57 Ind. 360, 26 Am. Rep. 58.

Kentucky.— Goggin *v.* Cord, 7 Ky. L. Rep. 39.

Ohio.—Williams *v.* Englebrecht, 38 Ohio St. 96; Cole *v.* Alexander, 2 Ohio Cir. Ct. 1.

South Carolina.—Aultman *v.* Utsey, 35 S. C. 596, 14 S. E. 351; Keep *v.* Leckie, 8 Rich. (S. C.) 164.

See 3 Cent. Dig. tit. "Appeal and Error," § 4405 *et seq.*

97. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418.

Arkansas.— Brodie *v.* Watkins, 31 Ark. 319; Pool *v.* Loomis, 5 Ark. 110.

California.— Black *v.* Shaw, 20 Cal. 68.

Georgia.— Pritchett *v.* Bartow County, 94 Ga. 731, 20 S. E. 256; Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75.

Illinois.— Danforth *v.* Danforth, 111 Ill. 236.

Indiana.— Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462; Jeffries *v.* Lamb, 73 Ind. 202; Lockenour *v.* Sides, 57 Ind. 360, 26 Am. Rep. 58; Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403.

Kentucky.— But in Goggin *v.* Cord, 7 Ky. L. Rep. 39, it was said that the power to render judgment in such case did not depend upon its entry as of a date prior to the verdict.

Missouri.— Mead *v.* Mead, 1 Mo. App. 247.

New York.— Matter of Beckwith, 87 N. Y. 503; Bergen *v.* Wyckoff, 84 N. Y. 659, 1 N. Y. Civ. Proc. 1; Peetsch *v.* Quinn, 6 Misc. (N. Y.) 52, 26 N. Y. Suppl. 729, 56 N. Y. St. 607; King *v.* Dunn, 21 Wend. (N. Y.) 253; Bemus *v.* Beekman, 3 Wend. (N. Y.) 667.

South Carolina.—Aultman *v.* Utsey, 35 S. C. 596, 14 S. E. 351; Keep *v.* Leckie, 8 Rich. (S. C.) 164.

Vermont.—Adams *v.* Newell, 8 Vt. 190.

United States.— U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 481, 7 L. ed. 492.

See 3 Cent. Dig. tit. "Appeal and Error," § 4407.

98. Wright *v.* Graham, 42 Ark. 140; Murphy *v.* Harbison, 29 Ark. 340.

See also *supra*, I, C, 2, g [2 Cyc. 520].

In Virginia writs of error must be disposed of in accordance with the law at the time of the rendition of the judgment complained of. Metropolitan L. Ins. Co. *v.* Rutherford, (Va. 1900) 35 S. E. 719; Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837; Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269. And see Kansas Pac. R. Co. *v.* Twombly, 100 U. S. 78, 25 L. ed. 550.

99. *In re* Stanford, (Cal. 1898) 54 Pac. 259; Ferry *v.* Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; Montague *v.* State, 54 Md. 481; Annapolis *v.* State, 30 Md. 112; Yeaton *v.* U. S., 5 Cranch (U. S.) 281, 3 L. ed. 101. See also Barker *v.* Esty, 19 Vt. 131; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453.

In Wade *v.* St. Mary's Industrial School, 43 Md. 178, 181, the court said: "It is a settled doctrine that courts, in deciding questions arising before them, will look to the law as it is at the time, and are not to be governed by what it may have been — unless proceedings under a prior existing law had been complete, or rights had become vested. This principle has been held to apply as well to cases before an appellate court as to those that are pending in courts of original jurisdiction."

Loss of jurisdiction.—When an appeal is taken from the common pleas to the circuit

though it lead to the reversal of a judgment which was proper at the time of its rendition,[1] or the affirmance of one wherein there was error which has since been obviated by a change in the law.[2] Thus, where the statute on which a judgment rests is repealed before the decision on appeal, without any saving clause as to pending proceedings, the appellate court is bound to take judicial notice of the repealing act,[3] and render its decision in accordance therewith.[4] But, of course,

court, where the cause will stand for trial *de novo*, and a statute is passed depriving the latter court of jurisdiction of such appeal, the appeal should be dismissed. Kennon *v.* Shull, 9 Ind. 154. But see Mobile, etc., R. Co. *v.* Stanley, 21 Ky. L. Rep. 1243, 54 S. W. 843, in which it was held that, where the amount in controversy was sufficient to give the court of appeals jurisdiction when the appeal was granted, a subsequent change of the law could not deprive appellant of the right to prosecute his appeal.

Termination of controversy.—Where, by a change of law pending an appeal, the subject-matter of the controversy is brought to an end, the appeal will usually be dismissed. Missouri Pac. R. Co. *v.* State, 60 Kan. 858, 56 Pac. 755; Delaporte *v.* Bourg, 20 La. Ann. 152; Meloy *v.* Scott, 83 Md. 375, 35 Atl. 20; Turner *v.* Bryan, 83 Md. 373, 35 Atl. 21; Essex County *v.* Union County, 44 N. J. L. 438. And see Broughton *v.* Askew, 62 N. C. 21.

1. Price *v.* Nesbitt, 29 Md. 263; Day *v.* Day, 22 Md. 530.

Rule stated by Chief Justice Marshall.—In U. S. *v.* Schooner Peggy, 1 Cranch (U. S.) 103, 2 L. ed. 49, Marshall, C. J., said: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and, if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

When the court below has properly rejected testimony as incompetent, and its incompetency has been removed by law before the case is heard on appeal, the appellate court will remand the cause for further proceedings. Cunningham *v.* Dwyer, 23 Md. 219; State *v.* Norwood, 12 Md. 177. But see Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670.

2. Linn County *v.* Hewitt, 55 Iowa 505, 8 N. W. 340; Lyons *v.* Jackson, 1 How. (Miss.) 474; Cline *v.* Brooks, 65 Mo. 61; Pugh *v.* McCormick, 14 Wall. (U. S.) 361, 20 L. ed. 789. And see Aycock *v.* Harrison, 63 N. C. 145.

Improper admission of evidence.—A new trial will be denied when the verdict accords with the real truth and justice of the case, and the only ground for the motion was the improper admission of evidence, since made admissible by statute. Wright *v.* Gaff, 6 Ind. 416; Wayne County *v.* St. Louis, etc., R. Co., 66 Mo. 77. And see Myers *v.* Hollingsworth, 26 N. J. L. 186.

Where one was unlawfully refused a jury trial it was held that the appellate court would reverse, although, by reason of a change in the law, another trial would be without a jury. Redinbo *v.* Fretz, 99 Ind. 458.

3. Springfield *v.* Worcester, 2 Cush. (Mass.) 52, in which case, however, the court ordered judgment to be entered *nunc pro tunc* as of a day previous to the going into effect of the repealing act. But see State *v.* Kirkland, 41 S. C. 29, 19 S. E. 215, in which it was held that, where a law which would have affected an appeal had not been enacted at the time of the hearing of the appeal, and, therefore, no question was discussed with relation thereto, the court would decide the appeal as if no such act had been passed.

4. *Iowa.*— Cross *v.* Burlington, etc., R. Co., 58 Iowa 62, 12 N. W. 71.

Louisiana.— State *v.* O'Conner, 13 La. Ann. 486; State *v.* Edward, 5 Mart. (La.) 474.

Maryland.—Wade *v.* St. Mary's Industrial School, 43 Md. 178.

Mississippi.— Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

New Hampshire.—Gray *v.* White Mountains R. Co., 56 N. H. 182; Lewis *v.* Foster, 1 N. H. 61.

Texas.— Proctor *v.* Maher, 6 Tex. 226; Hubbard *v.* State, 2 Tex. App. 506; Sheppard *v.* State, 1 Tex. App. 522, 28 Am. Rep. 422.

United States.— *Ex p.* McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264; U. S. *v.* Preston, 3 Pet. (U. S.) 57, 7 L. ed. 601; The Schooner Rachel *v.* U. S., 6 Cranch (U. S.) 329, 3 L. ed. 239; Yeaton *v.* U. S., 5 Cranch (U. S.) 281, 3 L. ed. 101.

See 3 Cent. Dig. tit. "Appeal and Error," § 4399 *et seq.*

As to effect of repealing acts, generally, see STATUTES.

a change in the law cannot interfere with rights which have already vested;[5] and a statute not intended to apply to pending appeals will not affect the decision.[6]

5. Change in State of Facts Pending Appeal. Generally, the appellate court, in considering the correctness of the judgment below, will confine itself to the state of the case at the time such judgment was rendered, and will not consider any facts arising subsequently.[7] But sometimes the court will depart from this rule where, by so doing, it can shorten litigation and best subserve the ends of justice.[8]

6. Discharge in Bankruptcy Pending Appeal. It is held that appellate proceedings will not be stayed on account of the bankruptcy of a party pending appeal.[9]

7. Findings of Fact by Appellate Court. While questions of fact will, generally, not be reviewed on appeal,[10] yet there are, in some jurisdictions, intermediate appellate courts which are required to find and recite the facts in cases wherein

5. Parmelee *v.* Lawrence, 48 Ill. 331; Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

6. State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118; McMillan *v.* Ferrell, 7 W. Va. 223.

7. *Alabama.*— Cloud *v.* Golightly, 5 Ala. 653.

California.— Matter of Siering, 90 Cal. 207, 27 Pac. 204.

Colorado.— Stimson *v.* Helps, 9 Colo. 33, 10 Pac. 290.

Indiana.— Bowman *v.* Ely, 135 Ind. 494, 35 N. E. 123.

Kentucky.— Cates *v.* Loftus, 4 T. B. Mon. (Ky.) 443.

Louisiana.— Hamblin's Succession, 3 Rob. (La.) 130; Dufau *v.* Deflechier, 3 La. 304.

Maryland.— Johnston *v.* George, 6 Md. 452.

Michigan.— Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600; Hill *v.* Mitchell, 40 Mich. 389.

Mississippi.— Boone *v.* McJunkin, 63 Miss. 559.

Missouri.— Dennison *v.* Kansas City, 95 Mo. 416, 8 S. W. 429.

New Hampshire.— Heywood *v.* Wingate, 14 N. H. 73.

New York.— White *v.* Buloid, 2 Paige (N. Y.) 164.

North Carolina.—Whitehead *v.* Spivey, 103 N. C. 66, 9 S. E. 319. *Compare* Howell *v.* Howell, 40 N. C. 218.

Ohio.— Clippinger *v.* Missouri Valley L. Ins. Co., 26 Ohio St. 404; Bowrell *v.* Zigler, 19 Ohio 362.

Pennsylvania.— Martin's Appeal, 23 Pa. St. 433.

Texas.— Continental Ins. Co. *v.* Milliken, 64 Tex. 46; Cloud *v.* Smith, 1 Tex. 611; Gunn *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 278.

Virginia.—Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

Wisconsin.—Weis *v.* Schoerner, 53 Wis. 72, 9 N. W. 794.

United States.— O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 3271, 4410.

Depreciation of currency.— In The Steamship Telegraph *v.* Gordon, 14 Wall. (U. S.) 258, 20 L. ed. 807, it was held that a decree, rendered for a specific sum as damages, estimated upon the principle of allowing plaintiff for depreciation of currency between the arising of the cause of action and the date of the decision, if right when rendered, could not be reversed on the ground that currency had still further depreciated pending the appeal.

In an action to quiet title, where defendant pleaded a judgment in his favor for the recovery of the land, and appellant responded that it had heen superseded, it was held that the fact that the judgment superseded had been affirmed pending the appeal might be considered even though the causes were not consolidated. Hayden *v.* Ortkiss, 7 Ky. L. Rep. 359.

8. Soale *v.* State, 23 Ind. App. 8, 54 N. E. 766; Royal *v.* Royal, 30 Oreg. 448, 47 Pac. 828, 48 Pac. 695; Ramsey *v.* White, 21 Pittsb. Leg. J. N. S. (Pa.) 425; Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585.

9. Merritt *v.* Glidden, 39 Cal. 559, 2 Am. Rep. 479; Hill *v.* Bourcier, 29 La. Ann. 841; Heywood *v.* Wingate, 14 N. H. 73; Ward *v.* Tunstall, 2 Baxt. (Tenn.) 319. But see Haggerty *v.* Morrison, 59 Mo. 324, wherein the appellate court ordered appellant discharged from the judgment, he having filed in such court his certificate of discharge in bankruptcy, and also his plea showing that judgment was allowed against his estate in the bankruptcy court.

Massachusetts — Discharge in insolvency. — In Swan *v.* Easterbrooks, 16 Gray (Mass.) 520, appellant, after obtaining his discharge in insolvency, was allowed to waive his exceptions and plead the insolvency, thereby barring the action and discharging a bond given to dissolve an attachment therein.

10. See *supra*, XVII, G.

Louisiana — Appeal to federal supreme court.—Where the parties desire it, the supreme court will, in a proper case, find the facts in such a manner that the questions of law can be fairly raised for the consideration of the supreme court of the United States. Wiggins *v.* Guier, 13 La. Ann. 356.

North Carolina — Facts not found below.— Where the supreme court has a right to review the findings of fact of the lower court, it may find the facts if they are not found by the lower court. Pearce *v.* Elwell, 116 N. C. 595, 21 S. E. 305.

an appeal lies to a higher court.[11] Such recital is usually necessary only where the court renders final judgment, and not where the cause is remanded for a new trial;[12] and it is not necessary to recite the evidentiary facts, the ultimate facts alone being required.[13]

11. As to review of questions of fact in intermediate courts see *supra*, XVII, G. See also *supra*, XVII, J, 5.

Illinois.— *If appellate court finds the facts differently from trial court*, its final order or judgment is required to recite the facts as found. Huntington *v.* Metzger, 158 Ill. 272, 41 N. E. 881; Siddall *v.* Jansen, 143 Ill. 537, 32 N. E. 384; Tenney *v.* Foote, 95 Ill. 99.

Such findings cannot be collaterally attacked.— Commercial Union Assur. Co. *v.* Scammon, 133 Ill. 627, 23 N. E. 406.

The finding of facts must appear in the record, and the opinion of the court cannot be referred to for the purpose of ascertaining what facts the court found. Centennial Nat. Bank *v.* Farrell, 166 Ill. 513, 46 N. E. 1125; W. W. Kimball Co. *v.* Cruikshank, 90 Ill. App. 3.

Where a case had previously been before the appellate court, and the facts had then been determined and recited in its final order, an order, on the second appeal, reciting "that the facts are substantially the same as they were in the record when the cause was before this court at a former term" is a sufficient compliance with the statutory provision. People *v.* Soucy, 122 Ill. 335, 12 N. E. 746.

Michigan — Appeal from probate court.— On appeal from an order of the probate court denying an administrator leave to sell, the circuit court should find and place on record all material facts relied on to warrant the judgment reversing the order and granting leave to sell. Matter of Ensign, 47 Mich. 443, 11 N. W. 262.

New York — Reversal of judgment on referee's report.—Where an appeal is taken from the judgment entered on the report of a referee, in the event of a reversal on a question of fact, the order should so state. Almy *v.* McKinney, 5 N. Y. St. 267.

Texas.— *If jurisdiction final.*— In cases where the court of civil appeals decides that its jurisdiction is final and judgment is affirmed, written conclusions of fact and law will not be filed unless its judgment on the question of jurisdiction is overruled. Lutcher *v.* Stoddard, (Tex. Civ. App. 1900) 56 S. W. 608; Burnett *v.* Powell, 6 Tex. Civ. App. 39, 25 S. W. 1030.

Where, on appeal, the record contained no statement of facts, a motion that the appellate court file conclusions of fact will be denied. Neyland *v.* Ward, 22 Tex. Civ. App. 369, 54 S. W. 604.

A decision, by the court of civil appeals, sustaining a verdict is, in effect, a finding of the facts necessary to support the verdict and judgment thereon, and the court is not required to find as to other facts. Rice *v.* Ward, (Tex. Civ. App. 1900) 55 S. W. 348.

Denial of motion to file conclusions of law and fact.— In Texas, if the opinion of the court of civil appeals contains the facts found by the court, and states them separately from the conclusions of law, a motion, asking such court to file its conclusions of law and fact on which the opinion was based, which does not point out any particular in which any of the findings are deficient will be denied. Muhle *v.* New York, etc., R. Co., (Tex. Civ. App. 1893) 24 S. W. 312.

Motion granted on rehearing.—Where suit s brought to establish a note as a claim against a decedent's estate, and, on appeal to the court of civil appeals, the judgment of the district court in favor of plaintiffs for the amount of their note and interest and attorney's fees is affirmed, on motion for rehearing, appellees' request that the court file conclusions of fact and law will be granted. George *v.* Ryon, (Tex. Civ. App. 1901) 61 S. W. 138.

12. Cassell *v.* Fitzsimmons, 9 Ill. App. 78; Sturgis Nat. Bank *v.* Smith, 9 Tex. Civ. App. 540, 30 S. W. 678.

Not necessary to remand.— The appellate court need not remand the cause on reversal, but may itself determine controverted questions of fact. Borg *v.* Chicago, etc., R. Co., 162 Ill. 348, 44 N. E. 722.

13. Travelers' Ins. Co. *v.* Pulling, 159 Ill. 603, 43 N. E. 762; Senger *v.* Harvard, 147 Ill. 304, 35 N. E. 137; Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Rogers *v.* Chicago, etc., R. Co., 117 Ill. 115, 6 N. E. 889; Green *v.* Stevenson, (Tenn. Ch. 1899) 54 S. W. 1011; State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007; Manchester F. Ins. Co. *v.* Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722; Houston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 32 S. W. 163.

Negligence.— In Illinois, it is necessary to recite conclusions of facts which prove the ultimate fact of negligence. Brown *v.* Aurora, 109 Ill. 165.

Where finding as to contributory negligence unnecessary.—Where, in an action for injuries, the appellate court reverses a judgment for plaintiff and finds that defendant was not guilty of negligence, it is not necessary to make findings as to plaintiff's contributory negligence, as this point is immaterial in view of the findings in regard to defendant's negligence. Senger *v.* Harvard, 147 Ill. 304, 35 N. E. 137.

Documentary evidence.— The Texas statute requiring the court of civil appeals to file conclusions of fact does not require it to incorporate therein documentary evidence. Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

Proceeding to correct conclusion of fact.— Where it is thought that the court of chancery appeals has overlooked facts that would

8. Rights of Persons Not Appealing — a. Persons Not Before the Court. It is the general rule that only the rights of parties before the court can be adjudicated on appeal, and the rights of persons who are not parties to the appeal cannot, ordinarily, be considered.[14] But where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question and equally affected by the same decree or judgment, the court will consider the whole case and settle the rights of all parties.[15]

change the result of one of its conclusions of fact, the proper course is to apply for a rehearing, so as to change that conclusion, and not to apply for findings of mere evidentiary facts that are deemed inconsistent with the conclusion assailed. Hill *v.* Southern R. Co., (Tenn. Ch. 1897) 42 S. W. 888.

14. *Arkansas.*—Mock *v.* Pleasants, 34 Ark. 63.

California.— Ricketson *v.* Richardson, 26 Cal. 149.

Georgia.— Pierce *v.* Chapman, 31 Ga. 674; Durham *v.* Keaton, 30 Ga. 800.

Illinois.— Rees *v.* Chicago, 38 Ill. 322; Alling *v.* Wenzell, 35 Ill. App. 246.

Indiana.— Michener *v.* Bengel, 135 Ind. 188, 34 N. E. 816.

Kansas.— Chicago, etc., R. Co. *v.* Ellis, 52 Kan. 41, 33 Pac. 478; Richardson *v.* McKim, 20 Kan. 346.

Louisiana.— Beckwith *v.* Peirce, 22 La. Ann. 67; Wallis *v.* Robertson, 10 La. Ann. 215.

Maryland.—Lanahan *v.* Latrobe, 7 Md. 268; Leadenham *v.* Nicholson, 1 Harr. & G. (Md.) 267.

Michigan.—Hall *v.* Calhoun Cir. Judge, 123 Mich. 555, 82 N. W. 229.

Missouri.— People's R. Co. *v.* Grand Ave. R. Co., 149 Mo. 245, 50 S. W. 829; Deatherage *v.* Sheidley, 50 Mo. App. 490.

Nevada.— Nesbitt *v.* Chisholm, 16 Nev. 39.

New Jersey.— Wilson *v.* Moore, 26 N. J. L. 458.

New York.— Brown *v.* Evans, 34 Barb. (N. Y.) 594; Compton *v.* Long Island R. Co., 1 N. Y. St. 554; McCammon *v.* Worrall, 11 Paige (N. Y.) 99.

North Carolina.— Baxter *v.* Wilson, 95 N. C. 137.

Ohio.— Tod *v.* Stambaugh, 37 Ohio St. 469; Glass *v.* Greathouse, 20 Ohio 503.

Pennsylvania.— Gallagher *v.* Miller, 2 Wkly. Notes Cas. (Pa.) 241.

South Carolina.—Annely *v.* De Saussure, 12 S. C. 488.

Tennessee.— Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836; Cowan *v.* Morrison, 4 Baxt. (Tenn.) 378.

Texas.— Ralston *v.* Skerrett, (Tex. 1891) 17 S. W. 238; Cannon *v.* McDaniel, 46 Tex. 303.

Virginia.—Walker *v.* Page, 21 Gratt. (Va.) 636; Tate *v.* Liggat, 2 Leigh (Va.) 84.

Washington.— Littell *v.* Miller, 8 Wash. 566, 36 Pac. 492; Tacoma Lumber, etc., Co. *v.* Wolff, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462 [*following* Hildebrandt *v.* Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109].

West Virginia.— Bowlby *v.* De Wit, 47 W. Va. 323, 34 S. E. 919; Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

Wisconsin.—Williams *v.* Starr, 5 Wis. 534.

United States.— *Ex p.* Howard, 9 Wall. (U. S.) 175, 19 L. ed. 634; McDonough *v.* Dannery, 3 Dall. (U. S.) 188, 1 L. ed. 563.

See 3 Cent. Dig. tit. "Appeal and Error," § 4415.

As to rights of persons not parties in the appellate court see *supra*, XVII, C, 1, c.

Where, after obtaining a writ of error, one of several plaintiffs in error obtains a severance and refuses to prosecute, the appellate court has full power over the cause, and may reverse as to him as fully as if he had remained. Having once been a party in the appellate court, he is governed by a rule different from that applicable to persons who have never appealed. Bowman *v.* Castleman, 4 Litt. (Ky.) 303.

As to severance of parties on appeal see *supra*, VI, B, 3 [2 Cyc. 761].

15. *Connecticut.*— Sherwood *v.* Smith, 23 Conn. 516.

New Hampshire.— Barker *v.* Garland, 22 N. H. 103.

Ohio.—Harpold *v.* Stobart, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618.

Texas.— Davenport *v.* Hervey, 30 Tex. 308.

Virginia.— Saunders *v.* Griggs, 81 Va. 506; Ashby *v.* Bell, 80 Va. 811.

West Virginia.— Bowlby *v.* De Wit, 47 W. Va. 323, 34 S. E. 919.

See 3 Cent. Dig. tit. "Appeal and Error," § 4415.

As to persons not entitled to allege error see *supra*, XVII, C.

Thus, where a judgment operates to the prejudice of all defendants, and not upon distinct and independent matters in which the several defendants are separately interested, a reversal as to one operates as a reversal as to the others, even though they have not joined in the appeal.

Illinois.—Alling *v.* Wenzel, 133 Ill. 264, 24 N. E. 551; Tompkins *v.* Wiltberger, 56 Ill. 385; Mohr *v.* McKenzie, 60 Ill. App. 575.

Minnesota.—Wood *v.* Cullen, 13 Minn. 394.

New Jersey.—Wilson *v.* Moore, 26 N. J. L. 458.

New York.— Belden *v.* Andrews, 43 N. Y. Suppl. 587; Hooper *v.* Beecher, 15 N. Y. Suppl. 113, 39 N. Y. St. 320.

Texas.— Bradford *v.* Taylor, 64 Tex. 169; McRea *v.* McWilliams, 58 Tex. 328; McIlhenny *v.* Lee, 43 Tex. 205; Dickson *v.* Burke, 28 Tex. 117; Willie *v.* Thomas, 22 Tex. 175; Wood *v.* Smith, 11 Tex. 367; Burleson *v.* Henderson, 4 Tex. 49.

b. Appellee or Defendant in Error. Where a party has acquiesced in a judgment or decree, and taken no steps to have it reviewed, he cannot, on an appeal by the adverse party, obtain relief greater than that granted him below,[16] unless his rights be so interwoven with those of appellant that the court, in adjudicating the latter's rights, must necessarily grant appellee additional relief.[17] But, usually, an appellee may obtain affirmative relief by cross-assignments of error.[18]

C. Affirmance — 1. On Motion — a. When Authorized — (i) *On Failure to Prosecute Appeal* **— (a)** *In General.* In most jurisdictions provision is made, by statute or rule of court, for the affirmance of the judgment appealed from, on a proper application by appellee, where appellant fails to prosecute his appeal as required by law.[19] And where appellee's right to an affirmance has attached,

Virginia.— Graham *v.* Graham, 4 Munf. (Va.) 205.

For reversal as to one or more co-parties see *infra,* XVII, E, 3.

Appeal by one partner.—A reversal on appeal by one partner from a judgment against the firm enures to the benefit of the other partners. Worthington *v.* Miller, 7 Ky. L. Rep. 439; Dickson *v.* Burke, 28 Tex. 117.

Principal and surety.—Where a judgment is reversed as to the principal, it is also reversed as to the surety, though the latter is not a party to the appeal. Brashear *v.* Carlin, 19 La. 395.

16. *District of Columbia.*—Mason *v.* Spalding, 7 Mackey (D. C.) 115.

Iowa.— Matthes *v.* Imperial Acc. Assoc., 110 Iowa 222, 81 N. W. 484; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247.

Michigan.—Heath *v.* Waters, 40 Mich. 457; Match *v.* Hunt, 38 Mich. 1.

Missouri.— Schmidt *v.* Densmore, 42 Mo. 225.

Nebraska.— Hamilton *v.* Whitney, 19 Nebr. 303, 27 N. W. 125.

Texas.— Hall *v.* McCormick, 7 Tex. 269.

Washington.— Phillips *v.* Reynolds, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107.

United States.— Chittenden *v.* Brewster, 2 Wall. (U. S.) 191, 17 L. ed. 839.

As to power of appellate court to increase amount of recovery see *infra,* XVIII, D, 5.

As to parties not entitled to allege error see *supra,* XVII, C.

Bill of exceptions filed by appellee.— On an appeal by defendant, a bill of exceptions filed by plaintiff, in the absence of a cross-appeal, affords no foundation for granting plaintiff relief in addition to that granted by the trial court, where the questions presented by the bill of exceptions in no way affect plaintiff's right to the relief granted. Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

Incidental relief to appellee.— On reversing a judgment or decree the court will sometimes grant appellee such incidental relief as the equities of the case may require. Shuman *v.* Willetts, 19 Nebr. 705, 28 N. W. 301; Taylor *v.* Williams, 14 Wis. 155; Chittenden *v.* Brewster, 2 Wall. (U. S.) 191, 17 L. ed. 839.

Relief between co-appellees.—Ordinarily no relief will be granted as between co-appellees. Trouilly's Succession, 52 La. Ann. 276, 26 So. 851; Hottinger *v.* Hottinger, 49 La. Ann. 1633, 22 So. 847; Bowman *v.* Kaufman, 30 La. Ann. 1021; Dupre *v.* Helm, 23 La. Ann. 145; Powell *v.* White, 11 Leigh (Va.) 322. And see Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560.

As to right to assign error against a co-party see *supra,* XVII, C, 1, b, (v).

17. Hamilton *v.* Whitney, 19 Nebr. 303, 27 N. W. 125; Garrett *v.* Carr, 3 Leigh (Va.) 407. In Cole *v.* Armour, 154 Mo. 333, 55 S. W. 476, wherein the issues and proof in an action on an express contract showed that plaintiff was entitled to recover twelve thousand two hundred and twenty-nine dollars and thirty-four cents, if anything, and the defense was an absolute denial, it was held that a verdict for plaintiff for six thousand dollars would be set aside, on an appeal by defendant, as not warranted by the issues and proof, though plaintiff did not complain thereof.

Appellee materially affected by alteration of judgment.— Where a defendant who has not appealed, but is joined as appellee in the appeal of other defendants, is materially affected by an alteration in the judgment, a new trial will be ordered, as between him and plaintiff, on determination of the appeal. Ramirez *v.* Smith, (Tex. 1900) 59 S. W. 258.

18. Patoka Tp. *v.* Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417; Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258. In Wendell *v.* French, 19 N. H. 205, the court, on an appeal from a decree allowing certain charges in the account of an administrator, permitted the latter, who was appellee, to show error in the decree and have it corrected.

As to the right of appellee, respondent, or defendant in error to allege error see *supra,* XVII, C, 1, b.

As to right to make cross-assignments of errors see *supra,* XI, M [2 Cyc. 1010].

19. *Connecticut.*— Belden *v.* Robbins, 1 Root (Conn.) 524.

Indian Territory.— Rudisill *v.* Lockwood, (Indian Terr. 1898) 46 S. W. 178.

Maine.— Cook *v.* Bennett, 2 Me. 13.

Massachusetts.— Gassett *v.* Cottle, 10 Gray (Mass.) 375.

Missouri.—Westpheling *v.* Enright, 60 Mo. 279; Rice *v.* McElhannon, 48 Mo. 224; Koenig *v.* Rohlfing, 47 Mo. 163; Williams *v.* Kortsendorffer, 47 Mo. 72; Bobb *v.* Comfort, 47 Mo.

appellant cannot defeat it by abandoning his appeal in the court below,[20] or dismissing it in the appellate court.[21] In order for the appellate court to affirm the judgment on motion, the record must show some color of right to the dismissal of the appeal,[22] and that the lower court had jurisdiction of defendant's person;[23] and the appellate court must have acquired jurisdiction of the case.[24]

36; Bausman *v.* Kirtley, 47 Mo. 28; State *v.* Ashbrook, 38 Mo. App. 278; Springfield F. & M. Ins. Co. *v.* Harrison, 21 Mo. App. 306. But see Schnelle *v.* Devanny, 61 Mo. App. 453, in which the power to affirm for failure to prosecute was held not to apply to writs of error.

New York.—Lyman *v.* Wilber, 3 Keyes (N. Y.) 427; Smith *v.* Martin, 3 Keyes (N. Y.) 373; Oeters *v.* Groupe, 15 Abb. Pr. (N. Y.) 263; Geraghty *v.* Malone, 1 Code Rep. (N. Y.) 94.

Tennessee.— Freeman *v.* Henderson, 5 Coldw. (Tenn.) 647.

Texas.— Overton *v.* Blum, 48 Tex. 370.

Wisconsin.— Betts *v.* Sholton, 24 Wis. 306.

See 3 Cent. Dig. tit. "Appeal and Error," § 4428 *et seq.*

As to dismissal of the appeal for failure to prosecute see *supra*, XIV, E, 6.

As to the requisites and proceedings for the transfer of a cause from the trial court to the appellate court see *supra*, VII [2 Cyc. 789].

In admiralty, if appellant fail to enter and prosecute his appeal, appellee may produce the record and have the cause retained in the appellate court, and, on a hearing *ex parte*, claim affirmation of the original decree, with costs. The Montgomery *v.* The Betsey, 1 Gall. (U. S.) 416, 17 Fed. Cas. No. 9,734.

Several judgments—Separate affirmance.— Where defendants in an action of trespass plead severally, and have several judgments in the court below, from which plaintiff appeals but neglects to enter and prosecute his appeal in the court above, each defendant is entitled, upon his separate complaint, to affirmation of his own judgment, independent of his co-defendant. Cook *v.* Bennett, 2 Me. 13.

Submission of an action to arbitrators, after an appeal, does not, necessarily, deprive plaintiff of his right to enter his complaint for affirmance unless there is an award made before the sitting of the appellate court, or, by the terms of submission, time beyond such sitting is allowed for making the award. Hayes *v.* Blanchard, 4 Vt. 210.

Where judgment has been set aside.— Oreg. Supreme Ct. Rules, No. 14, providing for the affirmance of a judgment where an appeal is not prosecuted, does not apply to a judgment which has been set aside after an appeal has been initiated. Henrichsen *v.* Smith, 29 Oreg. 475, 42 Pac. 486, 44 Pac. 496.

Where prosecution of a writ of error was prevented by defendant in error, his motion for affirmance, on certificate, was denied, and plaintiff allowed to dismiss his writ, and prosecute a new one. Mitchell *v.* Russell, 3 Stew. (Ala.) 53.

20. Douthet *v.* Word, 45 Tex. 626; San Antonio, etc., R. Co. *v.* Roy, 19 Tex. Civ. App. 416, 47 S. W. 477; Batchelder *v.* Tenney, 27 Vt. 784.

21. Freeman *v.* Henderson, 5 Coldw. (Tenn.) 647.

Affirmance refused after dismissal.—After the docket to which certain cases belonged had been taken up, plaintiff in error moved for leave to dismiss, not having assigned error in the court below. The motion was granted. Thereafter appellees moved for judgment of affirmance on production of a certificate, etc. The motion for affirmance was refused, because the records had been filed within the time required by the statute. Farquhar *v.* McFarland, 13 Tex. 92.

Retention of jurisdiction after dismissal.— In Washington, where an appeal is dismissed at the instance of appellant, the supreme court will retain jurisdiction of the cause so as to permit respondent to move for an affirmance of the judgment, and for damages and judgment on the appeal bond, in case appellant fails to prosecute a second appeal within the time limited by law. Agassiz *v.* Kelleher, 9 Wash. 656, 38 Pac. 221.

22. Bienville Water Supply Co. *v.* Mobile, 175 U. S. 109, 20 S. Ct. 40, 44 L. ed. 92; New Orleans *v.* Louisiana Constr. Co., 129 U. S. 45, 9 S. Ct. 223, 32 L. ed. 607; Gaines *v.* U. S., 113 U. S. 687, 5 S. Ct. 697, 28 L. ed. 1150; Davies *v.* U. S., 113 U. S. 687, 5 S. Ct. 696, 28 L. ed. 1149; Hinckley *v.* Morton, 103 U. S. 764, 26 L. ed. 458; Whitney *v.* Cook, 99 U. S. 607, 25 L. ed. 446. But see Chanute *v.* Trader, 132 U. S. 210, 10 S. Ct. 67, 33 L. ed. 345.

Affirmance and dismissal asked at same time.—When a transcript is filed at a term subsequent to that to which the appeal was taken, and therefore subject to be dismissed on motion of appellee, the appellee cannot have a dismissal of the appeal and an affirmance of the judgment at the same time, and on the same transcript. Perryman *v.* Camp, 24 Ala. 438.

Where an appeal has been dismissed, a party other than appellant has no right to afterward move the general term for an affirmance of the judgment appealed from. Struppman *v.* Muller, 43 N. Y. Super. Ct. 38.

23. Brooke *v.* King, 104 Iowa 713, 74 N. W. 683; Hart *v.* Weatherford, 19 Tex. 57.

24. Beckman *v.* Phœnix Ins. Co., 49 Mo. App. 343; Thompson *v.* Brown, 1 Mo. App. 603; Robbins *v.* Appleby, 2 N. H. 223; House *v.* Williams, 40 Tex. 346.

A bond or recognizance is necessary to give the appellate court jurisdiction; and, until filed in proper form, no appeal is pending and, consequently, the judgment cannot be affirmed on motion. Tindall *v.* Jones, 8 Ark. 267; Clark *v.* Oakley, 4 Ark. 236; Penn *v.* Penn, 7 Ky. L. Rep. 515; Goode *v.* Erwin,

(B) *What Constitutes Failure to Prosecute* — (1) IN GENERAL. As to what constitutes a failure to prosecute so as to authorize an affirmance on motion is a matter depending in large measure upon the statutes, rules, and practice in the different jurisdictions. Among the grounds on which such motions are granted may be enumerated a failure to appear when the docket is called,[25] to assign errors,[26] to furnish the proper papers for the hearing of the appeal,[27] or to pay the required fees.[28]

(2) FAILURE TO FILE TRANSCRIPT IN TIME. On the failure of appellant to file his transcript within the time prescribed by law, or to show good cause for the omission, the judgment will, usually, be affirmed on motion,[29] and appellee's right to an affirmance is not affected by the subsequent filing of the transcript, even

50 Tex. 160; Chambers *v.* Miller, 7 Tex. 75; Mills *v.* Bagby, 4 Tex. 320.

As to the necessity for bond, recognizance, or undertaking on appeal see *supra*, VII, D [2 Cyc. 818].

Appellant may show that bond was not filed in time.— The appellee having taken up the record and asked for an affirmance, appellant is not estopped from showing that the appeal bond was not filed in time, and that jurisdiction had, consequently, not attached. Burr *v.* Lewis, 6 Tex. 76.

Waiver of recognizance.— The statute requiring an appellant to enter into recognizance to prosecute his appeal, in order to stay execution, may be waived by appellee; and, in such case, if appellant fails to prosecute his appeal, the appellee must apply to the appellate court for an affirmance of the judgment in the same manner as where appellant has entered into recognizance. Wilson *v.* Dean, 10 Ark. 308.

As to waiver of bond, undertaking, or recognizance on appeal see *supra*, VII, D, 11 [2 Cyc. 850].

What judgment-entry must show.—Where the judgment of a county court is affirmed in the circuit court on certificate for failure to file a transcript, the judgment-entry in the circuit court must show affirmatively every fact necessary to authorize the judgment on certificate. Foster *v.* Harrison, 3 Ala. 25.

Where the citation in error is defective or has not been served, the appellate court does not acquire jurisdiction to affirm on motion. Beavers *v.* Butler, 30 Tex. 24; White *v.* Proctor, 17 Tex. 406; Chambers *v.* Shaw, 16 Tex. 143; Patton *v.* Laforce, 14 Tex. 240; Thompson *v.* Thompson, (Tex. Civ. App. 1897) 41 S. W. 679; Texas, etc., R. Co. *v.* Lennox, 1 Tex. App. Civ. Cas. § 530. But where plaintiff in error neglects the service of the citation, and a term of the court is allowed to pass, the defendant in error may acknowledge service, and bring the case up for affirmance at the next term. Wilson *v.* Adams, 50 Tex. 5.

As to the necessity of citation or notice see *supra*, VII, E [2 Cyc. 852].

25. *Alabama.*— Hunter *v.* Longmin, Minor (Ala.) 99.

Georgia.— Fields *v.* Alley, 65 Ga. 637; Avera *v.* Vason, 42 Ga. 233.

Michigan.— Jackson Iron Co. *v.* Farrand, 5 Mich. 249.

Missouri.—Westpheling *v.* Enright, 60 Mo. 279.

New York.— Townsend *v.* Keenan, 2 Hilt. (N. Y.) 544.

United States.— Montalet *v.* Murray, 3 Cranch (U. S.) 249, 2 L. ed. 429.

As to appearance in appellate court see *supra*, VII, G [2 Cyc. 880].

26. Schaeffer *v.* Schmidt, 6 Mo. App. 571; Williams *v.* Smith, 5 Mo. App. 597; Dugger *v.* Tayloe, 121 U. S. 286, 7 S. Ct. 895, 30 L. ed. 946; Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 L. ed. 564.

As to the necessity to assign errors see *supra*, XI [2 Cyc. 980].

No errors apparent in record.—Where appellant fails to serve a case on appellee, and there are no assignments of error, nor any errors apparent in the record, a motion to affirm the judgment is the proper proceeding. Walker *v.* Scott, 102 N. C. 487, 9 S. E. 488.

27. Cobb *v.* Rice, 128 Mass. 11; Brown *v.* Niess, 15 Abb. Pr. N. S. (N. Y.) 344.

As to necessity of making and filing: Brief see *supra*, XII, 1 [2 Cyc. 1013]. Abstract of record or transcript see *supra*, XIII, I. Bill of exceptions see *supra*, XIII, D. Case or statement of facts see *supra*, XIII, E.

Failure of judge to make up statement of facts.—An affirmance on certificate will not be denied because the parties failed to agree upon a statement of facts, and agreed that the judge should make up a statement from the statements furnished by the parties, and the judge had failed to do so. Overton *v.* Blum, 48 Tex. 370.

28. Davis *v.* Miller, 35 Mo. App. 253; Fallen *v.* Ferris, 2 Wyo. 141. See also *supra*, VII, C [2 Cyc. 816].

Subsequent offer to pay fee.—A failure to pay the fee required by law in filing a transcript in the circuit court on an appeal is a failure to prosecute the appeal, and the omission is not cured by an offer on the part of appellant to pay the fee on the second day of the term, and after the transcript has been filed, and the fee duly paid by appellee. Donzelot *v.* Tillotson, 8 Mo. App. 565.

29. Johnson *v.* Riggs, 67 Mo. App. 491; Barnes *v.* Winn, 31 Mo. App. 483; Montieth *v.* Sellers, 16 Mo. App. 547; Coleman *v.* Kincaly, 15 Mo. App. 575; Thomas *v.* East Tennessee, etc., R. Co., 15 Lea (Tenn.) 533; Nolensville Turnpike Co. *v.* Quinby, 8 Humphr. (Tenn.) 476. As to the necessity

though it be prior to the application for affirmance.[30] But a motion to affirm will not be granted where there is a record on file, though it be defective, since such record may, aside from the defect, show errors requiring a reversal.[31]

(11) *Where Proceedings Frivolous or For Delay.* A motion to affirm the judgment appealed from will, usually, be granted where the appeal is merely frivolous,[32] or appears to have been taken for delay only.[33] But, on such motion, the appellate court will examine the entire record,[34] and, unless it be manifestly free from prejudicial error, the motion will be denied.[35]

b. Discretion of Court. Whether the appellate court should affirm for want of prosecution depends on the facts and circumstances. The question rests largely in the discretion of the court,[36] and, on good cause being shown why appellant has failed to proceed in time, a motion to affirm will be denied.[37]

and duty of filing the record in the appellate court see *supra*, XIII, I.

30. Joseph Schnaider's Brewing Co. *v.* Levvie, 41 Mo. App. 584; Lincoln *v.* Milstead, 38 Mo. App. 350.

What not a waiver of right.— The appellee is not estopped to move to affirm, though the motion is not made until after appellant has filed his abstracts and briefs. Brown *v.* Farmers L. & T. Co., 109 Iowa 440, 80 N. W. 525; Ziefle *v.* Seid, 137 Mo. 538, 38 S. W. 963.

Right not defeated by second appeal.— Where appellee is entitled to an affirmance, on a certificate, of the judgment appealed from, because of appellant's failure to file the transcript in time, such right cannot be defeated by appellant bringing error on the judgment after such failure. Scottish Union, etc., Ins. Co. *v.* Clancey, 91 Tex. 467, 44 S. W. 482; Davidson *v.* Ikard, 86 Tex. 67, 23 S. W. 379; Perez *v.* Garza, 52 Tex. 571; Hurley *v.* Lester, (Tex. Civ. App. 1895) 32 S. W. 555. But this does not apply where appellant, after abandoning his appeal, files his transcript under a writ of error within ninety days after appeal taken. Harrington *v.* Blankenship, (Tex. Civ. App. 1899) 52 S. W. 585.

31. Kennedy *v.* Spencer, 4 Port. (Ala.) 272; Bracket *v.* Belknap, 40 Iowa 704; King County *v.* Hill, 1 Wash. 63, 23 Pac. 926; Swift *v.* Stine, 3 Wash. Terr. 518, 19 Pac. 63 [*overruling* 3 Wash. Terr. 18, 13 Pac. 904].

32. Londener *v.* Lichtenheim, 11 Mo. App. 385; Micas *v.* Williams, 104 U. S. 556, 26 L. ed. 842. See 3 Cent. Dig. tit. "Appeal and Error," § 4431.

As to affirmance of frivolous appeal on hearing see *infra*, note 51.

As to dismissal where proceedings are frivolous or for delay see *supra*, XIV, E, 3.

Error to the allowance of a merely formal amendment of the pleadings is evidently frivolous, and intended for delay, and the judgment in such case should be affirmed. Jenkins *v.* Banning, 23 How. (U. S.) 455, 16 L. ed. 580.

33. Silliman *v.* Dickson, 68 Tex. 623, 5 S. W. 408; Kelly *v.* West Wisconsin R. Co., 37 Wis. 357.

Presumption that appeal taken for delay. —Where no exception was reserved to any of the rulings of the court, the appellate court will presume, in view of appellant's failure to perfect the appeal granted by the lower court, and his delay in perfecting the appeal subsequently granted by the appellate court, that the appeal is prosecuted for delay merely. McDowell *v.* Pool, 10 Ky. L. Rep. 684.

34. Bradford *v.* Johnson, 44 Tex. 381; Furlow *v.* Miller, 30 Tex. 28; Moody v. Benge, 28 Tex. 545; Batey *v.* Dibrell, 28 Tex. 172; Riggs *v.* Horde, 25 Tex. Suppl. 456, 78 Am. Dec. 584; Nasworthy *v.* Draper, (Tex. Civ. App. 1894) 28 S. W. 564; Wheeler *v.* Phillips, (Tex. Civ. App. 1893) 22 S. W. 543.

Court decides on record.— In affirming on motion as a delay case the court decides upon the record, and not upon the statement of counsel. Longshaw *v.* Linning, 3 Ky. L. Rep. 822. A statement of counsel that he intends to take the case to the United States supreme court cannot be considered. Louisville, etc., R. Co. *v.* Schmidt, 20 Ky. L. Rep. 810, 47 S. W. 583.

35. Makibben *v.* White, 7 Ky. L. Rep. 514, wherein it was said that a motion to affirm as a delay case assumes that it is so manifestly free of prejudicial error as to induce the belief that the appeal was not taken with the hope of getting justice by a reversal, but with a desire to hinder justice by the delay.

Questions involved doubtful.—When an appellee making a motion to affirm as a delay case considers the questions involved so doubtful as to require a brief, and files one, this court will overrule his motion. Fisher *v.* Perkins, 4 Ky. L. Rep. 449.

36. Kamerick *v.* Castleman, 21 Mo. App. 587.

Affirmance without prejudice to appellant's rights.—In disposing of appellee's motion for affirmance of a judgment and appellant's motion to dismiss the appeal, the supreme court has power to order an affirmance without prejudice to appellant's rights under the law to a new trial in the lower court. White *v.* Poorman, 24 Iowa 108.

Where motion to withdraw also pending.— Where a motion for affirmation by defendant in error, and a motion to withdraw his writ of error by plaintiff, are pending at the same time, the court will grant that which the nature and justice of the case require. Rogers *v.* Alexander, 2 Greene (Iowa) 237.

37. Anderson *v.* Waco State Bank, (Tex. Civ. App. 1898) 47 S. W. 552; Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535.

c. Procedure to Obtain — (i) *In General.* The procedure to obtain an affirmance on motion depends upon the terms of the statute or rule of court authorizing it,[38] and a party seeking such relief must show affirmatively every fact necessary to bring the case within the statute or rule.[39]

(ii) *Notice of Application.* Notice of the motion to affirm must usually be given the opposite party.[40] But it has been held that, where notice of argument has been given by appellant, the appellee may move for affirmance without giving notice of argument.[41]

(iii) *Time of Making Application.* The question as to when the application for affirmance must be made is one depending, for the most part, upon the statutes and rules of court.[42] Affirmance will not be allowed where the application is made before[43] or after the time limited;[44] but the appeal may be dismissed.[45]

(iv) *Transcript or Certificate of Clerk.* The statutes and rules authorizing affirmance on motion require appellee to file a transcript,[46] or a certificate

In Dodd *v.* Bowles, 3 Wash. Terr. 11, 13 Pac. 681, a motion to affirm was denied and the case continued to the next term for a hearing on the merits, on condition that the plaintiff in error pay the costs of both courts.

Insufficient affidavit in opposition.—An affidavit, in opposition to a motion to affirm the judgment for failure to prosecute the appeal, which states that "due and great diligence was used," without setting forth any facts constituting such diligence, is insufficient. Meier *v.* Lowry, 28 Mo. App. 612.

38. Under Mass. Stat. (1888), c. 94, the application for an affirmance may be made and signed by attorney. Erlund *v.* Manning, 160 Mass. 444, 36 N. E. 59. And, where an appellant fails to file his exceptions in the appellate court, application may be made to the trial court to order the judgment affirmed. Erlund *v.* Manning, 160 Mass. 444, 36 N. E. 59; Ingalls *v.* Ingalls, 150 Mass. 57, 25 N. E. 92. But in equity and probate cases appeals from a single justice of the supreme judicial court must be affirmed by the full court. Gray *v.* Gray, 150 Mass. 56, 25 N. E. 91.

39. Harris *v.* Williams, 4 Tex. 339; Calvert *v.* Walker, 3 Tex. 14. See 3 Cent. Dig. tit. "Appeal and Error," § 4432 *et seq.*

A clerical error in the application for an affirmance, in stating that such application was made by defendant, will not render it invalid if it appears from the whole application that it was made by and in behalf of plaintiff. Erlund *v.* Manning, 160 Mass. 444, 36 N. E. 59.

A ground not stated in the motion will not be considered. Cunningham *v.* Roush, 141 Mo. 640, 43 S. W. 161.

40. McCarty *v.* Wintler, 17 Oreg. 391, 21 Pac. 195. See 3 Cent. Dig. tit. "Appeal and Error," § 4436.

Under Mass. Stat. (1888), c. 94, notice of an application for an order of affirmance need not be given to persons summoned as trustees of defendant. Erlund *v.* Manning, 160 Mass. 444, 36 N. E. 59.

41. Constant *v.* Ward, 1 Cal. 333.

42. See the statutes and rules of court, and the following cases:

Alabama.— Carleton *v.* Goodwin, 41 Ala. 153.

Arkansas.— Clay *v.* Notrebe, 11 Ark. 631.

Illinois.— Goudy *v.* Lake View, 27 Ill. App. 505.

Minnesota.— Guerin *v.* St. Paul, etc., R. Co., 32 Minn. 409, 21 N. W. 470.

Missouri.— Banse *v.* Tate, 62 Mo. App. 150.

Tennessee.— Norwood *v.* Humphreys, 2 Overt. (Tenn.) 188; Bustard *v.* Cheatham, 1 Overt. (Tenn.) 370.

Texas.— Laughlin *v.* Dabney, 86 Tex. 120, 24 S. W. 259; Pickett *v.* Mead, (Tex. Civ. App. 1894) 25 S. W. 654.

Virginia.—Nelson *v.* Matthews, 1 Hen. & M. (Va.) 21; Mills *v.* Black, 1 Call (Va.) 241.

See 3 Cent. Dig. tit. "Appeal and Error," § 4437.

In New York, a cause is not in readiness to be noticed for hearing until the case is settled and filed; and judgment cannot be affirmed on the call of the general-term calendar if the case has not been settled and filed. Anonymous, 36 How. Pr. (N. Y.) 366.

43. After case docketed.— Under Ky. Civ. Code, § 759, the motion can be made only after the case is docketed and regularly before the court, whether the transcript be filed by appellant or appellee. Louisville, etc., R. Co. *v.* Schmidt, 20 Ky. L. Rep. 456, 46 S. W. 688.

Second application.—Where a motion to affirm on certificate has been overruled, because made at a term of the court prior to that to which defendant in error had been cited to appear, if defendant desires to make a motion to affirm on certificate at the proper term of court he should file a new and independent motion, and ask the action of the court thereon. Lane *v.* Peters, 1 Tex. App. Civ. Cas. § 1030.

44. U. S. *v.* Haden, 5 Port. (Ala.) 533; McKeever *v.* Horine, 12 Iowa 227.

45. Nelson *v.* Matthews, 1 Hen. & M. (Va.) 21; Mills *v.* Black, 1 Call (Va.) 241.

As to dismissal see *supra*, XIV.

46. Must file whole transcript.—If appellee wishes to file the transcript in order to move for an affirmance as a delay case, he must file all of it. He cannot select part of it, and thereby preclude appellant from having it all considered. Tracey *v.* Symmes, 6 Ky. L. Rep. 288.

Judgment of affirmance or reversal will not be rendered unless a transcript is filed, but

from the clerk of the lower court showing that an appeal has been taken.[47] Where a certificate of the clerk is filed it must state enough to show that the court below had jurisdiction to render the judgment, and state the facts conferring jurisdiction on the appellate court.[48]

d. Vacating Affirmance. Where a judgment has been affirmed on appeal for failure to prosecute, the affirmance will not be set aside unless a valid and meritorious excuse for such failure be shown.[49] But it is, usually, competent

the appeal will be dismissed. Roberts *v.* Tucker, 1 Wash. Terr. 179.

Iowa — When transcript required. — Under the rules of the Iowa supreme court, to entitle an appellee to have the judgment appealed from affirmed he must first have filed a certified transcript of the judgment; but this is not required when the motion for affirmance is based on the ground of failure of appellant to file the printed abstract, as required by the rules of the supreme court. Hunger *v.* Patterson, 37 Iowa 501.

Texas — Indorsement on transcript. — Where defendant in error moved for an affirmance without regard to the merits, it was held that, there being no indorsement upon the transcript as required by statute, the motion for affirmance should be refused, the writ of error dismissed, and defendant in error condemned to pay the costs. Harris *v.* Williams, 4 Tex. 339. And so, where defendant in error filed the transcript and moved an affirmance without reference to the merits, and the transcript bore an indorsement, "Demanded by the Defendant," who was plaintiff in error, defendant in error did not bring himself within the statute, and therefore the motion was refused, and the writ of error dismissed, with costs against defendant in error. Moore *v.* Janes, 4 Tex. 340.

47. *Ex p.* Weissinger, 7 Ala. 710; Clark *v.* Oakley, 4 Ark. 236.

Under Mo. Acts (1885), p. 217, on motion of respondent to affirm the judgment for failure to prosecute the appeal, he must produce a perfect transcript of the record and proceedings. The clerk's certificate, as permitted by the Missouri act of March 24, 1883, is not sufficient. L. M. Rumsey Mfg. Co. *v.* Baker, 33 Mo. App. 239.

48. Schloss *v.* Atchison, etc., R. Co., 4 Tex. Civ. App. 177, 23 S. W. 392; City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1893) 22 S. W. 10.

What necessary to jurisdiction of appellate court.—A certified copy of the final judgment of the trial court, notice of appeal of record in the term when the judgment was rendered, or, in case of error, the service of citation in error, and the perfection of the appeal by giving bond in cases where the law requires bond to be given, or a bond for supersedeas, or for costs in cases of error, are necessary to give the court jurisdiction to affirm on certificate; and the certificate of the district clerk should state in the exact terms of the statute when the appeal or writ of error was perfected. House *v.* Williams, 40 Tex. 346; Texas, etc., R. Co. *v.* Lennox, 1 Tex. App. Civ. Cas. § 530. And a mistake of the clerk in certifying when the citations in error were perfected, though obvious, is fatal to the motion to affirm. Umbdemstock *v.* Perry, 41 Tex. 374.

Misdescription of judgment.—A certificate for an affirmance which misdescribes the judgment will, on motion, be struck from the docket. Lloyd *v.* Barnett, 36 Tex. 190.

Certificate which omits to show the time at which the writ of error issued and the term to which it is returnable is insufficient to authorize an affirmance of the judgment. Tardy *v.* Murry, 17 Ala. 585.

Failure to show in what court judgment rendered. — The appellate court acquires no jurisdiction to affirm the judgment of the court below, on the certificate of the clerk of that court, where the certificate does not show in what court the judgment appealed from was rendered. City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1893) 22 S. W. 10.

Failure to show appeal taken in term-time. —A certificate is fatally defective which fails to show that the appeal was taken in term-time, or that notice thereof was entered of record. A mere averment that the appeal bond was filed and approved does not comply with the Texas statute. Loftin *v.* Nalley, 28 Tex. 127.

49. Waters *v.* Creagh, 4 Stew. & P. (Ala.) 81.

Cause reached sooner than expected.—That a case was set for the last day of the session of the supreme court, which for years past had never been able to finish the calendar, and defendants' attorney did not expect it to be reached, is not sufficient to justify setting aside an affirmance, made because there was no appearance, or points or authorities on file, for defendant. Huggins *v.* Handy, (Cal. 1888) 17 Pac. 533.

Illness of attorney. — Where a judgment had been affirmed because of the wrongful retention of papers in the cause by appellant's attorney, it was held that the affirmance would not be set aside because of such attorney's continued illness, he having a partner who could attend to his business, and having been frequently urged to return the papers. Vice *v.* Jones, 4 Ind. App. 426, 30 N. E. 937.

Mere forgetfulness of counsel to assign errors, owing to the clerk's omission to enter their names on the docket, is not a sufficient reason for vacating the affirmance. Dorsey *v.* Dumas, 50 Ala. 244.

Technical objection.—Where a judgment on a forfeited bail bond has been affirmed, on appeal, for lack of prosecution, the cause will not be reinstated to allow appellant to interpose the technical objection that the bond

for the court, on good cause shown, to vacate the affirmance and reinstate the case.[50]

2. On Hearing — a. Where No Error Shown — (i) *In General.* Where it appears that the merits of the case have been fairly submitted to the jury, that their verdict is supported by substantial evidence, and, on an inspection of the record, the appellate court can discover no error in the rulings of the court below, the judgment will, of course, be affirmed,[51] and where several cases on appeal,

was not in due form. Price *v.* State, 55 Ark. 608, 18 S. W. 1054.

50. Jones *v.* Matthews, 48 Ala. 558; Engleken *v.* Schultz, 40 Iowa 703; Scarf *v.* Patterson, 37 Iowa 503.

In Alabama, a motion to reinstate must be made during the term, and supported by affidavits showing a satisfactory excuse for failure to file the transcript as required by the statute. Jones *v.* Matthews, 48 Ala. 558.

51. *Alabama.*—Anderson *v.* Bullock County Bank, 122 Ala. 275, 25 So. 523; Lehman *v.* McQueen, 65 Ala. 570; Parker *v.* Parker, 33 Ala. 459.

Arizona.—Newmark *v.* Marks, (Ariz. 1890) 28 Pac. 960.

Arkansas.— Bizzell *v.* Stone, 8 Ark. 478.

California.— Eastman *v.* Cook, 90 Cal. 238, 27 Pac. 191; Bellegarde *v.* San Francisco Bridge Co., 90 Cal. 179, 27 Pac. 20.

Colorado.— Gutshall *v.* Helm, 14 Colo. 543, 24 Pac. 329; Hallack *v.* Stockdale, 14 Colo. 198, 23 Pac. 340.

Florida.— Spratt *v.* Price, 18 Fla. 289.

Georgia.— Brinson *v.* Reid, 107 Ga. 250, 33 S. E. 31; Stevens *v.* Middlebrooks, 77 Ga. 81.

Illinois.— Hogan *v.* Chicago, 168 Ill. 551, 48 N. E. 210; Keller *v.* Rossbach, 61 Ill. 342; Snell *v.* De Land, 31 Ill. App. 68; Crain *v.* Crain, 23 Ill. App. 346.

Indiana.— Child *v.* Swain, 69 Ind. 230; Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264; Huston *v.* Cosby, 14 Ind. App. 602, 41 N. E. 953; Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800.

Iowa.— Calder *v.* Smalley, 66 Iowa 219, 23 N. W. 638, 55 Am. Rep. 270; Klaman *v.* Malvin, 61 Iowa 752, 16 N. W. 356.

Kansas.— Thom *v.* Davis, 16 Kan. 22; Cohen *v.* Hamill, 8 Kan. 621.

Massachusetts.— Lord Electric Co. *v.* Morrill, (Mass. 1901) 59 N. E. 807; Richards *v.* Smith, 9 Gray (Mass.) 315.

Michigan.—Young *v.* Detroit, etc., R. Co., 56 Mich. 430, 23 N. W. 67; Forsyth *v.* Prentis, 48 Mich. 268, 12 N. W. 199.

Missouri.— Summers *v.* Akers, 85 Mo. 213; Owens *v.* McBride, 32 Mo. 221; Merryman *v.* Shanks, 78 Mo. App. 265.

Nebraska.— Johnson *v.* Thompson, 56 Nebr. 552, 76 N. W. 1054; Grand Lodge, A. O. U. W. *v.* Higgins, 55 Nebr. 741, 76 N. W. 438; Lancaster County *v.* Marshall, 40 Nebr. 507, 58 N. W. 932.

New York.— Butler *v.* Third Ave. R. Co., 37 N. Y. Suppl. 651, 73 N. Y. St. 245; Hymann *v.* Cook, 2 Den. (N. Y.) 201; Durkee *v.* Marshall, 7 Wend. (N. Y.) 312.

North Carolina.— Biggs *v.* Waters, 112 N. C. 836, 16 S. E. 921.

Ohio.—Warder Bushnell, etc., Co. *v.* Jacobs, 58 Ohio St. 77, 50 N. E. 97.

Oklahoma.— Berry *v.* Hill, 6 Okla. 7, 37 Pac. 828.

Pennsylvania.— Commercial Nat. Bank *v.* McClain, 171 Pa. St. 132, 33 Atl. 78; Busch *v.* Groswith, 159 Pa. St. 623, 28 Atl. 438; Moore *v.* Moore, 153 Pa. St. 495, 25 Atl. 763.

Tennessee.— Stanley *v.* Donoho, 16 Lea (Tenn.) 492.

Texas.— Deadrick *v.* Rice, 26 Tex. 567; Bender *v.* Fischer, (Tex. Civ. App. 1893) 22 S. W. 656.

Vermont.— Lillie *v.* Lillie, 55 Vt. 470; Bartlett *v.* Wood, 32 Vt. 372.

Virginia.—Atlantic, etc., R. Co. *v.* Delaware, etc., Co., 98 Va. 503, 37 S. E. 13.

West Virginia.— McGraw *v.* Roller, 47 W. Va. 650, 35 S. E. 822.

Wisconsin.— Clune *v.* Gilson, 75 Wis. 537, 44 N. W. 655; *In re* Fleming, 16 Wis. 70.

Wyoming.— Boburg *v.* Prahl, 3 Wyo. 325, 23 Pac. 70.

United States.— Sutton *v.* Bancroft, 23 How. (U. S.) 320, 16 L. ed. 454; Guild *v.* Frontin, 18 How. (U. S.) 135, 15 L. ed. 290.

See 3 Cent. Dig. tit. "Appeal and Error," § 4441 *et seq.*

Affirmance without discussion. — Where every legal question involved in a case has already been passed upon by the supreme court in other cases, and when the court below has committed no error for which the judgment of such court can be reversed, such judgment will be affirmed without any discussion of any of the questions involved in such case. Rettman *v.* Richardson, 17 Kan. 413. And so, where the matter is of trivial importance and the merits are clearly against appellant, the court may affirm without discussion. Guinane *v.* Hogan, 78 Ill. App. 272.

Judgment by default will be affirmed where the complaint, though defective, does not lack anything material to plaintiff's right to recover. Hallock *v.* Jaudin, 34 Cal. 167.

As to right of appeal from judgments of default see *supra*, III, E, 3 [2 Cyc. 617]; IV, B, 2, c [2 Cyc. 649].

Where a plea of release of errors, in the appellate court, is sustained by the proof, the judgment below will be affirmed. Smucker *v.* Larimore, 21 Ill. 267. But see Hite *v.* Wilson, 2 Hen. & M. (Va.) 268.

As to plea of release of errors see *supra*, XI, K, 2, c, (II) [2 Cyc. 1007].

As to release of errors, generally, see *supra*, IV, B, 1, b [2 Cyc. 643].

Where no errors are assigned, and none appear on the record, the judgment will be affirmed. Territory *v.* Selden, 1 Ariz. 381, 25

presenting different states of fact, are, by agreement, consolidated and joined in one petition in error, the judgments must be affirmed as to all, if free from error as to one.[52]

(II) *In Actions Tried Without Jury.* And so, in an action at law tried by the court without the intervention of a jury, the judgment will be affirmed if it can be sustained on any theory consistent with the pleadings, there being evidence to warrant the findings, and no error is shown by the record.[53] But, in chancery appeals, the court will examine into the merits of the case and, where justice demands it, will reverse the decree even though there be no error apparent on the record.[54]

(III) *Failure to Reserve Questions Properly.* A party appealing from a judgment must take seasonable steps to bring the matters complained of to the attention of the appellate court in the manner prescribed by law, and unless this be done the judgment will, usually, be affirmed.[55]

(IV) *Defective Record.* A party alleging error must show error; and so, where the record before the appellate court is so imperfect or confused that the court cannot intelligently ascertain the facts nor pass upon the merits of the rulings of the lower court, and no reversible error is apparent on the face of the record as it stands, it is the practice in many jurisdictions to affirm the judgment.[56]

Pac. 534; Stowe *v.* Mapes Formula, etc., Guano Co., 21 Fla. 153; Weston, etc., R. Co. *v.* Cox, 32 Mo. 456; King *v.* Page, 86 N. C. 725; Clark's Code Civ. Proc. N. C. (1900), p. 772, and cases there cited.

As to the necessity to assign errors see *supra*, XI, L [2 Cyc. 1010].

When the appeal is clearly frivolous the judgment will be affirmed. Ames *v.* Wilson, (Cal. 1886) 9 Pac. 315; Holmes *v.* Henderson, 60 Ind. 273; Engs *v.* Priest, 69 Iowa 126, 28 N. W. 476; Matter of Newcombe, 18 N. Y. Suppl. 550, 45 N. Y. St. 807.

As to affirmance of frivolous appeal on motion see *supra*, XVIII, C, 1, a, (II).

52. Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330.

53. *California.*— German *v.* Brown, (Cal. 1893) 33 Pac. 58; Lee Chuck *v.* Quan Wo Chong, 91 Cal. 592, 28 Pac. 44, 15 Am. St. Rep. 50; Whittle *v.* Doty, (Cal. 1886) 12 Pac. 299.

Idaho.— McGuire *v.* Lamb, 2 Ida. 346, 17 Pac. 749; Cooper *v.* Kellogg, 2 Ida. 304, 13 Pac. 350.

Michigan.— Morgan *v.* Botsford, 82 Mich. 153, 46 N. W. 230.

Missouri.— Bancroft *v.* Bruning, 27 Mo. 235; Rosche *v.* Cook, 81 Mo. App. 616; Claflin *v.* Burkhart, 43 Mo. App. 226; Gruen *v.* Bamberger, 25 Mo. App. 89.

North Carolina.— Chastain *v.* Coward, 79 N. C. 543.

Texas.— Walker *v.* Cole, 89 Tex. 323, 34 S. W. 713; San Saba County *v.* Ray, 10 Tex. Civ. App. 557, 30 S. W. 945.

54. Austin *v.* Carpenter, 2 Greene (Iowa) 131.

55. *Alabama.*— Mahoney *v.* O'Leary, 34 Ala. 97.

Arkansas.— Biscoe *v.* State, 19 Ark. 559.

Florida.—Wall *v.* Shelley, 36 Fla. 357, 18 So. 856.

Indiana.— Dunlavy *v.* State, 19 Ind. 86.

Mississippi.—Cox *v.* Cox, 8 Sm. & M. (Miss.) 292.

Missouri.— Davis *v.* Ware, 57 Mo. 460.

North Carolina.— Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266.

Texas.—Keyser *v.* Willman, (Tex. Civ. App. 1895) 30 S. W. 504.

Wisconsin.— Kearns *v.* Thomas, 37 Wis. 118.

See 3 Cent. Dig. tit. "Appeal and Error," § 4550 *et seq.*

As to presentation and reservation in the lower court of grounds of review see *supra*, V [2 Cyc. 660].

As to the requisites and proceedings for transfer of cause see *supra*, VII [2 Cyc. 789].

As to the necessity of assignments of error see *supra*, XI [2 Cyc. 980].

As to the necessity of briefs see *supra*, XII [2 Cyc. 1013].

As to the record and proceedings not of record see *supra*, XIII [2 Cyc. 1025].

As to dockets and calendars and proceedings preliminary to hearing, see *supra*, XV.

56. *Arizona.*— Trimble *v.* Long, (Ariz. 1899) 56 Pac. 731.

Arkansas.— State Bank *v.* Wilson, 14 Ark. 113.

California.— Hughes *v.* Thompson, (Cal. 1888) 16 Pac. 532; Lower *v.* Knox, 10 Cal. 480.

Colorado.— Taub *v.* Swofford Bros. Dry Goods, etc., Co., 8 Colo. App. 213, 45 Pac. 513.

Connecticut.— Schlesinger *v.* Chapman, 52 Conn. 271.

Florida.—Wall *v.* Shelley, 36 Fla. 357, 18 So. 856; Florida Cent., etc., R. Co. *v.* St. Clair-Abrams, 35 Fla. 514, 17 So. 639.

Georgia.— Parks *v.* Norman, 108 Ga. 373, 33 S. E. 1005; Batchelor *v.* Batchelor, 97 Ga. 425, 24 S. E. 157.

Idaho.— Hyde *v.* Harkness, 1 Ida. 638.

Illinois.— Buckley *v.* Eaton, 60 Ill. 252; Maxwell *v.* Durkin, 86 Ill. App. 257; Goldfinger *v.* Waters, 86 Ill. App. 183.

Indiana.— Capital Nat. Bank *v.* Reid, 154 Ind. 54, 55 N. E. 1023; Campbell *v.* Monroe County, 130 Ind. 598, 27 N. E. 560.

It is the privilege of appellant to make up his case, and it is his duty to do it so as to intelligibly exhibit the error in the judgment of which he complains; and, on his failure to do so, the court will affirm the judgment — not because it is thought to be right, but because it cannot be seen to be wrong.[57]

b. Where Reversal Would Prove Fruitless — (i) *In General.* A judgment may be affirmed on appeal, although infected with error, if it be apparent that a reversal would prove ineffectual and of no benefit to the party asking it[58] — as

Iowa.— Stillman *v.* Lefferts, (Iowa 1900) 82 N. W. 491; Zimmerman *v.* Merchants, etc., Ins. Co., 77 Iowa 350, 42 N. W. 318. But *compare* McCaughan *v.* Tatman, 53 Iowa 508, 5 N. W. 712, where counsel agreed to treat a record as complete.

Kansas.— Sanford *v.* Weeks, 50 Kan. 335, 31 Pac. 1087; Hutchinson *v.* Bain, 11 Kan. 234.

Kentucky.— Sacra *v.* Carter, (Ky. 1900) 56 S. W. 708. But *compare* Sebastian *v.* Booneville Academy Co., (Ky. 1900) 56 S. W. 810.

Louisiana.— Goodrich *v.* Newell, 43 La. Ann. 378, 8 So. 921; Hunter *v.* Abert, 2 Mart. N. S. (La.) 328.

Michigan.— Duvernois *v.* Kaiser, 75 Mich. 431, 42 N. W. 848.

Minnesota.—Hendrickson *v.* Back, 74 Minn. 90, 76 N. W. 1019.

Mississippi.— Doty *v.* Lucas, 43 Miss. 337.

Missouri.— State *v.* Merriam, 159 Mo. 655, 60 S. W. 1112; Johnson *v.* Greenleaf, 73 Mo. 671; Stevens *v.* Stevens, 35 Mo. App. 50.

Montana.—Montana Cattle Co. *v.* Forsythe, 16 Mont. 389, 41 Pac. 137; Adams *v.* Bankers' L. Assoc., 13 Mont. 222, 33 Pac. 192.

Nebraska.— Hesser *v.* Johnson, 57 Nebr. 155, 77 N. W. 406; Haley *v.* McCarty, 48 Nebr. 883, 67 N. W. 857.

Nevada.— Earles *v.* Gilham, 20 Nev. 49, 14 Pac. 588.

New Mexico.— Territory *v.* Rudabaugh, 2 N. M. 222.

New York.—Wallach *v.* Van Schaick, 28 N. Y. Suppl. 168, 59 N. Y. St. 188; Gray *v.* American Bank-Note Co., 14 N. Y. Suppl. 885, 39 N. Y. St. 97.

North Carolina.— Cummings *v.* Hoffman, 113 N. C. 267, 18 S. E. 170; Wilson *v.* Shepherd, 98 N. C. 154, 3 S. E. 499; Carroll *v.* Barden, 97 N. C. 191, 1 S. E. 849.

Pennsylvania.— Schultz's Appeal, (Pa. 1887) 9 Atl. 320.

Tennessee.— Nave *v.* Nave, 1 Heisk. (Tenn.) 324; Chambers *v.* Brown, Cooke (Tenn.) 292.

Texas.—McWillie *v.* Kincheloe, 32 Tex. 655; Close *v.* State, 30 Tex. 631; Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59; Missouri, etc., R. Co. *v.* Stafford, 13 Tex. Civ. App. 192, 35 S. W. 48.

Utah.— Ruth *v.* Long, 3 Utah 466, 24 Pac. 756.

Virginia.—Wright *v.* Wood, 88 Va. 1037, 14 S. E. 914.

Washington.— Enos *v.* Wilcox, 3 Wash. 44, 28 Pac. 364.

West Virginia.— Hickman *v.* Painter, 11 W. Va. 386.

Wisconsin.—Kelley *v.* Fond du Lac, 36 Wis. 307.

United States.— Greenhood *v.* Randall, 111 U. S. 775, 4 S. Ct. 699, 28 L. ed. 596; James *v.* Mobile Bank, 7 Wall. (U. S.) 692, 19 L. ed. 275; Stevens *v.* Gladding, 19 How. (U. S.) 64, 15 L. ed. 569.

See 3 Cent. Dig. tit. "Appeal and Error," § 4450 *et seq.*

As to dismissal of the appeal see *supra*, XIV.

As to what the record must show see *supra*, XIII [2 Cyc. 1025].

As to the necessity to assign errors see *supra*, XI [2 Cyc. 980].

As to the necessity to file briefs see *supra*, XII [2 Cyc. 1013].

57. Chasteen *v.* Martin, 84 N. C. 391. See, generally, *supra*, XIII, D, E, F, G, as to appellant's duty in the preparation of his case.

58. *Georgia.*— Buchanan *v.* Buchanan, 103 Ga. 90, 29 S. E. 608; Hamrick *v.* Rouse, 17 Ga. 56.

Illinois.—Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189; Chicago *v.* Jackson, 88 Ill. App. 130.

Indiana.— Cleveland, etc., R. Co. *v.* Waynetown, 153 Ind. 550, 55 N. E. 451; State *v.* Harris, 89 Ind. 363, 47 Am. Rep. 169; Hamilton *v.* Shelbyville, 6 Ind. App. 538, 33 N. E. 1007.

Kentucky.—Violet *v.* Stephens, Litt. Sel. Cas. (Ky.) 147; Boales *v.* Boulware, 6 Ky. L. Rep. 222.

Maryland.—Annapolis *v.* Harwood, 32 Md. 471, 3 Am. Rep. 161; Spear *v.* Griffin, 23 Md. 418.

Mississippi.—Wright *v.* Weisinger, 5 Sm. & M. (Miss.) 210.

Missouri.— Garland *v.* Smith, 127 Mo. 583, 28 S. W. 196, 29 S. W. 836; McDermott *v.* Doyle, 11 Mo. 443.

New York.— Throckmorton *v.* Evening Post Pub. Co., 35 N. Y. App. Div. 396, 54 N. Y. Suppl. 887; Howe *v.* Lloyd, 9 Abb. Pr. N. S. (N. Y.) 257; People *v.* Board of Canvassers, 2 N. Y. Suppl. 561.

North Carolina.— Gay Mfg. Co. *v.* Hobbs, 128 N. C. 46, 38 S. E. 26.

Pennsylvania.— McConnell *v.* Apollo Sav. Bank, 146 Pa. St. 79, 23 Atl. 347.

South Dakota.— Tobin *v.* McKinney, (S. D. 1900) 84 N. W. 228.

Texas.— Galveston, etc., R. Co. *v.* Jackson, 93 Tex. 262, 54 S. W. 1023; Griffis *v.* Payne, 22 Tex. Civ. App. 519, 55 S. W. 757.

Virginia.— Todd *v.* Gallego Mills Mfg. Co., 84 Va. 586, 5 S. E. 676.

Wisconsin.— Swift *v.* Cornes, 20 Wis. 397.

where the court can see that the same result would inevitably be reached a second time.[59] Thus, where a reversal would prove fruitless, the appellate court may affirm, notwithstanding errors below in instructing the jury,[60] or in admitting or excluding evidence.[61] But the court will reverse where a different result may be reached on a new trial.[62]

(II) *WANT OF ACTUAL CONTROVERSY.* Notwithstanding an irregularity in the proceedings below, the judgment may be affirmed where, through the lapse of time or otherwise, it appears that the questions arising on the merits of the action have become abstract, or the subject-matter of the controversy has ceased to exist, and a new trial would prove of no advantage to the party asking it.[63] But the

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4456 *et seq.*; 4587.

As to right of appeal where the decision of the questions has been rendered ineffective see *supra*, II, A, 4 [2 Cyc. 533].

As to the effect of harmless error, generally, see *supra*, XVII, H.

As to reversal for failure to award nominal damages see *infra*, XVIII, E, 1, e, (II), (B), (2).

59. *California.*— Larco *v.* Casaneuava, 30 Cal. 560; Tohler *v.* Folsom, 1 Cal. 207.

Connecticut.— Union Bank *v.* Middlebrook, 33 Conn. 95; Sheldon *v.* South School Dist., 24 Conn. 88.

Illinois.—Van Vlissengen *v.* Cox, 44 Ill. App. 247.

Kentucky.— Barbour *v.* Morris, 6 B. Mon. (Ky.) 120; Thompson *v.* Taylor, 5 J. J. Marsh. (Ky.) 398.

Louisiana.— Destrehan *v.* Fazende, 13 La. Ann. 307; Whipple *v.* Hertzberger, 11 La. Ann. 475.

Maryland.—Washington *v.* Williamson, 23 Md. 244; Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

Massachusetts.— Brazier *v.* Clap, 5 Mass. 1.

Michigan.—Altman *v.* Fowler, 70 Mich. 57, 37 N. W. 708.

Minnesota.— Minor *v.* Willoughby, 3 Minn. 225.

Mississippi.— Perry *v.* Clarke, 5 How. (Miss.) 495.

Missouri.— Tate *v.* Barcroft, 1 Mo. 163; Daniel *v.* Atkins, 66 Mo. App. 342.

New Hampshire.— Bean *v.* Conway Sav. Bank, 64 N. H. 350, 10 Atl. 818.

Tennessee.— David *v.* Bell, Peck (Tenn.) 135.

Texas.— Gulf, etc., R. Co. *v.* Koska, 4 Tex. Civ. App. 668, 23 S. W. 1002.

Vermont.— Beckwith *v.* Middlesex, 20 Vt. 593.

Wisconsin.—Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644; Haney *v.* The Schooner Rosabelle, 20 Wis. 247.

60. *Connecticut.*—Cort *v.* Tracy, 9 Conn. 1.

Georgia.—Arrington *v.* Cherry, 10 Ga. 429.

Kentucky.— Robertson *v.* Rodes, 13 B. Mon. (Ky.) 325.

New York.— Hayden *v.* Palmer, 2 Hill (N. Y.) 205.

Texas.— Reeves *v.* Smith, 23 Tex. Civ. App. 711, 58 S. W. 185.

Vermont.—Walworth *v.* Readsboro, 24 Vt. 252.

61. *Georgia.*— Jordan *v.* Pollock, 14 Ga. 145.

Louisiana.—Alford *v.* Hughes, 14 La. Ann. 727; Linton *v.* Wikoff, 12 La. Ann. 878.

Maryland.— Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343.

Mississippi.—McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298.

Missouri.—Baker *v.* Shaw, 35 Mo. App. 611.

New Jersey.— Canfield *v.* Ball, 8 N. J. Eq. 582.

Pennsylvania.— Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573.

Tennessee.— Brown *v.* Williams, 4 Humphr. (Tenn.) 21.

Wisconsin.— Connehan *v.* Ford, 9 Wis. 240.

62. Marshall *v.* Betner, 17 Ala. 832; Erwin *v.* Crowell, 17 Ala. 227; Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428. See also Randolph *v.* Frick, 50 Mo. App. 275, in which it was held that, where the record in an action at law showed prejudicial error against appellant, the judgment appealed from must be set aside and a new trial granted, though it was plain that another trial must result, on a proper amendment of the pleadings, in the same judgment.

63. *California.*—Modoc County *v.* Madden, (Cal. 1898) 53 Pac. 268.

Connecticut.— State *v.* Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162.

District of Columbia.— Berlitz *v.* Strack, 7 Mackey (D. C.) 491.

Georgia.— Corning *v.* Siesel, 101 Ga. 389, 28 S. E. 861; Cranston *v.* State Bank, 97 Ga. 406, 23 S. E. 822.

Illinois.—Hoig *v.* Thrap, 84 Ill. 302; Loven *v.* People, 46 Ill. App. 306.

Kentucky.— Kercheval *v.* Berry, 6 J. J. Marsh. (Ky.) 508.

Maine.—Woodbury *v.* Portland Mar. Soc., 90 Me. 17, 37 Atl. 323.

Mississippi.— Pintard *v.* Griffing, 32 Miss. 133.

New York.—Williams *v.* Montgomery, 148 N. Y. 519, 43 N. E. 57; Matter of Schwager, 13 N. Y. Suppl. 384, 36 N. Y. St. 534.

North Carolina.—Vance County *v.* Gill, 126 N. C. 86, 35 S. E. 228; Herring *v.* Pugh, 125 N. C. 437, 34 S. E. 538; Craven *v.* Atlantic, etc., R. Co., 77 N. C. 297.

Virginia.— Reid *v.* Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 64 Am. St. Rep. 708, 36 L. R. A. 274.

Wisconsin.— State *v.* Hoeflinger, 31 Wis. 257.

fact that, pending an appeal from an order dissolving an injunction, the act sought to be enjoined has been accomplished is not an adequate reason why such order cannot be reversed.[64]

c. Affirmance to Permit Appeal to Higher Court. Where an appeal to an intermediate court involves questions of law as to which it is important there should be an authoritative settlement as early as possible, the judgment will sometimes be affirmed *pro forma* in order to permit an appeal to the court of highest jurisdiction, and thus save time and expense.[65] But the intermediate appellate tribunals, having been created for a substantial purpose, should not affirm *pro forma* except in cases where such practice is clearly warranted.[66]

d. Conditional Affirmance. Sometimes the appellate court will render a judgment of affirmance conditioned on appellee's performance of some act, or the carrying out of some direction made by the court.[67]

e. Effect of Affirmance — (I) *In General.* Where a final judgment is affirmed on appeal in all its parts, the controversy is at an end,[68] and all that is

United States.— Glendale Elastic Fabric, etc., Co. *v.* Smith, 100 U. S. 110, 25 L. ed. 547.

See 3 Cent. Dig. tit. "Appeal and Error," § 4461.

As to dismissal for want of actual controversy see *supra*, XIV.

As to the necessity of the existence of an actual controversy see *supra*, II, A [2 Cyc. 533].

64. Platteville *v.* Galena, etc., R. Co., 43 Wis. 493. In Walker *v.* Sarven, 41 Fla. 210, 25 So. 885, it was held that the fact that a decree for the sale of property had been executed would not necessarily prevent a reversal of such decree on an appeal taken after the sale.

65. Fairbanks *v.* Farwell, 43 Ill. App. 592; Phelps *v.* Curts, 38 Ill. App. 93; People *v.* Foster, 29 Ill. App. 208; McMillan *v.* McCormick, 17 Ill. App. 258.

See 3 Cent. Dig. tit. "Appeal and Error," § 4443.

To take case to United States supreme court.— In Tyler *v.* Wells, 70 Mo. 33, a judgment of affirmance was directed to be entered by the clerk on an appeal for the sole purpose of taking the case to the United States supreme court, from a judgment rendered in accordance with the opinion of the reviewing court on a former appeal.

To obtain construction of former opinion. —Where the parties to an action construe differently an opinion of the court of appeals on a former appeal, and it is not entirely clear that the views of plaintiffs, though in accordance with the decision of the general term in the former trial, are supported by the opinion of the court of appeals, and where the case will undoubtedly be carried again to the court of appeals, a judgment for defendant will be affirmed. Greenleaf *v.* Brooklyn, etc., R. Co., 71 Hun (N. Y.) 91, 24 N. Y. Suppl. 526, 54 N. Y. St. 291.

66. Roads *v.* Garman, 27 Iowa 338.

67. *Colorado.*— Lustig *v.* McCullouch, 10 Colo. App. 41, 50 Pac. 48.

Louisiana.— Carre *v.* New Orleans, 42 La. Ann. 1119, 8 So. 399.

Missouri.— Culver *v.* Smith, 82 Mo. App. 390.

Nebraska.— Howard *v.* Lamaster, 11 Nebr. 582, 10 N. W. 497.

New York.— Syracuse Sav. Bank *v.* Syracuse, etc., R. Co., 88 N. Y. 110; Reed *v.* Metropolitan El. R. Co., 63 Hun (N. Y.) 633, 18 N. Y. Suppl. 811, 45 N. Y. St. 330.

Pennsylvania.— Markley *v.* Swartzlander, 8 Watts & S. (Pa.) 172.

South Carolina.— Bradley *v.* Flewitt, 6 S. C. 69.

Washington.— Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

See 3 Cent. Dig. tit. "Appeal and Error," § 4448.

As to requiring a remission of part of the recovery as a condition to affirmance see *infra*, XVIII, D, 4.

As to reversal on condition see *infra*, XVIII, E, 4.

68. Chickering *v.* Failes, 29 Ill. 294.

A writ of error sued out after an affirmance of the judgment is a nullity. McRae *v.* Columbus Bank, 1 Ala. 578.

Cannot grant new trial.— On affirming a judgment, the appellate court has no discretion to grant a new trial. Junkin *v.* Lippman, 18 Ind. App. 316, 48 N. E. 8; Stevens *v.* Clark County, 43 Wis. 36. Nor can the lower court grant a new trial after appeal is prosecuted, although motion was made therefor before the writ of error was taken. Walker *v.* Hale, 16 Ala. 26.

Motion in arrest.— After a judgment has been affirmed on appeal, a motion to arrest it cannot be entertained. Haskell *v.* Sullivan, 31 Mo. 435.

The affirmance of chancellor's decree is not an affirmance of his opinion, where the opinion covers matters not embraced in the decree. McWilliams *v.* Jenkins, 72 Ala. 480.

Adoption of opinion below.—Where the court of appeals affirms the judgment below, without an opinion, and without formally adopting the opinion below, the inference, nevertheless, is that the opinion is adopted. Higgins *v.* Crichton, 98 N. Y. 626.

Appeal from part of decree.—If a chancery decree be partly in favor of a party and partly adverse, and he appeal from the adverse portion, an affirmance thereof on appeal

left to be done is to enforce the judgment.[69] In other words, the rights of the parties stand as if there had been no appeal or writ of error.[70] If the decision finally settles all the questions in the case, and there is nothing requiring further consideration below, the appellate court will render final judgment.[71] But, of course, the court has power to send the cause back to the lower court for such further proceedings as the circumstances render necessary;[72] and sometimes, where the appeal presents only technical questions, the appellate court, though affirming the judgment, will remand the cause for a trial on the merits.[73] So, in

does not affirm the other portion of the decree. Pennington *v.* Todd, 47 N. J. Eq. 569, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589.

On appeal from an interlocutory order the court cannot make any final disposition of the case. Schweinfurth *v.* Poehlman, 83 Ill. App. 428.

New York — Judgment absolute on affirming order granting new trial.— Under N. Y. Code Civ. Proc. §§ 191, 194, if the court of appeals affirms an order granting a new trial, judgment absolute is given against appellant. Boyle *v.* New York, etc., R. Co., 115 N. Y. 636, 21 N. E. 724, 23 N. Y. St. 731; Kennicutt *v.* Parmalee, 109 N. Y. 650, 16 N. E. 549, 15 N. Y. St. 515; Conklin *v.* Snider, 104 N. Y. 641, 9 N. E. 880; Snebley *v.* Conner, 78 N. Y. 218; Conger *v.* Conger, 77 N. Y. 432; Mackay *v.* Lewis, 73 N. Y. 382; Hitchings *v.* Van Brunt, 38 N. Y. 335; Brown *v.* Simmons, 14 Daly (N. Y.) 456, 15 N. Y. St. 370. By appealing he loses the right to any affirmative relief in case the order be affirmed. Rust *v.* Hauselt, 59 How. Pr. (N. Y.) 389. All the traversable allegations of the opposite party stand admitted. Thompson *v.* Lumley, 7 Daly (N. Y.) 74. And where defendant has set up a counter-claim in his answer he is entitled to a judgment thereon. Hiscock *v.* Harris, 80 N. Y. 402. But the judgment absolute on appeal can have no greater effect than such judgment as could be obtained against appellant on a new trial. Maloney *v.* Nelson, 16 Misc. (N. Y.) 474, 39 N. Y. Suppl. 930. Where the new trial is granted only on condition that the successful party below will not accept a reduction of the amount recovered, and he refuses to do so and appeals, the court of appeals need not give judgment absolute against him on the whole case, but may render judgment in his favor for the reduced amount. Freel *v.* Queens County, 154 N. Y. 661, 49 N. E. 124. But see Hitchings *v.* Van Brunt, 38 N. Y. 335, 5 Abb. Pr. N. S. (N. Y.) 272.

69. As to enforcement of the judgment or order affirmed see *infra*, XVIII, G, 5.

70. U. S. *v.* Jones, 1 Brock. (U. S.) 285, 26 Fed. Cas. No. 15,492. And see Steinbach *v.* Stewart, 11 Wall. (U. S.) 566, 20 L. ed. 56.

Merger of judgment.— It has been held that a judgment of affirmance merges the judgment of the court below. Werborn *v.* Pinney, 76 Ala. 291; Wiswell *v.* Munroe, 4 Ala. 9. But see Planters Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616.

71. State *v.* Wilson, 121 N. C. 480, 28 S. E. 554, 61 Am. St. Rep. 672; Schilling *v.* Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892; Fire-Extinguisher Mfg. Co. *v.* Clarksville, (Tenn. Ch. 1899) 52 S. W. 442; Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 56 S. W. 328; Phillips *v.* Watkins Land Mortg. Co., 90 Tex. 195, 38 S. W. 470; Humphreys *v.* Edwards, 89 Tex. 512, 36 S. W. 434.

72. Remand for amendment of pleadings. —Where evidence of an estoppel was improperly admitted without being alleged in the pleading, but the judgment was in accordance with the equity of the whole case, the judgment was affirmed and the case remanded for the proper amendment of the pleadings, to be made below. Gill *v.* Rice, 13 Wis. 549. And see Green *v.* Hill, 101 Ga. 258, 28 S. E. 692, in which the cause was remanded, with leave to amend the pleadings.

Remand, with direction to alter decree.— An interlocutory decree directed the sale of lands to satisfy a debt in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and, though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for that alteration. On appeal from the decree, it was held that the decree should not be reversed for that cause, but affirmed, and the cause remanded, with direction to alter the decree, and direct satisfaction out of the rents and profits, if such alteration were asked, and if the debt could be satisfied out of the rents and profits within a reasonable time. Mann *v.* Flinn, 10 Leigh (Va.) 97.

Allowing sale in lower court.—Where an order refusing to dissolve an injunction *pendente lite*, restraining a sheriff from selling certain silks on execution, was affirmed, but it appeared to the court that a sale of the goods would be to the pecuniary advantage of both parties, it was held that leave would be reserved to the court below to modify its order so that, by consent of the parties, the silk might be sold under the execution, after ample notice, and the proceeds placed in the registry to await a final decision. Hadden *v.* Dooley, 74 Fed. 429, 20 C. C. A. 494.

73. Case involving title to public office.— A petition for mandamus was dismissed without a trial, on the merits, and an appeal presented only technical questions of pleading. The case involved the title to a public office. It was held that, though the judgment was affirmed, it was a proper case for the exercise of the discretion given the court of appeals

affirming a judgment or order, the appellate court will sometimes frame its judgment so that it shall be without prejudice to appellant's application to the lower court for relief to which he is entitled.[74]

(II) *Of Judgment on Demurrer.* On affirming a judgment on demurrer the appellate court is not, ordinarily, obliged to remand the case.[75] But the court, generally, has a discretionary control in this regard, and, where the merits of the case render it proper to do so, will remand the case for further proceedings below.[76]

D. Modification — 1. In General — a. Power to Modify. Usually, the power of an appellate court is not restricted to a simple affirmance or reversal of the judgment, and such court, where the facts are not in dispute and all the material matters appear on the record, may modify the judgment so as to conform to the law and justice of the case,[77] or may order it to be so modified in the lower

by Md. Code, art. 5, § 20, when in its judgment the ends of justice will be promoted, to remand a cause to the lower court for trial on its merits. Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159.

74. Van Orman *v.* Spafford, 20 Iowa 215; Matter of Ingraham, 64 N. Y. 310; Koch *v.* Purcell, 45 N. Y. Super. Ct. 162; Campbell *v.* Hughes, 12 W. Va. 183; Fidelity Ins., etc., Co. *v.* McClain, 178 U. S. 113, 20 S. Ct. 774, 44 L. ed. 998.

Leave to file bill of review.— On affirming a decree the court may, in proper cases, grant leave to appellant to file a bill of review in the court below. Bloxham *v.* Florida Cent., etc., R. Co., 39 Fla. 243, 22 So. 697; Woodward *v.* Boston Lasting Mach. Co., 63 Fed. 609, 21 U. S. App. 463, 11 C. C. A. 353; Smith *v.* Weeks, 53 Fed. 758, 5 U. S. App. 240, 3 C. C. A. 644.

75. Colorado Springs Co. *v.* Hopkins, 5 Colo. 338; Lazell *v.* Francis, 5 Ill. 421; Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Wiley *v.* Heaps, 89 Md. 44, 42 Atl. 906; Watchman *v.* Crook, 5 Gill & J. (Md.) 239; Prater *v.* Tennessee Producers' Marble Co., 105 Tenn. 496, 58 S. W. 1068.

76. *Maryland.*— Kennerly *v.* Wilson, 2 Md. 245.

Mississippi.— Witty *v.* Hightower, 12 Sm. & M. (Miss.) 478.

North Carolina.—Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

Oregon.— Fowle *v.* House, 30 Oreg. 305, 47 Pac. 787; McDonald *v.* Cruzen, 2 Oreg. 259.

Wisconsin.— Crosby *v.* Smith, 19 Wis. 449.

Designating judgment to be entered.— The general term of the supreme court may, on affirmance of an order overruling a demurrer to the complaint, designate what kind of an interlocutory judgment and final judgment shall be entered. The remedy of the party dissatisfied with the order is by appeal from the final judgment. Smith *v.* Rathbun, 88 N. Y. 660. But see Coatsworth *v.* Lehigh Valley R. Co., 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511.

Power to permit withdrawal of demurrer. —Although, under N. Y. Code Civ. Proc. § 497, the court of appeals, on affirming a judgment overruling a demurrer to a complaint, has power to permit defendant to withdraw the demurrer and answer on payment of costs, yet, where changes — such as the loss of testimony to plaintiff — may have occurred since the commencement of the action, the court, instead of granting such permission, will leave defendant to make application therefor to the court below. Piper *v.* Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789.

Reference to take testimony.— On affirming a decree of divorce the case may be sent to a referee to take testimony as to the income from certain land on which alimony is made a lien. Brotherton *v.* Brotherton, 12 Nebr. 75, 10 N. W. 544.

Where an order overruling a demurrer is made in the court below and no further action is had, the supreme court will not, upon an affirmance of such order, enter final judgment. Tyler *v.* Langworthy, 37 Iowa 555.

Where demurrer to bill for multifariousness is properly sustained, and complainant, without dismissing his bill as to defendants by the joining of whom the bill is bad, appeals from the judgment on demurrer, the supreme court will, on affirming the judgment, dismiss the bill without prejudice. Johnson *v.* Brown, 2 Humphr. (Tenn.) 326, 37 Am. Dec. 556.

77. *Alabama.*— Kyle *v.* Caravello, 103 Ala. 150, 15 So. 527; Gould *v.* Meyer, 36 Ala. 565; Campbell *v.* May, 31 Ala. 567; Ashurst *v.* Ashurst, 13 Ala. 781.

California.—Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 5 Pac. 85; Argenti *v.* San Francisco, 30 Cal. 458; Tryon *v.* Sutton, 13 Cal. 490.

Delaware.— Clark *v.* Pritchett, 5 Harr. (Del.) 283.

District of Columbia.— Tierney *v.* Corbett, 2 Mackey (D. C.) 264.

Idaho.—Stickney *v.* Hanrahan, (Ida. 1900) 63 Pac. 189.

Illinois.—Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191; D'Wolf *v.* Haydn, 24 Ill. 525.

Indiana.—McAfee *v.* Reynolds, 130 Ind. 33, 28 N. E. 423, 30 Am. St. Rep. 194, 18 L. R. A. 211; Conwell *v.* Claypool, 8 Blackf. (Ind.) 124.

Iowa.—Wadsworth *v.* Nevin, 64 Iowa 64, 19 N. W. 849; Bayliss *v.* Hennessey, 54 Iowa 11, 6 N. W. 46.

Louisiana.—Barrios *v.* Lacroix, 44 La. Ann.

court.[78] But, ordinarily, an appellate court cannot exercise original jurisdiction in modifying a judgment. It cannot set aside a finding, make one of its own, and then apply the law to it;[79] and, if some of the material findings are against the evidence, the cause should be remanded for a new trial.[80] Moreover, the court should not modify a judgment where injustice would result therefrom to either party.[81]

b. Sufficiency of Record to Authorize Modification. In order for the appellate court to modify a judgment the record must contain sufficient to show clearly what judgment should have been rendered below; otherwise the cause will be remanded if error appears therein.[82]

147, 10 So. 598; Mississippi, etc., R. Co. *v.* Wooten, 36 La. Ann. 441.

Michigan.— Burnham *v.* Dillon, 100 Mich. 359, 59 N. W. 643; Hamilton *v.* Ames, 74 Mich. 298, 41 N. W. 930.

Minnesota.— Sanborn *v.* Webster, 2 Minn. 323. But see Tallman *v.* Gilman, 1 Minn. 179.

Missouri.— Jones *v.* Hart, 60 Mo. 351; Baldridge *v.* Dawson, 39 Mo. App. 527.

New York.— Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305; Goodwin *v.* Conklin, 85 N. Y. 21; People *v.* Delaware County, 45 N. Y. 196; Casler *v.* Shipman, 35 N. Y. 533; Brownell *v.* Winnie, 29 N. Y. 400, 29 How. Pr. (N. Y.) 193, 86 Am. Dec. 314; People *v.* Richmond County, 28 N. Y. 112; Hewitt *v.* Ballard, 16 N. Y. App. Div. 466, 44 N. Y. Suppl. 935, 4 N. Y. Annot. Cas. 228; Sperb *v.* Metropolitan El. R. Co., 60 N. Y. Super. Ct. 347, 17 N. Y. Suppl. 469, 44 N. Y. St. 216; Blumenthal *v.* New York El. R. Co., 60 N. Y. Super. Ct. 95, 17 N. Y. Suppl. 481, 42 N. Y. St. 683; Claflin *v.* Maguire, 45 N. Y. Super. Ct. 521; Odell *v.* Metropolitan El. R. Co., 3 Misc. (N. Y.) 335, 22 N. Y. Suppl. 737, 52 N. Y. St. 7; Schaffer *v.* Jones, 1 Misc. (N. Y.) 74, 20 N. Y. Suppl. 531, 48 N. Y. St. 408; Buffalo *v.* New York, etc., R. Co., 23 N. Y. Suppl. 303, 309, 54 N. Y. St. 150, 156; Reed *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 811, 45 N. Y. St. 330; Bradley *v.* Root, 5 Paige (N. Y.) 632.

Pennsylvania.— Ullery *v.* Clark, 18 Pa. St. 148; Com. *v.* Haffey, 6 Pa. St. 348; Haas *v.* Evans, 5 Watts & S. (Pa.) 252.

Tennessee.— Milly *v.* Harrison, 7 Coldw. (Tenn.) 191.

Texas.—Smock *v.* Tandy, 28 Tex. 130; Ellis *v.* Harrison, (Tex. Civ. App. 1899) 52 S. W. 581.

Utah.— Paragoonah Field, etc., Co. *v.* Edwards, 9 Utah 477, 35 Pac. 478.

Virginia.—Price *v.* Thrash, 30 Gratt. (Va.) 515; Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

See 3 Cent. Dig. tit. "Appeal and Error," § 4480 *et seq.*

As to rendering final judgment in the appellate court after reversal see *infra*, XVIII, E, 5.

As to compelling or directing restitution see *infra*, XVIII, E, 8.

Amendment by agreement.— The appellate court may modify a judgment or decree in accordance with an agreement of the parties to that effect. Bitzer's Succession, 22 La. Ann. 456; Peters *v.* Neville, 26 Gratt. (Va.) 549.

South Carolina — No power to modify in action at law.— In Hosford *v.* Wynn, 22 S. C. 309, it was held that the supreme court, in a case at law, could only reverse or affirm, and could not modify a judgment of the court below.

78. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Argenti *v.* San Francisco, 30 Cal. 458.

Georgia.—Cobb *v.* Battle, 34 Ga. 458; Wing *v.* Starr, 34 Ga. 118.

Illinois.—Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191.

Indiana.— De Ford *v.* Urbain, Wils. (Ind.) 67.

Iowa.— McReynolds *v.* McReynolds, 74 Iowa 89, 36 N. W. 128; Wadsworth *v.* Nevin, 64 Iowa 64, 19 N. W. 849.

Kansas.— Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

Michigan.—Yelverton *v.* Hilliard, 38 Mich. 355.

Minnesota.— Nelson *v.* Munch, 28 Minn. 314, 9 N. W. 863.

Missouri.— Cook *v.* Hannibal, etc., R. Co., 63 Mo. 397; Suddoth *v.* Bryan, 39 Mo. App. 652.

North Carolina.— Redman *v.* Redman, 65 N. C. 546.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422.

Washington.— Gose *v.* Blalock, 21 Wash. 75, 57 Pac. 342; Winsor *v.* Johnson, 5 Wash. 429, 32 Pac. 215; Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

Wisconsin.— Underwood *v.* Riley, 19 Wis. 412.

See 3 Cent. Dig. tit. "Appeal and Error," § 4480 *et seq.*

79. Hamilton *v.* Cormandy, 11 Ky. L. Rep. 97.

Judgment must be correct on the merits.— The appellate court will not correct a judgment in matter of form unless convinced that, on the merits, it is proper. Woodward *v.* Howard, 13 Wis. 557.

80. State *v.* Scott County, 61 Kan. 390, 59 Pac. 1055; Bertram *v.* Cook, 44 Mich. 396, 6 N. W. 868; Morse *v.* Stockman, 69 Wis. 272, 34 N. W. 92.

81. Park *v.* Holmes, 147 Pa. St. 497, 23 Atl. 769.

82. *Alabama.*— Faulks *v.* Heard, 31 Ala. 516.

Louisiana.— Hutchiss *v.* Dodd, 12 La. 142; Poston *v.* Adams, 5 Mart. (La.) 272.

c. Power Limited by Jurisdiction of Lower Court. The power of the appellate court to modify the judgment is limited by the jurisdiction of the court below, and no judgment can be given on appeal which the lower court was incompetent to render.[83]

2. Correction of Clerical Errors — a. In General. Mere clerical errors or omissions in the judgment may be, and ought to be, corrected in the court below;[84] but such errors will, usually, be remedied in the appellate court, where the record furnishes the necessary means of correction.[85]

b. Amendment as to Names of Parties. Where no prejudice will result to either party, and the true name appears in the record, the appellate court will, usually, correct a clerical error in the name of a party against whom,[86] or

New York.— Finn *v.* Lally, 1 N. Y. App. Div. 411, 37 N. Y. Suppl. 437, 72 N. Y. St. 492; Mead *v.* Mead, 11 Barb. (N. Y.) 661.

North Carolina.—Finley *v.* Smith, 15 N. C. 95.

Texas.— Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

No question not appearing by the record to have been connected with the proceeding below can be acted upon by the appellate court. Doolittle *v.* Shelton, 1 Greene (Iowa) 271.

What may be considered.— The appellate court, in modifying a judgment, may take into consideration the pleadings of the adverse party, and take judicial cognizance of a judgment on appeal in a former action between the parties. Parker *v.* Panhandle Nat. Bank, (Tex. Civ. App. 1896) 35 S. W. 31.

Will not receive proof of error.—An appellate court will not exercise original jurisdiction, and, therefore, where there is nothing by which to make a desired correction in the judgment, the court will not receive proof that an error existed therein. Stephens *v.* Norris, 15 Ala. 79.

83. *Alabama.*— Pruwitt *v.* Stuart, 5 Ala. 112.

Louisiana.—Waggaman *v.* Zacharie, 8 Rob. (La.) 190; Pritchard *v.* Hamilton, 6 Mart. N. S. (La.) 456; Reels *v.* Knight, 5 Mart. N. S. (La.) 9; Williams *v.* Spencer, 4 Mart. N. S. (La.) 77.

Michigan.— Cross *v.* Eaton, 48 Mich. 184, 12 N. W. 35.

New Jersey.— Glover *v.* Collins, 18 N. J. L. 232.

Utah.— Matter of Moulton, 9 Utah 159, 33 Pac. 694.

84. Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520; Grier *v.* Powell, 14 Tex. 320. And see Sadler *v.* Houston, 4 Port. (Ala.) 208.

85. *Alabama.*—Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Kyle *v.* Caravello, 103 Ala. 150, 15 So. 527; Burns *v.* Howard, 68 Ala. 352; Warfield *v.* State, 34 Ala. 261; Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544.

California.— Tryon *v.* Sutton, 13 Cal. 490.

Colorado.— Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446.

Georgia.—Girardey *v.* Bessman, 62 Ga. 654.

Illinois.— Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593; Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206.

Iowa.— Ft. Madison Lumber Co. *v.* Batavian Bank, 77 Iowa 393, 42 N. W. 331.

Mississippi.— Buckingham *v.* Nelson, 42 Miss. 417.

Missouri.— Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014.

New Hampshire.— Brown *v.* Cochran, 11 N. H. 199.

New York.—Johnson *v.* Lord, 35 N. Y. App. Div. 325, 54 N. Y. Suppl. 922; Brotherson *v.* Consaulus, 5 N. Y. St. 105.

Texas.—Wilcox *v.* State, 24 Tex. 544; Thorn *v.* State, 10 Tex. 295; Ramsey *v.* McCauley, 9 Tex. 106, 58 Am. Dec. 134; Holland *v.* Preston, (Tex. Civ. App. 1897) 41 S. W. 374.

Virginia.— Handly *v.* Snodgrass, 9 Leigh (Va.) 484; Heffner *v.* Miller, 2 Munf. (Va.) 43.

West Virginia.— Bee *v.* Burdett, 23 W. Va. 744.

See 3 Cent. Dig. tit. "Appeal and Error," § 4483 *et seq.*

Correction by chancellor in vacation.— Where the chancellor, during vacation, and while an appeal is pending from a decree rendered by him, corrects an error therein, the supreme court will order the same correction before affirming the judgment. Winston *v.* Mitchell, 93 Ala. 554, 9 So. 551.

That the action is debt, and the judgment is in damages, will be regarded as a clerical mistake, and not ground for reversal. Smith *v.* Nolen, 2 How. (Miss.) 735.

Where judgment reasonably clear.—An application to the supreme court to modify the phraseology of the judgment, so as to correct an alleged mistake in the same, will be denied where the judgment as a whole expresses with reasonable clearness the extent of the relief granted. Ingwaldson *v.* Skrivseth, 8 N. D. 544, 80 N. W. 475.

86. McBroom *v.* McBroom, 19 Ala. 173; Formento *v.* Robert, 27 La. Ann. 489; Steel *v.* Paten, 10 La. Ann. 702; Lay *v.* State, 5 Sneed (Tenn.) 604; Masterson *v.* Young, (Tex. Civ. App. 1899) 48 S. W. 1109.

Defendants not clearly shown.—Where, in a suit to foreclose a mortgage of land, given to secure notes of an association for the purchase-money of such land, the complaint in the caption named the association and the individual members as defendants, but the decree and pleadings do not clearly show who were the members of the association against

of a party in whose favor the judgment or decree was rendered in the court below.[87]

3. Rendering Judgment Lower Court Should Have Rendered — a. In General. Power is, generally, given by statute to appellate courts to enter such judgment or decree as should have been rendered by the court below on the undisputed facts of the case as shown by the record.[88] Thus, on appeals in equity causes, where the court can see from the record what the rights of the parties are, it will not remand the case, but will render such a decree as ought to have been rendered

whom complainant was entitled to a deficiency judgment when such obligation was incurred, the court will not modify the decree, but will remand the cause for further proceedings. Goodlett *v.* St. Elmo Invest. Co., 94 Cal. 297, 29 Pac. 505.

87. Weathersby *v.* Huddleston, 2 La. Ann. 845; Marsh *v.* Berry, 7 Cow. (N. Y.) 344.

In a suit by a feme sole, her marriage pending the suit was properly suggested on the record, but the entry of judgment was in her maiden name. This was held to be a clerical misprision, evident on the face of the record, and to be deemed amended on appeal. Lamkin *v.* Dudley, 34 Ala. 116.

88. *Alabama.*—Griffin *v.* Wall, 32 Ala. 149; McClure *v.* Lay, 30 Ala. 208.

Arizona.— Miller *v.* Douglas, (Ariz. 1900) 60 Pac. 722.

Arkansas.— Cox *v.* St. Louis, etc., R. Co., 55 Ark. 454, 18 S. W. 630.

California.— Bidleman *v.* Kewen, 2 Cal. 248; Gahan *v.* Neville, 2 Cal. 81.

Colorado.— McCumber *v.* Haynes, 9 Colo. App. 353, 48 Pac. 903.

Illinois.— Peck *v.* Stevens, 10 Ill. 127; Wilmans *v.* State Bank, 6 Ill. 667; Guild *v.* Johnson, 2 Ill. 405; Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355.

Indiana.— Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

Iowa.— Gilmore *v.* Ferguson, 28 Iowa 422.

Louisiana.— Bloch *v.* His Creditors, 46 La. Ann. 1334, 16 So. 267; State *v.* Cannon, (La. 1894) 15 So. 626; Miller *v.* Cappel, 39 La. Ann. 881, 2 So. 807; Emanuel *v.* Hatcher, 19 La. Ann. 525.

Maryland.— Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; Wroth *v.* Johnson, 4 Harr. & M. (Md.) 284.

Massachusetts.— Curran *v.* Burgess, 155 Mass. 86, 28 N. E. 1135; Com. *v.* Howard, 13 Mass. 221.

Michigan.—Dooley *v.* Eilbert, 47 Mich. 615, 11 N. W. 408.

Missouri.— Page *v.* Arnold, 51 Mo. 158; Murdock *v.* Ganahl, 47 Mo. 135; Bohm *v.* Stivers, 81 Mo. App. 236; Burris *v.* Shrewsbury Park Land, etc., Co., 55 Mo. App. 381.

Nevada.—Warren *v.* Sweeney, 4 Nev. 101.

New Hampshire.— Johnson *v.* Greenough, 33 N. H. 396; Eames *v.* Stevens, 26 N. H. 117; Murray *v.* Emmons, 26 N. H. 523.

New Jersey.— Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674; Garr *v.* Stokes, 16 N. J. L. 403.

New York.— Fischer *v.* Blank, 138 N. Y. 669, 34 N. E. 397, 53 N. Y. St. 293; Casler *v.* Shipman, 35 N. Y. 533; Arnold *v.* R. Rothschild's Sons Co., 23 N. Y. App. Div. 221, 48 N. Y. Suppl. 854; Fiedler *v.* Darrin, 59 Barb. (N. Y.) 651; Howard *v.* Freeman, 7 Rob. (N. Y.) 25, 3 Abb. Pr. N. S. (N. Y.) 292; Astor *v.* L'Amoreux, 4 Sandf. (N. Y.) 524; Curtis *v.* Ritzman, 7 Misc. (N. Y.) 254, 27 N. Y. Suppl. 259, 58 N. Y. St. 35; Rochester Water-Works Co. *v.* Wood, 41 How. Pr. (N. Y.) 53; Walsh *v.* Kelly, 27 How. Pr. (N. Y.) 359; Dunham *v.* Simmons, 5 Hill (N. Y.) 507; Close *v.* Stuart, 4 Wend. (N. Y.) 95.

North Carolina.— Rush *v.* Halcyon Steamboat Co., 68 N. C. 72; Isler *v.* Brown, 67 N. C. 175.

Ohio.— Columbus, etc., R. Co. *v.* Simpson, 5 Ohio St. 251; Sheldon *v.* Simonds, Wright (Ohio) 724.

Pennsylvania.—Myers *v.* Com., 2 Watts & S. (Pa.) 60. But see Swearingen *v.* Pendleton, 4 Serg. & R. (Pa.) 389, in which it was held that this rule applied only where the writ of error was brought by plaintiff, and that, in case it was brought by defendant, the judgment could not be modified.

Tennessee.—Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Willey *v.* Roirden, 2 Baxt. (Tenn.) 227.

Texas.— Good *v.* Galveston, etc., R. Co., (Tex. 1889) 11 S. W. 854; Harwood *v.* Blythe, 32 Tex. 800; Crawford *v.* Wingfield, 25 Tex. 414; Weatherford *v.* Van Alstyne, 22 Tex. 22.

Vermont.— Yates *v.* Pelton, 48 Vt. 314; Wires *v.* Farr, 24 Vt. 645.

Virginia.— Rorer Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Muller *v.* Bayly, 21 Gratt. (Va.) 521.

Washington.— Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973; Willey *v.* Morrow, 1 Wash. Terr. 474.

West Virginia.— Linsey *v.* McGannon, 9 W. Va. 154.

United States.—Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 U. S. App. 423, 5 C. C. A. 421; Richmond *v.* Atwood, 52 Fed. 10, 5 U. S. App. 151, 2 C. C. A. 596, 17 L. R. A. 615; Potter *v.* Beal, 50 Fed. 860, 5 U. S. App. 49, 2 C. C. A. 60.

See 3 Cent. Dig. tit. "Appeal and Error," § 4485 *et seq.*

When judgment on demurrer is reviewed in a court of error, judgment given should be the same as they decide ought to have been given by the court below — that is, a judgment in the cause for plaintiff or defendant; but the court of error, after reversing a judgment, may, instead of ordering such judgment as ought to be given, grant leave to amend. Hale *v.* Lawrence, 22 N. J. L. 72.

below.[89] And the same is true of appeals from probate courts[90] and in actions tried by the court without the intervention of a jury.[91]

b. Conforming Judgment to Verdict or Findings. Where the judgment below does not follow the verdict, which is itself proper, the appellate court will amend it so as to make it conform to the verdict.[92] And so, a judgment or decree in a cause tried by the court without a jury may be modified on appeal to correspond with the findings.[93] But if the verdict or findings be also not responsive to the issues submitted for trial, the error is incurable and the judgment must be reversed.[94]

c. Conforming Judgment to Pleadings. If the judgment does not conform to the pleadings, and the error is one which can be cured by a modification of the judgment, the appellate court will not order a new trial, but will itself correct the judgment.[95]

89. *Arkansas.*— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Maryland.— Diffenderffer *v.* Winder, 3 Gill & J. (Md.) 311.

New York.— Little *v.* Gallus, 57 N. Y. Suppl. 104; Livingston's Petition, 2 Abb. Pr. N. S. (N. Y.) 1.

Tennessee.—Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254; Gass *v.* Mason, 4 Sneed (Tenn.) 508; Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 532.

Virginia.— Bailey Constr. Co. *v.* Purcell, 88 Va. 300, 13 S. E. 456.

Wisconsin.—Durkee *v.* Stringham, 8 Wis. 1.

Dismissal without prejudice.—A decree dismissing absolutely a bill which should have been dismissed without prejudice may be modified by the appellate court so as to dismiss without prejudice. Munchus *v.* Harris, 69 Ala. 506; Griffith *v.* Frederick County Bank, 6 Gill & J. (Md.) 424; Stewart *v.* Stone, 3 Gill & J. (Md.) 510; Storrie *v.* Cortes, (Tex. Civ. App. 1897) 39 S. W. 607; Harrison *v.* Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443.

90. Howard *v.* Barrett, 52 Ga. 15; Pilling *v.* Pilling, 45 Barb. (N. Y.) 86.

91. *Illinois.*— Manistee Lumber Co. *v.* Union Nat. Bank, 143 Ill. 490, 32 N. E. 449.

Missouri.— Burris *v.* Shrewsbury Park Land, etc., Co., 55 Mo. App. 381.

Tennessee.— Wheeler *v.* State, 9 Heisk. (Tenn.) 393.

Texas.—Cook *v.* Love, 33 Tex. 487; Patrick *v.* Gibbs, 17 Tex. 275; McIntosh *v.* Greenwood, 15 Tex. 116; Kinsey *v.* Stewart, 14 Tex. 457.

Washington.— Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973.

Wisconsin.— Candee *v.* Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452.

92. *Alabama.*— Morris *v.* Poillon, 50 Ala. 403; Windham *v.* Clarke, 16 Ala. 659.

Illinois.— Peterson *v.* Randall, 70 Ill. App. 484.

Louisiana.—Anderson *v.* Dinn, 17 La. 168.

Mississippi.— Thomas *v.* Estes, 2 Sm. & M. (Miss.) 439.

Oklahoma.— Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656.

Tennessee.— Nolen *v.* Wilson, 5 Sneed (Tenn.) 332.

Texas.— Lewis *v.* Sellick, 69 Tex. 379, 7 S. W. 673; European-American Colonization Soc. *v.* Reed, 25 Tex. Suppl. 343.

Wisconsin.— Thrasher *v.* Tyack, 15 Wis. 256.

See 3 Cent. Dig. tit. "Appeal and Error," § 4484.

Amendment to conform to auditor's report.— Where the judge intended that the verdict and decree should be entered in accordance with the auditor's report, but the record shows that the decree does not exactly conform thereto, the judgment will be affirmed, with direction that the verdict and decree be amended so as to conform to the auditor's report. Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867.

Assumpsit — Judgment in debt.—In Galloway *v.* Trout, 2 Greene (Iowa) 595, it was held that where, in an action of assumpsit, judgment was rendered in debt, such judgment might be corrected on appeal, the proceedings being otherwise regular.

Where a verdict is directed for plaintiff for a definite sum, subject to a reservation to the supreme court upon the law of the case, which is defective because it does not find the facts, and which, therefore, would not authorize a judgment to be entered contrary to the verdict, the supreme court, in reversing the judgment, will also enter judgment for plaintiff in accordance with the verdict. Henry *v.* Heilman, 114 Pa. St. 499, 6 Atl. 921.

93. Scott-Force Hat Co. *v.* Hombs, 127 Mo. 392, 30 S. W. 183; Roehl *v.* Roehl, 20 Nebr. 55, 29 N. W. 257; Fischer *v.* Blank, 138 N. Y. 669, 34 N. E. 397, 53 N. Y. St. 293; Born *v.* Schrenkeisen, 110 N. Y. 55, 17 N. E. 339, 16 N. Y. St. 412.

94. Ross *v.* Taylor, 63 Ill. 215; Heyl *v.* Stapp, 4 Ill. 95; Parks *v.* Lancaster, (Tex. Civ. App. 1896) 38 S. W. 262.

Where intent of jury to return a verdict responsive to the issue is clear, but, under a mistake of law, their intent is incorrectly expressed, and the verdict is not corrected in the lower court, on appeal the court will order the judgment to be modified to conform to the finding. Woodruff *v.* Webb, 32 Ark. 612.

95. *California.*— Castle *v.* Smith, (Cal. 1894) 36 Pac. 859.

d. Amendments as to Rights and Liabilities of Parties — (I) *In General.* The appellate courts usually have power to modify the judgment of the lower court by amending errors as to the rights and liabilities of the parties thereto.[96]

(II) *Changing Character of Liability.* The appellate court may correct a judgment which is improperly rendered against an executor or administrator in his individual, instead of his representative, capacity,[97] and *vice versa.*[98]

(III) *Striking Out or Inserting Parties.* Ordinarily, appellate courts have power to insert the names of parties erroneously omitted from the judgment,[99] or to strike out such as have been improperly included therein.[1] But a judgment cannot be modified as to a person who is not a party to the appeal.[2]

Idaho.— Stickney *v.* Hanrahan, (Ida. 1900) 63 Pac. 189.

New York.—Weed *v.* Lee, 50 Barb. (N. Y.) 354.

Texas.—Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750.

United States.— Woodward *v.* Brown, 13 Pet. (U. S.) 1, 10 L. ed. 31.

See 3 Cent. Dig. tit. "Appeal and Error," § 4484.

96. Improper joinder of parties.—A decree in favor of husband and wife, and guardian and ward, jointly, is erroneous, but may be amended in this court at the costs of plaintiff in error. Key *v.* Vaughn, 15 Ala. 497.

Enforcement of lien — Erroneous personal judgment.— In an action to enforce a lien against a boat for coal furnished the lessee, error in rendering a personal judgment against the owner, who had given a bond to discharge the lien, instead of rendering judgment against the boat only, is merely formal, and the judgment will be amended by the superior court, and without reference. Lawrenceburgh Ferry-Boat *v.* Smith, 7 Ind. 520.

Payment directed in wrong capacity.— Where the decree of the circuit court is irregular, in that it directs payment to be made to one P as treasurer of a certain institution instead of to him as executor, it will be amended in that particular, and, so amended, confirmed. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279.

A separate judgment against each of several defendants in ejectment is a clerical error which may be corrected in the appellate court. Bishop *v.* Lalouette, 67 Ala. 197.

The rendition of a personal judgment against a husband in an action to enforce a mechanic's lien against the separate estate of the wife is an error which may be corrected in the appellate court. Eberle *v.* Curtis, 8 Mo. App. 566.

97. *Alabama.*— Chandler *v.* Shehan, 7 Ala. 251.

California.— Davis *v.* Lamb, (Cal. 1893) 35 Pac. 306.

Indiana.— Lewis *v.* Reed, 11 Ind. 239.

Iowa.— Myers *v.* Kendrick, 13 Iowa 599.

Mississippi.— Barrow *v.* Wade, 7 Sm. & M. (Miss.) 49.

Missouri.— Bates *v.* Scheik, 47 Mo. App. 642.

Wisconsin.—Woodward *v.* Howard, 13 Wis. 557.

See 3 Cent. Dig. tit. "Appeal and Error," § 4486.

98. Oliver *v.* Hearne, 4 Ala. 271; Pitner *v.* Flanagan, 17 Tex. 7.

99. Witte Iron Works *v.* Holmes, 62 Mo. App. 372; Beaucaire *v.* Sawyer, 2 Wyo. 125.

A judgment otherwise proper, except that it is rendered in the name of the wrong person, may be corrected on appeal. Jackson *v.* Shipman, 28 Ala. 488; Dawson *v.* Hardy, 33 Tex. 198, in which judgment was erroneously rendered in favor of a deceased administrator instead of the administrator *de bonis non.* In Cruchon *v.* Brown, 57 Mo. 38, a judgment in the name of the husband to the use of the wife was amended so as to be in the name of the husband alone.

Action wrongly dismissed as to one.— On appeal, by one of two sureties on a bond from a judgment thereon against him alone, where it appears that the action was wrongly dismissed as to the other surety, the appellate court will modify the judgment so as to provide that it shall not affect the latter's liability to plaintiff or appellant, that the dismissal shall be set aside, and that the case may be reopened to determine such other surety's liability on the bond. Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958.

Other interveners.—A judgment erroneous merely because it disposes of appellant's claim under the name of "other interveners," instead of by name, will be corrected on appeal, without reversal. Burkitt *v.* Twyman, (Tex. Civ. App. 1896) 35 S. W. 421.

1. *Alabama.*— Petree *v.* Wilson, 104 Ala. 157, 16 So. 143; Lucy *v.* Beck, 5 Port. (Ala.) 166.

California.—Browner *v.* Davis, 15 Cal. 9.

Missouri.— Orr *v.* Rode, 101 Mo. 387, 13 S. W. 1066.

Nebraska.— Youngson *v.* Pollock, 25 Nebr. 431, 41 N. W. 279.

North Carolina.— Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91.

West Virginia.— Boggess *v.* Robinson, 5 W. Va. 402.

The name of a married woman may be stricken from a judgment in which she is improperly joined with her husband. Crispen *v.* Hannovan, 86 Mo. 160; Mueller *v.* Kaessmann, 84 Mo. 318.

2. Flower *v.* Myrick, 49 La. Ann. 321, 21 So. 542.

As to the rights of persons not parties to appeal see *supra,* IV, A [2 Cyc. 626].

e. Amending Description of Property. Where the judgment of the lower court is erroneous in its description of property affected thereby, it may, usually, be amended on appeal.[3] But if the judgment cannot be modified without creating a variance, the court will set it aside and grant a new trial.[4]

f. Correcting Provisions as to Enforcement of Judgment. The appellate court may correct an error in the provisions as to the enforcement of the judgment,[5] or may supply the proper provisions where they are omitted.[6]

g. Amendment as to Costs. A judgment erroneous only in regard to the imposition of costs will not be wholly set aside on that account, but the error will be corrected by the appellate court.[7]

h. Amendment as to Medium of Payment. Where the judgment of the lower court errs in regard to the medium in which payment is to be made, it may be corrected on appeal.[8]

i. Amending Order of Sale. Where a decree or judgment ordering a sale of land is defective in its directions, the appellate court may correct it if sufficient facts are before it to warrant such action.[9]

4. Reducing Amount of Recovery — a. Where Amount of Excess Apparent — (i) *In General.* It is a very generally accepted rule — though denied in some cases[10] — that, where there is no reversible error in the record except that the judgment is for too much, and the amount of the excess is readily ascertainable, the appellate court need not remand the cause for a new trial, but may allow such excess to be

3. Spigener *v.* Farquhar, 82 Ala. 569, 3 So. 47; Bushnell *v.* Crooke Min., etc., Co., 12 Colo. 247, 21 Pac. 931.

A material and not merely formal error in the description of property decreed to be sold cannot be corrected in the appellate court except by reversing the decree in part, and then rendering the proper decree. Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Replevin — Goods erroneously included. — In replevin, brought to recover goods alleged to have been obtained by fraud, the judgment having erroneously included other goods not so obtained, it was modified in part, and then affirmed on appeal. Coghill *v.* Boring, 15 Cal. 213.

Where verdict and judgment in replevin for plaintiff for part of the property are silent as to the balance, and defendant, in his answer, asks for the return of the property, which, from the record, appears to be in plaintiff's possession, the judgment will be so modified as to require plaintiff to return to defendant that part as to which the verdict and judgment are silent. Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546.

4. Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

5. Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Itasca *v.* Schroeder, 182 Ill. 192, 55 N. E. 50; Canton *v.* Dewey, 71 Ill. App. 346; Cavellier *v.* Davenport, 10 La. Ann. 173.

See 3 Cent. Dig. tit. "Appeal and Error," § 4491.

6. Wilcox *v.* State, 24 Tex. 544; Willburn *v.* Tow, (Tex. Civ. App. 1893) 23 S. W. 853.

7. *Alabama.*— Commissioners' Ct. *v.* Tarver, 25 Ala. 480; Tilman *v.* McRae, 8 Ala. 677.

Illinois.— People *v.* Tompkins, 74 Ill. 482.

Maryland.— State *v.* Turner, 8 Gill & J. (Md.) 125.

Missouri.— Snell *v.* Harrison, 83 Mo. 651.

New Jersey.— Smith *v.* Williamson, 11 N. J. L. 315; Stout *v.* Hopping, 6 N. J. L. 125.

New York.— Matter of Schwager, 13 N. Y. Suppl. 384, 36 N. Y. St. 534.

Pennsylvania.— Rodgers *v.* Black, 15 Pa. Super. Ct. 498.

Texas.— Latimer *v.* Bagnell, 16 Tex. 588; Johnson *v.* Davis, 7 Tex. 173; Sullivan *v.* Kindred, (Tex. Civ. App. 1894) 26 S. W. 150.

West Virginia.— Farmers' Bank *v.* Woodford, 34 W. Va. 480, 12 S. E. 544; Jones *v.* Cunningham, 7 W. Va. 707.

See 3 Cent. Dig. tit. "Appeal and Error," § 4492.

8. Preston *v.* Breedlove, 36 Tex. 96; Leer *v.* Sutherland, 36 Tex. 151.

See 3 Cent. Dig. tit. "Appeal and Error," § 4493.

When a judgment is illegally made payable "in gold coin" the appellate court will order the judgment to be modified in that respect. Noonan *v.* Hood, 49 Cal. 293; Hastings *v.* Burning Moscow Co., 2 Nev. 93; Fowler *v.* Caldwell, 35 Tex. 431.

9. *Alabama.*— Cowles *v.* Morgan, 34 Ala. 535.

New Jersey.— Robison *v.* Furman, 47 N. J. Eq. 307, 20 Atl. 898.

New York.— Egan *v.* Laemmle, 5 Misc. (N. Y.) 224, 25 N. Y. Suppl. 330, 54 N. Y. St. 789.

Virginia.— Ewart *v.* Saunders, 25 Gratt. (Va.) 203.

West Virginia.— Anderson *v.* Nagle, 12 W. Va. 98.

Wisconsin.— Hays *v.* Lewis, 21 Wis. 663; Schmidt *v.* Gilson, 14 Wis. 514.

See 3 Cent. Dig. tit. "Appeal and Error," § 4494.

10. Greenleaf *v.* Hill, 30 Me. 165; Frank *v.* Morrison, 55 Md. 399; Clarke *v.* Robinson, 15 R. I. 231, 10 Atl. 642.

remitted, and let the judgment stand for the correct amount.[11] But, if plaintiff

11. *Alabama.*— Glidden *v.* Street, 68 Ala. 600; Manning *v.* Kohn, 44 Ala. 343.

Arkansas.— Ferguson *v.* Fargason, 38 Ark. 238; Robertson *v.* Allen, 36 Ark. 553; Dodds *v.* Roave, 36 Ark. 511; Hamlett *v.* Tallman, 30 Ark. 505.

California.— State L. & T. Co. *v.* Cochran, (Cal. 1900) 62 Pac. 466; De Costa *v.* Massachusetts Flat Water, etc., Co., 17 Cal. 613.

Colorado.— Salida *v.* McKenna, 16 Colo. 523, 27 Pac. 810; Duncan *v.* Whedbee, 4 Colo. 143.

District of Columbia.— Ross *v.* Fickling, 11 App. Cas. (D. C.) 442.

Florida.— Schnabel *v.* Betts, 23 Fla. 178, 1 So. 692; McLean *v.* Spratt, 20 Fla. 515.

Georgia.— Miller *v.* Wilkins, 79 Ga. 675, 4 S. E. 261; Lary *v.* Lewis, 76 Ga. 46.

Illinois.—Minchrod *v.* Ullmann, 163 Ill. 25, 44 N. E. 864; Cheney *v.* City Nat. Bank, 77 Ill. 562; Martin *v.* Topliff, 88 Ill. App. 362; Marshall *v.* Freeman, 52 Ill. App. 42. But, previous to the practice act of 1872, the supreme court would not allow a *remittitur* on appeal, but would remand the cause to the lower court. Beese *v.* Becker, 51 Ill. 82; Wood *v.* Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554; Pidgeon *v.* School Trustees, 44 Ill. 501; Pickering *v.* Pulsifer, 9 Ill. 79; Chenot *v.* Lefevre, 8 Ill. 637.

Indiana.— Indianapolis Union R. Co. *v.* Holt, (Ind. 1895) 41 N. E. 522; Line *v.* State, 131 Ind. 468, 30 N. E. 703; H. G. Olds Wagon Works *v.* Coombs, 124 Ind. 62, 24 N. E. 589.

Iowa.— Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810; Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595; Ketchum *v.* Larkin, 88 Iowa 215, 55 N. W. 472; Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633; Waggoner *v.* Turner, 69 Iowa 127, 28 N. W. 568.

Kansas.— Dennis *v.* Benfer, 54 Kan. 527, 38 Pac. 806; George R. Barse Live Stock, etc., Co. *v.* Guthrie, 50 Kan. 476, 31 Pac. 1073.

Kentucky.— Fraize *v.* Com., 17 Ky. L. Rep. 347, 30 S. W. 1014. But see Bealle *v.* Schoal, 1 A. K. Marsh. (Ky.) 475.

Maine.— Ekstrom *v.* Hall, 90 Me. 186, 38 Atl. 106.

Massachusetts.— Carberry *v.* Farnsworth, 177 Mass. 398, 59 N. E. 61; King *v.* Howard, 1 Cush. (Mass.) 137.

Michigan.— Sloman *v.* Mercantile Credit Guarantee Co., 112 Mich. 258, 70 N. W. 886; Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296.

Minnesota.— Becker *v.* Bohmert, 63 Minn. 403, 65 N. W. 728; Ward *v.* Haws, 5 Minn. 440.

Mississippi.—Breck *v.* Smith, 44 Miss. 690; Buck *v.* Little, 24 Miss. 463.

Missouri.— State *v.* Hope, 121 Mo. 34, 25 S. W. 893; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Oppliger *v.* Sutton, 50 Mo. App. 348; Hartman *v.* Louisville, etc., R. Co., 48 Mo. App. 619.

Nebraska.— Barker *v.* Wheeler, 60 Nebr. 470, 83 N. W. 678; Regier *v.* Shreck, 47 Nebr. 667, 66 N. W. 618; Fremont, etc., R. Co. *v.* Leslie, 41 Nebr. 159, 59 N. W. 559.

Nevada.— Hastings *v.* Johnson, 2 Nev. 190.

New Hampshire.—Cram *v.* Hadley, 48 N. H. 191; Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586; Taylor *v.* Jones, 42 N. H. 25.

New Jersey.— Herbert *v.* Hardenbergh, 10 N. J. L. 222.

New York.— Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, 57 N. E. 297; Andrews *v.* Brewster, 124 N. Y. 433, 26 N. E. 1024, 36 N. Y. St. 412 [*affirming* 9 N. Y. Suppl. 114, 30 N. Y. St. 329]; Griffiths *v.* Hardenbergh, 41 N. Y. 464; Chouteau *v.* Suydam, 21 N. Y. 179; Sears *v.* Conover, 3 Keyes (N. Y.) 113, 34 Barb. (N. Y.) 330; Farrell *v.* Manhattan R. Co., 43 N. Y. App. Div. 143, 59 N. Y. Suppl. 401; McGrath *v.* Third Ave. R. Co., 9 N. Y. App. Div. 141, 41 N. Y. Suppl. 93, 75 N. Y. St. 554; Fisk Pavement, etc., Co. *v.* Evans, 37 N. Y. Super. Ct. 482; Scott *v.* Lilienthal, 9 Bosw. (N. Y.) 224; La Motte *v.* Archer, 4 E. D. Smith (N. Y.) 46; Messer *v.* Hutkoff, 32 Misc. (N. Y.) 728, 66 N. Y. Suppl. 381; Doran *v.* Brooklyn, etc., Ferry Co., 19 N. Y. Suppl. 172, 46 N. Y. St. 310; Willets *v.* New York El. R. Co., 15 N. Y. Suppl. 923, 40 N. Y. St. 917; Grossman *v.* Walters, 11 N. Y. Suppl. 471, 33 N. Y. St. 921; Van Bokkelin *v.* Ingersoll, 5 Wend. (N. Y.) 315.

North Carolina.—Harper *v.* Davis, 31 N. C. 44; Williamson *v.* Canaday, 25 N. C. 349.

Ohio.— Lear *v.* McMillen, 17 Ohio St. 464; Doty *v.* Rigour, 9 Ohio St. 526; Collins *v.* John, Wright (Ohio) 628; Hamilton *v.* Baltimore, etc., R. Co., 9 Ohio Dec. 435, 7 Ohio N. P. 566.

Oregon.—McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12; Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548; Mackey *v.* Olssen, 12 Oreg. 429, 8 Pac. 257.

Pennsylvania.— Graham *v.* Keys, 29 Pa. St. 189; Lautz *v.* Frey, 19 Pa. St. 366; Joseph *v.* Richardson, 2 Pa. Super. Ct. 208, 38 Wkly. Notes Cas. (Pa.) 487. But see Pontius *v.* Com., 4 Watts & S. (Pa.) 52.

South Carolina.—Croxton *v.* Addison, Harp. (S. C.) 72.

Tennessee.— Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133; McKinley *v.* Beasley, 5 Sneed (Tenn.) 169.

Texas.— Coverdill *v.* Seymour, (Tex. 1900) 57 S. W. 635; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408; Barnes *v.* Darby, 18 Tex. Civ. App. 468, 44 S. W. 1029; International, etc., R. Co. *v.* Overton, (Tex. Civ. App. 1896) 34 S. W. 165.

Vermont.— Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872; Chandler *v.* Spear, 22 Vt. 388.

Virginia.—Lewis *v.* Arnold, 13 Gratt. (Va.) 454; Bowyer *v.* Hewitt, 2 Gratt. (Va.) 193.

Washington.— King County *v.* Perry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500.

seeks to avoid a reversal by remitting a portion of his recovery, he must be able to satisfy the appellate court that it can be done without prejudice to defendant;[12] and, where there is no clear proof as to what is the true amount to which plaintiff is entitled, a *remittitur* cannot be allowed, but a new trial must be granted.[13] The court has no power to determine, upon the examination of conflicting evidence, what sum plaintiff ought to recover, and render judgment therefor.[14]

(11) *Errors in Computation.* Where it appears from the record that, through an error in computation, the judgment below was rendered for too great an amount, the mistake may be corrected in the appellate court and judgment given for the proper amount, if there be no other error requiring a reversal.[15]

West Virginia.— Chapman *v.* J. W. Beltz, etc., Co., (W. Va. 1900) 35 S. E. 1013.

Wisconsin.— Bigelow *v.* Doolittle, 36 Wis. 115; Smith *v.* Schulenberg, 34 Wis. 41.

Wyoming.— Ivenson *v.* Caldwell, 3 Wyo. 465, 27 Pac. 563.

United States.— Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746; Mills *v.* Scott, 99 U. S. 25, 25 L. ed. 294; Kentucky Bank *v.* Ashley, 2 Pet. (U. S.) 327, 7 L. ed. 440; Fury *v.* Stone, 2 Dall. (U. S.) 184, 1 L. ed. 341.

See 3 Cent. Dig. tit. "Appeal and Error," § 4498 *et seq.*

As to affirmance on condition, generally, see *supra*, XVIII, C, 2, d.

As to remission to give jurisdiction to the appellate court see *supra*, III, C, 4, h, (XI) [2 Cyc. 575].

As to excess in recovery as a ground of reversal see *infra*, XVIII, E, 1, e.

As to the effect of an excessive verdict, generally, see DAMAGES; NEW TRIAL.

In Louisiana the supreme court has arbitrary power to reduce an excessive verdict and render the proper judgment. Haselmeyer *v.* McLellan, 24 La. Ann. 629; Hughes' Succession, 14 La. Ann. 863. But where plaintiff appeals from a verdict in his favor, but defendant does not appeal nor ask an amendment of the judgment, the court will not reduce the judgment even though it appear excessive. Drews *v.* Williams, 50 La. Ann. 579, 23 So. 897.

Motion to remit unnecessary.— Under the Texas act of May 1, 1893, providing that, when a judgment is reversible only because excessive, the court shall indicate to the party in whose favor judgment was rendered the excess, and the time within which *remittitur* may be filed, and, if so filed, judgment shall be reformed and affirmed, appellee need not file motion to remit, nor need appellant be given notice. Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 24 S. W. 334.

Remittitur on rehearing.— It has been held that where a judgment has been reversed solely on account of an excess therein, if, in a petition for a rehearing, appellee offers to remit such excess, the court may render judgment for the proper amount. Irlbeck *v.* Bierl, 101 Iowa 240, 67 N. W. 400, 70 N. W. 206; Hyde *v.* Minneapolis Lumber Co., 53 Iowa 243, 1 N. W. 740, 5 N. W. 126; Galveston, etc., R. Co. *v.* Wesch, (Tex. Civ. App. 1893) 21 S. W. 1014. But see Chadwick *v.* Meredith, 40 Tex. 380. Where a rehearing is applied for on the ground, urged, for the first time, that the judgment is excessive, though the application will be refused, the excessiveness of the judgment, if patent, will be ordered remitted. Arnau *v.* Florida First Nat. Bank, 36 Fla. 395, 18 So. 790.

After refusal to remit.—Where an order granting defendant a new trial, unless plaintiff should remit a portion of the damages recovered, was affirmed on appeal after plaintiff's refusal to remit, it was held that the supreme court would not, on rehearing, permit him to file a *remittitur* of such amount as to it might seem just, and direct a judgment for the balance. Kohler *v.* Fairhaven, etc., R. Co., 8 Wash. 452, 36 Pac. 253.

12. McNail *v.* Welch, 21 Ill. App. 378; Olcott *v.* Hanson, 12 Mich. 452; Orange, etc., R. Co. *v.* Fulvey, 17 Gratt. (Va.) 366.

A slight excess will not be ordered remitted on appeal where the trial court was not asked to make such order. Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341.

Where judgment by default.— To make a *remittitur* effective it should affirmatively appear by the record that the real merits as to the residue after the *remittitur* are with the party who has the judgment. Therefore, on default after publication in attachment proceedings, a judgment for too large an amount cannot be cured by a *remittitur*, for the reason that it cannot appear from the record that the merits as to the residue are with the holder of the judgment. Cohen *v.* Smith, 33 Ill. App. 344.

13. Seeman *v.* Feeney, 19 Minn. 79; Smith *v.* Dukes, 5 Minn. 373; Moffet *v.* Sackett, 18 N. Y. 522; Lawson *v.* Cirrito, 9 Misc. (N. Y.) 698, 30 N. Y. Suppl. 257, 61 N. Y. St. 114; Pavey *v.* American Ins. Co., 56 Wis. 221, 13 N. W. 925.

14. Whitehead *v.* Kennedy, 69 N. Y. 462.

15. *Alabama.*— Mock *v.* Walker, 42 Ala. 668.

California.— Matter of Thompson, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; Davis *v.* Lamb, (Cal. 1893) 35 Pac. 306.

Colorado.— Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446.

Illinois.— Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593; Schneider *v.* Seely, 40 Ill. 257; Hall *v.* Jackson County, 5 Ill. App. 609.

Iowa.— Montelius *v.* Wood, 56 Iowa 254, 9 N. W. 212; Dyer *v.* Jessup, 11 Iowa 118.

Louisiana.— Moores *v.* McConnell, 17 La. Ann. 84; Baudoin *v.* Tete, 10 La. Ann. 69.

But though the appellate court has the power to remedy such defects and render the proper judgment without remanding the case, it is not obliged to do so,[16] and, usually, it will not undertake to readjust complicated matters of account for the purpose of reforming, instead of setting aside, the judgment.[17]

(III) *JUDGMENT EXCEEDING AMOUNT CLAIMED.* Where the record shows that the judgment awarded plaintiff below exceeds the amount claimed by him, the court will not, on that account, award a new trial if plaintiff consents to remit the excess.[18] But it has been held that, unless plaintiff offers to remit the amount

Nebraska.— Leavitt *v.* Bell, 59 Nebr. 595, 81 N. W. 614; Gerber *v.* Jones, 36 Nebr. 126, 54 N. W. 81.

Nevada.— Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

New Hampshire.— West *v.* Whitney, 26 N. H. 314.

New York.— Hasbrouck *v.* Marks, 58 N. Y. App. Div. 33, 68 N. Y. Suppl. 510; Matter of Gallagher, 17 N. Y. Suppl. 440, 43 N. Y. St. 581 [*affirmed* in 142 N. Y. 628, 37 N. E. 565, 60 N. Y. St. 866].

North Carolina.— Reade *v.* Street, 122 N. C. 301, 30 S. E. 124.

Ohio.— Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459, 31 Am. Rep. 555.

South Carolina.— Laurens *v.* McGrath, 1 Rich. Eq. (S. C.) 296.

Tennessee.— Lay *v.* State, 5 Sneed (Tenn.) 604.

Texas.— Hoffman *v.* Bowen, 17 Tex. 506; Durie *v.* Anderson, (Tex. App. 1891) 16 S. W. 345.

Vermont.— Chandler *v.* Spear, 22 Vt. 388.

Virginia.— Tazewell *v.* Saunders, 13 Gratt. (Va.) 354.

Wisconsin.— Ketchum *v.* Mukwa, 24 Wis. 303.

See 3 Cent. Dig. tit. "Appeal and Error," § 4501.

Failure to deduct cross-demand.—Where the proper deduction has not been made in the lower court, on account of a set-off or counter-claim established by defendant, the judgment may be corrected on appeal. Bush *v.* Hall, 95 N. C. 82; Parker *v.* Denny, 3 Wash. Terr. 598, 21 Pac. 386. See also Walker *v.* Walker, 100 Iowa 99, 63 N. W. 331, 69 N. W. 517; Kemp v. Hutchinson, 10 La. Ann. 494.

16. Telfer *v.* Hoskins, 32 Ill. 165. And see Farr *v.* Johnson, 25 Ill. 522, wherein the case was remanded, with directions to the court below to enter judgment for the proper sum.

17. Williams *v.* Durst, 35 Tex. 421.

Requiring statement by master.— The appellate court will only declare the rule in stating an account of rents and profits, taxes and repairs, between a mortgagor and mortgagee. The statement must be wrought out by the master in chancery. Stipulation of counsel will not be permitted to vary the practice in that regard. Mosier *v.* Norton, 83 Ill. 519.

The court of appeals will direct an audit to be made, and new accounts to be stated, where it is necessary to enable them to pass a final decree in the cause. Diffenderffer *v.* Winder, 3 Gill & J. (Md.) 311.

18. *California.*—Kerry *v.* Pacific Mar. Supply, etc., Co., (Cal. 1898) 54 Pac. 262; Pierce *v.* Payne, 14 Cal. 419.

Colorado.—Duncan *v.* Whedbee, 4 Colo. 143.

Georgia.— Hunnicutt *v.* Perot, 100 Ga. 312, 27 S. E. 787.

Illinois.—Winslow *v.* People, 117 Ill. 152, 7 N. E. 135; Bristow *v.* Catlett, 92 Ill. 17.

Iowa.— Bridge *v.* Livingston, 11 Iowa 57; Anderson *v.* Kerr, 10 Iowa 233; Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445.

Kansas.— Frankhouser *v.* Cannon, 50 Kan. 621, 32 Pac. 379.

Kentucky.— Newport News, etc., R. Co. *v.* Thomas, 15 Ky. L. Rep. 876. But see Bealle *v.* Schoal, 1 A. K. Marsh. (Ky.) 475.

Maryland.— Harris *v.* Jaffray, 3 Harr. & J. (Md.) 543.

Massachusetts.— King *v.* Howard, 1 Cush. (Mass.) 137.

Michigan.— McCormick Harvesting Mach. Co. *v.* McKee, 51 Mich. 426, 16 N. W. 796.

Mississippi.— Hurd *v.* Germany, 7 How. (Miss.) 675.

Missouri.—Atwood *v.* Gillespie, 4 Mo. 423; Johnson *v.* Robertson, 1 Mo. 615; Brooking *v.* Shinn, 25 Mo. App. 277.

New Hampshire.—Taylor *v.* Jones, 42 N. H. 25.

New Jersey.— Herbert *v.* Hardenbergh, 10 N. J. L. 222.

New York.—Weed *v.* Lee, 50 Barb. (N. Y.) 354; Gansevoort Freezing, etc., Co. *v.* Wessels Co., 9 Misc. (N. Y.) 703, 29 N. Y. Suppl. 590, 60 N. Y. St. 611; Jenks *v.* Van Brunt, 6 N. Y. Civ. Proc. 158.

North Carolina.—Harper *v.* Davis, 31 N. C. 44; Williamson *v.* Canaday, 25 N. C. 349.

North Dakota.— Q. W. Loverin-Browne Co. *v.* Buffalo Bank, 7 N. D. 569, 75 N. W. 923.

Oregon.— Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Lantz *v.* Frey, 19 Pa. St. 366; Spackman *v.* Byers, 6 Serg. & R. (Pa.) 385; Fury *v.* Stone, 1 Yeates (Pa.) 186, 2 Dall. (Pa.) 184, 1 L. ed. 341.

South Carolina.—Croxton *v.* Addison, Harp. (S. C.) 72.

Tennessee.—Fowlkes *v.* Webber, 8 Humphr. (Tenn.) 529; Campbell *v.* Hancock, 7 Humphr. (Tenn.) 75.

Texas.— Moore *v.* Republic, 1 Tex. 563.

Utah.— Garner *v* Van Patten, 20 Utah 342, 58 Pac. 684.

Virginia.—Lewis *v.* Arnold, 13 Gratt. (Va.) 454.

Wisconsin.— Smith *v.* Phelps, 7 Wis. 211.

Wyoming.— Ivenson *v.* Caldwell, 3 Wyo. 465, 27 Pac. 563.

above that claimed by him in the court below, the judgment will be set aside by the appellate court.[19]

(iv) *Judgment Exceeding Verdict.* Where the judgment of the lower court is in excess of the verdict, a *remittitur* as to the excess may be allowed, and judgment affirmed to the extent of the verdict.[20]

(v) *Erroneous Allowance of Interest.* Where a judgment is proper in every respect except that, owing to the erroneous allowance of interest, it is for too much, if the amount of the excess can be ascertained by calculation, it may be remitted and the judgment be allowed to stand for the residue.[21] Thus, an exces-

United States.— Kentucky Bank *v.* Ashley, 2 Pet. (U. S.) 327, 7 L. ed. 440.

See 3 Cent. Dig. tit. "Appeal and Error," § 4498 *et seq.*

Excess remitted in lower court.—An error in rendering judgment for a greater amount than the damages alleged in the declaration is cured by an amendment of the judgment in the lower court, remitting the excess, made after writ of error brought. Hunter *v.* Sherman, 3 Ill. 539; Hubbell *v.* Palmer, 76 Mich. 441, 43 N. W. 442.

Judgment satisfied before error brought.— Where a judgment has been rendered for a greater sum than that for which damages are claimed in the writ, the error cannot be cured by entering a *remittitur*, under Ill. Prac. Act, § 81, in the appellate court, after execution has issued on such judgment and been satisfied by payment, before suing out the writ of error. Miller *v.* Glass, 11 Ill. App. 560.

When error not cured by remittitur.— Where plaintiff recovered a verdict in excess of his claim, it was held that he could not avoid a reversal by remitting the excess, on the theory that it represented interest erroneously allowed by the jury, there being nothing in the record to authorize the assumption that such was the case. Zerbe *v.* Missouri, etc., R. Co., 70 Mo. App. 644.

19. Lantz *v.* Frey, 19 Pa. St. 366.

Court will not order remittitur.—Where the verdict was in excess of the amount claimed the court said that this might be cured by a *remittitur*, but that, in the absence of defendant in error, the court would not take it upon itself to order the *remittitur*. Roberts *v.* Smith, Morr. (Iowa) 417.

20. Morrill *v.* Miller, 3 Greene (Iowa) 104; Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Miller *v.* Hardin, 64 Mo. 545; McDonald *v.* Grey, 29 Tex. 80.

Amount not fixed by verdict.—As the verdict was in favor of plaintiff for the amount he was entitled to recover under the pleadings, without fixing the amount, an error of the court in rendering judgment for more than plaintiff was entitled to may be corrected without disturbing the verdict. Seeley *v.* Hobson, 11 Ky. L. Rep. 403.

21. *Alabama.*—Wadsworth *v.* Montgomery First Nat. Bank, 124 Ala. 440, 27 So. 460; Glidden *v.* Street, 68 Ala. 600.

California.— Behlow *v.* Shorb, 91 Cal. 141, 27 Pac. 546.

Georgia.— Wilkinson *v.* Bertock, 111 Ga. 187, 36 S. E. 623; Western, etc., R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868.

Illinois.— Tomlinson *v.* Earnshaw, 112 Ill. 311 [*affirming* 14 Ill. App. 593]; Hart *v.* Morgan, 49 Ill. App. 516; Cooper *v.* Johnson, 27 Ill. App. 504. But see Wood *v.* Kingston Coal Co., 48 Ill. 356, 96 Am. Dec. 554, in which the court refused to allow a remission of excessive interest.

Iowa.— Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; Thrift *v.* Redman, 13 Iowa 25.

Kansas.— Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Kansas City *v.* Frohwerk, (Kan. App. 1900) 62 Pac. 432.

Michigan.— Bresnahan *v.* Nugent, 97 Mich. 359, 56 N. W. 765; James *v.* Schroeder, 61 Mich. 28, 27 N. W. 850.

Missouri.— State *v.* Hope, 121 Mo. 34, 25 S. W. 893; Kimes *v.* St. Louis, etc., R. Co., 85 Mo. 611; Dye *v.* Bowling, 82 Mo. App. 587.

New York.— Moore *v.* Erie R. Co., 7 Lans. (N. Y.) 39; McLaughlin *v.* Washington County Mut. Ins. Co., 23 Wend. (N. Y.) 525.

Oregon.— Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548.

Pennsylvania.— Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025.

South Carolina.— McKenzie *v.* Sifford, 52 S. C. 270, 29 S. E. 736, 812.

Tennessee.— Louisville, etc., R. Co. *v.* Wallace, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

Texas.— Brooks *v.* State, (Tex. Civ. App. 1900) 58 S. W. 1032; Halbert *v.* Paddleford, (Tex. Civ. App. 1896) 33 S. W. 1092.

Vermont.— Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

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

United States.—Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; American Nat. Bank *v.* Williams, 101 Fed. 943, 42 C. C. A. 101.

See 3 Cent. Dig. tit. "Appeal and Error," § 4503.

Judgment directed in court below.—Where the only error is in allowing interest, the amount of which may be ascertained by computation, the judgment will not be set aside *in toto*, and a new trial ordered, but the court below will be directed to enter a judgment such as should have been entered in the first place. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166.

Variance between verdict and judgment.— Where the verdict is for a certain sum, with interest at eight per cent., and the judgment is for such sum, with interest at ten per cent.,

sive judgment may be corrected on appeal where the excess in the amount is caused by the allowance of interest at more than the legal rate,[22] or by a mere error in calculating the interest[23]—as where it is computed from the wrong date.[24]

(VI) *Improper Allowance of Costs or Attorneys' Fees.* An excessive judgment may be corrected, with the consent of the appellee, where the excess is due to the improper inclusion therein of costs[25] or attorneys' fees.[26]

(VII) *Remittitur as Cure of Errors*—(A) *In General.* The fact that error was committed in the court below, whereby the judgment was rendered excessive, will not necessarily require a new trial. If it can be clearly seen that defendant could not have been prejudiced thereby to more than a certain amount, and plaintiff consents to remit that much of his recovery, judgment may be affirmed for the residue.[27]

on appeal the judgment will be modified to conform to the verdict. Goldberg *v.* McCracken, (Tex. 1888) 8 S. W. 676.

22. Browning *v.* Merritt, 61 Ind. 425; Simpson *v.* Shafer, 20 Ind. 306; Thompson *v.* Purnell, 10 Iowa 205; Gerspach *v.* Mullin. 25 La. Ann. 599; Rayne *v.* Taylor, 12 La. Ann. 765; Ottinger *v.* New York El. R. Co., 15 N. Y. Suppl. 18, 39 N. Y. St. 339.

23. Spence *v.* Rutledge, 11 Ala. 590; McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761; Heard *v.* Wynn, 22 La. Ann. 469; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550, 30 S. W. 833; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

24. *District of Columbia.*— Costello *v.* District of Columbia, 21 D. C. 508.

Illinois.— Boyle *v.* Carter, 24 Ill. 49.

Louisiana.— Cenas *v.* Shackleford, 24 La. Ann. 39.

Texas.— Chapman *v.* Bolton, (Tex. Civ. App. 1894) 25 S. W. 1001.

Virginia.— Williams *v.* Howard, 3 Munf. (Va.) 277.

See 3 Cent. Dig. tit. "Appeal and Error," § 4502.

25. Glos *v.* McKeown, 141 Ill. 288, 31 N. E. 314; School Trustees *v.* Hihler, 85 Ill. 409.

New judgment directed for correct amount.—Upon a writ of error, the court found that there was an error, in taxation of costs, to the amount of eight dollars and twenty-three cents, and ordered the judgment to be set aside and a new judgment entered for the correct amount, the plaintiff in error to have a writ of restitution for the excessive costs paid by him, with interest. George *v.* Starrett, 40 N. H. 135.

26. Dowty *v.* Holtz, 85 Ill. 525; Sells *v.* Sandwich Mfg. Co., 21 Ill. App. 56; Trester *v.* Pike, 60 Nebr. 510, 83 N. W. 676.

No reduction as to parties not appealing.—Where a decree was rendered allowing attorneys' fees against several defendants, and the allowance made was reduced on an appeal by some of defendants, it was held that it would not be reduced in a decree as to defendants who did not appeal, the court having no jurisdiction over them. Pickett *v.* Gore, (Tenn. Ch. 1900) 58 S. W. 402.

Where judgment for gross amount.—Where it is contended that an unauthorized item of damages for attorney's fees, which had not been paid, is included in the judgment, but no such question is presented in the instruction, and the judgment is for a gross amount in excess of such amount and less than plaintiff's claim, the judgment will not be set aside, since it cannot be determined whether such sum, was included therein, and the question should have been presented by the instruction. Missouri Coal, etc., Co. *v.* Ladd, 160 Mo. 435, 61 S. W. 191.

27. *Alabama.*— Hinson *v.* Williamson, 74 Ala. 180.

Arkansas.— Fulton *v.* Hunt, 3 Ark. 280.

California.— Perine *v.* Lewis, 128 Cal. 236, 60 Pac. 772.

Colorado.— Denver, etc., R. Co. *v.* Wilson, (Colo. 1900) 62 Pac. 843.

Iowa.— Fuller *v.* Chicago, etc., R. Co., 31 Iowa 211; Rowell *v.* Williams, 29 Iowa 210.

Kentucky.— Fraize *v.* Com., 17 Ky. L. Rep. 347, 30 S. W. 1014.

Michigan.— Hines *v.* Darling, 99 Mich. 47, 57 N. W. 1081; Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98.

Missouri.— Franklin *v.* Haynes, 119 Mo. 566, 25 S. W. 223.

New York.— Lawrence *v.* Church, 129 N. Y. 635, 29 N. E. 106, 41 N. Y. St. 513; Kelly *v.* Leggett, 122 N. Y. 633, 25 N. E. 272, 33 N. Y. St. 264; Sackett *v.* Thomas, 4 N. Y. App. Div. 447, 38 N. Y. Suppl. 608, 74 N. Y. St. 236; Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. (N. Y.) 448.

Oregon.— Mackey *v.* Olssen, 12 Oreg. 429, 8 Pac. 357.

Texas.— Texas, etc., R. Co. *v.* White, 55 Tex. 251; Baird *v.* Trice, 51 Tex. 555; Ft. Worth, etc., R. Co. *v.* Viney, (Tex. Civ. App. 1895) 30 S. W. 252.

Wisconsin.— Underwood *v.* Paine Lumber Co., 79 Wis. 592, 48 N. W. 673; Potts *v.* Cooley, 56 Wis. 45, 13 N. W. 682; Pryce *v.* Security Ins. Co., 29 Wis. 270.

United States.— Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746.

Where result of new trial evident.—Where it is evident that a new trial will necessarily result in a verdict for a certain amount, the case can properly be disposed of by allowing a *remittitur* of all the recovery in excess of such amount. Sherman *v.* Commercial Printing Co., 29 Mo. App. 31; Schenck *v.* Marx, 5 N. Y. Suppl. 309, 24 N. Y. St. 809.

(B) *Excess Caused by Erroneous Instruction.* Where, by reason of an erroneous instruction, the jury is led into giving a verdict for too much, but the amount of the excess caused thereby clearly could not have exceeded a given sum which appellee offers to remit, the judgment need not be reversed, but may be allowed to stand for the proper amount.[28]

(C) *Improper Admission or Rejection of Evidence.* The improper admission or rejection of evidence, whereby the jury are caused to return too large a verdict, will not necessitate the granting of a new trial if appellee remits a portion of his recovery fully sufficient to cover the amount of excess produced by such error; and, after such remission, the judgment may be affirmed as to the balance.[29]

b. In Actions For Unliquidated Damages — (I) *In General.* It is a generally adopted rule of appellate practice that, where a verdict is excessive and there is no other error requiring reversal, the appellate court may, on the entry by plaintiff of a *remittitur* of part of his recovery, affirm the judgment for the residue, even though the action be for unliquidated damages.[30] The right of the appel-

28. *California.*— Eames *v.* Haver, 111 Cal. 401, 43 Pac. 1120.

Illinois.— Hartford Deposit Co. *v.* Calkins, 186 Ill. 104, 57 N. E. 863; Illinois Cent. R. Co. *v.* Gilbert, 51 Ill. App. 404.

Iowa.— Buetzier *v.* Jones, 85 Iowa 721, 51 N. W. 242.

Maine.— Ekstrom *v.* Hall, 90 Me. 186, 38 Atl. 106.

Missouri.—Rider *v.* Kirk, 82 Mo. App. 120; McLean *v.* Kansas City, 81 Mo. App. 72; Pierce *v.* Lowder, 54 Mo. App. 25.

New Hampshire.—Cram *v.* Hadley, 48 N. H. 191.

New York.— Hayden *v.* Florence Sewing Mach. Co., 54 N. Y. 221.

Pennsylvania.— Graham *v.* Keys, 29 Pa. St. 189; Moyer v. Fretz, 1 Mon. (Pa.) 289, 17 Atl. 8.

Texas.— Freiberg *v.* Elliott, (Tex. 1888) 8 S. W. 322; Galveston, etc., R. Co. *v.* Neel, (Tex. Civ. App. 1894) 26 S. W. 788.

United States.— Hazard Powder Co. *v.* Volger, 58 Fed. 152, 158, 12 U. S. App. 665, 675, 7 C. C. A. 130, 136.

Insufficient remission in lower court.— Where, on a motion by defendant for new trial, the court ruled that certain instructions were erroneous as to one of plaintiff's causes of action, and the latter undertook to avoid a new trial by entering a *remittitur*, but failed to remit enough, he was permitted to remit, in the supreme court, the balance of the amount improperly recovered. Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

29. *Colorado.*— Chapin *v.* Goodell, 2 Colo. 608.

Illinois.— North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899 [*affirming* 41 Ill. App. 311]; Toledo, etc., R. Co. *v.* Beals, 50 Ill. 150.

Iowa.— Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510.

Mississippi.—Anderson *v.* Tarpley, 6 Sm. & M. (Miss.) 507.

Ohio.— Dolittle *v.* McCullough, 7 Ohio St. 299.

Pennsylvania.— Thomas *v.* Northern Liberties, 13 Pa. St. 117.

Texas.— Wilson *v.* Adams, 15 Tex. 323; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596; Galveston, etc., R. Co. *v.* Wesch, (Tex. Civ. App. 1893) 21 S. W. 1014.

United States.— Loewer *v.* Harris, 57 Fed. 368, 14 U. S. App. 615, 6 C. C. A. 394.

When remittitur will not cure error.— In an action on a note defendant was not allowed to prove a part payment on the ground that it was not contained in his bill of particulars of set-off. It was held that this error was not cured by permitting plaintiff, after recovering judgment, to remit the amount of such payment, since other payments might also have been excluded by the erroneous ruling. Olcott *v.* Hanson, 12 Mich. 452.

30. *Arkansas.*— St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, 21 S. W. 886; Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491. But see St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138.

California.— Phelps *v.* Cogswell, 70 Cal. 201, 11 Pac. 628. But see George *v.* Law, 1 Cal. 363.

District of Columbia.— Flannery *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 111.

Florida.— Turner *v.* Adams, 39 Fla. 86, 21 So. 575.

Illinois.— Elgin City R. Co. *v.* Salisbury, 162 Ill. 187, 44 N. E. 407; Chicago, etc., R. Co. *v.* Walsh, 157 Ill. 672, 41 N. E. 900; North Chicago St. R. Co. *v.* Wrixon, 150 Ill. 532, 37 N. E. 895.

Iowa.— Kroener *v.* Chicago, etc., R. Co., 88 Iowa 16, 55 N. W. 28; Kitterman *v.* Chicago, etc., R. Co., 69 Iowa 440, 30 N. W. 174; Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633; Lombard *v.* Chicago, etc., R. Co., 47 Iowa 494; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Collins *v.* Council Bluffs, 35 Iowa 432, 7 Am. Rep. 200.

Maine.— Snow *v.* Weeks, 77 Me. 429, 1 Atl. 243; Howard *v.* Grover, 28 Me. 97, 48 Am. Dec. 478.

Minnesota.— Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, 46 N. W. 79.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Kennon *v.* Gilmer, 9 Mont. 108, 22 Pac. 448.

late court to accept a *remittitur* in this class of cases has been frequently assailed on the ground that the province of the jury is infringed thereby. But, while the courts have not been absolutely unanimous in sanctioning the practice, yet it is now well established in most jurisdictions, and is sustained on the theory that the court does not substitute its judgment for that of the jury, but, being convinced

Nebraska.—Bee Pub. Co. *v.* World Pub. Co., (Nebr. 1900) 82 N. W. 28; Fremont, etc., R. Co. *v.* Leslie, 41 Nebr. 159, 59 N. W. 559; Orleans *v.* Perry, 24 Nebr. 831, 40 N. W. 417; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724.

New Hampshire.— Belknap *v.* Boston, etc., R. Co., 49 N. H. 358.

New York.— Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701, 31 N. Y. St. 379; Sears *v.* Conover, 3 Keyes (N. Y.) 113; Kaplan *v.* Metropolitan St. R. Co., 52 N. Y. App. Div. 296, 65 N. Y. Suppl. 91; Lazarus *v.* Metropolitan El. R. Co., 14 N. Y. App. Div. 438, 43 N. Y. Suppl. 873; Sackett *v.* Thomas, 4 N. Y. App. Div. 447, 38 N. Y. Suppl. 608, 74 N. Y. St. 236; Bailey *v.* Rome, etc., R. Co., 80 Hun (N. Y.) 4, 29 N. Y. Suppl. 816, 61 N. Y. St. 490; Klemm *v.* New York, etc., R. Co., 78 Hun (N. Y.) 277, 28 N. Y. Suppl. 861, 60 N. Y. St. 231; Morris *v.* Eighth Ave. R. Co., 68 Hun (N. Y.) 39, 22 N. Y. Suppl. 666, 52 N. Y. St. 61; Coppins *v.* New York Cent., etc., R. Co., 48 Hun (N. Y.) 292; Mahar *v.* Simmons, 47 Hun (N. Y.) 479; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490, 54 N. Y. St. 342; Turton *v.* New York Recorder, 3 Misc. (N. Y.) 314, 22 N. Y. Suppl. 766, 52 N. Y. St. 398; Cummings *v.* Line, 18 N. Y. Suppl. 469, 45 N. Y. St. 56. But the New York decisions on this subject have not been marked by the greatest consistency, and in a number of cases the power to reduce the judgment has been denied. See Cassin *v.* Delany, 38 N. Y. 178, 6 Abb. Pr. N. S. (N. Y.) 1; Mcffet *v.* Sackett, 18 N. Y. 522; Thaule *v.* Krekeler, 17 Hun (N. Y.) 338; Sloan *v.* New York Cent., etc., R. Co., 1 Hun (N. Y.) 540; Alfaro *v.* Davidson, 40 N. Y. Super. Ct. 87; Crumiell *v.* Hill, 14 Daly (N. Y.) 409, 14 N. Y. St. 712; Thompson *v.* Lumley, 7 Daly (N. Y.) 74.

Tennessee.— Branch *v.* Bass, 5 Sneed (Tenn.) 366.

Texas.— Galveston, etc., R. Co. *v.* Duelm, 86 Tex. 450, 25 S. W. 406; Galveston, etc., R. Co. *v.* Nicholson, (Tex. Civ. App. 1900) 57 S. W. 693; San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670.

Utah.— Mahood *v.* Pleasant Valley Coal Co., 8 Utah 85, 30 Pac. 149; Brown *v.* Southern Pac. R. Co., 7 Utah 288, 26 Pac. 579.

Washington.— Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411; Cunningham *v.* Seattle Electric R., etc., Co., 3 Wash. 471, 28 Pac. 745.

Wisconsin.— McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689; Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141.

United States.— Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. ed. 110; Hazard Powder Co. *v.* Volger, 58 Fed. 152, 12 U. S. App. 665, 7 C. C. A. 130.

See 3 Cent. Dig. tit. "Appeal and Error," § 4500.

As to reversal because of excessive verdict see *infra*, XVIII, E, 1, e.

In Kansas it is the practice, where a verdict appears excessive, to direct the judgment to be modified in the lower court in accordance with the undisputed testimony as to the amount of damages sustained. Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. 991; Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352.

In Mississippi the court cannot interfere with the verdict in a slander case, the statute providing that the jury shall be sole judge of the damages in such cases. Lewis *v.* Black, 27 Miss. 425.

In Missouri the courts appear to have been unable to establish any permanent rule. In Nicholds *v.* Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991, and Burdict *v.* Missouri Pac. R. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384, it was held, by a bare majority of the court, that a *remittitur* could be required as a condition of the affirmance of the judgment in this class of cases. And in several other cases the same course has been adopted, without discussing the power to do so. Furnish *v.* Missouri Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Smith *v.* Wabash, etc., R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729; Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37. But in Rodney *v.* St. Louis Southwestern R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, owing to a change in the personnel of the court, the foregoing cases were overruled, and it was held, again by a bare majority, that, where, in an action for damages for personal injuries, the verdict is not so excessive as to warrant a reversal on the ground of passion or prejudice, the appellate court has no power to require a *remittitur* as a condition of affirmance. The same doctrine had been asserted in earlier cases. Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. 11; Franklin *v.* Fischer, 51 Mo. App. 345; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75; Lanius *v.* Druggist Pub. Co., 20 Mo. App. 12.

No reversible error — Excess not ascertainable.— In an action for damages for killing cattle the jury gave plaintiff a verdict for an aggregate sum. No error was urged which authorized reversal, but a reduction of the verdict was asked. It was held that, there being no way to determine the amount of the excess, if any, and no cause being shown for reversal, the judgment must be affirmed in whole. Cady *v.* Chicago, etc., R. Co., 5 Dak. 97, 37 N. W. 221.

that the verdict is too great, merely indicates an amount which it would not feel at liberty to pronounce excessive.[31]

(II) *Extent of Power.* Usually, the power of the appellate court extends only to giving appellee his option either to accept the reduced amount or to submit to a new trial; and, where the jury assess the damages at an entire sum, the reviewing court cannot, according to its own estimate of what plaintiff ought to recover, compel him to accept any other sum than that assessed by the jury.[32]

(III) *Verdict Showing Passion or Prejudice.* Where the damages awarded in an action for a tort are so grossly excessive as to show passion or prejudice on the part of the jury, it would seem that a new trial should be granted, since it is probable, in such case, that defendant's side has not been properly considered.[33]

(IV) *Excess Caused by Errors on the Trial* — (A) *Where Amount Can Be Segregated.* Generally, where the injury resulting from an error committed on the trial can be segregated from the amount of the verdict, which is otherwise supported by the evidence, the judgment may be affirmed for the residue, on the remission of such excess by the prevailing party.[34] Thus, a *remittitur* has been allowed where the verdict exceeded the amount claimed by plaintiff,[35] where interest was erroneously allowed,[36] or where the court erred in instructing the jury.[37]

31. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352. And see Galveston, etc., R. Co. *v.* Nicholson, (Tex. Civ. App. 1900) 57 S. W. 693.

32. Noel *v.* Dubuque, etc., R. Co., 44 Iowa 293; Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. ed. 110.

Remittitur under protest.— Though, in case of an excessive verdict, the trial court may suggest a *remittitur*, it should not enter one made under protest; and, both parties having appealed in such case, and the supreme court agreeing with the trial court that the verdict is so excessive as to show passion and prejudice, a new trial will be awarded. Massadillo *v.* Nashville, etc., R. Co., 89 Tenn. 661, 15 S. W. 445.

But, in Louisiana, the supreme court assumes to reduce excessive verdicts on its own judgment, without requiring a *remittitur*. Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791; Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530; Amet *v.* Boyer, 42 La. Ann. 831, 8 So. 588, 17 Am. St. Rep. 430; Bomar *v.* Louisiana North, etc., R. Co., 42 La. Ann. 983, 8 So. 478; Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690; Cointement *v.* Cropper, 41 La. Ann. 303, 6 So. 127.

33. Lœwenthal *v.* Streng, 90 Ill. 74; Sterling Hydraulic Co. *v.* Galt, 81 Ill. App. 600; West Chicago St. R. Co. *v.* Johnson, 69 Ill. App. 147; West Chicago St. R. Co. *v.* Krueger, 68 Ill. App. 450; Chicago, etc., R. Co. *v.* Barnett, 56 Ill. App. 384; Steinbuchel *v.* Wright, 43 Kan. 307, 23 Pac. 560; Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868; Koeltz *v.* Bleckman, 46 Mo. 320; Doty *v.* Steinberg, 25 Mo. App. 328; Illies *v.* Diercks, 16 Tex. 251. See also, generally, DAMAGES; NEW TRIAL.

But see Brown *v.* Southern Pac. R. Co., 7 Utah 288, 26 Pac. 579, wherein it was held that, where the verdict in a personal-injury case was so excessive as to show passion or prejudice, if plaintiff would remit a specified amount, the judgment would be affirmed for the residue. And in North Chicago St. R. Co. *v.* Shreve, 70 Ill. App. 666, the court refused to reverse an excessive verdict caused by improper remarks of counsel, the defendant's liability being clearly established.

34. *Illinois.*— Erie, etc., Dispatch *v.* Stanley, 22 Ill. App. 459 [*affirmed* in 123 Ill. 158, 14 N. E. 212].

Iowa.— Fuller *v.* Chicago, etc., R. Co., 31 Iowa 211.

Missouri.—Berthold *v.* Gruner, 12 Mo. App. 575.

New York.— Kelly *v.* Leggett, 122 N. Y. 633, 25 N. E. 272, 33 N. Y. St. 264; Garrett *v.* Wood, 55 N. Y. App. Div. 281, 67 N. Y. Suppl. 122; Boyd *v.* Foot, 5 Bosw. (N. Y.) 110; Lieberman *v.* Third Ave. R. Co., 25 Misc. (N. Y.) 704, 55 N. Y. Suppl. 677.

Oregon.— Mackey *v.* Olssen, 12 Oreg. 429, 8 Pac. 257.

Texas.— Bracken *v.* Neill, 15 Tex. 109; Texas-Mexican R. Co. *v.* Blucher, (Tex. Civ. App. 1897) 42 S. W. 1022.

35. Frankhouser *v.* Cannon, 50 Kan. 621, 32 Pac. 379; Corning *v.* Corning, 6 N. Y. 97.

36. Glidden *v.* Street, 68 Ala. 600; Jean *v.* Sandiford, 39 Ala. 317; Costello *v.* District of Columbia, 21 D. C. 508; State *v.* Hope, 121 Mo. 34, 25 S. W. 893.

37. *Connecticut.*— Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

Illinois.— Illinois Cent. R. Co. *v.* Gilbert, 51 Ill. App. 404.

New Hampshire.—Cram *v.* Hadley, 48 N. H. 191.

Pennsylvania.— Moyer *v.* Fretz, 1 Mon. (Pa.) 289, 17 Atl. 8.

Texas.— Missouri, etc., R. Co. *v.* Burrough, (Tex. Civ. App. 1898) 46 S. W. 403; Ft. Worth, etc., R. Co. *v.* Viney, (Tex. Civ. App. 1895) 30 S. W. 252.

Wisconsin.— Kavanaugh *v.* Janesville, 24 Wis. 618.

Similarly, a remittitur has been allowed where the court erred in admitting or rejecting evidence.[38]

(B) *Where Amount Not Ascertainable.* But where it is impracticable for the appellate court to ascertain the extent to which the verdict has been affected by an error occurring on the trial, a new trial will, usually, be granted.[39]

c. Excessive Recovery of Land. Where a judgment in an action concerning real property erroneously includes too much land, it may be reformed in the appellate court.[40] Thus, where plaintiff in ejectment recovers a judgment for land in excess of that to which he is legally entitled under the evidence, he may remit the excess and have judgment for the residue, if the record furnishes the requisite evidence by which a correct judgment may be rendered.[41]

5. Increasing Amount of Recovery. In some jurisdictions the court will increase the amount of a judgment where it is for a less sum than the undisputed evidence shows plaintiff to be entitled to[42]— as, for instance, where there

38. Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810; Chapin *v.* Goodell, 2 Colo. 608; North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899 [*affirming* 41 Ill. App. 311]; Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510; Leavenworth, etc., R. Co. *v.* Meyer, 58 Kan. 305, 49 Pac. 89; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596.

Issue unsupported by proof.— The submission to the jury of an issue unsupported by proof may be cured by a remission of the excess caused thereby, if the remainder of the verdict is warranted by the evidence. George R. Barse Live Stock, etc., Co. *v.* Guthrie, 50 Kan. 476, 31 Pac. 1073; Freiberg *v.* Elliott, (Tex. 1888) 8 S. W. 322.

39. *Arkansas.*— St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222; St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138.

Georgia.— Dillard *v.* Ellington, 62 Ga. 389.

Illinois.— Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42.

Minnesota.— Stout *v.* McMasters, 37 Minn. 185, 33 N. W. 558; Seeman *v.* Feeney, 19 Minn. 79.

Missouri.— Slattery *v.* St. Louis, 120 Mo. 183, 25 S. W. 521.

New York.— Thompson *v.* Lumley, 7 Daly (N. Y.) 74; Burling *v.* Gunther, 63 How. Pr. (N. Y.) 68.

Pennsylvania.—Waters *v.* Atlantic Refining Co., 9 Pa. Dist. 473.

Texas.—Houston, etc., R. Co. *v.* Bird, (Tex. Civ. App. 1898) 48 S. W. 756.

Wisconsin.— Reed *v.* Keith, 99 Wis. 672, 75 N. W. 392.

See also *infra*, XVIII, E, 1, e.

When the verdict is excessive and the evidence is conflicting as to the basis of recovery, a *remittitur* will not be entered, but the judgment will be set aside. Terre Haute, etc., R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774.

40. Musselman *v.* Strohl, 83 Tex. 473, 18 S. W. 857.

Enforcement of lien.—A decree for the sale of land, to satisfy a lien thereon, when only part of the land was subject to such lien, will be corrected and affirmed on appeal, if proper in other respects. Helm *v.* Weaver, 69 Tex. 143, 6 S. W. 420; Peel *v.* Gary, 54 Tex. 253.

41. Sanders *v.* Simmons, (Miss. 1893) 12 So. 850; Keen *v.* Schnedler, 92 Mo. 516, 2 S. W. 312; McQuiddy *v.* Ware, 67 Mo. 74; Fine *v.* St. Louis Public Schools, 39 Mo. 59; Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482.

Amount of error not apparent.—Where it is apparent on appeal that a judgment for plaintiffs in ejectment is erroneous, in that title to a part of the land recovered is in one not a party to the suit, and the *quantum* of the interest of such party does not appear, a *remittitur* cannot be entered. Lowe *v.* Foulke, 103 Ill. 58. See also East St. Louis *v.* Hackett, 85 Ill. 382, wherein the court declined to reform the verdict according to the evidence.

Damages erroneously given.— Where, in ejectment, judgment was erroneously rendered for damages as well as for possession, the judgment was affirmed, upon a *remittitur* of the damages and payment of the costs of appeal by respondent. Doll *v.* Feller, 16 Cal. 432.

42. *Alabama.*— Wade *v.* Kelly, 2 Stew. (Ala.) 443; Mason *v.* Smith, 1 Stew. (Ala.) 275.

Iowa.— Callanan *v.* Shaw, 24 Iowa 441.

Louisiana.— Risers *v.* McLean, 10 La. Ann. 565.

Nebraska.— Spence *v.* Damrow, 32 Nebr. 112, 48 N. W. 880.

Texas.— Morrison *v.* Dibrell, 22 Tex. 199; Wortham *v.* Harrison, 8 Tex. 141.

By statute in Maine, on appeal to the supreme court in a probate case, that court has authority to render any decree therein that law and justice may require; and so, on appeal from a decree making an allowance to the widow of a decedent, it was held that the supreme court might increase the amount decreed below. Gilman *v.* Gilman, 53 Me. 184.

In New York it seems that the appellate court has power to increase the judgment where, on the undisputed evidence, such increase is proper and the defendant consents thereto rather than submit to a new trial. Newhall *v.* Wyatt, 68 Hun (N. Y.) 1, 22 N. Y. Suppl. 828, 52 N. Y. St. 456; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138; Murphy *v.* Long, 1 Hilt. (N. Y.) 309, 4 Abb. Pr. (N. Y.) 476; Ayvard *v.* Powers, 25 Misc. (N. Y.) 476, 54 N. Y. Suppl. 984; Gold-

is an obvious error in regard to the allowance of interest.[43] But, usually, this can only be done where the necessary facts appear on the record, and there is no valid exception to the process by which they have been found.[44]

E. Reversal — 1. Grounds For Reversing — a. Jurisdictional Defects —(I) *As to Parties.* A judgment against one over whose person the trial court has acquired no jurisdiction will be reversed on appeal or error.[45] And so, failure to acquire jurisdiction of a necessary and indispensable party will require a reversal of the judgment,[46] even where such person is not a party to the appeal, and the objection is taken by others.[47] But, where sufficient parties are before the trial

stein *v.* Greenberg, 18 Misc. (N. Y.) 61, 41 N. Y. Suppl. 1021. 75 N. Y. St. 474. But see McHugh *v.* New York El. R. Co., 19 N. Y. Suppl. 744, 47 N. Y. St. 73; Kingsley *v.* Brooklyn, 5 Abb. N. Cas. (N. Y.) 1.

43. *Alabama.*— Smith *v.* Kennedy, 63 Ala. 334.

Louisiana.—Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436.

Missouri.—Berthold *v.* Gruner, 12 Mo. App. 575.

Tennessee.— East Tennessee, etc., R. Co. *v.* Burnett, 11 Lea (Tenn.) 525.

Texas.— Pridgen *v.* Bonner, 28 Tex. 799; Mathews *v.* Hancock, 20 Tex. 6; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

Virginia.— Peters *v.* Neville, 26 Gratt. (Va.) 549.

44. Minthorn *v.* Hemphill, 73 Iowa 257, 34 N. W. 844; Holton *v.* McPike, 27 Kan. 286.

Amount not assigned as error.— Under Hill's Anno. Laws Oreg. § 544, the supreme court will not, on affirming a judgment, increase the amount where the amount of the judgment is not assigned as error. Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378.

Damages for loss of profits.— The appellate court will not go beyond the strict rules of law to increase plaintiff's allowance of damages for loss of profits. Bryson *v.* McCone. 121 Cal. 153, 53 Pac. 637.

Facts not admitted in pleadings.— In Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076, it was held that the appellate court could not go beyond the verdict and give judgment for a greater sum, because of facts shown by the evidence but not admitted by the pleadings.

Unliquidated damages.— By statute, in Louisiana, the supreme court has power to increase the amount awarded by the jury even in an action for unliquidated damages for a tort. Scheen *v.* Poland, 34 La. Ann. 1107; Donnell *v.* Sandford, 11 La. Ann. 645; Vincent *v.* Sharp, 9 La. Ann. 463; Dudley *v.* Canal Bank, 5 La. Ann. 295.

45. *California.*— Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318.

Indiana.— Houk *v.* Barthold, 73 Ind. 21; King *v.* Anthony, 2 Blackf. (Ind.) 131.

Louisiana.— Townsend's Succession, 36 La. Ann. 447; First Municipality New Orleans *v.* Christ Church, 3 La. Ann. 453.

Minnesota.— Sullivan *v.* La Crosse, etc., Steam Packet Co., 10 Minn. 386.

Montana.—Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424.

Texas.— Swearingen *v.* Glenn, 34 Tex. 243.

West Virginia.—McCoy *v.* McCoy, 9 W. Va. 443.

See 3 Cent. Dig. tit. "Appeal and Error," § 4528.

Defective return of citation.—Where, on appeal from a judgment rendered on an irregular return of the citation, it does not appear that there was an utter want of legal service, the suit will be remanded for further proceedings, and not dismissed. Adams *v.* Basile, 35 La. Ann. 101.

Insanity of a defendant at the time of the service of the original process and until judgment rendered, where defendant appears personally or by attorney, or not at all, is good cause to reverse a judgment on error. Lamprey *v.* Nudd, 29 N. H. 299.

The courts of the United States are courts of limited jurisdiction; and, consequently, the fact of jurisdiction must appear affirmatively on the record, else their judgments and decrees may be reversed on appeal or error. Roberts *v.* Lewis, 144 U. S. 653, 12 S. Ct. 781, 36 L. ed. 579; McCormick *v.* Sullivant, 10 Wheat. (U. S.) 192, 6 L. ed. 300; Tinsley *v.* Hoot, 53 Fed. 682, 2 U. S. App. 548, 3 C. C. A. 612; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 51 Fed. 929, 5 U. S. App. 97, 2 C. C. A. 542.

46. *Arkansas.*— King *v.* Clay, 34 Ark. 291.

Florida.— Craver *v.* Spencer, 40 Fla. 135, 23 So. 880.

Indiana.— Muir *v.* Gibson, 8 Ind. 187.

Louisiana.—Ellery *v.* Dameron, 18 La. Ann. 109.

Michigan.— Smith *v.* Smith, 13 Mich. 258.

Missouri.— Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19.

New Jersey.— Adams *v.* Adams, 50 N. J. Eq. 751, 26 Atl. 903.

West Virginia.— Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Camden *v.* Haymond, 9 W. Va. 680.

Wisconsin.— Hays *v.* Lewis, 21 Wis. 663.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4518, 4528.

47. Gallatin Land, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747; McCoy *v.* McCoy, 9 W. Va. 443.

Reversal by court of its own motion.— Where a decree has been rendered in the absence of proper parties, it will be vacated by the appellate court of its own motion. Greeley

court to authorize a proper judgment, the fact that others are interested in the subject-matter will not call for reversal, if no injustice has been done.[48]

(II) *As to Subject-Matter.* Where the lower court renders judgment without having jurisdiction of the subject-matter, the appellate court will reverse, and itself dismiss the action,[49] or direct the lower court to do so.[50] If the lower court has no jurisdiction the appellate court can have none.[51]

b. Prejudicial Error in Judgment — (I) *In General.* An attempt to enumerate all of the classes of errors for which a judgment may be reversed would necessitate an invasion of practically every branch of the law, and would serve no useful purpose here. It is enough to state the broad principle that wherever a prejudicial and incurable error has intervened without the fault of the party injuriously affected thereby,[52] it is ground for reversing the judgment.[53] And

v. Hendricks, 23 Fla. 366, 2 So. 620; Pierson *v.* Gillespie, 4 N. Y. Suppl. 691, 21 N. Y. St. 55.

48. Gatling *v.* Newell, 9 Ind. 572; Davison *v.* Rake, 44 N. J. Eq. 506, 16 Atl. 227.

49. *Kentucky.*— Harper *v.* Montgomery, 5 Litt. (Ky.) 347.

Maryland.— Armstrong *v.* Hagerstown, 32 Md. 54.

Missouri.—Lindsay *v.* Kansas City, etc., R. Co., 36 Mo. App. 51.

New York.— People *v.* Ferris, 34 How. Pr. (N. Y.) 189.

Texas.— Roeser *v.* Bellmer, 7 Tex. 1; Gray *v.* Maddox, 5 Tex. 528.

Washington.— Stewart *v.* Lohr, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

See 3 Cent. Dig. tit. "Appeal and Error," § 4529.

Equitable jurisdiction.— Where the real points of difference between litigants have been fully and fairly tried out and decided in an action in equity, the judgment should not be vacated, upon objection to the equitable jurisdiction, if there be any reasonable view upon which that jurisdiction can he asserted. McNeeley *v.* Welz, 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310.

Equity and common-law jurisdiction.— Under Miss. Const. § 147, no judgment can be vacated on the ground of want of jurisdiction from any error as to whether the cause was of equity or common-law jurisdiction. Day *v.* Hartman, 74 Miss. 489, 21 So. 302; Cazeneuve *v.* Curell, 70 Miss. 521, 13 So. 32; Barrett *v.* Carter, 69 Miss. 593, 13 So. 625.

Fictitious action.—A judgment rendered in any action which the appellate court is satisfied is fictitious will be set aside, and the case be remanded to the inferior court, with instructions to dismiss it. Ebert *v.* Beedy, 113 Ill. 316.

When cause remanded.—Where a judge of a circuit court renders a decree in vacation which purports to be final as to any subject embraced by it, the appellate court will not dismiss the appeal because the decree was rendered without sufficient authority by the judge, but will take jurisdiction of the cause and decree, so far, and so far only, as to vacate the decree, and remand the cause to the circuit court, there to be proceeded with. Monroe *v.* Bartlett, 6 W. Va. 441.

Where failure of trial justice to render judgment within eight days after the trial, and the submission of the case to him for decision, resulting, under N. Y. Consol. Act, § 1384, in a loss of jurisdiction, appears upon the face of the return, the judgment must, upon appeal to the appellate term of the supreme court, be vacated. Penniman *v.* La Grange, 23 Misc. (N. Y.) 121, 50 N. Y. Suppl. 710.

50. McConoughey *v.* San Diego, 128 Cal. 366, 60 Pac. 925; Dewey *v.* Hyde, 1 Pinn. (Wis.) 469.

51. Gormly *v.* McIntosh, 22 Barb. (N. Y.) 271; State *v.* King County Superior Ct., 9 Wash. 369, 37 Pac. 489.

52. Absence of fault on part of appellant. — To authorize a new trial, it must appear that the error complained of arose without the fault of the party injuriously affected, or his legal capacity to prevent it. McArthur *v.* Starrett, 43 Me. 345.

53. As to what are reversible errors see the specific titles, such as Evidence; Pleading; Trial.

As to what questions will be reviewed on appeal or error see *supra*, XIII, L, M; XVII.

An error in an interlocutory order or decree will not, generally, require a vacation of the final decree, unless such error has been carried into the final decree. Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 3 So. 696; Brand *v.* Webb, 2 A. K. Marsh. (Ky.) 574. In Booton *v.* Booton, (Va. 1898) 29 S. E. 823, it was held that a final decree inconsistent with certain interlocutory decrees would not be set aside for the technical error of not having reheard and amended such decrees before entering the final decree, where appellant would not ultimately be benefited by such vacation.

Judgment rendered without evidence to sustain it will be set aside. Reisenleiter *v.* Evangelische Lutherische Guaden Kirche, 29 Mo. App. 291; Smith *v.* Laumeier, 12 Mo. App. 546; Tenesci *v.* Societa Italiano Abbrizzo, etc., 23 Misc. (N. Y.) 763, 51 N. Y. Suppl. 362.

Verdict contrary to the law and evidence is ground for vacating a judgment.

Illinois.— Gordon *v.* Crooks, 11 Ill. 142; Atchison, etc., R. Co. *v.* Alsdurf, 68 Ill. App. 149.

Iowa.— Morss *v.* Johnson, 38 Iowa 430.

sometimes, where the appellate court is satisfied that justice has not been done, it will reverse the judgment even though no error of law has been committed in the court below.[54]

(II) *Erroneous Rulings by Trial Court.* It is ground for the reversal of a judgment that the trial court erred in its ruling on a material point, to the prejudice of appellant[55] — as, for instance, in the improper admission[56] or exclusion of evidence;[57] the giving of an erroneous or misleading instruction to the jury on a material point,[58] or refusing to give a proper instruction;[59] the improper determination as to which party must sustain the burden of proof;[60] the improper dismissal of the plaintiff's cause;[61] an erroneous ruling as to the sufficiency of a pleading;[62] a refusal of a demand for a jury trial where the right to such trial

Missouri.— Holt *v.* Morton, 53 Mo. App. 187.

New Hampshire.— Wendell *v.* Safford, 12 N. H. 171.

New York.— Gould *v.* Segee, 5 Duer (N. Y.) 260.

Tennessee.— Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

Void judgment may be set aside upon error. Bates *v.* Kaestner, 69 Ill. App. 620; Van Slyke *v.* Trempealeau Farmers' Mut. F. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50. And see State *v.* Eddy, 58 Mich. 318, 25 N. W. 299.

Where a case has been so tried as to deprive a party of the opportunity of being heard, a new trial will be ordered. Barrow *v.* Stewart, 6 Mart. N. S. (La.) 635.

Whatever would be good ground for arresting a judgment is good ground for vacating it. Wood *v.* Hustis, 17 Wis. 416.

54. Curley *v.* Tomlinson, 5 Daly (N. Y.) 283.

No error in rulings excepted to.—Where a case is tried on agreed facts, and no stipulation is made authorizing judgment for either party, and the only error assigned was the refusal of instructions, which were properly refused, yet, where an affirmance would result in a judgment based on an unconstitutional statute, the judgment will be vacated, even though there is no error in the rulings excepted to. Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210.

New trial for error of fact.— It is the duty of the general term, when convinced that a decision brought before it for review is not in accordance with the truth, to vacate the judgment for error of fact. Dickinson *v.* Ensign, 14 N. Y. St. 65.

55. See, generally, Trial.

56. Armstrong *v.* High, 106 Ga. 508, 32 S. E. 590; Clapp *v.* Engledow, 72 Tex. 252, 10 S. W. 462; Doty *v.* Moore, 16 Tex. 591.

See, generally, Evidence; and 3 Cent. Dig. tit. "Appeal and Error," § 4534.

57. *Georgia.*— Armstrong *v.* High, 106 Ga. 508, 32 S. E. 590.

Kansas.— McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373.

Louisiana.— Bainbridge *v.* Clay, 3 Mart. N. S. (La.) 671.

New York.— Bascom *v.* Smith, 31 N. Y. 595.

West Virginia.— Farmers' Bank *v.* Gould, 42 W. Va. 132, 24 S. E. 547.

See 3 Cent. Dig. tit. "Appeal and Error," § 4534.

Objection not properly taken.—Where evidence is incompetent and properly excluded, the fact that the proper objection was not taken to such evidence at the time it was offered and rejected is not ground for new trial. Cooper *v.* Hills Bros. Co., 50 N. Y. App. Div. 304, 63 N. Y. Suppl. 1046.

58. *Alabama.*— Hines *v.* Trantham, 27 Ala. 359; Nolen *v.* Palmer, 24 Ala. 391.

Georgia.— Morgan *v.* Taylor, 55 Ga. 224; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Illinois.— Union Stock Yards, etc., Co. *v.* Monaghan, 13 Ill. App. 148.

Indiana.— Doyle *v.* Kiser, 12 Ind. 474.

Kentucky.— Hewitt *v.* Bronaugh, 3 Dana (Ky.) 459.

Missouri.— Boynton *v.* Miller, 63 Mo. 207; Swartz *v.* Chappell, 19 Mo. 304; Edwards *v.* Meyers, 22 Mo. App. 481.

Ohio.— Newnam *v.* Cincinnati, 18 Ohio 323.

Tennessee.— Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

United States.— U. S. *v.* Tillotson, 12 Wheat. (U. S.) 180, 6 L. ed. 594.

See 3 Cent. Dig. tit. "Appeal and Error," § 4535.

59. Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403; Weisiger *v.* Chisholm, 22 Tex. 670. And see Avery Planter Co. *v.* Peck, 80 Minn. 519, 83 N. W. 455, 1083.

60. Hurd *v.* Wing, 56 N. Y. App. Div. 595, 67 N. Y. Suppl. 227.

61. *Alabama.*— Leavitt *v.* Dawson, 4 Ala. 335.

Missouri.— Banks *v.* McCarty, 5 Mo. 1.

New York.— Field *v.* Pinkus, 61 N. Y. Suppl. 1038.

North Carolina.— Governor *v.* Twitty, 13 N. C. 176.

United States.— Ruhy *v.* Atkinson, 71 Fed. 567, 30 U. S. App. 642, 18 C. C. A. 249.

See 3 Cent. Dig. tit. "Appeal and Error," § 4532.

62. *Connecticut.*—Dunnett *v.* Thornton, 73 Conn. 1, 46 Atl. 158.

Indiana.— Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114.

Missouri.— State *v.* Smith, 10 Mo. 633.

West Virginia.— Griffie *v.* McCoy, 8 W. Va. 201.

Wisconsin.— Sage *v.* McLean, 37 Wis. 357.

exists;[63] the improper granting[64] or denial of a new trial;[65] a failure of the trial court to find facts where required to do so,[66] or making erroneous[67] or inconsistent findings.[68]

(III) *Errors Not Waivable.* Where the error is of a nature not capable of being waived, the appellate court will, of its own motion, reverse the judgment, though the question be not raised by the parties thereto.[69]

c. Trivial Errors. Where the merits of the case are fairly with the successful party, the judgment will not be reversed on account of trivial or unimportant errors.[70] Thus, an erroneous ruling by the court below on an immaterial point will not warrant a reversal if the cause has been fairly tried on the merits, and no substantial prejudice has resulted from such ruling.[71] But, where the court

United States.— Mandelbaum *v.* U. S., 8 Wall. (U. S.) 310, 19 L. ed. 479; Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320, 6 L. ed. 484; Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

See 3 Cent. Dig. tit. "Appeal and Error," § 4533.

63. Treadway *v.* Wilder, 12 Nev. 108.

64. Jones *v.* Cooprider, 1 Blackf. (Ind.) 47; Spore *v.* Leeper, 27 Kan. 68; Curry *v.* Fetter, 15 Ky. L. Rep. 494; Hexter *v.* Pennsylvania R. Co., 55 N. Y. Suppl. 1105.

See 3 Cent. Dig. tit. "Appeal and Error," § 4538½.

65. Maine Boys' Tunnel Co. *v.* Boston Tunnel Co., 37 Cal. 40.

66. *New York.*—Ames *v.* Peck, Seld. Notes (N. Y.) 135.

Texas.— Davis *v.* Davis, 24 Tex. 187; Pierpont *v.* Pierpont, 19 Tex. 227.

Virginia.— Powell *v.* Tarry, 77 Va. 250.

Wisconsin.— Luthe *v.* Farmers' Mut. F. Ins. Co., 55 Wis. 543, 13 N. W. 490; Wisconsin River Lumber Co. *v.* Plumer, 49 Wis. 666, 6 N. W. 319.

United States.— Miller *v.* Houston City St. R. Co., 55 Fed. 366, 13 U. S. App. 57, 5 C. C. A. 134.

See 3 Cent. Dig. tit. "Appeal and Error," § 4537.

67. White *v.* Douglass, 71 Cal. 115, 11 Pac. 860; Golden State, etc., Iron Works *v.* Muir, (Cal. 1885) 8 Pac. 836; Inglis *v.* Floyd, 33 Mo. App. 565; Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802; State *v.* Clark, 67 Wis. 229, 30 N. W. 122.

See 3 Cent. Dig. tit. "Appeal and Error," § 4537.

Failure of a referee or master to make proper report of matters submitted to him is a ground for vacation. Banta *v.* Kenton, 3 Ky. L. Rep. 539; McConn *v.* Wrought-Iron Bridge Co., 8 N. Y. St. 281.

68. Freeman *v.* Badgley, 105 Cal. 372, 38 Pac. 955; Pappenheim *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 281, 7 N. Y. Suppl. 679, 28 N. Y. St. 577.

See 3 Cent. Dig. tit. "Appeal and Error," § 4537.

69. Smith *v.* Smith, 13 Mich. 258; Miller *v.* Sunde, 1 N. D. 1, 44 N. W. 301.

Decree prejudicial to both parties.—Where, on the whole case, it appears that a decree is prejudicial to the interests of both parties, the court can set it aside on grounds other than those on which a new trial is claimed. Coy *v.* Downie, 14 Fla. 544.

Judgment on illegal contract.— The supreme court will, on appeal, of its own motion, reverse a judgment based on an illegal contract which is contrary to public policy, though the question of the legality thereof was not raised in the court below or presented in the supreme court by the parties. Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

70. *Georgia.*— Belt *v.* Farrow, 83 Ga. 695, 10 S. E. 357.

Illinois.— E. A. Moore Furniture Co. *v.* Sloane, 64 Ill. App. 581.

Indiana.— Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Heady *v.* Boden, 4 Ind. App. 475, 30 N. E. 1119.

Kansas.— Gregg *v.* Berkshire, (Kan. App. 1900) 62 Pac. 550.

Kentucky.—Smith *v.* Surber, 2 A. K. Marsh. (Ky.) 449; Ross *v.* Dimmit, 3 Ky. L. Rep. 685.

Louisiana.— Lengsfield *v.* Jones, 11 La. Ann. 624; Kohn *v.* Schooner Renaisance, 5 La. Ann. 25, 52 Am. Dec. 577.

Missouri.— Short *v.* Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508; Pierce City Nat. Bank *v.* Hughlett, 84 Mo. App. 268.

New York.— Agate *v.* House, 81 Hun (N. Y.) 586, 30 N. Y. Suppl. 1119, 63 N. Y. St. 256; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

United States.— Stewart *v.* Morris, 96 Fed. 703, 37 C. C. A. 562.

See 3 Cent. Dig. tit. "Appeal and Error," § 4540 *et seq.*

As to trifling errors in the amount of recovery see *infra*, XVIII, E, 1, e, (II).

As to harmless error generally, see *supra*, XVII, H.

Correct decision based on erroneous reasoning.— A correct decision will not be vacated because based by the court below on erroneous reasons. See *supra*, XVII, A, 4, b.

71. *California.*— Coonan *v.* Loewenthal, (Cal. 1900) 61 Pac. 940.

District of Columbia.—Massachusetts Mut. Acc. Assoc. *v.* Dudley, 15 App. Cas. (D. C.) 472; Prindle *v.* Campbell, 7 Mackey (D. C.) 598.

Iowa.— Van Patten *v.* Burr, 55 Iowa 224, 7 N. W. 522.

Kansas.— Pittsburg *v.* Broderson, (Kan. App. 1900) 62 Pac. 5.

is not satisfied with the justice of the judgment, it will reverse for slight errors.[72]

d. Technical or Formal Defects. A judgment will not, ordinarily, be reversed on account of technical, formal, or clerical errors, where the merits have been fairly tried and the judgment is otherwise proper.[73] Such errors being, usually, amendable in the lower court, will be considered as amended on appeal, and, therefore, not ground for reversal.[74]

e. Error in Amount of Recovery — (i) *In General.* Appellate courts in some jurisdictions have power to reverse judgments on the ground that they are excessive or inadequate in amount.[75] Thus, it is ground for reversal that the judg-

Maryland.—Bannon *v.* Warfield, 42 Md. 22.

Massachusetts.— Clarke *v.* Springfield Second Nat. Bank, 177 Mass. 257, 59 N. E. 121.

New York.— Hyatt *v.* Wood, 3 Johns. (N. Y.) 239.

United States.— Gray *v.* Smith, 83 Fed. 824, 48 U. S. App. 581, 28 C. C. A. 168.

72. Savannah, etc., R. Co. *v.* Harrigan, 80 Ga. 602, 7 S. E. 280; Strawbridge *v.* Vandenburgh, 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 610, 32 N. Y. St. 493; Goldstein *v.* White, 16 N. Y. Suppl. 860, 43 N. Y. St. 121.

73. *California.*— Anderson *v.* Parker, 6 Cal. 197.

Georgia.— Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867; Boram *v.* Thweatt, 45 Ga. 94.

Idaho.— Miller *v.* Smith, (Ida. 1900) 61 Pac. 824.

Illinois.— Southworth *v.* People, 183 Ill. 621, 56 N. E. 407; American Preservers' Co. *v.* Bishop, 88 Ill. App. 443; Dwyer *v.* Strenitz, 68 Ill. App. 546.

Indiana.— Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471; Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397; Huston *v.* Cosby, 14 Ind. App. 602, 41 N. E. 953.

Iowa.— Mackemer *v.* Benner, 1 Greene (Iowa) 157.

Kansas.— Clippinger *v.* Ingram, 17 Kan. 584.

Kentucky.— Salyer *v.* Napier, 21 Ky. L. Rep. 172, 51 S. W. 10; Bell *v.* Dowdy, 13 Ky. L. Rep. 543.

Maryland.— Cooper *v.* Utterbach, 37 Md. 282.

Massachusetts.— Buckfield *v.* Gorham, 6 Mass. 445.

Michigan.— American Merchants' Union Express Co. *v.* Phillips, 29 Mich. 515.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

Missouri.—Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668; Phillips *v.* Evans, 64 Mo. 17; Kuhn *v.* Germania L. Ins. Co., 71 Mo. App. 305; Ghio *v.* Beard, 11 Mo. App. 21.

New York.— Lake Ontario, etc., R. Co. *v.* Marvine, 18 N. Y. 585; Simpson *v.* McKay, 3 Hun (N. Y.) 316; Hedden *v.* Nederburg, 28 Misc. (N. Y.) 233, 58 N. Y. Suppl. 1065; Fassett *v.* Tallmadge, 18 Abb. Pr. (N. Y.) 48; O'Shea *v.* Kirker, 8 Abb. Pr. (N. Y.) 69; Read *v.* Hurd, 7 Wend. (N. Y.) 408; Moore *v.* Tracy, 7 Wend. (N. Y.) 229.

Pennsylvania.— Flanagin *v.* Wetherill, 5 Whart. (Pa.) 280.

Tennessee.— Louisville, etc., R. Co. *v.* Parker, 12 Heisk. (Tenn.) 49; Beeler *v.* Huddleston, 3 Coldw. (Tenn.) 201; McBee *v.* Petty, 3 Coldw. (Tenn.) 178.

Texas.— Menifee *v.* Hamilton, 32 Tex. 495; Punderson *v.* Love, 3 Tex. 60.

Virginia.—Woodson *v.* Perkins, 5 Gratt. (Va.) 345.

Wisconsin.—Ciscel *v.* Wheatley, 27 Wis. 618; Stephens *v.* Magor, 25 Wis. 533.

United States.— Shaw *v.* Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892.

See 3 Cent. Dig. tit. "Appeal and Error," § 4540 *et seq.*

Where a writ of error is brought merely to urge technical errors, defendant in error may, if the merits are with him, be allowed the advantage of a technicality in order to uphold the judgment. Swits *v.* Carver, 20 Ill. 578.

74. *Alabama.*— Powell *v.* Hadden, 21 Ala. 745; Crawford *v.* Whittlesey, 8 Ala. 806.

California.— Storke *v.* Storke, 99 Cal. 621, 34 Pac. 339; Shelby *v.* Houston, 38 Cal. 410.

Illinois.— Southworth *v.* People, 85 Ill. App. 289.

Indiana.— Roberts *v.* Comer, 41 Ind. 475; Sloan *v.* Wittbank, 12 Ind. 444.

Kansas.— Missouri Valley R. Co. *v.* Caldwell, 8 Kan. 244.

Massachusetts.— Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337.

New York.— Lake Ontario, etc., R. Co. *v.* Marvine, 18 N. Y. 585.

Pennsylvania.— Shoenberger *v.* Hackman, 37 Pa. St. 87; Shoenberger *v.* Zook, 34 Pa. St. 24.

Tennessee.— Edwards *v.* Greene, 5 Sneed (Tenn.) 669.

Wisconsin.—Boyd *v.* Weil, 11 Wis. 58.

See 3 Cent. Dig. tit. "Appeal and Error," § 4541.

As to presumptions that amendments were made see *supra*, XVII, E, 2, c.

75. *Illinois.*— Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 34 Ill. App. 312.

Kansas.—Western Contracting, etc., Assoc. *v.* Rettiger, (Kan. App. 1900) 61 Pac. 313.

Kentucky.— Tong *v.* Eifort, 3 Ky. L. Rep. 647.

Missouri.— Benson *v.* Chicago, etc., R. Co., 78 Mo. 504; Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

New Jersey.— Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Scheller *v.* Metropolitan St. R. Co., 63 N. Y. Suppl. 192.

South Carolina.—Josey *v.* Wilmington, etc., R. Co., 11 Rich. (S. C.) 399.

Texas.—Texas, etc., R. Co. *v.* Durrett, (Tex.

ment is in excess of the amount demanded by plaintiff.[76] But it is, usually, necessary that the correction of the error shall have been sought and denied in the lower court,[77] and there will be no reversal on account of an alleged excess, not demonstrated by any calculation shown in the record.[78] In modern practice, such errors are, ordinarily, cured by a remission of the excess in the appellate court.[79]

(II) *Trifling Errors*—(A) *In General.* Where the only impropriety in the judgment or decree is a trifling error in the amount of the recovery which might have been corrected in the court below, the appellate court will, usually, apply the maxim *de minimis lex non curat*, and refuse to reverse the judgment or decree on that account.[80] Thus, a judgment or decree will not, ordinarily, be reversed for an inconsiderable mistake in the matter of interest,[81]

Civ. App. 1900) 58 S. W. 187; Fergus *v.* Dodson, (Tex. Civ. App. 1895) 33 S. W. 273.

Wisconsin.— Kickhoefer *v.* Hidershide, 104 Wis. 126, 80 N. W. 62; Evans *v.* Foster, 80 Wis. 509, 50 N. W. 410, 14 L. R. A. 117.

See 3 Cent. Dig. tit. "Appeal and Error," § 4546 *et seq.*

As to when the power to vacate for error in the amount of the recovery should be exercised see *supra*, XVII, G, 6, e.

As to estoppel to allege error as to amount of recovery see *supra*, XVII, C, 2, a, (XIV).

Judgment greater than verdict.—A judgment rendered for a larger sum than is found due by the jury on a special verdict may be set aside. Reid *v.* Dunklin, 5 Ala. 205.

76. *Illinois.*— Stumpf *v.* Osterhage, 94 Ill. 115; Hobson *v.* Emporium Real Estate, etc., Co., 42 Ill. 306.

Indiana.— Hall *v.* Hall, 42 Ind. 585.

Kentucky.— Stewart *v.* Tevis, 7 T. B. Mon. (Ky.) 109.

Louisiana.— Cumming *v.* Archinard, 1 La. Ann. 279.

Mississippi.— Hart *v.* Chemical Nat. Bank, (Miss. 1900) 27 So. 926; Lester *v.* Barnett, 33 Miss. 584.

Missouri.—Horton *v.* St. Louis, etc., R. Co., 83 Mo. 541; Showles *v.* Freeman, 81 Mo. 540.

Texas.— Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695; Texas, etc., R. Co. *v.* Morin, 66 Tex. 133, 18 S. W. 345.

Contra, by statute, in Maryland.— Under Maryland Code, art. 29, § 39, the court of appeals cannot vacate a judgment because entered for a larger amount than that claimed. Marburg *v.* Marburg, 26 Md. 8, 90 Am. Dec. 84.

Error as to division of debt and damages.— Although judgment cannot be entered for a greater amount than is claimed in the declaration, no judgment will be set aside, as to a mere technical division of debt and damages, where the aggregate amount is less than the aggregate sum laid in the declaration. Boardman *v.* Poland, 2 Port. (Ala.) 431.

77. Whiteside *v.* Decatur Branch Bank, 10 Ala. 249; Moore *v.* Coolidge, 1 Port. (Ala.) 280; Stuhl *v.* Shipp, 44 Ill. 133.

78. Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148; Bishop *v.* Jones, 28 Tex. 294.

79. As to reducing the amount of the recovery on appeal see *supra*, XVIII, D, 4.

80. *Arkansas.*— Washington *v.* Love, 34 Ark. 93.

Colorado.— Carson *v.* Arvantes, 10 Colo. App. 382, 50 Pac. 1080.

Florida.— Milton *v.* Blackshear, 8 Fla. 161.

Georgia.— Belt *v.* Farrow, 83 Ga. 695, 10 S. E. 357.

Idaho.— Wood Live-Stock Co. *v.* Woodmansee, (Ida. 1900) 61 Pac. 1029.

Illinois.—Chicago, etc., Coal Co. *v.* Streator, 172 Ill. 435, 50 N. E. 167; Chicago Artesian Well Co. *v.* Corey, 60 Ill. 73.

Indiana.—Ray *v.* Dunn, 38 Ind. 230; Hall *v.* Hall, 34 Ind. 314.

Iowa.— Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341; Richardson *v.* McLaughlin, 92 Iowa 393, 60 N. W. 639.

Kentucky.—Koehler *v.* Hussey, (Ky. 1900) 57 S. W. 241; Combs *v.* Breathitt County, 18 Ky. L. Rep. 809, 38 S. W. 138, 39 S. W. 33.

Louisiana.— Guice *v.* Stubbs, 13 La. Ann. 442; Gamble *v.* McClintock, 9 La. Ann. 159.

Minnesota.—Jensen *v.* Chicago Great Western R. Co., 64 Minn. 511, 67 N. W. 631; American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243.

Missouri.— Kreibohm *v.* Yancey, 154 Mo. 67, 55 S. W. 260; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060.

New York.— Hinde *v.* Smith, 6 Lans. (N. Y.) 464; Brown *v.* Clark, 3 Johns. (N. Y.) 443.

Rhode Island.—Stevens *v.* Hargraves, (R. I. 1900) 47 Atl. 311.

Tennessee.— Fox *v.* Boyd, 104 Tenn. 357, 58 S. W. 221.

Texas.— Foster *v.* Van Norman, 1 Tex. 636.

Vermont.— Thompson *v.* Arms, 5 Vt. 546.

Wisconsin.—Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644; Holzhauer *v.* Milwaukee County, 41 Wis. 639.

See 3 Cent. Dig. tit. "Appeal and Error," § 4546 *et seq.*

81. *California.*— Croshy *v.* McDermitt, 7 Cal. 146.

Georgia.— Wilkinson *v.* Bertock, 111 Ga. 187, 36 S. E. 623.

Illinois.— Sharp *v.* Hull, 81 Ill. App. 400.

Louisiana.— Edelin *v.* Richardson, 4 La. Ann. 502.

New York.— Mercer *v.* Vose, 67 N. Y. 56.

Pennsylvania.— Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867.

Texas.— Missouri Pac. R. Co. *v.* Colquitt, (Tex. 1888) 9 S. W. 603.

Virginia.— Lovett *v.* Thomas, 81 Va. 245.

United States.— Gulf, etc., R. Co. *v.* John-

nor will a reversal of a judgment or decree be granted by the appellate court in a case where the only error relates to the allowance or taxation of costs.[82]

(B) *What Is Trifling Error* — (1) In General. As to what error in amount is so trivial as not to require reversal is a question depending largely upon the circumstances of the particular case. Generally, an error of five dollars or less is too small to justify reversal,[83] and errors amounting to more than five dollars will frequently be regarded as immaterial in large cases, where the expense of a new trial would greatly exceed the amount of the error.[84] But the question is, necessarily, governed by the discretion of the court, and, where equity and justice demand it, a judgment will be reversed even though the amount in controversy be insignificant.[85]

(2) Failure to Recover Nominal Damages. It is a general rule that a judgment for defendant will not be reversed and a new trial granted merely to enable appellant to recover nominal damages.[86] And so, a judgment in favor of plaintiff

son, 54 Fed. 474, 10 U. S. App. 629, 4 C. C. A. 447.

See 3 Cent. Dig. tit. "Appeal and Error," § 4546 *et seq.*

82. *Alabama.*— Bryan *v.* Bryan, 34 Ala. 516.

Connecticut.— Raymond *v.* Clark, 46 Conn. 129.

Louisiana.—McMullen *v.* Jewell, 3 La. Ann. 139.

New Jersey.— Moffett *v.* Ayres, 3 N. J. L. 234.

New York.— Moore *v.* Tracy, 7 Wend. (N. Y.) 229.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

Wisconsin.— Hoyt *v.* Jones, 31 Wis. 389.

83. *Alabama.*— Sanford *v.* Richardson, 1 Ala. 182.

Illinois.— Tipton *v.* Utley, 59 Ill. 25; Wright *v.* Freeman, 46 Ill. App. 421.

Indiana.— Zehner *v.* Taylor, 15 Ind. 70.

Kentucky.— Ferrell *v.* Ferrell, 20 Ky. L. Rep. 1023, 48 S. W. 153; Ferguson *v.* Moore, 19 Ky. L. Rep. 1681, 44 S. W. 113.

Louisiana.—Jacques *v.* Kopman, 6 La. Ann. 542.

Minnesota.— Palmer *v.* Degan, 58 Minn. 505, 60 N. W. 342.

Missouri.— Suss *v.* Fuhrman, 31 Mo. 470; Cameron *v.* Hart, 57 Mo. App. 142.

Texas.—Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348; Matthews *v.* Bonham First Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 331.

Wisconsin.—Warden *v.* Sweeney, 86 Wis. 161, 56 N. W. 647; Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331.

See 3 Cent. Dig. tit. "Appeal and Error," § 4548.

84. Errors not requiring new trial.— The maxim *de minimis* has been applied where the error amounted to seven dollars and fifty cents (Fowler *v.* Kallam, 4 Ky. L. Rep. 988); to an error of about eight dollars (Angelloz *v.* Rivollet, 2 La. Ann. 652); to an error of nine dollars and seventy cents (McNutt *v.* Dickson, 42 Ill. 498); to an error of ten dollars (Wolff *v.* Prosser, 73 Cal. 219, 14 Pac. 852; Callanan *v.* Shaw, 24 Iowa 441; Hopkins *v.* Myers, 10 Ky. L. Rep. 39); to an error of twelve dollars (Anderson *v.* Samuels, 14 Ky. L. Rep. 48; Mulholland *v.* Troutman, 10 Ky. L. Rep. 263); to an error of thirty dollars (Wood Live-Stock Co. *v.* Woodmansee, (Ida. 1900) 61 Pac. 1029); to an error of thirty-four dollars (Seiler *v.* Northern Bank, 9 Ky. L. Rep. 497, 5 S. W. 536).

85. Moss *v.* Rowland, 3 Bush (Ky.) 505; Flesh *v.* Christopher, 11 Mo. App. 483; Cumberland Telephone, etc., Co. *v.* Shaw, 102 Tenn. 313, 52 S. W. 163.

Tender of too small an amount.— In Boyden *v.* Moore, 5 Mass. 365, it was held that the maxim *de minimis* did not apply to a case where a defendant tendered a less sum than was due, even though the difference were but a few cents. But see Mannheim *v.* Carleton College, 68 Minn. 531, 71 N. W. 705.

86. *Alabama.*— Cahuzac *v.* Samini, 29 Ala. 288.

Arkansas.— Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710; De Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363.

Georgia.—Eiswald *v.* Southern Express Co., 60 Ga. 496.

Illinois.— Thisler *v.* Hopkins, 85 Ill. App. 207; Meyer *v.* Huse, 32 Ill. App. 328.

Indiana.— State *v.* Trout, 75 Ind. 563; State *v.* Shackleford, 15 Ind. 376; Gardner *v.* Caylor, (Ind. App. 1900) 56 N. E. 134; Stewart *v.* Strong, 20 Ind. App. 44, 50 N. E. 95.

Iowa.—Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343; Ellithorpe *v.* Reidessell, 88 Iowa 729, 55 N. W. 313.

Kentucky.— Robertson *v.* Gentry, 2 Bibb (Ky.) 542.

Louisiana.— Stewart *v.* Lapsley, 7 La. Ann. 456; Patterson *v.* Spaulding, 5 La. Ann. 171.

Maryland.— Rawlings *v.* Adams, 7 Md. 26.

Massachusetts.— Boyden *v.* Moore, 5 Mass. 365.

Michigan.— Stevens *v.* Yale, 113 Mich. 680, 72 N. W. 5; Lewis *v.* Flint, etc., R. Co., 56 Mich. 638, 22 N. W. 469.

Minnesota.— Sloggy *v.* Crescent Creamery Co., 72 Minn. 316, 75 N. W. 225; Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891.

Montana.— McCauley *v.* McKeig, 8 Mont. 389, 21 Pac. 22.

New York.— Funk *v.* Evening Post Pub. Co., 152 N. Y. 619, 46 N. E. 292; McConihe *v.*

below will not be reversed because a nominal recoupment, set-off, or counter-claim on the part of defendant was not allowed.[87] But a failure to award nominal damages is reversible error where plaintiff is substantially prejudiced thereby[88] — as where the judgment carries costs[89] — and the mere fact that the damages recoverable must be small will not prevent a new trial where such damages will be substantial, and not merely nominal, and a real right is involved.[90]

(3) UNAUTHORIZED RECOVERY OF NOMINAL DAMAGES. An unauthorized judgment for nominal damages in plaintiff's favor will not be reversed where no substantial right of defendant is prejudiced thereby.[91]

2. PARTIAL REVERSAL — a. Divisible Judgments. Where a judgment appealed from consists of distinct and independent matters, so that an erroneous portion thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment, but only so much as is erroneous, leaving the residue undisturbed.[92] Thus, where a judgment entered on several causes of action is cor-

New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472, 62 N. Y. Suppl. 952; Rambaut *v.* Irving Nat. Bank, 42 N. Y. App. Div. 143, 58 N. Y. Suppl. 1056; Cady *v.* Fairchild, 18 Johns. (N. Y.) 129.

Ohio.— Chambers *v.* Frazier, 29 Ohio St. 362.

Wisconsin.— Bilgrien *v.* Dowe, 91 Wis. 393, 64 N. W. 1025; Middleton *v.* Jerdee, 73 Wis. 39, 40 N. W. 629; Mecklem *v.* Blake, 22 Wis. 495, 99 Am. Dec. 68.

United States.— Kelly *v.* Fahrney, 97 Fed. 176, 38 C. C. A. 103; East Moline Co. *v.* Weir Plow Co., 95 Fed. 250, 37 C. C. A. 62.

See 3 Cent. Dig. tit. "Appeal and Error," § 4553.

87. Wadhams *v.* Swan, 109 Ill. 46; Hays *v.* Wheatley, 7 Ky. L. Rep. 660; Hill *v.* Butler, 6 Ohio St. 207; Wilson *v.* Vick, (Tex. Civ. App. 1899) 51 S. W. 45.

88. Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147; McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376; State *v.* Rayburn, 22 Mo. App. 303; Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320; Herrick *v.* Stover, 5 Wend. (N. Y.) 580.

89. Heater *v.* Pearce, 59 Nebr. 583, 81 N. W. 615; Enos *v.* Cole, 53 Wis. 235, 10 N. W. 377; Eaton *v.* Lyman, 30 Wis. 41.

90. Chapin *v.* Babcock, 67 Conn. 255, 34 Atl. 1039.

91. English *v.* Caldwell, 30 Mich. 362; Riess *v.* Delles, 45 Wis. 662; Fisher *v.* Meyer, 20 Blatchf. (U. S.) 512, 12 Fed. 842.

See 3 Cent. Dig. tit. "Appeal and Error," § 4554.

Judgment on counter-claim.—An unauthorized judgment for nominal damages on defendant's counter-claim is not ground for new trial. Osborne *v.* Johnson, 35 Minn. 300, 28 N. W. 510.

When judgment reversible.—A petition alleged that a deed absolute was given by plaintiff to defendant to secure a debt, on the agreement that defendant should convey the land when a purchaser was found, and out of the proceeds pay his debt and other encumbrances, and the surplus to plaintiff. It was alleged that the sale was made and defendant received three thousand three hundred and eighty-nine dollars above its debt and the other encumbrances. The prayer was for the surplus. It was held that a judgment for plaintiff on the verdict for one dollar should be set aside, since, if plaintiff was entitled to recover at all, he was entitled to a larger sum. Yager *v.* Exchange Nat. Bank, 57 Nebr. 310, 77 N. W. 768.

92. *Alabama.*— Jeter *v.* Jeter, 36 Ala. 391.

California.— Fox *v.* Hale, etc., Silver Min. Co., (Cal. 1898) 53 Pac. 32.

Colorado.— McClair *v.* Huddart, 6 Colo. App. 493, 41 Pac. 832.

Connecticut.— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Selleck *v.* Rusco, 46 Conn. 370.

Illinois.— Domestic Bldg. Assoc. *v.* Nelson, 172 Ill. 386, 50 N. E. 194; Mann *v.* Harrison, 49 Ill. App. 403.

Indiana.— Pratt *v.* Wallbridge, 16 Ind. 147.

Kansas.— Hutchinson First Nat. Bank *v.* Kansas Grain Co., 60 Kan. 30, 55 Pac. 277.

Kentucky.— Chesapeake, etc., R. Co. *v.* Judd, 20 Ky. L. Rep. 1978, 50 S. W. 539; Williams *v.* Murrell, 12 Ky. L. Rep. 307, 13 S. W. 1075.

Massachusetts.— Cummings *v.* Pruden, 11 Mass. 206; Whiting *v.* Cochran, 9 Mass. 532.

Mississippi.—Weathersby *v.* Sinclair, 43 Miss. 189.

Missouri.— Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

New Hampshire.— Eames *v.* Stevens, 26 N. H. 117.

New Jersey.—Wood *v.* Tallman, 1 N. J. L. 177.

New York.— Fields *v.* Moul, 15 Abb. Pr. (N. Y.) 6; Smith *v.* Jansen, 8 Johns. (N. Y.) 111.

North Carolina.—Satterwhite *v.* Carson, 25 N. C. 549.

Ohio.— Nulsen *v.* Wagner, 2 Cinc. Super. Ct. (Ohio) 258.

Pennsylvania.— McMicken *v.* Com., 58 Pa. St. 213.

Texas.— Schuster *v.* L. Bauman Jewelry Co., 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

Virginia.— Defarges *v.* Lipscomb, 2 Munf. (Va.) 451.

West Virginia.— Billingsley *v.* Menear, 44 W. Va. 651, 30 S. E. 61.

rect as to some of them, but erroneous as to others, it may, if the judgment is divisible, be reversed as to the latter and affirmed as to the former.[93]

b. Judgment Entire and Indivisible. But, where a judgment is entire and indivisible, it cannot be reversed in part and affirmed in part, and if there be reversible error therein, it must be set aside *in toto*.[94]

3. Reversal as to One or More Co-Parties. It is a general rule that, in the absence of any statute to the contrary, an entire judgment, jointly binding on several, if reversed as to one, must be reversed as to all.[95] But, where the inter-

Wisconsin.— Rogers *v.* Weil, 12 Wis. 664.

United States.— Great Western Coal Co. *v.* Chicago Great Western R. Co., 98 Fed. 274, 39 C. C. A. 79.

As to ordering a new trial of certain issues only see *infra*, XVIII, E, 6, b, (VI).

As to modification of the judgment in general see *supra*, XVII, D.

Erroneous ruling.—A verdict may be set aside in part and as to certain issues only, when it plainly appears that the erroneous ruling urged as ground for vacation would not and did not affect the findings upon the other issues. Chesapeake, etc., R. Co. *v.* Judd, 20 Ky. L. Rep. 1978, 50 S. W. 539; Burton *v.* Wilmington, etc., R. Co., 84 N. C. 192.

Vacation as to costs.— A decree may be vacated as to costs and affirmed in other particulars. McDonald *v.* Kirby, 3 Heisk. (Tenn.) 607.

Vacation as to damages — Affirmance as to costs.— On a writ of error a judgment may be vacated as to the damages and affirmed as to the costs. Dixon *v.* Pierce, 1 Root (Conn.) 138; Jordan *v.* Dennis, 7 Metc. (Mass.) 590; Cummings *v.* Pruden, 11 Mass. 206.

Effect of partial setting aside.— Where a decree is vacated in part and affirmed as to the residue, the vacation in part does not destroy the lien of so much of the decree as is unvacated or affirmed. Shepherd *v.* Chapman, 83 Va. 215, 2 S. E. 273.

93. Totten *v.* Cooke, 2 Metc. (Ky.) 275; Boeckler *v.* Missouri Pac. R. Co., 10 Mo. App. 448; Crim *v.* Starkweather, 88 N. Y. 339, 42 Am. Rep. 250; Lawson *v.* Pinckney, 40 N. Y. Super. Ct. 187; Sidner *v.* Alexander, 31 Ohio St. 433.

94. *Alabama.*—Alabama Great Southern R. Co. *v.* McAlpine, 80 Ala. 73.

Arkansas.— Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164.

Colorado.— Langley *v.* Grill, 1 Colo. 71.

Connecticut.— Gaylord *v.* Payne, 4 Conn. 190.

Iowa.— Bond *v.* Wabash, etc., R. Co., 67 Iowa 712, 25 N. W. 892; Nevada *v.* Hutchins, 59 Iowa 506, 13 N. W. 634.

Kentucky.— Burris *v.* Johnson, 1 J. J. Marsh. (Ky.) 196.

Missouri.—Killoren *v.* Meehan, 55 Mo. App. 427.

New Hampshire.— Murray *v.* Emmons, 26 N. H. 523.

New Jersey.— Hay *v.* Imley, 3 N. J. L. 401; Riggs *v.* Tyson, 1 N. J. L. 39.

New York.— Gray *v.* Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498, 40 N. Y. St. 478; Wolstenholme *v.* Wolstenholme File Mfg. Co., 64 N. Y. 272; Van Bokkelin *v.* Ingersoll, 5 Wend. (N. Y.) 315.

North Carolina.— Beam *v.* Jennings, 96 N. C. 82, 2 S. E. 245.

Pennsylvania.— Swearingen *v.* Pendleton, 4 Serg. & R. (Pa.) 389.

Tennessee.— Herd *v.* Dew, 8 Humphr. (Tenn.) 501.

Virginia.— Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742.

West Virginia.— Rollins *v.* Fisher, 17 W. Va. 578.

See 3 Cent. Dig. tit. "Appeal and Error," § 4556 *et seq.*

95. *Alabama.*— Huckabee *v.* Nelson, 54 Ala. 12.

Colorado.—Streeter *v.* Marshall Silver Min. Co., 4 Colo. 535; Gargan *v.* School Dist. No. 15, 4 Colo. 53.

Connecticut.— Gaylord *v.* Payne, 4 Conn. 190.

Illinois.— Glos *v.* O'Toole, 184 Ill. 585, 56 N. E. 827; Supreme Lodge, K. of H. *v.* Goldberger, 175 Ill. 19, 51 N. E. 647.

Indiana.— Roy *v.* Rowe, 90 Ind. 54; Gaar *v.* Millikan, 68 Ind. 208.

Iowa.— Cavender *v.* Smith, 5 Iowa 157.

Kentucky.— Joyes *v.* Hamilton, 10 Bush (Ky.) 544; Horine *v.* Woods, Ky. Dec. 235.

Maine.— Benner *v.* Welt, 45 Me. 483.

Maryland.— Hanley *v.* Donoghue, 59 Md. 239, 43 Am. Rep. 554.

Massachusetts.—Whitcomb *v.* Dickinson, 169 Mass. 16, 47 N. E. 426.

Michigan.— Matteson *v.* Nathanson, 38 Mich. 377; Powers *v.* Irish, 23 Mich. 429.

Mississippi.— Jones *v.* Mathews, (Miss. 1888) 4 So. 547.

Nevada.— Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 3 Nev. 336.

New Hampshire.—Burt *v.* Stevens, 22 N. H. 229.

New Jersey.—Wilson *v.* Moore, 26 N. J. L. 458.

New York.—Altman *v.* Hofeller, 152 N. Y. 498, 46 N. E. 961; Van Schoonhoven *v.* Comstock, 1 Den. (N. Y.) 655.

North Carolina.—Tillett *v.* Lynchburg, etc., R. Co., 115 N. C. 662, 20 S. E. 480; Ramsour *v.* Raper, 29 N. C. 346.

Pennsylvania.— Boaz *v.* Heister, 6 Serg. & R. (Pa.) 18.

Tennessee.— Ouly *v.* Dickinson, 5 Coldw. (Tenn.) 486.

Texas.— Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; Robinson *v.* Schmidt, 48 Tex. 13.

Vermont.— Somers *v.* Rogers, 26 Vt. 585.

ests of the parties are several and independent, so that a proper decision of the case as to one is not dependent upon the judgment as to the other, the judgment may be reversed as to the one and affirmed as to the other.[96] And, under the influence of statutes in many jurisdictions, the force of the common-law rule has been much weakened, and the courts are accustomed to reverse as to one or more co-parties and affirm as to the rest whenever the circumstances of the case warrant such course.[97]

4. Conditional Reversal. An appellate court will sometimes attach to a reversal of a judgment or decree such conditions as are warranted or required by the circumstances of the particular case.[98] But, when appellant or plaintiff in error

Virginia.— Lenow *v.* Lenow, 8 Gratt. (Va.) 349; Jones *v.* Raine, 4 Rand. (Va.) 386.

West Virginia.— Lyman *v.* Thompson, 11 W. Va. 427.

Wisconsin.— Kopmeier *v.* Larkin, 47 Wis. 598, 3 N. W. 373.

See 3 Cent. Dig. tit. "Appeal and Error," § 4562 *et seq.*

As to the effect of a reversal on parties not appealing see *supra*, XVIII, B, 8.

Application of rule in equity.— The rule that a judgment is an entire thing, and if set aside as to one must be set aside as to all, is held to apply only to judgments at law. Dickerson *v.* Chrisman, 28 Mo. 134. And see Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. But in Illinois the same rule is applied in equity as at law. Enos *v.* Capps, 12 Ill. 255; Montgomery *v.* Brown, 7 Ill. 581.

96. *Alabama.*—Windham *v.* National Fertilizer Co., 99 Ala. 578, 12 So. 872.

Georgia.—Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955.

Illinois.— Enos *v.* Capps, 12 Ill. 255; Olcott *v.* State, 10 Ill. 481.

Indiana.— Cutchen *v.* Coleman, 13 Ind. 568.

Kentucky.— Joyes *v.* Hamilton, 10 Bush (Ky.) 544; Louisville Southern R. Co. *v.* Tucker, 20 Ky. L. Rep. 1303, 49 S. W. 314.

Mississippi.— Holman *v.* Murdock, 34 Miss. 275.

Missouri.—Wescott *v.* Bridwell, 40 Mo. 146.

Nebraska.—Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592.

New Mexico.— Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 159, 42 Pac. 89.

New York.— Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459.

Ohio.— Reugler *v.* Lilly, 26 Ohio St. 48.

Texas.— Missouri, etc., R. Co. *v.* Enos, 92 Tex. 577, 50 S. W. 928; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33.

Virginia.— Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934.

Wisconsin.—American Button-Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49.

Infancy of party.— The rule that a judgment is a unit, and, on appeal therefrom, if set aside as to one must be set aside as to all, does not apply to cases where the defense of one is purely personal, as infancy. Wilford *v.* Grant, Kirby (Conn.) 114; Lowis *v.* Conrad Seipp Brewing Co., 63 Ill. App. 345; Ingersoll *v.* Ingersoll, 42 Miss. 155. But see Van Schoonhoven *v.* Comstock, 1 Den. (N. Y.) 655; Cole *v.* Pennell, 2 Rand. (Va.) 174.

Plaintiff not entitled to recover.— Where judgment has been rendered for all plaintiffs in an action to recover real estate, but the findings are that the right to recover is in part of them only, the appellate court, on appeal by defendants, will reverse the judgment only as to those plaintiffs not entitled to recover, and affirm it as to the others. Steeple *v.* Downing, 60 Ind. 478. See also Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

97. *Indiana.*— Louisville, etc., R. Co. *v.* Treadway, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

Mississippi.— Cook *v.* Ligon, 54 Miss. 368.

Missouri.— Hunt *v.* Missouri R. Co., 89 Mo. 607, 1 S. W. 127; Mansfield *v.* Allen, 85 Mo. 502.

Nevada.—Wood *v.* Olney, 7 Nev. 109.

New York.—Van Slyck *v.* Snell, 6 Lans. (N. Y.) 299; Geraud *v.* Stagg, 4 E. D. Smith (N. Y.) 27, 10 How. Pr. (N. Y.) 369.

Pennsylvania.— McCanna *v.* Johnston, 19 Pa. St. 434; Jamieson *v.* Pomeroy, 9 Pa. St. 230.

Wisconsin.— Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414; Cairns *v.* O'Bleness, 40 Wis. 469.

See 3 Cent. Dig. tit. "Appeal and Error," § 4564.

Rule doubted.— In Belkin *v.* Hill, 53 Mo. 492, the rule of law that a judgment is an entirety, and if set aside at all must be set aside as to all the parties, was said to be "of doubtful validity now."

98. Thompson *v.* Clay, 1 J. J. Marsh. (Ky.) 413; Usher *v.* Flood, 12 Ky. L. Rep. 721, 17 S. W. 132; Steinau *v.* Gorham, 67 N. Y. Suppl. 628; Stowell *v.* Eldred, 39 Wis. 614.

See 3 Cent. Dig. tit. "Appeal and Error," § 4525.

Allowing vendor time to produce his title.—Where the error complained of is a failure to decree a rescission, upon the failure of a vendor to produce his title when called upon by the purchaser, if peculiar circumstances appear sufficient to account for the omission without attributing it to a want of title, this court, reversing the decree, will direct that time be allowed the vendor to produce his title. Clark *v.* Bell, 4 Dana (Ky.) 15.

Requiring appellant to pay costs of appeal.—A judgment will be set aside only on condition that appellant pay the costs of the appeal, where his own erroneous construction of the pleadings led respondent into error. Lambert *v.* Hoffman, 20 Misc. (N. Y.) 331, 45 N. Y. Suppl. 806.

is entitled to a reversal as a matter of right, the appellate court has no power to impose conditions.[99]

5. Rendering or Ordering Final Judgment — a. In General. While it is true, as stated hitherto, that an appellate court cannot, in rendering its decision, invade the province of the jury,[1] yet such court, on reversing a judgment, will sometimes render final judgment where it manifestly appears that the ends of justice would not be promoted by remanding the cause for a new trial[2] — as, for instance, where there is nothing on which to ground further proceedings.[3] But the more usual practice in such cases is for the appellate court to order the lower court to render the proper judgment instead of rendering such judgment itself.[4]

99. **In vacating an order denying a motion to set aside an execution against the person,** and to release appellant from arrest, the general term has no right to attach to its order of vacation a condition that appellant shall stipulate not to sue for false imprisonment. Chapin *v.* Foster, 101 N. Y. 1, 3 N. E. 786.

1. See *supra*, XVII, G.

On vacating a new trial should not be refused unless it is clear from the pleadings, or from the nature of the controversy, that the party against whom the judgment is pronounced cannot prevail in the suit. Schroeder *v.* Schweizer Lord Transport Versicherungs Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61; Muldoon *v.* Pitt, 54 N. Y. 269; Griffin *v.* Marquardt, 17 N. Y. 28; Minnehaha Nat. Bank *v.* Torrey, 10 S. D. 548, 74 N. W. 890; Keller *v.* Schmidt, 104 Wis. 596, 80 N. W. 935.

As to new trial see *infra*, XVIII, E, 6, b.

2. *Arkansas.*— Haden *v.* Swepston, 64 Ark. 477, 43 S. W. 393.

Arizona.— Egan *v.* Estrada, (Ariz. 1899) 56 Pac. 721.

Connecticut.— Scofield *v.* Lockwood, 35 Conn. 425.

Illinois.— Commercial Ins. Co. *v.* Scammon, 123 Ill. 601, 14 N. E. 666.

Maryland.—Walters *v.* Munroe, 17 Md. 501; Emery *v.* Owings, 6 Gill (Md.) 191.

Missouri.— Hickman *v.* Dill, 39 Mo. App. 246; Musser *v.* Harwood, 23 Mo. App. 495.

New Jersey.—Van Dyke *v.* Van Dyke, 17 N. J. L. 478.

New York.— Howells *v.* Hettrick, 160 N. Y. 308, 54 N. E. 677; Flatow *v.* Van Bremsen, 17 N. Y. Suppl. 506, 44 N. Y. St. 302.

Tennessee.— Jones *v.* Western Union Tel. Co., 101 Tenn. 442, 47 S. W. 699; Boring *v.* Griffith, 1 Heisk. (Tenn.) 456.

Texas.— Cotton *v.* Coit, 88 Tex. 414, 31 S. W. 1061; Brownsville *v.* Basse, 43 Tex. 440.

See 3 Cent. Dig. tit. "Appeal and Error," § 4573 *et seq.*

As to modifying and rendering the judgment which the lower court should have rendered see *supra*, XVIII, D, 3.

As to affirmance where reversal would prove fruitless see *supra*, XVIII, C, 2, b.

Vacating after several trials.— Where a judgment in favor of plaintiff has before been vacated, the court, on setting aside another judgment based on the same evidence, may itself render final judgment without remanding, if it is evident that further litigation can serve no useful purpose. St. Louis, etc. R. Co. *v.* Morgart, 56 Ark. 213, 19 S. W. 751; Central R., etc., Co. *v.* Kent, 91 Ga. 687, 18 S. E. 850; Connor *v.* Akin, 34 Ill. App. 431. And see Ruffners *v.* Barrett, 6 Munf. (Va.) 207.

Where a judgment rendered on a trial without a jury is set aside, the appellate court, in its discretion, will either order a new trial or pronounce the proper judgment, as justice may require.

Illinois.— Peshtigo Co. *v.* Great Western Tel. Co., 50 Ill. App. 624.

Tennessee.— Boothe *v.* Allen, 4 Heisk. (Tenn.) 258.

Texas.— Monroe *v.* Buchanan, 27 Tex. 241; Meyer *v.* Orynski, (Tex. Civ. App. 1894) 25 S. W. 655.

Vermont.— Bishop *v.* Babcock, 22 Vt. 295; Vanderburg *v.* Clark, 22 Vt. 185.

West Virginia.— Nutter *v.* Sydenstricker, 11 W. Va. 535.

Wisconsin.— Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691; Westcott *v.* Miller, 42 Wis. 454.

See 3 Cent. Dig. tit. "Appeal and Error," § 4581.

Where, on appeal in an equitable proceeding, all the necessary facts are before the appellate court, that court will, usually, not remand the case for new trial, but will itself render the proper judgment.

Arkansas.— Biscoe *v.* Tucker, 14 Ark. 515.

Maryland.— Turner *v.* Bouchell, 3 Harr. & J. (Md.) 99.

Missouri.— Barrett *v.* Davis, 104 Mo. 549, 16 S. W. 377; Pfau *v.* Breitenburger, 17 Mo. App. 19.

New York.— Matter of Livingston, 34 N. Y. 555; Van Wyck *v.* Alley, Hopk. (N. Y.) 552.

Wisconsin.— Carney *v.* Emmons, 9 Wis. 114.

See 3 Cent. Dig. tit. "Appeal and Error," § 4581.

3. Vose *v.* Cratty, 66 Ill. App. 472; Stein *v.* Stein, 44 Ill. App. 107; Yawkey *v.* Richardson, 9 Mich. 529, 81 Am. Dec. 769; Watt *v.* Hunter, 20 Tex. Civ. App. 76, 48 S. W. 593, 49 S. W. 412.

4. *Alabama.*— Leeper *v.* Taylor, 47 Ala. 221.

California.— Oakland Paving Co. *v.* Bagge, 70 Cal. 439, 21 Pac. 855.

Kentucky.—Whittemore *v.* Stout, 7 Dana (Ky.) 236.

Minnesota.— Brennan Lumber Co. *v.* Great Northern R. Co., 80 Minn. 205, 83 N. W. 137; Everest *v.* Ferris, 17 Minn. 466.

Missouri.— Deatherage *v.* Sheidley, 50 Mo. App. 490.

b. Where Facts Not Disputed. It is the general rule that, where the facts of a case have been determined and are not in dispute, and the only error lies in the application of the law, the appellate court, on reversing the judgment, need not remand the case for a new trial, but may itself render the proper judgment,[5] or direct the lower court to render it.[6] Thus, where a wrong judgment is rendered on a proper verdict or finding, the appellate court may reverse and render, or direct, the judgment which should have been given below.[7] But a new trial will

Virginia.— Shultz *v.* Hansbrough, 76 Va. 817.

Wisconsin.— Fintel *v.* Cook, 88 Wis. 485, 60 N. W. 788; Pike *v.* Vaughn, 45 Wis. 660.

See 3 Cent. Dig. tit. "Appeal and Error," § 4588 *et seq.*

5. *Iowa.*— Roberts *v.* Corbin, 28 Iowa 355.

Maine.—Waldo County *v.* Moore, 33 Me. 511.

Michigan.—Harrington *v.* Hilliard, 27 Mich. 271; Barman *v.* Carhartt, 10 Mich. 337.

Missouri.— May *v.* Crawford, 150 Mo. 504, 51 S. W. 693; Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

Nebraska.— Furbush *v.* Barker, 38 Nebr. 1, 56 N. W. 996.

New York.— Fairchild *v.* Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; Marquat *v.* Marquat, 12 N. Y. 336; Matter of Rapplee, 66 Hun (N. Y.) 558, 21 N. Y. Suppl. 801, 50 N. Y. St. 239; Peterson *v.* Walsh, 1 Daly (N. Y.) 182.

North Carolina.— Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 715, 36 L. R. A. 402; Isler *v.* Brown, 67 N. C. 175.

Ohio.— Minnear *v.* Holloway, 56 Ohio St. 148, 46 N. E. 636; Yeoman *v.* Lasley, 40 Ohio St. 339.

Oklahoma.— Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627.

Texas.— Brownsville *v.* Basse, 43 Tex. 440; Park *v.* Johnson, 23 Tex. Civ. App. 46, 56 S. W. 759.

Wisconsin.— Swift *v.* Agnes, 33 Wis. 228.

See 3 Cent. Dig. tit. "Appeal and Error," § 4580.

Demurrer to evidence.— Usually, when a court sets aside a judgment rendered below on a demurrer to evidence, it will proceed to render such judgment as should have been given below. Hollimon *v.* Griffin, 37 Tex. 453.

Findings of fact by the judge, by consent, are equivalent to a special verdict, and upon them the revising tribunal may, without sending the case back, pronounce such judgment as is proper. Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40.

No new trial to let in counter-claim.— If the agreed facts warrant a final judgment on an appeal, the cause will not be remanded for the purpose of letting in a counter-claim which can be recovered upon in another action. Davis *v.* Krum, 12 Mo. App. 279.

In Alabama, where a judgment rendered on a demurrer to evidence, special verdict, or case-agreed is set aside, the court is accustomed to remand it in order that the primary tribunal may, in the exercise of its discretion, award a new trial or place the parties in such a condition as will advance the justice of the case. Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371; Rawls *v.* Kennedy, 23 Ala. 240, 58 Am. Dec. 289; Townsend *v.* Harwell, 18 Ala. 301; Edmonds *v.* Edmonds, 1 Ala. 401.

6. *Arizona.*—Arhelger *v.* New York Mut. L. Ins. Co., (Ariz. 1899) 56 Pac. 720.

California.— Bagley *v.* Eaton, 10 Cal. 126; Grayson *v.* Guild, 4 Cal. 122.

Colorado.— Ohio Creek Anthracite Coal Co. *v.* Hinds, 15 Colo. 173, 25 Pac. 502; Tucker *v.* Parks, 7 Colo. 298, 1 Pac. 427, 3 Pac. 486.

Illinois.— Storing *v.* Onley, 44 Ill. 123; Supreme Lodge, K. of H. *v.* Goldberger, 72 Ill. App. 320.

Indiana.— Brown *v.* Ohio, etc., R. Co., 138 Ind. 648, 37 N. E. 717, 38 N. E. 176; Bell *v.* Golding, 27 Ind. 173.

Kansas.— Douglass *v.* Anderson, 32 Kan. 350, 4 Pac. 257.

Kentucky.— Neff *v.* Burch, 15 Ky. L. Rep. 812.

Missouri.— Bruce Lumber Co. *v.* Hoos, 67 Mo. App. 264; Trail *v.* Somerville, 22 Mo. App. 1.

United States.— Ft. Scott *v.* Hickman, 112 U. S. 150, 5 S. Ct. 56, 28 L. ed. 636; Irvine *v.* Angus, 93 Fed. 629, 35 C. C. A. 501; Rathbone *v.* Kiowa County, 83 Fed. 125, 49 U. S. App. 577, 27 C. C. A. 477.

7. *Arkansas.*— Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

Colorado.— Floyd *v.* Colorado Fuel, etc., Co., 10 Colo. App. 54, 50 Pac. 864.

Illinois.— Gage *v.* People, 163 Ill. 39, 44 N. E. 819; McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631.

Indiana.— Lake Shore, etc., R. Co. *v.* Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1.

Kansas.— McGonigle *v.* Gordon, 11 Kan. 167.

Missouri.— Garr *v.* Harding, 37 Mo. App. 24.

Montana.— Kimpton *v.* Jubilee Placer Min. Co., 16 Mont. 379, 41 Pac. 137, 42 Pac. 102.

Nebraska.— Roberson *v.* Reiter, 38 Nebr. 198, 56 N. W. 877.

Oregon.— Oregon R. Co. *v.* Bridwell, 11 Oreg. 282, 3 Pac. 684.

Tennessee.— Park *v.* Walker, 2 Sneed (Tenn.) 503.

Texas.— Young *v.* Van Benthuysen, 30 Tex. 762.

Wisconsin.— Everit *v.* Walworth County Bank, 13 Wis. 419.

United States.—Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573; Germania F. Ins. Co. *v.* Boykin, 12 Wall. (U. S.) 433, 20 L. ed. 442.

be ordered where the facts are in dispute or not found,[8] or the court is satisfied that it would work injustice to give judgment on a special finding of facts.[9]

c. Lack of Jurisdiction Below. The appellate court will not, on reversing a judgment, remand the cause for further proceedings where the court below had no jurisdiction of the subject-matter[10] or of the person.[11]

d. Want of Cause of Action — (i) *In General.* Where, on appeal from a judgment in favor of plaintiff below, the appellate court decides that plaintiff has no cause of action and cannot succeed on another trial, it will not order a new trial on reversing the judgment, but will itself render the proper judgment,[12] or

Arrest of judgment.— On reversing an order granting a motion in arrest of judgment, the appellate court will, usually, render or direct final judgment. Gordon *v.* Downey, 1 Gill (Md.) 41; Wilson *v.* Gray, 8 Watts (Pa.) 25; Sims *v.* Alderson, 8 Leigh (Va.) 479. But see O'Reilly *v.* Murdoch, 1 Gill (Md.) 32, in which the cause was remanded to give defendant an opportunity of appealing from an instruction against him. See also Favor *v.* Philbrick, 5 N. H. 477.

Entering judgment on former verdict.— In some states, where a verdict in favor of one party is improperly set aside, and, on a second trial, judgment is given for the other party, the appellate court, on reversing such judgment, may enter or direct judgment for the first party on the former verdict. Louisville, etc., R. Co. *v.* Ricketts, 21 Ky. L. Rep. 662, 52 S. W. 939; Wood *v.* American L. Ins. Trust Co., 7 How. (Miss.) 609; Stearns *v.* Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758; Johnson *v.* McClung, 26 W. Va. 659. But see Zobel *v.* Bauersachs, 55 Nebr. 20, 75 N. W. 43. In Edmunds *v.* Mister, 58 Miss. 765, the jury in the first trial, disregarding the instructions of the court, found for plaintiff; and on the second trial, following the instructions, the jury found for defendant. It was held that, on overruling the law given the jury at the second trial, the appellate court would not give judgment on the first verdict.

New trial illegally granted.—Where a verdict is illegally set aside by the trial judge, and a new trial granted, in vacation and after his term of office has expired, judgment will be entered in the supreme court on appeal. Coopwood *v.* Prewett, 30 Miss. 206.

8. As to granting a new trial where the facts are disputed or not found see *infra*, XVIII, E, 6, b, (III).

Rule stated.—When, on an appeal, error is found as to the proceedings anterior to and including the verdict, the supreme court can only declare error and order a new trial. When the error is solely in the judgment rendered upon an admitted or ascertained state of facts, then, and in such case only, can the judgment below be reversed, using the word in its strict sense. Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 715, 36 L. R. A. 402.

9. Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786; Bonine *v.* Denniston, 41 Mich. 292, 1 N. W. 1024.

10. *Alabama.*— Dunham *v.* Hatcher, 31 Ala. 483.

Illinois.— Ide *v.* Sayer, 129 Ill. 230, 21 N. E. 810; Ditch *v.* Edwards, 2 Ill. 127, 26 Am. Dec. 414.

Maryland.— Kimberly *v.* Henderson, 29 Md. 512.

Pennsylvania.—Walker *v.* Marine Nat. Bank, 98 Pa. St. 574.

Texas.— Marx *v.* Carlisle, 1 Tex. App. Civ. Cas. § 94.

Wisconsin.— Spaulding *v.* Milwaukee, etc., R. Co., 57 Wis. 304, 14 N. W. 368, 15 N. W. 482.

United States.—Ashley *v.* Presque Isle County, 60 Fed. 55, 16 U. S. App. 656, 8 C. C. A. 455.

See 3 Cent. Dig. tit. "Appeal and Error," § 4575.

As to jurisdictional defects as ground for reversal see *supra*, XVIII, E, 1, a.

11. Imperial Bldg. Co. *v.* Cook, 46 Ill. App. 279; Jacobs *v.* Sartorius, 3 La. Ann. 9; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Webb *v.* Leominster Shirt Co., 101 Mich. 136, 59 N. W. 397.

See 3 Cent. Dig. tit. "Appeal and Error," § 4576.

12. *Colorado.*— Leadville *v.* Bishop, 14 Colo. App. 517, 61 Pac. 58.

Illinois.— Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395.

Maryland.— Mudd *v.* Harper, 1 Md. 110, 54 Am. Dec. 644; Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Michigan.— Dayton *v.* Fargo, 45 Mich. 153, 7 N. W. 758; Sheldon *v.* Rounds, 40 Mich. 425.

Mississippi.— Bailey *v.* Gaskins, 6 How. (Miss.) 519.

Missouri.— Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; Carroll *v.* Inter-State Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

New York.— Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680; Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571.

Pennsylvania.— Griffith *v.* Eshelman, 4 Watts (Pa.) 51; Miller *v.* Ralston, 1 Serg. & R. (Pa.) 309.

South Carolina.— Sampson *v.* Singer Mfg. Co., 5 S. C. 465.

Texas.—Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581; Boettcher *v.* Prude, 32 Tex. 472.

United States.— Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920.

See 3 Cent. Dig. tit. "Appeal and Error," § 4577.

order it rendered in the lower court.[13] Thus, where it is apparent that there can be no new evidence, introduced by the party against whom a reversal is pronounced, to change the aspect of the case, a new trial will not be ordered.[14]

(II) *In Equity — Dismissal of Bill.* On appeal in chancery, if the bill is obviously devoid of equity and cannot be remedied by amendment, and no supplementary evidence can be offered which will change the result, the appellate court, on finding error, will dismiss the bill,[15] or direct its dismissal below.[16] Where the justice and equity of the case require it, the dismissal will be without prejudice.[17]

e. Insufficiency of Defense. Where plaintiff has made out a *prima facie* case, and defendant has set up no defense sufficient to prevent or bar the right of recovery, the appellate court, on reversing a judgment in defendant's favor, will, sometimes, render the proper judgment for plaintiff,[18] or direct the court below to do so.[19] But, if the reversal be for a mere deficiency in defendant's proof which may be supplied on another trial, a *venire de novo* will be directed.[20]

6. Remand For Further Proceedings — a. In General. While it is impracticable to lay down rigid rules regarding the power of appellate courts to remand causes,

As to remanding with leave to amend the pleadings see *infra*, XVIII, E, 6, c.

Good cause imperfectly stated.—Where the error lies in the imperfect statement of a good cause of action and not in the want of any cause, it is proper to remand the case for amendment. Evans *v.* Thompson, 12 Heisk. (Tenn.) 534.

13. *California.*— Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

Louisiana.— Louisiana State Bank *v.* Cammack, 21 La. Ann. 133.

Missouri.— Rhodes *v.* Farish, 16 Mo. App. 430.

New York.—Waldron *v.* Hendrickson, 40 N. Y. App. Div. 7, 57 N. Y. Suppl. 561.

South Carolina.—Anderson *v.* Woodward, 47 S. C. 203, 24 S. E. 1037.

Wisconsin.— Learned *v.* Bishop, 42 Wis. 470.

United States.—Churchill *v.* Buck, 102 Fed. 38, 42 C. C. A. 148.

14. *Arkansas.*— Pennington *v.* Underwood, 56 Ark. 53, 19 S. W. 108.

Georgia.— Rowe *v.* Ware, 30 Ga. 278.

Illinois.— Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304; Senger *v.* Harvard, 147 Ill. 304, 35 N. E. 137.

Iowa.— Brink *v.* Morton, 2 Iowa 411.

Kentucky.—Rosenfield *v.* Goldsmith, 11 Ky. L. Rep. 662, 12 S. W. 928, 13 S. W. 3.

Maryland.—Emery *v.* Owings, 6 Gill (Md.) 191.

Missouri.— Berning *v.* Medart, 56 Mo. App. 443; Speak *v.* Ely, etc., Dry Goods Co., 22 Mo. App. 122.

New York.—Edmonston *v.* McLoud, 16 N. Y. 543; Stevenson *v.* Spratt, 35 N. Y. Super. Ct. 496.

Texas.—Arnold *v.* Ellis, 20 Tex. Civ. App. 262, 48 S. W. 883; Burkitt *v.* Key, (Tex. Civ. App. 1897) 42 S. W. 231.

Virginia.— Calvert *v.* Bowdoin, 4 Call (Va.) 217.

Washington.— Bernhard *v.* Reeves, 6 Wash. 424, 33 Pac. 873.

West Virginia.— State *v.* Seabright, 15 W. Va. 590.

15. *Alabama.*— Bradford *v.* Bradford, 66 Ala. 252; Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; Gentry *v.* Rogers, 40 Ala. 442.

Georgia.—Summerville *v.* Reid, 35 Ga. 47.

Illinois.— Carpenter *v.* Calvert, 4 Ill. App. 171.

Michigan.— Hurlbut *v.* Britain, 2 Dougl. (Mich.) 189.

Texas.— Crawford *v.* Wingfield, 25 Tex. 414.

West Virginia.— Bier *v.* Smith, 25 W. Va. 830.

16. Castner *v.* Coffman, 178 U. S. 168, 20 S. Ct. 842, 44 L. ed. 1021; Mast *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856. And see Wilsons *v.* Harper, 25 W. Va. 179.

17. Holley *v.* Wilkinson, 31 Ala. 196; Edwards *v.* Edwards, 30 Ala. 394; Lang *v.* Waring, 17 Ala. 145.

Reversing absolute dismissal.— If a bill be dismissed absolutely by the lower court when it should only be dismissed without prejudice, the appellate court will reverse the decree and render or direct the proper decree, dismissing without prejudice. Danforth *v.* Herbert, 33 Ala. 497; Cameron *v.* Abbott, 30 Ala. 416; McElderry *v.* Shipley, 2 Md. 25, 56 Am. Dec. 703; Rogers *v.* Durant, 106 U. S. 644, 1 S. Ct. 623, 27 L. ed. 303.

18. *Alabama.*— McCausland *v.* Drake, 3 Stew. (Ala.) 344.

Louisiana.— Bauer *v.* Martin, 22 La. Ann. 326.

Maryland.—Wall *v.* Wall, 2 Harr. & G. (Md.) 79.

Mississippi.—Atkinson *v.* Fortinberry, 7 Sm. & M. (Miss.) 302.

Texas.— Gregory *v.* Montgomery, 23 Tex. Civ. App. 68, 56 S. W. 231.

See 3 Cent. Dig. tit. "Appeal and Error," § 4578 *et seq.*

19. Nicholson *v.* Walker, 25 Mo. App. 368; Russell *v.* Brown, 21 Mo. App. 51; Retzer *v.* Wood, 109 U. S. 185, 3 S. Ct. 164, 27 L. ed. 900.

20. Shotwell *v.* Dennman, 1 N. J. L. 342.

yet it may be stated as broadly true that, whenever it appears to be necessary for the purposes of justice, the appellate court will remand for such further proceedings as the circumstances of the particular case may require.[21]

b. For New Trial—(I) *In General.* It is difficult to lay down general rules as to when a new trial will be ordered on the setting aside of a judgment, the matter being one largely in the discretion of the appellate court.[22] It may be stated, however, that in actions at law there will, usually, be a remand for a new trial,[23] unless the case be one in which there is no dispute as to facts,[24] or it is quite evident that a new trial would serve no useful purpose.[25] The object of courts is to

21. *Connecticut.*—Dunton *v.* Mead, 6 Conn. 418.

District of Columbia.— Butler *v.* Strong, 3 App. Cas. (D. C.) 80.

Iowa.— Byington *v.* Buckwalter, 7 Iowa 512, 74 Am. Dec. 279.

Kentucky.— Baker *v.* Red, 4 Dana (Ky.) 158.

Louisiana.— Landry *v.* Adeline Sugar Factory Co., 50 La. Ann. 542, 23 So. 621.

Maryland.— Bull *v.* Pyle, 41 Md. 419.

Massachusetts.— Old Colony R. Co. *v.* Wilder, 137 Mass. 536.

Michigan.—Wilkins *v.* Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

Mississippi.— Griffin *v.* Byrd, 74 Miss. 32, 19 So. 717.

North Carolina.—Jones *v.* Cotten, 108 N. C. 457, 13 S. E. 161.

Ohio.— Young *v.* Schenck, 6 Ohio St. 110.

Oregon.— Smith *v.* Wilkins, 31 Oreg. 421, 51 Pac. 438.

Pennsylvania.— Lindemuth's Estate, 5 Watts (Pa.) 145.

Tennessee.—Avery *v.* Warren, 12 Heisk. (Tenn.) 559.

Washington.— Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

West Virginia.— Baldenberg *v.* Warden, 14 W. Va. 397.

United States.— Blumenthal *v.* Shaw, 70 Fed. 801, 28 U. S. App. 597, 17 C. C. A. 423.

As to the proper mode of remitting the cause and the proceedings subsequent to the remand see *infra*, XVIII, G.

As to remitting record to lower court to correct defects or supply omissions see *supra*, XIII, J, 2.

Where new trial not necessary.— Sometimes it is not necessary to order new trial, but the cause may be remanded for further proceedings from the point where the error was committed. Felton *v.* Spiro, 78 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321. And see Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030.

22. *Connecticut.*— Cowles *v.* Coe, 21 Conn. 220.

Georgia.— Justices Inferior Ct. *v.* Griffin, etc., Plank Road Co., 15 Ga. 39.

Michigan.— Herring *v.* Hock, 1 Mich. 501.

Pennsylvania.— Fries *v.* Pennsylvania R. Co., 98 Pa. St. 142.

South Carolina.— Durant *v.* Atkinson, 2 Bailey (S. C.) 18; McKie *v.* Garlington, 3 McCord (S. C.) 276.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4597 *et seq.*; 4604 *et seq.*

In Vermont, if error is shown in proceedings by bill of exceptions, the appellate court has no discretion but to grant a new trial (Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446); but, on a petition for a new trial, the court will exercise its discretion (Beckwith *v.* Middlesex, 20 Vt. 593).

23. As to what questions will be determined by an appellate court see *supra*, XVII.

In Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367, the court said: "In general, where a judgment is reversed a new trial should be awarded, and in most cases it is imperatively necessary for the attainment of justice."

By what propriety of new trial determined.— Under Md. Code, art. 5, § 20, the question whether "a new trial ought to be had" must be determined according to the rules and principles of law and from the record before the appellate court at the time of its decision. Archer *v.* State, 74 Md. 410, 22 Atl. 737; McCann *v.* Sloan, 26 Md. 81.

24. As to rendering or ordering judgment where there is no dispute as to the facts see *supra*, XVIII, E, 5, b.

Cannot exercise original jurisdiction.—Appellate courts usually have no original jurisdiction in actions at law, and if, after vacating the judgment, it is necessary to determine questions other than those purely of law, the cause will be remanded to the lower court.

California.— Shively *v.* Eureka Tellurium Gold Min. Co., 129 Cal. 293, 61 Pac. 939; Dyer *v.* Brogan, 57 Cal. 234.

Illinois.— Spring Valley *v.* Spring Valley Coal Co., 173 Ill. 497, 50 N. E. 1067.

Louisiana.— Campbell *v.* Miller, 3 Mart. N. S. (La.) 149.

Oregon.— Fisk *v.* Henarie, 14 Oreg. 29, 13 Pac. 193.

Texas.— Martin-Brown Co. *v.* Pool, (Tex. Civ. App. 1897) 40 S. W. 820.

Virginia.— Monteith *v.* Com., 15 Gratt. (Va.) 172.

25. As to rendering or ordering final judgment on reversal see *supra*, XVIII, E, 5.

As to affirmance where reversal would prove fruitless see *supra*, XVIII, C, 2, b.

Possibility of success on new trial.— On setting aside a judgment because of a defect or insufficiency in the evidence, the appellate court should order a new trial unless it be manifest that the party against whom error is adjudged would not, on another trial, be entitled to a judgment under any possible state of proof applicable to the issues.

Connecticut.— Smith *v.* Allen, 5 Day (Conn.) 337.

ascertain the truth of facts between the parties litigant; and so, in the exercise of a sound judicial discretion, an appellate court will order a new trial whenever it appears that the ends of justice will best be served by such course.[26]

(II) *For Errors Occurring at Trial*—(A) *In General.* Where a judgment in an action at law is set aside for an error committed in the course of the trial below, a new trial will, usually, be ordered.[27] Thus, the cause will be remanded for a new trial where the lower court has erred in instructing the jury on a material point,[28] or in improperly admitting or excluding material evidence.[29]

Illinois.— Neer *v.* Illinois Cent. R. Co., 138 Ill. 29, 27 N. E. 705.

Kentucky.— Broaddus *v.* Broaddus, 10 Bush (Ky.) 299.

Louisiana.— Powell *v.* Hopson, 13 La. Ann. 626; McMaster *v.* Stewart, 11 La. Ann. 546.

Maine.— Crawford *v.* Howard, 30 Me. 422.

New Jersey.— Shotwell *v.* Dennman, 1 N. J. L. 342.

New York.— New *v.* New Rochelle, 158 N. Y. 41, 52 N. E. 647; Benedict *v.* Arnoux, 154 N. Y. 715, 49 N. E. 326.

Ohio.— Minnear *v.* Holloway, 56 Ohio St. 148, 46 N. E. 636.

Pennsylvania.— Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672.

South Carolina.— Townes *v.* Augusta, 46 S. C. 15, 23 S. E. 984; Sampson *v.* Singer Mfg. Co., 5 S. C. 456.

Virginia.— Thornton *v.* Stewart, 7 Leigh (Va.) 128.

Washington.—Edmunds *v.* Black, 13 Wash. 490, 43 Pac. 330.

Wisconsin.—Wight *v.* Rindskopf, 43 Wis. 344.

26. *Indiana.*— Buchanan *v.* Milligan, 108 Ind. 433, 9 N. E. 385; Stuart *v.* Patrick, 5 Ind. App. 50, 58, 30 N. E. 814.

Louisiana.—Byrne *v.* Hebert, 51 La. Ann. 548, 25 So. 586; Lanfear *v.* Harper, 16 La. Ann. 382.

Maryland.—Whyte *v.* Betts Mach. Co., 61 Md. 172; Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

New Hampshire.—Chase *v.* Brown, 32 N. H. 130.

Pennsylvania.—Freiler *v.* Kear, 126 Pa. St. 470, 17 Atl. 906, 3 L. R. A. 839; Wharton *v.* Williamson, 13 Pa. St. 273.

South Carolina.— Wood *v.* Atlanta, etc., Air-Line R. Co., 19 S. C. 579; Blythe *v.* Sutherland, 3 McCord (S. C.) 258.

Tennessee.— Settle *v.* Marlow, 12 Lea (Tenn.) 472.

Texas.—Kuhlman *v.* Medlinka, 29 Tex. 385; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1900) 56 S. W. 228.

Washington.— Libbey *v.* Packwood, 11 Wash. 176, 39 Pac. 647.

Wisconsin.— Curtis *v.* Brown County, 22 Wis. 167.

United States.—Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055.

Order denying new trial.— On setting aside an order denying a new trial, the appellate court will remand the cause for a new trial. Payne *v.* Chicago, etc., R. Co., 47 Iowa 605; Pollock *v.* Pollock, 9 Misc. (N. Y.) 82, 29 N. Y. Suppl. 37, 59 N. Y. St. 750; Gay *v.* Davey, 47 Ohio St. 396, 25 N. E. 425; Miller *v.* Sullivan, 26 Ohio St. 639.

When judgment has been rendered by a judge disqualified by relationship to the parties, the judgment will be reversed and the case sent back for trial in the court below. Chase *v.* Weston, 75 Iowa 159, 39 N. W. 246.

27. *Montana.*— Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558, 39 Pac. 1054.

Nebraska.— Lancaster County Bank *v.* Gregory, 24 Nebr. 656, 39 N. W. 835.

New York.— Bliss *v.* Fosdick, 76 Hun (N. Y.) 508, 27 N. Y. Suppl. 1053, 58 N. Y. St. 498; Meyer *v.* Louisville, 26 Barb. (N. Y.) 609.

Pennsylvania.—Griffith *v.* Eshelman, 4 Watts (Pa.) 51.

Wisconsin.—Hayward *v.* Ormsbee, 7 Wis. 111.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 4597 *et seq.*; 4604 *et seq.*

Expression of opinion by trial judges.— Under Ga. Rev. Code, § 3183, a new trial must always be granted where the trial judge expresses any opinion as to what has been proved, even though it appear that substantial justice has been done. Phillips *v.* Williams, 39 Ga. 597.

28. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

Colorado.— Colorado Fuel, etc., Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875.

Georgia.— Wynn *v.* Georgia R., etc., Co., 43 Ga. 163; Adams *v.* Fitzgerald, 14 Ga. 36.

New York.— Dickerson *v.* Wason, 48 Barb. (N. Y.) 412.

Tennessee.— Memphis First Nat. Bank *v.* Oldham, 6 Lea (Tenn.) 718; Pilcher *v.* Hart, 1 Humphr. (Tenn.) 523.

See 3 Cent. Dig. tit. "Appeal and Error," § 4604 *et seq.*

29. *Alabama.*— Bliss *v.* Winston, 1 Ala. 344.

Kentucky.—Couadeau *v.* American Acc. Co., 95 Ky. 280, 25 S. W. 6.

Louisiana.— Noble *v.* Flower, 36 La. Ann. 737; Walpole *v.* Renfroe, 16 La. Ann. 92.

Maryland.— Spring Garden Mut. Ins. Co. *v.* Evans, 15 Md. 54, 74 Am. Dec. 555.

Massachusetts.— Keyes *v.* Stone, 5 Mass. 391.

Michigan.— Starkweather *v.* Martin, 28 Mich. 471.

New Jersey.— Bordentown, etc., Steamboat Co. *v.* Flanagan, 41 N. J. L. 115.

(B) *Preventing Full Development of Merits.* Where, by reason of erroneous rulings below, either party has been prevented from developing fully the merits of his case, the appellate court will, usually, remand the cause to the trial court for a determination of the merits.[30]

(III) *Facts Disputed or Not Found.* On setting aside a judgment in an action at law, the appellate court will not undertake to render or order final judgment where the facts in issue are controverted or not definitely settled, but will order a new trial.[31] And so, where the facts have been found so imperfectly as not to authorize a judgment thereon, the appellate court will remand the cause for further proceedings.[32]

New York.— Sullivan *v.* Metropolitan St. R. Co., 37 N. Y. App. Div. 491, 56 N. Y. Suppl. 88.

South Carolina.— Stark *v.* Hopson, 22 S. C. 42; Gage *v.* McIlwain, 1 Strobh. (S. C.) 135.

South Dakota.— Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894.

Texas.— Coffin *v.* Loomis, (Tex. Civ. App. 1897) 41 S. W. 511.

United States.— Drummond *v.* Magruder, 9 Cranch (U. S.) 122, 3 L. ed. 677; Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666.

See 3 Cent. Dig. tit. "Appeal and Error," § 4604 *et seq.*

30. *Alabama.*— Childress *v.* Harrison, 47 Ala. 556; Bondurant *v.* Sibley, 29 Ala. 570.

Arkansas.— Niemeyer *v.* Hudspeth, 54 Ark. 88, 14 S. W. 1090.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

Indiana.— Pittsburgh, etc., R. Co. *v.* Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101.

Louisiana.— Wattles *v.* Conner, 9 La. Ann. 227; Brown *v.* Brown, 2 Mart. N. S. (La.) 441.

Maryland.— Howard *v.* Carpenter, 22 Md. 249; Walters *v.* Munroe, 17 Md. 501.

Mississippi.— Hart *v.* Chemical Nat. Bank, (Miss. 1900) 27 So. 926; Martin *v.* Kelly, 59 Miss. 652.

Nebraska.— Sawyer *v.* Sweet, 33 Nebr. 630, 50 N. W. 954.

New Jersey.—Osborne *v.* Tunis, 25 N. J. L. 633; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— Lopez *v.* Campbell, 163 N. Y. 340, 57 N. E. 501; Cuff *v.* Dorland, 57 N. Y. 560.

South Carolina.— Brown *v.* Brown, 45 S. C. 408, 23 S. E. 137.

Texas.—Pierpont *v.* Threlkeld, 13 Tex. 244; Rhodes *v.* Alexander, (Tex. Civ. App. 1898) 47 S. W. 754.

Vermont.—Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656.

Virginia.— Anderson *v.* Leitch, 1 Leigh (Va.) 462.

Wisconsin.— Reed *v.* Jones, 8 Wis. 421.

See 3 Cent. Dig. tit. "Appeal and Error," § 4608.

Inequitable defense.—A judgment will not be set aside to enable a defendant to avail himself of a possible defense, which, although good in law, is without equity. Hill *v.* Robbins, 22 Mich. 475.

Merits not presented.—Where, in a foreclosure suit, certain defendants pleaded subsequent mortgage liens, and, through misapprehension as to the correct practice in such cases, were prevented from properly presenting the merits of their claims on the record, it was held that, under the peculiar circumstances, the appellate court was justified, after vacating the judgment, in remanding the case for a new trial in the lower court on issues properly framed. Ladd *v.* Mason, 10 Oreg. 308.

31. *California.*— Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

Colorado.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

District of Columbia.— Bradley *v.* Galt, 5 Mackey (D. C.) 386.

Illinois.— Spring Valley *v.* Spring Valley Coal Co., 173 Ill. 497, 50 N. E. 1067; Neer *v.* Illinois Cent. R. Co., 138 Ill. 29, 27 N. E. 705.

Iowa.— Pettus *v.* Farrell, 59 Iowa 296, 13 N. W. 319; Artz *v.* Chicago, etc., R. Co., 38 Iowa 293.

Louisiana.— Varion *v.* Bell, 12 La. 384.

Michigan.— Baylis *v.* Cronkite, 39 Mich. 413; Flint, etc., R. Co. *v.* Weir, 37 Mich. 111, 26 Am. Rep. 499.

New York.— Ross *v.* Caywood, 162 N. Y. 259, 56 N. E. 629; Cuff *v.* Dorland, 57 N. Y. 560.

Ohio.—Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

Tennessee.— Williamson *v.* Smith, 1 Coldw. (Tenn.) 1, 78 Am. Dec. 478.

Texas.—Morrison *v.* Thomas, (Tex. 1898) 48 S. W. 500; Patrick *v.* Smith, 90 Tex. 267, 38 S. W. 17.

Wisconsin.— Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17; Curtis *v.* Brown County, 22 Wis. 167.

United States.—St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722.

See 3 Cent. Dig. tit. "Appeal and Error," § 4610.

32. *Connecticut.*— Cothren's Appeal, 59 Conn. 545, 22 Atl. 297.

Indiana.— Matchett *v.* Cincinnati, etc., R. Co., 132 Ind. 334, 31 N. E. 792; Chicago, etc., R. Co. *v.* Meyer, 117 Ind. 563, 19 N. E. 320.

Kansas.— Atchison, etc., R. Co. *v.* Woodcock, 42 Kan. 344, 22 Pac. 421.

Louisiana.— Mandeville *v.* Baudot, 48 La. Ann. 248, 19 So. 134; Collins *v.* Graves, 13 La. Ann. 95.

(iv) *Imperfect Record.* Where, without the fault of appellant, the record is so imperfect or confused that the appellate court cannot render judgment with safety to the rights of the parties, a new trial will be ordered.[33] Thus, where papers necessary to present the case for review have been lost and their loss cannot be supplied, the cause will be remanded.[34]

(v) *How Many New Trials Permissible.* In many jurisdictions there are statutes limiting the number of new trials which may be granted to the same party, and such statutes have, sometimes, been held to apply to appellate courts.[35] But, by the weight of authority, an appellate court is not prevented by such a statute from ordering a new trial for error of law, regardless of the number of trials already had.[36]

(vi) *Partial New Trial.* In a number of jurisdictions it is the practice, on holding a judgment erroneous for errors relating only to distinct and specific issues, independent of the remaining issues which have been properly tried, to remand the case for a new trial as to such specific issues alone.[37] But such a rule

Michigan.— Cram *v.* Stiles, 47 Mich. 129, 10 N. W. 168; Carroll *v.* Grand Trunk R. Co., 19 Mich. 94.

Minnesota.— Rich *v.* Rich, 12 Minn. 468.

Montana.— Lebcher *v.* Custer County, 9 Mont. 315, 23 Pac. 713.

New York.— Potter *v.* Carpenter, 71 N. Y. 74; L'Artiste Pub. Co. *v.* Walker, 9 Misc. (N. Y.) 491, 30 N. Y. Suppl. 229, 61 N. Y. St. 113.

North Carolina.— New Hanover Bank *v.* Blossom, 89 N. C. 341; Sheppard *v.* Bland, 87 N. C. 163.

Pennsylvania.— Muhlenberg *v.* Brock, 25 Pa. St. 517; Thayer *v.* Society United Brethren, 20 Pa. St. 60.

South Carolina.— Caston *v.* Perry, Bailey Eq. (S. C.) 96.

Texas.— Long *v.* Chicago, etc., R. Co., (Tex. 1900) 57 S. W. 802; Missouri, etc., R. Co. *v.* Levy, (Tex. Civ. App. 1899) 50 S. W. 1026.

Wisconsin.— Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628; Winslow *v.* Urquhart, 39 Wis. 260.

United States.—Saltonstall *v.* Birtwell, 150 U. S. 417, 14 S. Ct. 169, 37 L. ed. 1128; Barnes *v.* Williams, 11 Wheat. (U. S.) 415, 6 L. ed. 508.

33. *California.*— Reed *v.* Jourdain, 1 Cal. 101.

Florida.— Pearson *v.* Grice, 8 Fla. 214.

Illinois.— Danforth *v.* McIntyre, 11 Ill. App. 417.

Indiana.— Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

Iowa.—Lyon *v.* Tevis, 8 Iowa 79.

Kentucky.—Stipp *v.* Alkire, 5 J. J. Marsh. (Ky.) 4; Bell *v.* Bullitt, 3 T. B. Mon. (Ky.) 200.

Louisiana.— Hagan *v.* Cox, 16 La. Ann. 374.

Maryland.— Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

Michigan.— Biddle *v.* Wendell, 37 Mich. 452; Tucker *v.* Tucker, 26 Mich. 443.

Mississippi.— Marx *v.* State, 61 Miss. 478.

North Carolina.— Cansler *v.* Cobb, 77 N. C. 30; Brown *v.* Kyle, 47 N. C. 442.

Ohio.— Lawrence *v.* McGregor, 5 Ohio 309.

Virginia.— Bowyer *v.* Chestnut, 4 Leigh (Va.) 1; Thompson *v.* Cumming, 2 Leigh (Va.) 321.

West Virginia.— Stockton *v.* Copeland, 23 W. Va. 696; Boggs *v.* Johnson, 9 W. Va. 434.

Wisconsin.— Canfield *v.* Bayfield County, 74 Wis. 60, 41 N. W. 437, 42 N. W. 100; Wittmann *v.* Watry, 45 Wis. 491.

As to what the record on appeal must contain see *supra*, XIII.

34. Mulligan *v.* New Orleans, 22 La. Ann. 11; Abat *v.* Harris, 16 La. Ann. 183; Clemmons *v.* Archbell, 107 N. C. 653, 12 S. E. 572; Burton *v.* Green, 94 N. C. 215; Nichols *v.* Dunning, 91 N. C. 4; Weisiger *v.* Chisholm, 22 Tex. 670.

35. Carmichael *v.* Geary, 27 Ind. 362; Knoxville Iron Co. *v.* Dobson, 15 Lea (Tenn.) 409.

36. *Illinois.*— Illinois Cent. R. Co. *v.* Patterson, 93 Ill. 290; Stanberry *v.* Moore, 56 Ill. 472.

Kentucky.— Doe *v.* Lively, 1 Dana (Ky.) 60.

Mississippi.—Garnett *v.* Kirkman, 33 Miss. 389.

Missouri.— Harrison *v.* Cachelin, 23 Mo. 117; Boyce *v.* Smith, 16 Mo. 317.

Texas.— Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

See 3 Cent. Dig. tit. "Appeal and Error," § 4613.

37. *California.*— Jungerman *v.* Bovee, 19 Cal. 354.

Georgia.— Georgia R., etc., Co. *v.* Daniel, 89 Ga. 463, 15 S. E. 538.

Iowa.— McAfferty *v.* Hale, 24 Iowa 355.

Louisiana.— Ward *v.* Acklen, 9 La. Ann. 443.

Maryland.— Bowie *v.* Jones, 1 Gill (Md.) 208.

Massachusetts.— Williams *v.* Henshaw, 12 Pick. (Mass.) 378, 23 Am. Dec. 614; Winn *v.* Columbian Ins. Co., 12 Pick. (Mass.) 279.

Missouri.—Oberbeck *v.* Mayer, 59 Mo. App. 289; Paddock-Hawley Iron Co. *v.* Graham, 48 Mo. App. 638. But see Needles *v.* Burke, 27 Mo. App. 211.

New Hampshire.— Lishon *v.* Lyman, 49 N. H. 553.

will not apply to a case which has not been submitted to a jury in the mode required by law.[38]

c. To Allow Amendments — (I) *In General.* In furtherance of justice an appellate court may, usually, remand a cause to allow amendments of the pleadings, where the defects therein are curable by amendment.[39] But the cause will not be remanded merely to allow an amendment which the party has refused to

North Carolina.— Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; Jones *v.* Coffey, 109 N. C. 515, 14 S. E. 84.

Texas.— Hirams *v.* Coit, Dall. (Tex.) 449.

Wisconsin.—Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97; Hegar *v.* Chicago, etc., R. Co., 26 Wis. 624.

See 3 Cent. Dig. tit. "Appeal and Error," § 4614.

Rule stated.— If the jury omit to find a matter which goes to the very point of the issue, the new trial granted by the supreme court must be *in toto*. But when, on the first trial, all the material issues have been correctly found, and the error does not touch the merits, the supreme court may award a partial new trial to correct the error. Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; Holmes *v.* Godwin, 71 N. C. 306.

Assessment of damages.—A cause may be remanded, in order to have the damages assessed by a jury, without ordering a new trial of the other questions decided below. Patterson *v.* Blakeney, 33 Ala. 338; Davenport *v.* Bradley, 4 Conn. 309; Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Entire new trial.— It seems that, even where the issues involved are independent of each other, the court may, if it thinks proper, grant a new trial of the entire cause and not confine it to particular issues. Porter *v.* Sherman County Banking Co., 40 Nebr. 274, 58 N. W. 721; Foster *v.* Browning, 4 R. I. 47, 67 Am. Dec. 505; Brown *v.* Hendersons, 4 Munf. (Va.) 492.

In Louisiana, if appellant's right to appeal is contested and the facts do not appear in the record, the case will be remanded to the lower court to try that issue. Allen's Succession, 43 La. Ann. 1071, 10 So. 304; President, etc., Ascension Church *v.* Perche, 39 La. Ann. 223, 1 So. 543; State *v.* Echeveria, 33 La. Ann. 709; Carroll's Succession, 32 La. Ann. 141; James *v.* Fellowes, 23 La. Ann. 37.

38. Hodges *v.* Easton, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169.

39. *Alabama.*— Langley *v.* Langley, 121 Ala. 70, 25 So. 707; Ryall *v.* Prince, 71 Ala. 66.

Arkansas.—Polk *v.* Gardner, 67 Ark. 441, 55 S. W. 840.

California.— Blood *v.* Fairbanks, 48 Cal. 171; Fish *v.* Redington, 31 Cal. 185.

Connecticut.— Pond *v.* Smith, 4 Conn. 297.

Florida.— Reddick *v.* Mickler, 23 Fla. 335, 2 So. 698.

Georgia.— Trippe *v.* Winter, 83 Ga. 359, 9 S. E 672.

Idaho.— Boise City *v.* Artesian Hot, etc., Water Co., (Ida. 1895) 39 Pac. 566.

Illinois.— Shafer *v.* Newlan, 29 Ill. 44; Pickering *v.* Pulsifer, 9 Ill. 79.

Indiana.—Cincinnati, etc., R. Co. *v.* Wynne, 14 Ind. 385.

Iowa.— White *v.* Farlie, 67 Iowa 628, 25 N. W. 837; Hamble *v.* Owen, 20 Iowa 70.

Kentucky.— Johnson *v.* Connecticut F. Ins. Co., 84 Ky. 470, 2 S. W. 151; Thomas *v.* Winchester Bank, 17 Ky. L. Rep. 194, 28 S. W. 774, 31 S. W. 732.

Louisiana.— Pasley *v.* McConnell, 40 La. Ann. 609, 4 So. 501; Wells *v.* St. Dizier, 9 La. Ann. 119.

Maryland.— Keyser *v.* Upshur, 92 Md. 726, 48 Atl. 399; Lucke *v.* Clothing Cutters, etc., Assembly No. 7507, K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Michigan.— Palmer *v.* Rich, 12 Mich. 414.

Missouri.— Haseltine *v.* Smith, 154 Mo. 404, 55 S. W. 633; North *v.* Stevenson, 71 Mo. App. 427.

Montana.— Ryan *v.* Spieth, 18 Mont. 45, 44 Pac. 403.

Nebraska.—Moseley *v.* Chicago, etc., R. Co., 57 Nebr. 636, 78 N. W. 293; Humphries *v.* Spafford, 14 Nebr. 488, 16 N. W. 911.

New Jersey.— Ogden *v.* Thornton, 30 N. J. Eq. 569.

New York.— Addington *v.* Allen, 11 Wend. (N. Y.) 374.

North Carolina.—Holley *v.* Holley, 96 N. C. 229, 1 S. E. 553; Foy *v.* Haughton, 83 N. C. 467.

Ohio.— Buckley *v.* Osburn, 8 Ohio 180.

Oregon.— Branson *v.* Oregonian R. Co., 11 Oreg. 161, 2 Pac. 86.

Rhode Island.— Bates *v.* Slocum, 3 R. I. 129.

South Carolina.— Hunter *v.* Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845.

South Dakota.— Evans *v.* Hughes County, 4 S. D. 33, 54 N. W. 1049; Greely *v.* McCoy, 3 S. D. 624, 54 N. W. 659.

Tennessee.—Stovall *v.* Bowers, 10 Humphr. (Tenn.) 560.

Texas.— Hopkins *v.* Wright, 17 Tex. 30; Ward *v.* Lathrop, 11 Tex. 287.

Virginia.—Shelton *v.* Welsh, 7 Leigh (Va.) 175.

West Virginia.— Rigg *v.* Parsons, 29 W. Va. 522, 2 S. E. 81; Norris *v.* Lemen, 28 W. Va. 336.

Wisconsin.— Davis *v.* Henderson, 20 Wis. 520.

United States.— Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057.

See 3 Cent. Dig. tit. "Appeal and Error," § 4616 *et seq.*

make in the lower court,[40] or one which would demand a different kind of relief or make a different case from that stated.[41] And, generally, on remanding the cause, the appellate court will not give directions as to amendments, but will leave such questions to the lower court.[42]

(11) *Bringing in New Parties.* Where there is a meritorious cause of action and it appears, on appeal, that other parties are necessary to a final determination of the matters involved, the cause will, sometimes, be remanded to allow such parties to be brought in.[43]

d. To Determine Issues or Introduce Evidence. On appeal in a proceeding tried without a jury, the appellate court, in furtherance of justice, may, usually, remand the cause for the determination of issues necessary to a decision on the merits or for the introduction of such further evidence as the circumstances may require.[44] Thus, where a case involving an accounting, or other matters of that

For a full discussion of amendments of pleadings see EQUITY; PLEADING.

On reversing a judgment of the lower court overruling a demurrer to a pleading the cause will, usually, be remanded for the purpose of amendment.

Alabama.— Jones *v.* McPhillips, 77 Ala. 314; Jones *v.* Latham, 70 Ala. 164.

Arkansas.— Carmack *v.* Lovett, 44 Ark. 180.

California.— Phelan *v.* San Francisco, 9 Cal. 15.

Indiana.— McCole *v.* Loehr, 79 Ind. 430.

Iowa.— Pierson *v.* David, 1 Iowa 23.

Virginia.— Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 300, 62 Am. Dec. 653; Strange *v.* Floyd, 9 Gratt. (Va.) 474.

See 3 Cent. Dig. tit. "Appeal and Error," § 4617.

And see, generally, EQUITY; PLEADING.

40. Sutter *v.* San Francisco, 36 Cal. 112; Denison *v.* Tyson, 17 Vt. 549; Rigg *v.* Parsons, 29 W. Va. 522, 2 S. E. 81.

Facts known to pleader.—Where a demurrer to a bill in equity is sustained upon appeal, the supreme court will not remand the case with leave to amend by the insertion of facts which were known to complainant when he filed his bill. McEwen *v.* Gillespie, 3 Lea (Tenn.) 204; Fogg *v.* Union Bank, 4 Baxt. (Tenn.) 539.

41. Williams *v.* Barnes, 28 Ala. 613; Squire *v.* Hewlett, 141 Mass. 597, 6 N. E. 779; Newton *v.* Wells, 10 N. Y. St. 349; Fields *v.* Watson, 23 S. C. 42. In Wise *v.* Joplin R. Co., 85 Mo. 178, it was held that the supreme court would not grant a new trial so that plaintiff might widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issues again. Nor would it do so to afford a party a benefit and an advantage he had already received.

42. Haven *v.* Place, 28 Minn. 551, 11 N. W. 117; Farley *v.* Kittson, 27 Minn. 102, 6 N. W. 450, 7 N. W. 267; Branson *v.* Oregonian R. Co., 11 Oreg. 161, 2 Pac. 86; Sheehy *v.* Mandeville, 6 Cranch (U. S.) 253, 3 L. ed. 215.

43. *Florida.*— Sloan *v.* Sloan, 21 Fla. 589.

Iowa.— Parshall *v.* Moody, 24 Iowa 314; Postlewait *v.* Howes, 3 Iowa 365.

Michigan.— Schwab *v.* Mabley, 47 Mich. 512, 11 N. W. 390; Palmer *v.* Rich, 12 Mich. 414.

Nebraska.— Smith *v.* Shaffer, 29 Nebr. 656, 45 N. W. 936.

New York.— Teal *v.* Woodworth, 3 Paige (N. Y.) 470.

North Carolina.— Finlayson *v.* Kirby, 121 N. C. 106, 28 S. E. 135; Brooks *v.* Headen, 80 N. C. 8.

Tennessee.— Thurman *v.* Jenkins, 2 Baxt. (Tenn.) 426; Stewart *v.* Glenn, 3 Heisk. (Tenn.) 581.

West Virginia.— Harmison *v.* Loneberger, 11 W. Va. 175; Hill *v.* Proctor, 10 W. Va. 59.

United States.—Caldwell *v.* Taggart, 4 Pet. (U. S.) 190, 7 L. ed. 828.

And see, generally, PARTIES.

Person not bound by judgment.—A motion to remand the case, in order that the newly-arising conflicting claims of a third person may be decided, will be overruled, on the ground that such third person will not be bound by the judgment in the case, and may assert his rights in a separate action. Morehead *v.* Western North Carolina R. Co., 96 N. C. 362, 2 S. E. 247.

When cause not remanded.— On vacating a decree for want of parties, the bill will not be remanded for further preparation where, if the bill were taken as true, the complainant would not be entitled to relief, unless it appears by the answer that relief should be granted to him. Shropshire *v.* Reno, 5 Dana (Ky.) 583.

44. *Alabama.*— Robinson *v.* Reid, 50 Ala. 69.

District of Columbia.— Fields *v.* Central Nat. Bank, 10 App. Cas. (D. C.) 1.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Iowa.— Troutman *v.* Gowing, 16 Iowa 415.

Kentucky.— Davidson *v.* Combs, 19 Ky. L. Rep. 1380, 43 S. W. 409.

Louisiana.— Simpson *v.* Normand, 51 La. Ann. 1355, 26 So. 266.

Maine.— Call *v.* Foster, 49 Me. 452.

Maryland.— Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339.

New Jersey.—Reeve *v.* Townsend, 8 N. J. Eq. 81.

North Carolina.— Springs *v.* Wilson, 17 N. C. 385.

nature, is not in shape to be disposed of, the appellate court may remand for reference to an auditor, master, or referee.[45] But, generally, an issue already tried will not be reopened to enable a party to introduce evidence which could have been, but was not, introduced at the trial.[46]

7. Effect of Reversal — a. In General. The effect of a general and unqualified setting aside of a judgment, order, or decree is to nullify it completely, and to leave the case standing as if such judgment, order, or decree had never been rendered;[47] and the judgment debtor is entitled to be restored to the property or rights he has lost by reason thereof.[48] The judgment operates *ex vi termini* to vacate the judgment of the court below, without any action on the part of the latter court.[49]

b. On Dependent Judgments or Proceedings. On the setting aside of a judgment, order, or decree, a dependent judgment or proceeding, ancillary and accessory thereto, shares its fate and falls to the ground along with it,[50] and, generally,

South Carolina.— Gist *v.* Cattell, Bailey Eq. (S. C.) 343.

Tennessee.—Wood *v.* Neely, 7 Baxt. (Tenn.) 586.

Utah.— Nephi Irrigation Co. *v.* Vickers, 20 Utah 310, 58 Pac. 836.

Virginia.— Watkins *v.* Carlton, 10 Leigh (Va.) 586.

Wisconsin.— Wilcox *v.* Bates, 58 Wis. 128, 15 N. W. 774.

45. *Louisiana.*— Breen *v.* Downey, 34 La. Ann. 1217.

Maine.— Preble *v.* Reed, 17 Me. 169.

Michigan.— Barnebee *v.* Beckley, 43 Mich. 613, 5 N. W. 976.

Missouri.— Knowles *v.* Mercer, 16 Mo. 455.

New York.— *In re* New York Mut. Ins. Co., 45 N. Y. Suppl. 263.

North Carolina.— Vest *v.* Cooper, 75 N. C. 519.

United States.— Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 20 S. Ct. 336, 44 L. ed. 417.

46. Hubnall *v.* Watt, 11 La. Ann. 57; Hospes *v.* Almstedt, 83 Mo. 473; Marden *v.* Campbell Printing Press, etc., Co., 67 Fed. 809, 33 U. S. App. 123, 15 C. C. A. 26.

47. *Alabama.*— Williams *v.* Simmons, 22 Ala. 425; Jones *v.* Dyer, 20 Ala. 373.

Arkansas.—Harrison *v.* Trader, 29 Ark. 85.

California.—Carpy *v.* Dowdell, (Cal. 1901) 63 Pac. 780; Westall *v.* Altschul, 126 Cal. 164, 58 Pac. 458.

Connecticut.—Vila *v.* Weston, 33 Conn. 42; Curtice *v.* Scovel, 1 Root (Conn.) 421.

Georgia.— Finney *v.* Tommey, 50 Ga. 140; Ragan *v.* Cuyler, 24 Ga. 397.

Illinois.— Coalfield Coal Co. *v.* Peck, 105 Ill. 529; Mohler *v.* Wiltberger, 74 Ill. 163; Schumann *v.* Helberg, 62 Ill. App. 218; Follansbee *v.* Scottish-American Mortg. Co., 7 Ill. App. 486.

Mississippi.— Harris *v.* Newman, 5 How. (Miss.) 654.

New York.— Hayden *v.* Florence Sewing Mach. Co., 54 N. Y. 221; Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888, 53 N. Y. St. 455.

Ohio.— Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60.

South Carolina.— Sullivan *v.* Thomas, 6 S. C. 201.

Texas.— Sandoval *v.* Rosser, 86 Tex. 682, 26 S. W. 933; Watkins *v.* Junker, (Tex. Civ. App. 1897) 38 S. W. 1129.

Virginia.— Flemings *v.* Riddick, 5 Gratt. (Va.) 272, 50 Am. Dec. 119.

United States.— French *v.* Edwards, 4 Sawy. (U. S.) 125, 9 Fed. Cas. No. 5,097.

See 3 Cent. Dig. tit. "Appeal and Error," § 4626 *et seq.*

Law declared.— Though a judgment in a case is binding until reversed, when such judgment is reversed and the law declared, such law is to be considered as having existed from the first. Moore *v.* Damon, 4 Mo. App. 111.

Not admissible in evidence.—A judgment which has been set aside on appeal is properly excluded from evidence in a subsequent suit between the same parties. Atkison *v.* Dixon, 96 Mo. 577, 10 S. W. 160.

Vacates whole judgment.— The vacation of a judgment, generally, for a specified error, alleged to be the only error, sets aside the whole judgment, and not merely the part held to be erroneous. Davis *v.* Headley, 22 N. J. Eq. 115. And see Watkins *v.* Junker, 4 Tex. Civ. App. 629, 23 S. W. 802; Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742.

Where a judgment granting a new trial is reversed on appeal, the lower court should proceed to again try and determine the issues joined upon the petition for a new trial, as if no appeal had been taken. Dryden *v.* Wyllis, 53 Iowa 390, 5 N. W. 518.

Where vacation not general and entire.— Of course, a vacation is not always general so as to require a reëxamination of all the issues, and, in such case, the effect of the reversal will depend largely upon the directions given by the appellate court, construed in connection with the circumstances of the particular case. See the preceding subdivisions of this section.

48. See *infra*, XVIII, E, 8; and see, generally, Judicial Sales.

49. Cox *v.* Pruitt, 25 Ind. 90.

50. *Arkansas.*— Fowler *v.* Gibson, 4 Ark. 427.

California.— Howell *v.* Thompson, 70 Cal. 635, 11 Pac. 789; McGarrahan *v.* Maxwell, 28 Cal. 75.

Florida.— Archer *v.* Hart, 5 Fla. 234.

the appellate court will specifically set aside such depending matters so as to give consistency to the record.[51] But this rule will not operate, by implication, to set aside a distinct and independent judgment or proceeding, though it form a part of the same litigation.[52] Thus, the proceedings in the court below previous to, and not infected by, the error for which the judgment is set aside are not vacated thereby.[53]

Georgia.—Knox *v.* Laird, 92 Ga. 123, 18 S. E. 988; Jones *v.* Hurst, 91 Ga. 338, 17 S. E. 635.

Maryland.— Everett *v.* State, 28 Md. 190.

Minnesota.— Minnesota Valley R. Co. *v.* Doran, 15 Minn. 240; Frazer *v.* Sherrerd, 6 Minn. 576.

Mississippi.— McDowell *v.* Brooks, (Miss. 1895) 18 So. 657; Ogden *v.* Harrison, 56 Miss. 743.

Missouri.— Carthage Marble Co. *v.* Bauman, 55 Mo. App. 204; Smith *v.* Kansas City, etc., R. Co., 49 Mo. App. 54.

Nebraska.— Olson *v.* Lamb, (Nebr. 1901) 85 N. W. 397; Clough *v.* Buck, 6 Nebr. 343.

New Jersey.— Waldron *v.* Ely, 2 N. J. L. 75; Barton *v.* Long, 45 N. J. Eq. 160, 16 Atl. 683.

New York.— Raff *v.* Koster, 38 N. Y. App. Div. 336, 56 N. Y. Suppl. 997; Benedict, etc., Mfg. Co. *v.* Thayer, 21 Hun (N. Y.) 614, 59 How. Pr. (N. Y.) 272; Cahill *v.* Lilienthal, 30 Misc. (N. Y.) 429, 62 N. Y. Suppl. 524; Weinberg *v.* Frank, 25 Misc. (N. Y.) 788, 56 N. Y. Suppl. 920.

Pennsylvania.— Thomas' Appeal, 124 Pa. St. 640, 17 Atl. 181.

South Carolina.— Buist *v.* Dawes, 3 Rich. Eq. (S. C.) 281.

Virginia.— Roanoke St. R. Co. *v.* Hicks, (Va. 1899) 32 S. E. 790.

West Virginia.— Jones *v.* Gillespie, 32 W. Va. 343, 9 S. E. 235; Hollingsworth *v.* Brooks, 7 W. Va. 559.

Wisconsin.— Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677; Mead *v.* Walker, 20 Wis. 518.

United States.— Butler *v.* Eaton, 141 U. S. 240, 11 S. Ct. 985, 35 L. ed. 713; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47.

See 3 Cent. Dig. tit. "Appeal and Error," § 4627 *et seq.*

Creditor's bill to enforce judgment.— The vacation of a judgment at law operates as a dismissal of a creditor's bill, filed by a complainant to enforce the judgment. Brown *v.* Troup, 33 Miss. 35.

Garnishment proceedings.—Should the judgment upon which a process of garnishment has been issued in aid of execution be set aside, the garnishment proceedings necessarily fall with it. Clough *v.* Buck, 6 Nebr. 343.

Judgment on prison-limits bond.— The vacation of the original judgment vacates a judgment upon a bond for the prison limits. Anderson *v.* Radley, 3 N. J. L. 586; Steelman *v.* Ackley, 2 N. J. L. 152.

Vacation of an interlocutory judgment or order will operate to vacate a final judgment based thereon. Barton *v.* Long, 45 N. J. Eq. 160, 16 Atl. 683; Agate *v.* House, 23 N. Y. Suppl. 716, 53 N. Y. St. 890.

Reversal of order denying new trial.—A decision on an appeal from an order denying a motion for a new trial, reversing the order and remanding the cause for retrial, as effectually vacates the judgment as a vacation of the judgment upon a direct appeal therefrom. Fulton *v.* Hanna, 40 Cal. 278; Minnesota Valley R. Co. *v.* Doran, 15 Minn. 240.

Mandamus —Writ of inquiry.—Where the action of the lower court in awarding a peremptory mandamus is, on error, reversed, a writ of inquiry, awarded by that court to ascertain the damages caused by defendant's breach of duty, necessarily falls with the judgment. Com. *v.* Buffalo, etc., R. Co., (Pa. 1888) 14 Atl. 449.

51. English *v.* Smith, 13 Conn. 221; Stanton *v.* King, 76 N. Y. 585; Cochran *v.* Ingersoll, 66 N. Y. 652; Butler *v.* Eaton, 141 U. S. 240, 11 S. Ct. 985, 35 L. ed. 713.

52. Johnson *v.* Harvey, 4 Mass. 483.

An order of reference is not vacated by a vacation of the judgment entered on the referee's report. Catlin *v.* Adirondack Co., 19 Hun (N. Y.) 389 [*affirmed* in 81 N. Y. 379].

Judgment denying a new trial will not be reversed by the supreme court as a consequence of vacating a previous decision erroneously holding that a given document, filed with the motion for a new trial, was a brief of the evidence. Mehaffey *v.* Hambrick, 83 Ga. 597, 10 S. E. 274.

Order of arrest.—The vacation of a judgment leaves the parties in the situation in which they were before trial. It does not make void an order of arrest granted on grounds extrinsic to the cause of action, or discharge defendant from imprisonment. People *v.* Bowe, 20 Hun (N. Y.) 85.

Preliminary injunction to which the party showed himself entitled before the trial of the cause is not dissolved by a vacation of the judgment and the granting of a new trial. Hess *v.* Winder, 34 Cal. 270.

Temporary injunction previously granted. — The vacation of a decree granting a permanent injunction does not affect a temporary injunction previously granted in the case. Samis *v.* King, 40 Conn. 298.

53. Nelson *v.* Hubbard, 13 Ark. 253; Scutt's Appeal, 46 Conn. 38; Ervin *v.* Collier, 3 Mont. 189; Montgomery County *v.* Carey, 1 Ohio St. 463.

Refusal to dismiss motion for new trial.— When the supreme court holds a refusal of the court below to dismiss a motion for a new trial to be erroneous, this does not dismiss the motion itself, but only abrogates the decision rendered, and leaves the motion

c. Rights of Third Persons. Rights acquired *bona fide* by a third person, under a judgment, order, or decree rendered by a court of competent jurisdiction, are not affected by the subsequent setting aside thereof.[54]

d. Reversal of Judgment of Intermediate Court. Where a judgment of an intermediate court, holding erroneous a judgment below, is in its turn held to be erroneous by a higher court, it will, usually, operate to restore the judgment of the trial court.[55]

8. Restitution After Vacating Judgment — a. When Authorized — (i) *In General.* It is the general rule that when a judgment, order, or decree of the lower court has been reversed or vacated by the appellate court, restitution will be made to the party aggrieved of all property and rights which he has lost by reason of such erroneous judgment, order, or decree,[56] and it is no reason for denying

still pending below. Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719.

54. *Florida.*— Florida Cent. R. Co. *v.* Bisbee, 18 Fla. 60.

Illinois.— Montanye *v.* Wallahan, 84 Ill. 355; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

Louisiana.— Taylor *v.* Lauer, 26 La. Ann. 307.

New Hampshire.— Little *v.* Bunce, 7 N. H. 485, 28 Am. Dec. 363.

New York.— Langley *v.* Warner, 3 N. Y. 327; Butcher v. Henning, 90 Hun (N. Y.) 565, 35 N. Y. Suppl. 1006, 70 N. Y. St. 665; Field *v.* Maghee, 5 Paige (N. Y.) 539.

United States.— U. S. Bank *v.* Washington Bank, 6 Pet. (U. S.) 8, 8 L. ed. 299.

See 3 Cent. Dig. tit. "Appeal and Error," § 4631.

As to effect of reversal on title to land acquired by third persons under erroneous judgment see *infra*, XVIII, E, 8, d, (II).

As to rights of persons not appealing in general see *supra*, XVIII, B, 8.

55. *Alabama.*— Simmons *v.* Price, 18 Ala. 405.

California.— Argenti *v.* San Francisco, 30 Cal. 458; Phelan *v.* San Francisco, 9 Cal. 15.

Georgia.— Ragan *v.* Cuyler, 24 Ga. 397.

Illinois.— Coalfield Coal Co. *v.* Peck, 105 Ill. 529; Peak *v.* People, 71 Ill. 278.

Missouri.—Strouse *v.* Drennan, 41 Mo. 289; Rankin *v.* Perry, 5 Mo. 501.

New York.—Mead *v.* Mead, 18 Barb. (N. Y.) 578.

See 3 Cent. Dig. tit. "Appeal and Error," § 4630.

Judgment merely suspended.—A judgment set aside by an intermediate appellate court is not destroyed, but merely suspended until final action by the court of last resort. Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385.

Where two judgments entered in same case. — When, on appeal to the circuit court from the county court, two judgments are entered at different times, one for defendant, setting aside judgment below, the other for plaintiff, the effect of reversing the second, on further appeal, for lack of jurisdiction will be to give full effect to the first one decreeing error; hence, the cause will stand for new trial in the county court. Toledo, etc., R. Co. *v.* Eastburn, 79 Ill. 140.

56. *Alabama.*— Crocker *v.* Clements, 23 Ala. 296; Williams *v.* Simmons, 22 Ala. 425.

Arkansas.— Ringgold *v.* Randolph, 13 Ark. 328.

California.—Raun *v.* Reynolds, 18 Cal. 275; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Illinois.— Field *v.* Anderson, 103 Ill. 403; Hays *v.* Cassell, 70 Ill. 669; McElwee *v.* Wilce, 80 Ill. App. 338; Major *v.* Collins, 17 Ill. App. 239.

Indiana.— Doe *v.* Crocker, 2 Ind. 575; Martin *v.* Woodruff, 2 Ind. 237.

Iowa.—Ft. Madison Lumber Co. *v.* Batavian Bank, 77 Iowa 393, 42 N. W. 331.

Kentucky.— Brown *v.* Vancleave, 14 Ky. L. Rep. 821, 21 S. W. 756.

Louisiana.— Mooney *v.* Corcoran, 15 La. 46.

Massachusetts.— Delano *v.* Wilde, 11 Gray (Mass.) 17, 71 Am. Dec. 687; Cummings *v.* Noyes, 10 Mass. 433; Jones *v.* Hacker, 5 Mass. 264.

Missouri.—Jones *v.* Hart, 60 Mo. 362; Hannibal, etc., R. Co. *v.* Brown, 43 Mo. 294; Ming *v.* Suggett, 34 Mo. 364, 86 Am. Dec. 112.

Nebraska.— Hier *v.* Anheuser-Busch Brewing Assoc., 60 Nebr. 320, 83 N. W. 77; Jenkins *v.* State, 60 Nebr. 205, 82 N. W. 622.

New Hampshire.— Gay *v.* Smith, 38 N. H. 171; Thompson *v.* Carroll, 36 N. H. 21; Little *v.* Bunce, 7 N. H. 485, 28 Am. Dec. 363.

New Jersey.— Scott *v.* Conover, 10 N. J. L. 61.

New York.— Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Murray *v.* Berdell, 98 N. Y. 480; Chamberlain *v.* Choles, 35 N. Y. 477; Langley *v.* Warner, 3 N. Y. 327; McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 328; Britton *v.* Phillips, 24 How. Pr. (N. Y.) 111; Estus *v.* Baldwin, 9 How. Pr. (N. Y.) 80; Close *v.* Stuart, 4 Wend. (N. Y.) 95; Pangburn *v.* Ramsay, 11 Johns. (N. Y.) 141.

North Carolina.— Lytle *v.* Lytle, 94 N. C. 522; Boyett *v.* Vaughan, 86 N. C. 725; Rollins *v.* Henry, 77 N. C. 467; Perry *v.* Tupper, 71 N. C. 385.

Ohio.— Bickett *v.* Garner, 31 Ohio St. 28; Bayley *v.* Pearman, 1 Ohio Dec. (Reprint) 56; Stoffregen *v.* Biederman, 6 Ohio Cir. Ct. 55.

Oregon.— McFadden *v.* Swinerton, 36 Oreg.

such restitution to the party aggrieved that the money was received by the other party in good faith.[57]

(II) *Discretion of Court.* Restitution is not a matter of right, but depends upon the sound discretion of the court, and will be ordered only when the justice of the case seems to call for it.[58] Thus, where it appears that plaintiff is equitably entitled to retain the money, restitution will not be ordered,[59] though the burden is upon him to prove his equitable right to retain it.[60] But, where the judgment of vacation is final and absolute, and no new rights have been acquired, restitution will, usually, be ordered as a matter of course.[61]

(III) *Where Merits Not Before Court.* If the merits of the controversy are not before the appellate court, restitution will, usually, not be awarded.[62]

336, 59 Pac. 816, 62 Pac. 12; Metschan *v.* Grant County, 36 Oreg. 117, 58 Pac. 80.

Pennsylvania.— Whitesell *v.* Peck, 176 Pa. St. 170, 35 Atl. 48; Benscotter *v.* Long, 167 Pa. St. 595, 31 Atl. 863; Williams *v.* Coward, 1 Grant (Pa.) 21; Ranck *v.* Becker, 13 Serg. & R. (Pa.) 41; Brightly *v.* McAleer, 4 Pa. Super. Ct. 563.

Tennessee.— Gates *v.* Brinkley, 4 Lea (Tenn.) 710; Caruthers *v.* Caruthers, 2 Lea (Tenn.) 71.

Texas.— Peticolas *v.* Carpenter, 53 Tex. 23.

Virginia.— Flemings *v.* Riddick, 5 Gratt. (Va.) 272, 50 Am. Dec. 119; Stanard *v.* Brownlow, 3 Munf. (Va.) 229.

West Virginia.— Keck *v.* Allender, 42 W. Va. 420, 26 S. E. 437.

United States.— Northwestern Fuel Co. *v.* Brock, 139 U. S. 216, 11 S. Ct. 523, 35 L. ed. 151; *Ex p.* Morris, 9 Wall. (U. S.) 605, 19 L. ed. 799; U. S. Bank *v.* Washington Bank, 6 Pet. (U. S.) 8, 8 L. ed. 299; South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479, 22 Fed. Cas. No. 13,189.

England.—Eyre *v.* Woodfine, Cro. Eliz. 278; Westerne *v.* Creswick, 4 Mod. 161; Anonymous, 2 Salk. 588; 2 Tidd Pr. 1130.

See 3 Cent. Dig. tit. "Appeal and Error," § 4621 *et seq.*

Purchase of judgment same as payment.— A payment to plaintiff by a defendant of the amount of a judgment against him, although in the form of a conveyance or transfer of the judgment, is in effect a payment thereof, and, upon its subsequent vacation, the payor is entitled to a restoration of the amount so paid. Gates *v.* Brinkley, 4 Lea (Tenn.) 710.

Partial restitution.—Where a decision that a wife's inchoate right of dower in land cannot, as against the husband, be recognized in an award, in proceedings to condemn the land, is vacated after payment of the award to the husband, he may be required to make restitution to the extent of the dower right. Matter of Trustees New York, etc., Bridge, 89 Hun (N. Y.) 219, 34 N. Y. Suppl. 1002, 68 N. Y. St. 837.

Re-restitution.—Where restitution has been awarded after vacation, if the judgment of vacation be itself vacated by a higher court, a writ of re-restitution may be awarded. Cooke *v.* Reinhart, 1 Rawle (Pa.) 317. But the mere fact that restitution has been prematurely ordered, in that plaintiff was required to refund before the filing of the judgment, will not entitle such plaintiff to have the money restored. Ware *v.* McCormick, 15 Ky. L. Rep. 59.

57. Keck *v.* Allender, 42 W. Va. 420, 26 S. E. 437.

58. Smith *v.* Mitchell, 1 J. J. Marsh. (Ky.) 270; Wright *v.* Nostrand, 100 N. Y. 616, 3 N. E. 78; Coster *v.* Peters, 7 Rob. (N. Y.) 386; Carlson *v.* Winterson, 7 Misc. (N. Y.) 15, 689, 27 N. Y. Suppl. 368, 57 N. Y. St. 100, 28 N. Y. Suppl. 20, 58 N. Y. St. 390; Gould *v.* McFall, 118 Pa. St. 455, 12 Atl. 336, 4 Am. St. Rep. 606; Harger *v.* Washington County, 12 Pa. St. 251. In Miller *v.* Clark, 52 Fed. 900, it was held that the circuit court would not order restitution of costs paid by plaintiff under the original decree dismissing the appeal on the merits, as plaintiff was in fault in invoking a jurisdiction to which he had no right to resort.

Denial of motion on ground of delay.— In the exercise of its discretion, the court may deny a motion for restitution on the ground of delay. Market Nat. Bank *v.* Pacific Nat. Bank, 102 N. Y. 464, 7 N. E. 302.

Not granted on bald legal right.— Restitution will not be granted on a bald legal right against equity and justice. Grant *v.* Rodgers, 6 Phila. (Pa.) 132, 23 Leg. Int. (Pa.) 141.

Payment into court.— In its discretion, the court may order the money collected on the judgment to be paid into court to await further orders. Ranck *v.* Becker, 13 Serg. & R. (Pa.) 41; Kirk *v.* Eaton, 10 Serg. & R. (Pa.) 103. See also *infra*, XVIII, E, 8, a, (IV).

59. Stewart *v.* Conner, 9 Ala. 803; Dupuy *v.* Roebuck, 7 Ala. 484; Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772; Green *v.* Stone, 1 Harr. & J. (Md.) 405; Teasdale *v.* Stoller, 133 Mo. 645, 34 S. W. 873, 54 Am. St. Rep. 703; Gould *v.* McFall, 118 Pa. St. 455, 12 Atl. 336, 4 Am. St. Rep. 606.

60. Crocker *v.* Clements, 23 Ala. 296.

61. Coster *v.* Peters, 7 Rob. (N. Y.) 386; Estus *v.* Baldwin, 9 How. Pr. (N. Y.) 80; Cassel *v.* Duncan, 2 Serg. & R. (Pa.) 57. In Ranck *v.* Becker, 13 Serg. & R. (Pa.) 41, Tilghman, C. J., said: "Restitution is always granted on the reversal of a judgment unless there be something peculiar in the case."

62. Mears *v.* Remare, 34 Md. 333; Carlson *v.* Winterson, 7 Misc. (N. Y.) 15, 27 N. Y.

(iv) *Where New Trial Granted.* While it is within the power of the court to direct restitution on ordering a new trial,[63] the order will sometimes be denied where it is not clear that plaintiff is not entitled to the money.[64] In such case, the appellate court may order the amount deposited in court to abide the result of the new trial.[65]

(v) *Effect of Voluntary Payment.* The fact that the money was voluntarily paid on the judgment, and not coerced by execution, will not affect the right to restitution.[66]

(vi) *To What Property the Right Applies.* The right to restitution applies only to property or rights lost under, or in consequence of, the judgment vacated,[67] and property taken under another judgment or order cannot be restored, notwithstanding the effect of the vacation be to decide that the property was taken from the party entitled to it.[68] And so, where a payment is made in consequence of a settlement rather than in pursuance of the decree, restitution will not be ordered on reversal of such decree.[69]

b. By What Court Compelled. While the power to enforce restitution exists in both the appellate court and that to which the cause is remanded,[70] it is the usual practice to leave such enforcement to the latter court.[71] Thus, the appel-

Suppl. 368, 57 N. Y. St. 100. But see Ranck *v.* Becker, 13 Serg. & R. (Pa.) 41.

On appeals from orders at special term it is not usual to order restitution. Radway *v.* Graham, 4 Abb. Pr. (N. Y.) 468.

63. Whitman *v.* Johnson, 12 Misc. (N. Y.) 23, 33 N. Y. Suppl. 60, 66 N. Y. St. 717, 1 N. Y. Annot. Cas. 238, 24 N. Y. Civ. Proc. 350.

Payment as defense on new trial.— After restitution has been made to the judgment debtor, he cannot, on a new trial, avail himself of such payment in bar to another judgment. But, if restitution has not, in fact, been made, the payment may be set up by way of set-off on the new trial. Ringgold *v.* Randolph, 13 Ark. 328. But see Close *v.* Stuart, 4 Wend. (N. Y.) 95.

64. Traun *v.* Keiffer, 31 Ala. 136; Marvin *v.* Brewster Iron Min. Co., 56 N. Y. 671; Cushing *v.* Vanderbilt, 7 Daly (N. Y.) 512; Young *v.* Brush, 18 Abb. Pr. (N. Y.) 171.

No bar to recovery on second trial.—A refusal by the supreme court, on setting aside a judgment on which money was paid, to grant a writ of restitution is no bar to a recovery of the money where, on the second trial, the verdict is for defendant. Travellers' Ins. Co. *v.* Heath, 95 Pa. St. 333.

65. Marvin *v.* Brewster Iron Min. Co., 56 N. Y. 671; Britton *v.* Phillips, 24 How. Pr. (N. Y.) 111.

66. Gregory *v.* Litsey, 9 B. Mon. (Ky.) 43, 48 Am. Dec. 415; Scholey *v.* Halsey, 72 N. Y. 578; Lott *v.* Swezey, 29 Barb. (N. Y.) 87; Hayes *v.* Nourse, 15 Daly (N. Y.) 364, 7 N. Y. Suppl. 656, 28 N. Y. St. 167, 11 N. Y. Suppl. 825, 25 Abb. N. Cas. (N. Y.) 95; Hiler *v.* Hiler, 35 Ohio St. 645. But see Groves *v.* Sentell, 66 Fed. 179, 30 U. S. App. 119, 13 C. C. A. 386.

To make a payment compulsory it is not necessary that execution should issue; it is sufficient if the payment, when made, could have been compelled at law, and the fact that execution had not issued when the payment was made will not prevent restitution. Garr *v.* Martin, 1 Hilt. (N. Y.) 358.

67. Weaver *v.* Stacy, 93 Iowa 683, 62 N. W. 22; Gillig *v.* George C. Treadwell Co., 151 N. Y. 552, 45 N. E. 1035.

68. Reynolds *v.* Reynolds, (Cal. 1885) 8 Pac. 184; Murray *v.* Berdell, 98 N. Y. 480; Lewis *v.* Chicago, etc., R. Co., 97 Wis. 368, 72 N. W. 976.

Costs paid under mandate of higher court. — In Miller *v.* Clark, 52 Fed. 900, it was held that, where the circuit court, on a bill of review, reversed its original decree and dismissed the bill, it could not order restitution of the costs of appeal which had been paid under the mandate of the supreme court.

69. Travellers Ins. Co. *v.* Patten, 119 Ind. 416, 20 N. E. 790; Kaufman *v.* Dickensheets, 30 Ind. 258, 95 Am. Dec. 694.

70. Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Stanard *v.* Brownlow, 3 Munf. (Va.) 229.

New York.— Under N. Y. Code Civ. Proc. § 1323, restitution may be compelled either by the court that vacates the judgment or by the general term of the court to which the case is remanded, if it have a general term. Carlson *v.* Winterson, 146 N. Y. 345, 40 N. E. 995, 66 N. Y. St. 649; Market Nat. Bank *v.* Pacific Nat. Bank, 102 N. Y. 464, 7 N. E. 302; Hall *v.* Emmons, 11 Abb. Pr. N. S. (N. Y.) 435. And it has been held that such statute does not affect the power of the supreme court at special term to order restitution. Platt *v.* Withington, 11 N. Y. Suppl. 824, 19 N. Y. Civ. Proc. 387, 25 Abb. N. Cas. (N. Y.) 103.

Certificate of reversal withheld.—Where appellant, after having taken the appeal, coerces payment of the judgment, the appellate court will withhold the certificate of reversal unless the money paid on the judgment is refunded. Phillips *v.* Towles, 73 Ala. 406; Hall *v.* Hrabrowski, 9 Ala. 278.

71. Hewitt *v.* Dean, 91 Cal. 617, 28 Pac. 93, 25 Am. St. Rep. 227; Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 861; Gregory *v.* Litsey,

late court will merely direct restitution and remand the cause to the court below for enforcement of the order;[72] and it has been held that the lower court can compel restitution, notwithstanding the decree of the appellate court omits to direct it.[73]

c. Who Entitled to Restitution. The right to restitution can be asserted by no one other than the judgment debtor who has made the payment,[74] or by some one standing in his shoes.[75]

d. From Whom Restitution Compelled — (i) *Judgment Creditor* — (a) *In General.* The right to restitution in favor of one entitled thereto exists against the party who prosecuted the suit and for whose benefit the money was paid,[76]

9 B. Mon. (Ky.) 43, 48 Am. Dec. 415; Stoffregen *v.* Biederman, 6 Ohio Cir. Ct. 55; Whitesell *v.* Peck, 176 Pa. St. 170, 35 Atl. 48.

Vacated for lack of jurisdiction.— In Northwestern Fuel Co. *v.* Brock, 139 U. S. 216, 11 S. Ct. 523, 35 L. ed. 151, the court, in holding that the lower court had power to award restitution after its judgment had been set aside for lack of jurisdiction, said: "Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal."

Remand with leave to apply to lower court. — Restitution of money paid under an erroneous decree will not be directed by the appellate court where the interests of the parties defendant are, or may be, diverse, except, possibly, in a very plain case; but leave will be reserved in the mandate to present a petition for restitution to the court below. Andrews *v.* Thum, 71 Fed. 763, 33 U. S. App. 393, 18 C. C. A. 308. And see Wright *v.* Nostrand, 100 N. Y. 616, 3 N. E. 78.

After return of record to lower court.—A motion in the supreme court of Michigan for a writ of restitution, based on a final decree of said court, will be denied when the record of the case in which said decree was entered has been returned to the court below. The lower court has power and authority to issue the writ required. Crawford *v.* Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870.

Clerk cannot issue writ of restitution.—A writ of restitution is always founded on a special award of the court, and a clerk of court cannot issue the writ without such award. Mears *v.* Remare, 34 Md. 333.

72. McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12; Russell *v.* Gray, 6 Serg. & R. (Pa.) 208.

Lower court must enforce order promptly. — Where the supreme court, on affirming an order vacating a judgment, directs restitution, the court below has no discretion but to enforce the order promptly. Hart *v.* Weidzelski, 9 Kulp (Pa.) 313.

73. Flemings *v.* Riddick, 5 Gratt. (Va.) 272, 50 Am. Dec. 119.

But in Pennsylvania it is held that the lower court cannot ingraft on a decree of the supreme court an order of restitution not contained in said decree. This holding is based on the view that the order of restitution is a constituent part of the judgment on appeal. Hughes' Appeal, 90 Pa. St. 60; Whitesell *v.* Peck, 26 Pittsb. Leg. J. N. S. (Pa.) 355; Kerr *v.* Sharpsburg, etc., Turnpike Co., 26 Pittsb. Leg. J. N. S. (Pa.) 354.

74. McLagan *v.* Brown, 11 Ill. 519; Major *v.* Collins, 17 Ill. App. 239; Marshall *v.* Macy, 10 Abb. N. Cas. (N. Y.) 87.

Payment by co-defendant.—On the vacation of a judgment against two defendants, one of them has no right to avail himself of any enforced payment by the other, who is entirely out of the action as such, unless the party who made the payment has done something to give his co-defendant that right and to waive restitution. Brown *v.* Richardson, 4 Rob. (N. Y.) 603.

A garnishee is discharged from liability on paying the money into court, and, on a vacation, a motion for an order of restitution should be made by defendant in the principal action, he being the only person interested. Lewis *v.* Chicago, etc., R. Co., 99 Wis. 368, 72 N. W. 976.

75. Executor of a deceased judgment debtor is entitled to restitution of the amount paid under the erroneous judgment. Gates *v.* Brinkley, 4 Lea (Tenn.) 710.

Surety on appeal bond paid the debt of appellant on affirmance, but, on an appeal to the court of last resort, the cause was remanded and the judgment reversed. It was held that the judgment creditor was responsible only to the judgment debtor, and not to the surety, as the amount paid by the surety should be considered the money of the debtor. Garr *v.* Martin, 20 N. Y. 306 [*reversing* 1 Hilt. (N. Y.) 358].

Receiver of defendant corporation.—On motion for restitution by defendant's attorney, it is proper to order payment to the receiver of defendant, in accordance with the motion. Market Nat. Bank *v.* Pacific Nat. Bank, 102 N. Y. 464, 7 N. E. 302.

76. Catlin *v.* Allen, 17 Vt. 158.

Restitution may be compelled from the real party plaintiff, who has prosecuted a suit in the name of a nominal plaintiff — as, for instance, an assignee who obtains judgment in the name of his assignor. Langley *v.* Warner, 3 N. Y. 327; Maghee *v.* Kellogg, 24 Wend. (N. Y.) 32.

Right to prove himself nominal plaintiff.— The party in whose name the original suit was prosecuted and against whom the reversal was decreed is not estopped by such reversal from proving, in an action brought

or, as the case may be, against one who has received, and still retains, the money in behalf of such party.[77]

(B) *Right to Specific Restitution.* It has been held, in a few cases, that setting aside a judgment or decree under which land has been sold does not affect the title acquired by the purchaser at the sale, whether such purchaser be a party or a stranger.[78] But these decisions are opposed to the weight of authority, by which the doctrine is established that, on the vacation of a judgment, the debtor therein is entitled to specific restitution of everything he has lost by reason thereof, and which still remains in the hands of the adverse party, his agents, attorneys, or privies.[79]

against him to recover money paid under the judgment, that he was merely nominal plaintiff in the suit, which fact was known to defendant, and that no portion of the money so paid was ever received by him or paid to his use. Catlin *v.* Allen, 17 Vt. 158.

Necessity to show receipt of money.— In Isom *v.* Johns, 2 Munf. (Va.) 272, it was held that a recovery could not be had against plaintiff without proof that the money was actually received by him, or was applied to his use. But see Owings *v.* Owings, 10 Gill & J. (Md.) 267, wherein it was held that, where a decree was assigned for property, and thereafter payment was made to the assignee, the original plaintiff was still liable in an action for restitution.

Where United States plaintiff.— The supreme court has no authority, by a mandate for the restitution of moneys recovered by persons under a decree of a court below, to order the United States to refund. *Ex p.* Morris, 9 Wall. (U. S.) 605, 19 L. ed. 799.

77. An agent who is a party to a suit, receives money on the footing of an erroneous judgment, and pays it over to his principal with notice of an application for an appeal, is liable to refund in case of a reversal. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507.

Plaintiff's attorney.— Payment, under order, to plaintiff's attorneys is, in legal effect, payment to plaintiff (Grauer *v.* Grauer, 2 Misc. (N. Y.) 98, 20 N. Y. Suppl. 854, 49 N. Y. St. 354); and the judgment debtor is entitled to restitution from such attorney while the money collected is still in his hands (Catlin *v.* Allen, 17 Vt. 158).

Personal representative.—Where money is received by an executor or administrator in a suit prosecuted by him, he may, on reversal of the judgment, be compelled to make restitution. Burdine *v.* Roper, 7 Ala. 466; Gillmore *v.* Meeker, 2 Ohio Dec. (Reprint) 63. But, where money collected under a judgment has been disbursed by order of court, restitution cannot be enforced against him under Iowa Rev. (1860), § 3540 Hanschild *v.* Stafford, 27 Iowa 301. See also Peek *v.* Peek, 21 Ky. L. Rep. 15, 50 S. W. 982.

78. Parker *v.* Anderson, 5 T. B. Mon. (Ky.) 445; McAusland *v.* Pundt, 1 Nebr. 211, 93 Am. Dec. 358; South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479, 22 Fed. Cas. No. 13,189.

79. *California.*— Reynolds *v.* Hosmer, 45 Cal. 616; Johnson *v.* Lamping, 34 Cal. 293; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Illinois.— Hays *v.* Cassell, 70 Ill. 669; Fergus *v.* Woodworth, 44 Ill. 374; Major *v.* Collins, 17 Ill. App. 239.

Iowa.— Twogood *v.* Franklin, 27 Iowa 239.

Massachusetts.— Delano *v.* Wilde, 11 Gray (Mass.) 17, 71 Am. Dec. 687.

Missouri.—Jones *v.* Hart, 60 Mo. 362; Hannibal, etc., R. Co. *v.* Brown, 43 Mo. 294; Gott *v.* Powell, 41 Mo. 416.

New York.— Chamberlain *v.* Choles, 35 N. Y. 477; Lovett *v.* German Reformed Church, 12 Barb. (N. Y.) 67; Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629.

Ohio.— McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478.

Wisconsin.—Corwith *v.* Illinois State Bank, 15 Wis. 289. And see Jesup *v.* City Bank, 15 Wis. 604, 82 Am. Dec. 703.

Extent upon real estate.— If satisfaction of the judgment has been obtained by an extent upon real estate the land itself is restored, and not its value. Bryant *v.* Fairfield, 51 Me. 149; Gay *v.* Smith, 36 N. H. 435. But see Horton *v.* Wilde, 8 Gray (Mass.) 425, in which the court refused to order restitution, and left the party to his writ of entry.

Right to elect.— In California, if land is sold under a judgment and purchased by the judgment creditor on reversal of the judgment, defendant therein may either have the sale set aside and be restored to possession, or may affirm the sale and maintain an action for damages. Reynolds *v.* Hosmer, 45 Cal. 616; Johnson *v.* Lamping, 34 Cal. 293.

An assignee of a judgment who procures an execution and a sale of land thereunder, which land he purchases, is not entitled to protection as a *bona fide* purchaser, he standing in no better position than his assignor. Reynolds *v.* Hosmer, 45 Cal. 616; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459. And see Harle *v.* Langdon, 60 Tex. 555.

The attorney of a plaintiff in execution who purchases, on his own account, lands sold under the execution is not a *bona fide* purchaser so as not to be affected by a subsequent reversal of the judgment. Hays *v.* Cassell, 70 Ill. 669.

Purchase by defendant lien-holder.—Where lands encumbered by various liens were sold in judicial proceedings at the suit of one of the lien-holders and on cross-petitions of the different defendant lien-holders, and were purchased at such judicial sale by a defendant lien-holder, and the proceeds of sale were distributed, by order of court, among the sev-

(II) *STRANGERS.* It is well settled that what is done under a judgment or decree rendered by a court of competent jurisdiction is valid so far as third persons are concerned, and that rights acquired thereunder by such persons are not affected by its subsequent vacation.[80] Therefore, where moneys collected under a judgment are applied to a debt of plaintiff to a third person, there is, upon its subsequent reversal, no remedy against such third person.[81] And so, title to land acquired by a third person under a judicial sale is not affected by setting aside of the judgment in pursuance of which the sale was made.[82] In such case the party aggrieved must seek his remedy in the shape of damages from plaintiff in the judgment.[83]

e. Mode of Obtaining Restitution — (I) *SUMMARY PROCEEDING* — (A) *In General.* Both under the common law and by statute in most jurisdictions a party entitled to restitution may obtain it by a summary proceeding in the same suit, without resorting to a new one for that purpose.[84] And on the granting of the

eral encumbrancers according to their priorities, such purchaser, though a party to the suit, is entitled, upon the setting aside of the judgment or decree under which the sale was made, to the protection which the policy of the statute affords to purchasers at judicial sales. McBride *v.* Longworth, 14 Ohio St. 349, 84 Am. Dec. 383.

80. See *supra*, XVIII, B, 8.

81. Florida Cent. R. Co. *v.* Bisbee, 18 Fla. 60; Fidelity, etc., Co. *v.* Louisville Banking Co., (Ky. 1900), 58 S. W. 712; Langley *v.* Warner, 3 N. Y. 327 (wherein the money was used to pay a debt to plaintiff's attorney); Butcher *v.* Henning, 90 Hun (N. Y.) 565, 35 N. Y. Suppl. 1006, 70 N. Y. St. 665; Field *v.* Maghee, 5 Paige (N. Y.) 539. And see Little *v.* Bunce, 7 N. H. 485, 28 Am. Dec. 363.

Attaching creditors not parties to appeal.— Where an action by N, asserting a lien on a fund owing to his debtor, was consolidated with the actions of various creditors to attach the same fund, and, on appeal by N, a judgment dismissing his petition upon demurrer filed by the attaching creditors was reversed, N was entitled, on the return of the case to the lower court, to a rule against the attaching creditors to show cause why they should not be required to return the attached fund which had been distributed to them pending the appeal, though they were not made parties to the appeal. Noonan *v.* Newport, (Ky. 1900) 56 S. W. 499.

82. *California.*— Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Colorado.— Stout *v.* Gully, 13 Colo. 604, 22 Pac. 954; Cheever *v.* Minton, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258.

Illinois.— Hannas *v.* Hannas, 110 Ill. 53; Whitman *v.* Fisher, 74 Ill. 147; Fergus *v.* Woodworth, 44 Ill. 374; Dunning *v.* Bathrick, 41 Ill. 425; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

Indiana.—McCormick *v.* McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441.

Iowa.— Hanschild *v.* Stafford, 27 Iowa 301.

Kansas.—Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014.

Louisiana.— McWaters *v.* Smith, 25 La. Ann. 515.

Missouri.— Macklin *v.* Allenberg, 100 Mo. 337, 13 S. W. 350; Vogler *v.* Montgomery, 54 Mo. 577; Gott *v.* Powell, 41 Mo. 416.

Nebraska.— Parker *v.* Courtnay, 28 Nebr. 605, 44 N. W. 863, 26 Am. St. Rep. 360.

New York.—Wambaugh *v.* Gates, 8 N. Y. 138; Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629.

North Carolina.— Den *v.* Dellinger, 5 N. C. 272.

Ohio.— Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603; McGuire *v.* Ely, Wright (Ohio) 520.

Wisconsin.— Jesup *v.* City Bank, 15 Wis. 604, 82 Am. Dec. 703.

Who is a bona fide purchaser.— One claiming to be a *bona fide* purchaser must show that he has paid the purchase-money, and also that he is the purchaser of the legal title — not of the mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a sheriff's deed. Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459. See also Doe *v.* Crocker, 2 Ind. 575. But see McGuire *v.* Ely, Wright (Ohio) 520. For a full treatment of the subject see JUDICIAL SALES.

83. *Illinois.*— Hays *v.* Cassell, 70 Ill. 669; Fergus *v.* Woodworth, 44 Ill. 374.

Louisiana.— McWaters *v.* Smith, 25 La. Ann. 515.

New Hampshire.— See Gay *v.* Smith, 36 N. H. 435.

North Carolina.— Doe *v.* Dellinger, 5 N. C. 272.

Ohio.— McGuire *v.* Ely, Wright (Ohio) 520.

United States.— South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479, 22 Fed. Cas. No. 13,189.

84. Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Kidd *v.* Curry, 29 Hun (N. Y.) 215; Hall *v.* Emmons, 11 Abb. Pr. N. S. (N. Y.) 435; Peticolas *v.* Carpenter, 53 Tex. 23. In Keck *v.* Allender, 42 W. Va. 420, 26 S. E. 437, wherein the record showed performance of the decree, it was held that restitution might be obtained by rule in the nature of a scire facias, by cross-bill, or by motion.

motion for restitution it becomes a part of the judgment, and the amount can be collected by execution,[85] though its enforcement is not confined to this means alone.[86]

(B) *When Scire Facias Necessary.* Where the record itself shows the payment of the judgment, the party may have restitution without a scire facias; but, where the facts do not not appear of record, a scire facias or some proceeding of that nature is necessary.[87]

A common-law remedy.— In Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588, Vann, J., said: "Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and, hence, the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed 'that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.'"

Cal. Code Civ. Proc. § 957, which provides for restitution, by the appellate court, of all property and rights lost by the erroneous judgment or order, applies only to cases where the judgment operates upon specific property in such a manner that its title is not changed — as by directing the possession of real estate or the delivery of documents, or of particular personal property in the hands of defendant, and the like. Hewitt *v.* Dean, 91 Cal. 617, 28 Pac. 93, 25 Am. St. Rep. 227; Farmer *v.* Rogers, 10 Cal. 335.

Wis. Rev. Stat. (1878), § 3732, providing for restitution after reversal of a judgment, does not apply to an order made by a justice of the peace requiring a garnishee to pay into court the amount of his indebtedness to the principal defendant. Eilers *v.* Wood, 64 Wis. 422, 25 N. W. 440.

Stipulation for restitution.—A judgment was rendered against defendant, and execution issued. Defendant, desiring to bring error, entered into a stipulation with plaintiff whereby a certain sum was paid to him, in full satisfaction of the judgment if affirmed, but to be restored if reversed. It was held that the trial court, after a reversal, was warranted in enforcing restitution in a summary manner, in that action, on the motion of defendant. Ft. Scott First Nat. Bank *v.* Elliott, 60 Kan. 172, 55 Pac. 880.

Notice to the adverse party is usually required. Anonymous, 3 N. J. L. 459; Grauer *v.* Grauer, 2 Misc. (N. Y.) 98, 20 N. Y. Suppl. 854, 49 N. Y. St. 354; Young *v.* Brush, 18 Abb. Pr. (N. Y.) 171.

Time to make application.—On appeal from a district court of New York city to the court of common pleas, the appellant should apply for restitution at the time of arguing his appeal; and, in the case of his omission to do so if the judgment is reversed, he should apply for a reargument on that point. Cushing *v.* Vanderhilt, 7 Daly (N. Y.) 512.

Quashing writ of restitution.—A writ of restitution issued after, although tested before, the death of defendant or person against whom it issues will be quashed. And the application to quash may be made on behalf of a party interested. Quigley *v.* Middleton, 10 N. J. L. 293.

85. Kennedy *v.* O'Brien, 2 E. D. Smith (N. Y.) 41.

Conclusiveness of order of restitution.—An order of restitution, made upon the vacation of an erroneous judgment, is final and conclusive between the parties, and cannot be questioned by them collaterally. Hiler *v.* Hiler, 35 Ohio St. 645; Breading *v.* Blocher, 29 Pa. St. 347.

Failure to comply with order.—A party who wilfully fails to comply with a lawful order for restitution may be proceeded against as for a criminal contempt. But he may purge himself of such contempt by showing that his failure to comply with the order was due to inability. Jenkins *v.* State, 60 Nebr. 205, 82 N. W. 622.

Where identity of property disputed.— Restitution will not be ordered under N. Y. Code Civ. Proc. § 1323, where the identity of the property to be restored is in dispute, since such dispute should be settled in an action for restitution. Shapiro *v.* Goldberg, 31 Misc. (N. Y.) 787, 65 N. Y. Suppl. 312.

Ordering restitution at subsequent term.— Where the record still remains in the appellate court it may award restitution at a term subsequent to the reversal, and remit the record. Cassel *v.* Duncan, 2 Serg. & R. (Pa.) 57.

Where action dismissed.—An order for the restitution of money, paid pursuant to the direction of an erroneous judgment, cannot be made after such judgment has been set aside and the action dismissed. Anheuser-Busch Brewing Assoc. *v.* Hier, 55 Nebr. 557, 75 N. W. 1111.

86. Devlin *v.* Hinman, 161 N. Y. 115, 55 N. E. 386 [*affirming* 40 N. Y. App. Div. 101, 57 N. Y. Suppl. 663].

87. *Indiana.*— Martin *v.* Woodruff, 2 Ind. 237.

New Jersey.— Scott *v.* Conover, 10 N. J. L. 61.

New York.— Sheridan *v.* Mann, 5 How. Pr. (N. Y.) 201; Clark *v.* Pinney, 6 Cow. (N. Y.) 297.

Oregon.— McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12.

Virginia.— Eubank *v.* Ralls, 4 Leigh (Va.) 308.

(II) *Action*—(A) *In General.* It is well settled that an action will lie to recover back money paid upon a judgment which is afterward set aside, the appropriate remedy being the common-law action of assumpsit for money had and received, or an equivalent proceeding under the code practice.[88]

(B) *Defenses to Action.* In such an action it is not permissible for defendant to urge, by way of set-off, the original claim on which the vacated judgment was based;[89] and no claim outside of the original suit, and not disposed of by the judgment, can be set up.[90]

f. Extent of Restitution—(I) *In General.* A party who had been deprived of possession of land under an erroneous judgment or decree is entitled to restitution of the rents and profits of the land.[91] And, where the restitution is in money, interest may be allowed thereon from the time of payment.[92] It has been held

United States.— U. S. Bank *v.* Washington Bank, 6 Pet. (U. S.) 8, 8 L. ed. 299.

England.—Anonymous, 2 Salk. 588.

Evidence of payment.— The return of the sheriff on execution that the money was made and paid to plaintiff is sufficient evidence of the receipt of the money by plaintiff upon a rule to restore it to defendant. But a bare return of satisfied, without stating it was paid to plaintiff, or a return that the money was paid by defendant to plaintiff or his attorney, is not sufficient. Morgan *v.* Hart, 9 B. Mon. (Ky.) 79.

88. *Alabama.*— Williams *v.* Simmons, 22 Ala. 425; Stewart *v.* Conner, 9 Ala. 803; Dupuy *v.* Roebuck, 7 Ala. 484; Burdine *v.* Roper, 7 Ala. 466; Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

California.—Raun *v.* Reynolds, 18 Cal. 275.

Connecticut.— Lewis *v.* Hull, 39 Conn. 116; Hosmer *v.* Barret, 2 Root (Conn.) 156.

Illinois.— Field *v.* Anderson, 103 Ill. 403.

Indiana.— Martin *v.* Woodruff, 2 Ind. 237.

Maryland.— Owings *v.* Owings, 10 Gill & J. (Md.) 267; Green *v.* Stone, 1 Harr. & J. (Md.) 405.

Massachusetts.— Cummings *v.* Noyes, 10 Mass. 433.

New York.— Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Garr *v.* Martin, 1 Hilt. (N. Y.) 358; Maghee *v.* Kellogg, 24 Wend. (N. Y.) 32; Sturges *v.* Allis, 10 Wend. (N. Y.) 354; Clark *v.* Pinney, 6 Cow. (N. Y.) 297.

Ohio.— Hiler *v.* Hiler, 35 Ohio St. 645; Cincinnati Southern R. Co. *v.* Banning, 21 Cinc. L. Bul. 9.

Oregon.— McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12.

Vermont.— Catlin *v.* Allen, 17 Vt. 158; Jamaica *v.* Guilford, 2 D. Chipm. (Vt.) 103.

Virginia.—Caperton *v.* McCorkle, 5 Gratt. (Va.) 177.

Contrary view in Pennsylvania.— In Duncan *v.* Kirkpatrick, 13 Serg. & R. (Pa.) 292, it was held that, where the court, on reversing a judgment, ordered restitution, assumpsit would not lie to recover back the money paid thereunder.

New York — Statutory remedy cumulative. — The summary remedy for obtaining restitution given by N. Y. Code Civ. Proc. § 1323, is cumulative merely, and a party entitled to restitution may obtain relief by action. Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Kidd *v.* Curry, 29 Hun (N. Y.) 215; Lott *v.* Swezey, 29 Barb. (N. Y.) 87; Shapiro *v.* Goldberg, 31 Misc. (N. Y.) 787, 65 N. Y. Suppl. 312; Badger *v.* Appleton, 12 N. Y. Civ. Proc. 93.

Necessity for demand.— In cases where a writ of restitution can issue at once, a demand is not required before bringing suit. Martin *v.* Woodruff, 2 Ind. 237.

Sufficient proof of reversal.— While an entry on the record of the circuit court of a decision of the supreme court, in a case taken by appeal from the circuit court, is necessary before any action of the circuit court in the cause remanded, yet the entry of a reversal is not necessary to authorize the maintenance of an action to recover back money paid on the judgment reversed; and when the question, in a suit to recover money paid on a reversed judgment, is whether the judgment had been reversed, the record of the court that reversed the judgment, or an agreement of the parties that it had been reversed, is sufficient to prove the reversal. Glover *v.* Foote, 7 Blackf. (Ind.) 293.

Cannot divide demand.—Where the judgment debtor sues to recover the amount paid under an erroneous judgment, he must proceed for the whole amount, costs as well as debt, and, if he dismiss as to the costs, his remedy, *pro tanto*, will be gone. A plaintiff cannot divide an entire demand so as to maintain several actions for its recovery. Camp *v.* Morgan, 21 Ill. 255.

89. Ming *v.* Suggett, 34 Mo. 364, 86 Am. Dec. 112; Hier *v.* Anheuser-Busch Brewing Assoc., 60 Nebr. 320, 83 N. W. 77; Conover *v.* Scott, 11 N. J. L. 400; Bickett *v.* Garner, 31 Ohio St. 28.

90. Morgan *v.* Hart, 9 B. Mon. (Ky.) 79.

91. Delano *v.* Wilde, 11 Gray (Mass.) 17, 71 Am. Dec. 687; Cummings *v.* Noyes, 10 Mass. 433; Murray *v.* Berdell, 98 N. Y. 480; Breading *v.* Blocher, 29 Pa. St. 347.

See 3 Cent. Dig. tit. "Appeal and Error," § 4625.

As to when specific restitution may be compelled see *supra*, XVIII, E, 8, d, (I), (B).

92. Thompson *v.* Carroll, 36 N. H. 21; Stanard *v.* Brownlow, 3 Munf. (Va.) 229. And see Platt *v.* Withington, 11 N. Y. Suppl.

that costs may also be included in the order of restitution in a case where the aggrieved party is entitled to restitution.[93]

(11) *Where Property Sold.* Where there has been a sale under the judgment, the court will order restitution only for the amount actually received by the judgment creditor, and not for the value of the property sold.[94]

F. Rendition and Correction of Appellate Judgment — 1. Form of Judgment — a. In General — Certainty of Intent. The form of a judgment in the appellate court is sufficient if it expresses with reasonable certainty the judgment intended in the cause wherein it is entered.[95]

b. Absolute Affirmance. Ordinarily, a judgment of affirmance is sufficient if it states simply or in substance that the judgment below is affirmed,[96] unless a more specific form is required by statute,[97] by the character of the proceeding,[98]

824, 19 N. Y. Civ. Proc. 387, 25 Abb. N. Cas. (N. Y.) 103.

Fund paid to claimants.—Where a fund has been turned over to claimants thereof under a decree of a trial court, they should, on reversal of such decree, be charged with interest received by them on such funds pending the determination of the appeal, and credited with the expenses of its management of the fund. Independent Order Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

93. Thompson *v.* Carroll, 36 N. H. 21; Platt *v.* Withington, 11 N. Y. Suppl. 824, 19 N. Y. Civ. Proc. 387, 25 Abb. N. Cas. (N. Y.) 103; Estus *v.* Baldwin, 9 How. Pr. (N. Y.) 80. But see Richards *v.* Comstock, 1 Conn. 150.

94. Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665; Gay *v.* Smith, 38 N. H. 171; Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 296. *Contra*, Maynard *v.* May, (Ky. 1894) 25 S. W. 879.

Conversion of property by plaintiff.—Where plaintiff in attachment acquires possession of the property under a sale, which is set aside on appeal, and converts it to his own use, the trial court, on the cause being remanded, may compel him to account for it, and protect both parties by crediting defendant on the judgment against him with its market value. Stout *v.* Brown, 67 Ark. 481, 55 S. W. 838.

95. A mere clerical error in the caption will not invalidate or affect the judgment. McClelland *v.* Com., Hard. (Ky.) 290.

An omission to specify the amount for which judgment is given on appeal and trial *de novo* was held immaterial, since it could be made certain by reference to the appealed judgment recited in the appeal bond. Benedict *v.* Dillehunt, 4 Ill. 287.

The reasons therefor may be given orally or in writing, or entirely withheld, according to the court's own wise discretion, uncontrolled by legislative action. Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565.

Where an affirmed decree is not explicit, the appellate court may and should "add any explanation which may be necessary to make it fully understood." Mayo *v.* Purcell, 3 Munf. (Va.) 243.

Where an evidentiary ruling alone is brought up in the bill of exceptions, upon which ruling a judgment of dismissal was rendered in the lower court, an order on appeal that "the judgment below be reversed" was held to refer, not to the ruling on evidence which was no judgment, but to the order of dismissal, though the latter was not included in the bill of exceptions. Wells *v.* Walker, 26 Ga. 390.

96. Trenton Potteries Co. *v.* Smith, 26 Misc. (N. Y.) 822, 56 N. Y. Suppl. 1075; Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367; Eno *v.* Crooke, 6 How. Pr. (N. Y.) 462.

Satisfaction of an appellate judgment, which includes the judgment below, has been held a satisfaction of both judgments, though the rendition of a new judgment in addition to the appealed judgment was improper. Beers *v.* Hendrickson, 45 N. Y. 665.

Forms of judgments of affirmance may be found set out in full, in part, or in substance in Montgomery *v.* McGimpsey, 7 Sm. & M. (Miss.) 557; Delaplaine *v.* Bergen, 7 Hill (N. Y.) 591; Chase *v.* Washburn, 2 Ohio St. 98; U. S. *v.* Church, etc., Latter Day Saints, 150 U. S. 145, 14 S. Ct. 44, 37 L. ed. 1033; Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413.

97. Young *v.* Porter, 5 Yerg. (Tenn.) 98, where the statute required appellate court to render new judgment in place of appealed judgment.

An appeal by one of two defendants, in a case wherein the appellate court is required by statute to render a new judgment, leaves the judgment as to the defendant not appealing in full force in the lower court; hence, upon affirmance, there should be a new judgment as to appellant and a simple affirmance as to the other defendant. Puckett *v.* Ainsworth, 1 Yerg. (Tenn.) 254.

98. A judgment on certificate of the clerk, in Alabama, "must show every fact affirmatively in the judgment entry that is necessary to sustain the summary jurisdiction exercised by the court." Foster *v.* Harrison, 3 Ala. 25.

A judgment on appeal from a summary judgment against a sheriff and the sureties upon his official bond, in Tennessee, stands upon a different footing from a summary judgment in the first instance. "The rule requiring summary judgments to recite fully the jurisdictional facts does not apply to appellate judgments of the supreme court." Bittick *v.* McEwen, 7 Heisk. (Tenn.) 1.

Upon affirmance of an order denying a new trial, it is improper to enter an affirmance of

or by the circumstances of the particular case in which the judgment of affirmance is rendered.[99]

c. Absolute Reversal. A simple statement that the judgment below is set aside does not, ordinarily, express the full intent of a judgment of vacation.[1] It is, usually, necessary to order a new trial,[2] settle the rights of parties,[3] enter another judgment in different terms or for different parties,[4] or order the entry of such judgment in the lower court.[5]

d. Neither Affirmance Nor Reversal. To be effective, the judgment should contain specific as well as certain provisions in case of affirmance or reversal in part[6] or upon condition,[7] in case of modification,[8] or in case of judgment on cross-appeals.[9]

2. Entry of Judgment — a. Necessity of Entry. An appellate judgment becomes final and complete only when entered on the records of the appellate

the judgment to which the order related, since the order alone, not the judgment, is the subject of the appeal. Miller *v.* Eagle L., etc., Ins. Co., 3 E. D. Smith (N. Y.) 184.

Upon trial de novo the court must render a new judgment upon which execution may be issued, since the appealed judgment is vacated by the proceeding *de novo* and cannot be revived by affirmance. Doremus *v.* Howard, 23 N. J. L. 390; Ivins *v.* Schooley, 18 N. J. L. 269. *Compare* Benedict *v.* Dillehunt, 4 Ill. 287.

99. Additional relief against a surety on an injunction bond may be required to be given upon an affirmance of a judgment dissolving the injunction and for damages. Mora *v.* Avery, 22 La. Ann. 417.

Further proof may be required to enable the appellate court to make an adequate decree, and, under proper circumstances, such proof may be directed. Stulzfoos' Appeal, 3 Penr. & W. (Pa.) 265.

Costs of the appeal may properly be awarded in the judgment in addition to affirmance of the judgment below. Beardsley Scythe Co. *v.* Foster, 34 How. Pr. (N. Y.) 97; Eno *v.* Crooke, 6 How. Pr. (N. Y.) 462.

1. Forms of judgments of reversal are set out in full, in part, or in substance in:

Georgia.— Summerville Macadamized, etc., Road Co. *v.* Baker, 70 Ga. 513.

Michigan.— Adair *v.* Adair, 5 Mich. 204, 71 Am. Dec. 779.

New Jersey.—Horner *v.* Webster, 33 N. J. L. 387; Engle *v.* Crombie, 21 N. J. L. 614; McGrail *v.* McGrail, 51 N. J. Eq. 537, 26 Atl. 705.

Ohio.— Bolles *v.* Stockman, 42 Ohio St. 445; Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481.

Pennsylvania.— Murdoch's Appeal, 31 Pa. St. 47; Hallowell's Estate, 23 Pa. St. 223; Smith's Appeal, 23 Pa. St. 9.

In Pennsylvania, after reversing, on appeal, a decree of the orphan's court, upon a writ of error in the case of a feigned issue directed in the same matter by the common pleas, the supreme court "simply set aside the whole proceedings in the common pleas." Wills *v.* Hannen, 22 Pa. St. 334.

2. National Board Mar. Underwriters *v.* National Bank, 146 N. Y. 64, 40 N. E. 500, 65 N. Y. St. 755 [*reversing* 9 Misc. (N. Y.) 688, 30 N. Y. Suppl. 544, 62 N. Y. St. 125]; Giles *v.* Austin, 34 N. Y. Super. Ct. 540; Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367.

3. Haynes *v.* Kent, 8 La. Ann. 132; Riley *v.* Renick Milling Co., 44 Mo. App. 519; Kummer *v.* Christopher, etc., R. Co., 3 Misc. (N. Y.) 100, 22 N. Y. Suppl. 698, 51 N. Y. St. 770.

4. Hunter *v.* Hatch, 45 Ill. 178; Nugent *v.* Philadelphia Traction Co., 183 Pa. St. 142, 41 Wkly. Notes Cas. (Pa.) 210, 38 Atl. 587; Bittick *v.* McEwen, 7 Heisk. (Tenn.) 1.

5. McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 328; Hopkins *v.* Flynn, 7 Cow. (N. Y.) 526; Summerlin *v.* Cowles, 107 N. C. 459, 12 S. E. 234.

6. Mundy *v.* Stevens, 61 Fed. 77, 17 U. S. App. 442, 463, 9 C. C. A. 366.

7. National Board Mar. Underwriters *v.* National Bank, 146 N. Y. 64, 40 N. E. 500, 65 N. Y. St. 755 [*reversing* 9 Misc. (N. Y.) 688, 30 N. Y. Suppl. 544, 62 N. Y. St. 125].

8. Hunter *v.* Hatch, 45 Ill. 178; Lemars First Nat. Bank *v.* Northwestern Water, etc., Co., (Iowa 1898) 74 N. W. 772.

In New York, a judgment of modification, on appeal, of an order of the district court of New York city opening a default, should contain a provision setting the cause down for trial on a designated day. Schwartz *v.* Schendel, 24 Misc. (N. Y.) 701, 53 N. Y. Suppl 773.

9. Consistency of the record in an appellate judgment upon cross-appeals may require a complete reversal of the appealed judgment, although, upon plaintiff's appeal, it is determined that he has not been prejudiced. Sloan *v.* Kansas City State Bank, 158 Mo. 439, 57 S. W. 1014.

Severable judgment upon cross-appeals, which affirmed the judgment on plaintiff's appeal as not inadequate, and reversed it and awarded a new trial on defendant's appeal as excessive, was declared, on further appeal, to be "glaringly inconsistent," and a new trial of the whole matter, with conditions, was directed. National Board Mar. Underwriters *v.* National Bank, 146 N. Y. 64, 40 N. E. 500, 65 N. Y. St. 755 [*reversing* 9 Misc. (N. Y.) 688, 30 N. Y. Suppl. 544, 62 N. Y. St. 125].

court;[10] but where the fact of entry is questioned in further proceedings had as upon proper entry, the fact of entry may be presumed until the contrary is shown.[11] A judgment does not become final, nor is it regularly entered as such until the time within which a rehearing may be granted has expired,[12] or, within such time, until a petition for rehearing has been made and denied.[13]

b. Nunc Pro Tunc Entry. An entry of an appellate judgment may be made as of a prior date, at which time it might have been entered, when, for any cause, it would be improper to enter it as of the time of the actual entry;[14] and a *nunc pro tunc* operation of an amendment may be presumed.[15] Where a judgment has been entered at a time when it could not legally be entered, it may be set aside and entered as of a date when its entry would have been legal, even though a remittitur has gone forth, which may be recalled for that purpose.[16] But a *nunc pro tunc* entry will not be made merely for the purpose of aiding an appeal to a higher court.[17]

3. Amendment or Vacation of Judgment — a. Correction of Clerical Error or Fraud — (I) *In the Judgment.* So long as jurisdiction of the cause remains in the appellate court, the power to correct clerical errors by way of amendment, so as to make the judgment as rendered conform to the judgment intended, is absolute, and will be exercised upon a proper application or upon its own motion,[18]

10. Ryerson *v.* Eldred, 18 Mich. 490. See 3 Cent. Dig. tit. "Appeal and Error," § 4634.

A signed memorandum of a decision, handed down by the court, is simply authority to enter a judgment in accordance with its terms — it is not a complete and final judgment. Knapp *v.* Roche, 82 N. Y. 366 [*affirming* 46 N. Y. Super. Ct. 200].

Notice of the decision to any of the parties interested is not necessary. Petrie *v.* Fitzgerald, 2 Abb. Pr. N. S. (N. Y.) 354.

11. An objection to proceeding with a new trial, which had been awarded, and after remand of the cause to the trial court, that no judgment had been entered in the appellate court, in the absence of evidence to support such objection, was held to have been properly overruled, upon the presumption that the mandate of the appellate court was regularly sent down. Caldwell *v.* Bruggerman, 8 Minn. 286.

12. Bedford *v.* Saunders, 2 Rob. (La.) 285.

13. Cline *v.* Wrightson, 7 Ky. L. Rep. 215.

14. *Arkansas.*— Cunningham *v.* Ashley, 13 Ark. 653.

California.— Ede *v.* Cuneo, (Cal. 1898) 55 Pac. 772.

New Jersey.— Tallman *v.* Wallack, (N. J. 1896) 41 Atl. 677.

New York.— Matter of Beckwith, 87 N. Y. 503.

North Carolina.— Cook *v.* Moore, 100 N. C. 294, 6. S. E. 795, 6 Am. St. Rep. 587.

Texas.— Ximenes *v.* Ximenes, 43 Tex. 458.

United States.— Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309 [*reversing* 83 Fed. 898, 42 U. S. App. 581, 28 C. C. A. 229].

See 3 Cent. Dig. tit. "Appeal and Error," § 4635.

Limitations on power to change or modify judgment.— In North Carolina the court cannot change or modify its judgment at a subsequent term, though the previous judgment may be amended so as to make it in fact the judgment intended (James *v.* Western North Carolina R. Co., 123 N. C. 299, 31 S. E. 707); nor can a judgment be entered as of a date when the court was not in session, nor as of a term when the appeal could not have been heard (De Agreda *v.* Mantel, 1 Abb. Pr. (N. Y.) 130); nor as of a time prior to the submission of the cause (Cunningham *v.* Ashley, 13 Ark. 653); nor changed to the prejudice of a surety on an appeal bond without notice to him (Koch *v.* Atlantic, etc., R. Co., 77 Mo. 354).

15. A regular, following an irregular, affirmance may be held to relate back to the time of the actual affirmance, so as to effectuate an execution issued upon the irregular affirmance. Slagel *v.* Murdock, 65 Mo. 522.

16. Holloway *v.* Galliac, 49 Cal. 149. But the judgment as rendered must have been wholly void to justify a recall of the remittitur. Martin *v.* Wagner, 124 Cal. 204, 56 Pac. 1023.

17. Commonwealth Bank *v.* Swindler, 2 Dana (Ky.) 393.

18. *Arkansas.*— Levy *v.* Inglish, 4 Ark. 591.

California.— Swain *v.* Naglee, 19 Cal. 127.

Georgia.— Walker *v.* Scott, 29 Ga. 392.

Illinois.— Brown *v.* Keller, 40 Ill. 81; Mitcheltree *v.* Sparks, 2 Ill. 122.

Kentucky.—Stephens *v.* Wilson, 14 B. Mon. (Ky.) 71; Bradford *v.* Patterson, 1 A. K. Marsh. (Ky.) 464.

Louisiana.— Mahony *v.* Mahony, 41 La. Ann. 135, 5 So. 645.

Maryland.— Lovejoy *v.* Irelan, 19 Md. 56.

Michigan.— Crawford *v.* Osmun, 90 Mich. 77, 51 N. W. 356, 52 N. W. 73.

Mississippi.— Cotten *v.* McGehee, 54 Miss. 621.

Missouri.—State *v.* St. Gemme, 15 Mo. 219.

New York.— Morris *v.* Sickly, 137 N. Y. 604, 33 N. E. 373, 51 N. Y. St. 4; Salmon *v.* Gedney, 75 N. Y. 479; Harper *v.* Hall, 1 Daly (N. Y.) 498; Bagley *v.* Brown, 3 E. D. Smith

untrammelled by legislative interference;[19] and a judgment procured by fraud may be amended or vacated in a similar manner.[20] Even after the remittitur has gone forth it may, for good cause shown, be recalled and jurisdiction reassumed for the correction of clerical errors or fraud in the judgment.[21] But the power may not be exercised after issuance of execution,[22] the payment of the

(N. Y.) 66; Beardsley Scythe Co. *v.* Foster, 34 How. Pr. (N. Y.) 97; Hopkins *v.* Flynn, 7 Cow. (N. Y.) 526.

North Carolina.— Board of Education *v.* Henderson, 127 N. C. 8, 37 S. E. 72; Summerlin *v.* Cowles, 107 N. C. 459, 12 S. E. 234; Cook *v.* Moore, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587; Scott *v.* Queen, 95 N. C. 340; Governor *v.* Twitty, 13 N. C. 386.

Ohio.— Murphy *v.* Swadner, 34 Ohio St. 672.

South Carolina.— Hartsfield *v.* Chamblin, 44 S. C. 110, 21 S. E. 798.

Tennessee.— Easley *v.* Tarkington, 5 Baxt. (Tenn.) 592; Polk *v.* Pledge, 5 Heisk. (Tenn.) 371; Farris *v.* Kilpatrick, 1 Humphr. (Tenn.) 379.

Texas.— Milam County *v.* Robertson, 47 Tex. 222.

Wisconsin.— Pringle *v.* Dunn, 39 Wis. 435; Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

United States.— Elizabeth *v.* American Nicholson Pavement Co., 131 U. S. cxlviii, appendix, 24 L. ed. 1059.

See 3 Cent. Dig. tit. "Appeal and Error," § 4636 *et seq.*

The clerk, of his own motion, cannot amend a judgment — the irregularity or mistake should be brought to the attention of the court. Prout *v.* Berry, 12 Gill & J. (Md.) 285; Chapin *v.* Churchill, 12 How. Pr. (N. Y.) 367.

A matter which the lower court may remedy will not be incorporated in the appellate judgment by amendment.

Arkansas.— Hershey *v.* Luce, 56 Ark. 320, 19 S. W. 953, 20 S. W. 6.

California.— Ashton *v.* Heydenfeldt, (Cal. 1899) 56 Pac. 1031.

Nebraska.— Fuller *v.* Ryan, 34 Nebr. 183, 51 N. W. 755.

New York.— Dresser *v.* Brooks, 2 N. Y. 559.

North Carolina.— White *v.* Butcher, 97 N. C. 7, 2 S. E. 59.

Wisconsin.— Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

19. Legislative interference unconstitutional.— Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565, where the court, by Field, J., said: "The records of the court are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice. . . . Legislation, which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt."

A legislative direction to the clerk to strike out a judgment of dismissal and reinstate the cause has been held inoperative to confer power on the clerk to take such action without an order of the court. Prout *v.* Berry, 12 Gill & J. (Md.) 285.

20. *Kentucky.*— McIlvoy *v.* Russell, 16 Ky. L. Rep. 737, 29 S. W. 630.

Mississippi.— Cotten *v.* McGehee, 54 Miss. 621.

Montana.— Harvey *v.* Whitlatch, 2 Mont. 55.

New York.— Newton *v.* Harris, 8 Barb. (N. Y.) 306, Code Rep. N. S. (N. Y.) 191.

North Carolina.— Mann *v.* Taylor, 49 N. C. 127.

Wisconsin.— McDougall *v.* Townsend, 6 Wis. 198.

Estoppel to show fraud — Unauthorized appeal.— Where, three months after a reversal of which appellees had notice, an application was made by appellees to vacate as to one of appellants, on the ground that he had not authorized the prosecution of the appeal in his name, it was denied as coming too late. Day *v.* Burnham, 11 Ky. L. Rep. 292, 11 S. W. 807, 12 S. W. 148.

Knowledge of a false statement of fact, in the report of a referee, by the parties at the hearing on appeal, will prevent a subsequent showing thereof as ground for review of the appellate judgment. Farrar *v.* Staton, 101 N. C. 78, 7 S. E. 753.

21. *California.*— Martin *v.* Wagner, 124 Cal. 204, 56 Pac. 1023; Trumpler *v.* Trumpler, 123 Cal. 248, 55 Pac. 1008; Romine *v.* Cralle, 80 Cal. 626, 22 Pac. 296; Rowland *v.* Kreyenhagen, 24 Cal. 52.

Montana.— Kimpton *v.* Jubilee Placer Min. Co., 16 Mont. 379, 41 Pac. 137, 42 Pac. 102.

New Jersey.— King *v.* Ruckman, 22 N. J. Eq. 551.

New York.— Palmer *v.* Lawrence, 5 N. Y. 455; Burkle *v.* Luce, 1 N. Y. 239, 3 How. Pr. (N. Y.) 236; Legg *v.* Overbagh, 4 Wend. (N. Y.) 188, 21 Am. Dec. 115.

Washington.— Titlow *v.* Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406; Wolferman *v.* Bell, 8 Wash. 140, 35 Pac. 603; Sears *v.* Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918.

United States.— Killian *v.* Ebbinghaus, 111 U. S. 798, 4 S. Ct. 698, 28 L. ed. 593.

Mistake and fraud stand on the same footing, with reference to the entry of a false order, necessitating a correction by amendment or vacation, and recall of the remittitur for that purpose. Vance *v.* Peña, 36 Cal. 328.

Mere harmless surplusage in the judgment will not impel the court to recall a mandate for the purpose of having it struck out. Morrell *v.* Miller, 28 Oreg. 354, 43 Pac. 490, 45 Pac. 246.

22. Stoll *v.* Padley, 100 Mich. 404, 59 N. W. 176; First Nat. Bank *v.* Fitch, 7 Ohio N. P. 426, 5 Ohio Dec. 197. *Contra,* Tuttle *v.* Gilmore, 42 N. J. Eq. 369, 7 Atl. 859, where the judgment entry was amended on appeal from proceedings on execution thereof. To similar effect see Carlson *v.* Winterson, 147 N. Y. 652, 723, 42 N. E. 347, 70 N. Y. St. 872.

judgment,[23] the intervention of other rights,[24] the lapse of an unreasonable and unexplained length of time after notice,[25] or the expiration of a reasonable time, fixed by statute, for such purpose.[26]

(II) *In the Remittitur or Mandate.* A remittitur or mandate, affected by clerical error or fraud so that it does not conform to the judgment as rendered, may be amended or vacated;[27] and, for the same purpose, it may be recalled after it has gone forth,[28] before action has been taken thereon in the lower court,[29] and if the applicant therefor is not guilty of laches,[30] but not for the purpose of giving relief supplemental to that adjudged,[31] or for reëxamination on the merits,[32] unless the remittitur had erroneously been issued pending the right to a rehearing.[33]

b. Correction of Judicial Error — (I) *General Rule.* Where the amendment or the vacation of a judgment for the correction of judicial error or oversight therein involves a reëxamination of the appeal upon its merits, this power will not, generally, be exercised except upon a proper petition for rehearing,[34] made previous to a transfer of the cause from the appellate to the lower court,[35]

23. Bradley, etc., Co. *v.* Lally, 10 Misc. (N. Y.) 366, 31 N. Y. Suppl. 120, 63 N. Y. St. 405.

24. Bailey *v.* Hearn, 3 Greene (Iowa) 415.

25. **After two years,** the supreme court of California refused to recall a remittitur for the purpose of permitting the representatives of a party who had died before the judgment to be made parties, a new trial having been ordered wherein they could, by application to the trial court, be made parties. The judgment was held to be not wholly void, but only erroneous. Martin *v.* Wagner, 124 Cal. 204, 56 Pac. 1023.

After the lapse of seven years the supreme court of Texas refused to recall a mandate, for the purpose of vacating a judgment rendered upon a mistake of fact as to the death of parties at the time of its rendition, upon the application of representatives of said parties, represented by the same counsel who appeared on the appeal, without any explanation or excuse for the long delay or any showing that the rights of innocent third parties had intervened. Milam County *v.* Robertson, 47 Tex. 222.

After a new trial and second appeal, a motion to recall a remittitur, upon grounds sufficient if seasonably urged, was denied. McKenzie *v.* Sifford, 52 S. C. 394, 29 S. E. 811.

Rights of parties to fraud.— The propriety of recalling a remittitur, fraudulently obtained, ordering a new trial in an action in which a decree in partition had been rendered and the nominal parties thereto had sold the land, is not affected by the fact that some personalty was included in the decree, and not conveyed by the nominal parties. Trumpler *v.* Trumpler, 123 Cal. 248, 55 Pac. 1008.

26. Corry *v.* Campbell, 34 Ohio St. 204.

27. Platte Valley State Bank *v.* National Live Stock Bank, 155 Ill. 250, 40 N. E. 621; Wade *v.* Franklin First Nat. Bank, 11 Bush (Ky.) 697; Woods *v.* Roman, 5 B. Mon. (Ky.) 145.

A second motion to amend a remittitur, in substantially the same respects as those shown in a motion previously denied, will not be entertained. Whitman *v.* Foley, 19 N. Y. Suppl. 910, 43 N. Y. St. 969.

28. *California.*— Trumpler *v.* Trumpler, 123 Cal. 248, 55 Pac. 1008.

Minnesota.— Rud *v.* Pope County, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886.

Missouri.—State *v.* St. Gemme, 15 Mo. 219.

New York.— Franklin Bank Note Co. *v.* Mackey, 158 N. Y. 683, 51 N. E. 178.

Washington.— Titlow *v.* Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406.

A remittitur which conforms to the judgment cannot be recalled for amendment of the judgment where it is too late to amend the judgment in the particular complained of. San Francisco Sav. Union *v.* Long, (Cal. 1899) 56 Pac. 882.

29. Merriam *v.* Gordan, 20 Nebr. 405, 30 N. W. 410; People *v.* Nelliston, 79 N. Y. 638; Hosack *v.* Rogers, 7 Paige (N. Y.) 108.

30. Baker *v.* Southern California R. Co., (Cal. 1900) 62 Pac. 302; San Francisco *v.* Calderwood, 58 Cal. 355.

31. See *infra*, XVIII, F, 3, c.

32. See *infra*, XVIII, F, 3, b.

33. *California.*— Mateer *v.* Brown, 1 Cal. 231; Grogan *v.* Ruskle, 1 Cal. 193.

Montana.— Columbia Min. Co. *v.* Holter, 1 Mont. 429.

New York.— Franklin Bank Note Co. *v.* Mackey, 158 N. Y. 683, 51 N. E. 178; Wilmerdings *v.* Fowler, 15 Abb. Pr. N. S. (N. Y.) 86.

South Carolina.— Milhous *v.* Sally, 43 S. C. 318, 21 S. E. 885, 49 Am. St. Rep. 834.

Virginia.—Wynn *v.* Wyatt, 11 Leigh (Va.) 12.

34. **A correction proper only upon rehearing** cannot be made except upon a proper petition for rehearing. Rhea *v.* Surryhne, 39 Cal. 581; Powell *v.* Bunger, 91 Ind. 64; Solomon *v.* Bates, 118 N. C. 321, 24 S. E. 746.

35. **A remittitur will not be recalled for reëxamination of the cause on the merits.**— *California.*— Martin *v.* Wagner, 124 Cal. 204, 56 Pac. 1023; Matter of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Leese *v.* Clark, 20 Cal. 387.

Florida.— Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

within the term,[36] and within the time prescribed for such petition.[37] And the merits of a cause will not be reëxamined upon the allowance of a motion for correction of a mistake in the judgment entry,[38] except in the case of a vacation of a judgment inadvertently rendered.[39] But the converse rule obtains where the error is apparent on the face of the record,[40] or where the error is of such

Kentucky.— Bradford *v.* Patterson, 1 A. K. Marsh. (Ky.) 464.

Louisiana.— D'Apremont *v.* Peytavin, 5 Mart. (La.) 641.

Michigan.— Ryerson *v.* Eldred, 18 Mich. 490.

Minnesota.— Rud *v.* Pope County, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886; Caldwell *v.* Bruggerman, 8 Minn. 286.

Montana.— Kimpton *v.* Jubilee Placer Min. Co., 16 Mont. 379, 41 Pac. 137, 42 Pac. 102; Columbia Min. Co. *v.* Holter, 1 Mont. 429.

Nevada.—Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 3 Nev. 336.

New Hampshire.— Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332; Preston *v.* Travellers' Ins. Co., 59 N. H. 49.

New Jersey.—King *v.* Ruckman, 22 N. J. Eq. 551.

New York.— Bradley, etc., Co. *v.* Lally, 10 Misc. (N. Y.) 366, 31 N. Y. Suppl. 120, 63 N. Y. St. 405.

North Carolina.— See Finlayson *v.* Kirby, 127 N. C. 222, 37 S. E. 223.

South Carolina.— Des Portes *v.* Hunter, 51 S. C. 250, 28 S. E. 530; Brooks *v.* Brooks, 16 S. C. 621: *Ex p.* Dunovant, 16 S. C. 299; Sullivan *v.* Speights, 14 S. C. 358; Whaley *v.* Charleston Bank, 5 S. C. 262.

South Dakota.— *In re* Seydel, (S. D. 1900) 84 N. W. 397; Dempsey *v.* Billinghurst, 8 S. D. 86, 65 N. W. 427.

Vermont.—Underhill *v.* Jericho, 66 Vt. 183, 28 Atl. 879.

Washington.—Wolferman *v.* Bell, 8 Wash. 140, 35 Pac. 603.

Wisconsin.— Hopkins *v.* Gilman, 23 Wis. 512.

United States.—Peck *v.* Sanderson, 18 How. (U. S.) 42, 15 L. ed. 262; Browder *v.* McArthur, 7 Wheat. (U. S.) 58, 5 L. ed. 397; Hawkins *v.* Cleveland, etc., R. Co., 99 Fed. 322, 39 C. C. A. 538.

36. **After the term** of an appellate judgment, the court has no jurisdiction to entertain an application involving a reëxamination on the merits.

Illinois.— Coates *v.* Cunningham, 100 Ill. 463; Dunning *v.* Bathrick, 41 Ill. 425; Hollowbush *v.* McConnel, 12 Ill. 203; School Trustees *v.* Love, 29 Ill. App. 615; Gallagher *v.* Kilkeary, 29 Ill. App. 600.

Kentucky.— Beazley *v.* Mershon, 6 Bush (Ky.) 424; Stephers *v.* Wilson, 14 B. Mon. (Ky.) 71; Bradford *v.* Patterson, 1 A. K. Marsh. (Ky.) 464; Prather *v.* Phelps, 5 Ky. L. Rep. 763; Booth *v.* Wood, 5 Ky. L. Rep. 763.

Mississippi.—Lane *v.* Wheless, 46 Miss. 666.

Nevada.—Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 3 Nev. 336.

Texas.— Burke *v.* Mathews, 37 Tex. 73; Kincheloe *v.* McWillie, 33 Tex. 9; Trammell *v.* Trammell, 25 Tex. Suppl. 261.

Virginia.— Roanoke St. R. Co. *v.* Hicks, (Va. 1899) 32 S. E. 790; Thompson *v.* Carpenter, 88 Va. 702, 14 S. E. 181; Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120; State Bank *v.* Craig, 6 Leigh (Va.) 399.

Wisconsin.— Everett *v.* Gores, 92 Wis. 527, 66 N. W. 616; Pringle *v.* Dunn, 39 Wis. 435.

United States.— Rice *v.* Minnesota, etc., R. Co., 21 How. (U. S.) 82, 16 L. ed. 31; Hawkins *v.* Cleveland, etc., R. Co., 99 Fed. 322, 39 C. C. A. 538; Jourolman *v.* East Tennessee Land Co., 85 Fed. 251, 56 U. S. App. 155, 29 C. C. A. 140; Minnesota Tribune Co. *v.* Associated Press, 84 Fed. 921, 56 U. S. App. 52, 28 C. C. A. 566.

Aliter, if the judgment is not final. McCoy *v.* Porter, 17 Serg. & R. (Pa.) 59; Com. *v.* Beaumarchais, 3 Call (Va.) 122.

An entry at a subsequent term, of an order amending or vacating a judgment, made at the original term, may be made to correct the omission. Beasley *v.* Owen, 3 Hen. & M. (Va.) 449.

A continuance for formal entry to a subsequent term does not leave the case upon the calendar for reëxamination on the merits (Slade *v.* Day, Brayt. (Vt.) 72); nor does a general order continuing all cases not otherwise disposed of cure an improper motion for a rehearing at the preceding term (Smith *v.* Alston, 40 Tex. 139).

37. **After the time for rehearing** the merits of a case will not be reëxamined upon motion. Gray *v.* Gray, 11 Cal. 341; Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146; Pierce *v.* Kelly, 39 Wis. 568; Ogilvie *v.* Richardson, 14 Wis. 157.

Clerical mistake or fraud may be corrected after the term and after the time for rehearing on the merits. See cases cited *supra,* note 18 *et seq.*

38. Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 49 Kan. 726, 31 Pac. 691; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210.

39. **Vacation of judgment by divided court.** —Where a judgment of reversal was rendered by a court equally divided, which judgment was afterward vacated in view of a statutory provision that in such case the appealed judgment should be affirmed, the case stands as if no judgment had been rendered, and judgment of affirmance may be entered, or a reargument ordered. Case *v.* Hoffman, 100 Wis. 314, 75 N. W. 945, 44 L. R. A. 728.

40. National Board Mar. Underwriters *v.* National Bank, 146 N. Y. 64, 40 N. E. 500, 65 N. Y. St. 755 [*reversing* 9 Misc. (N. Y.) 688, 30 N. Y. Suppl. 544, 62 N. Y. St. 125]; Wilmerdings *v.* Fowler, 15 Abb. Pr. N. S. (N. Y.) 86, Haskell *v.* Raoul, 1 McCord Eq.

a nature as to render the judgment or decree void for want of jurisdiction in the court below.[41]

(II) *Misapprehension of the Facts.* In case of a plain misapprehension of the facts upon which a judgment was rendered, the appellate court may, upon motion, thereafter reconsider its judgment in view of the real facts,[42] although the time for a regular rehearing on the merits had expired,[43] or the term of the judgment has passed [44] or remittitur issued.[45]

c. **Supplemental Relief.** Supplemental relief to that given in the judgment, which amounts to more than the mere correction of clerical errors or fraud, error apparent on the face of the judgment, or invalidity for want of jurisdiction, and which does not contemplate a reëxamination for a plain misapprehension of the facts, will not be granted at a subsequent term,[46] although no remittitur had issued;[47] and a remittitur will not be recalled for such purpose,[48] nor will the judgment in accordance with the mandate be controlled or effectuated in the lower court otherwise than by another appellate proceeding.[49]

(S. C.) 22; Bond *v.* Greenwald, 7 Baxt. (Tenn.) 466; Lamb *v.* Sneed, 4 Baxt. (Tenn.) 349; Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672; Wolferman *v.* Bell, 8 Wash. 140, 35 Pac. 603.

In California it has been held that an order for a hearing by the court *in banc* upon a motion to correct a judgment must have been made by a department of the court, else the judgment becomes final after thirty days unless a petition for a rehearing within that time be filed; and, though the motion was pending, a remittitur not inadvertently issued would not be recalled. Herrlich *v.* McDonald, 83 Cal. 505, 23 Pac. 710.

41. *Alabama.*— Donnell *v.* Hamilton, 77 Ala. 610.

Indiana.— Huntington County *v.* Brown, 14 Ind. 191.

Kentucky.— Finnell *v.* Jones, 7 Bush (Ky.) 359.

Minnesota.— Page *v.* Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 1119.

Mississippi.— Cotten *v.* McGehee, 54 Miss. 621.

Montana.— Harvey *v.* Whitlatch, 2 Mont. 55.

New York.— Waters *v.* Travis, 8 Johns. (N. Y.) 566.

Texas.— Milam County *v.* Robertson, 47 Tex. 222; Martel *v.* Hernsheim, 9 Tex. 294.

Washington.— Wolferman *v.* Bell, 8 Wash. 140, 35 Pac. 603; Bell *v.* Waudby, 7 Wash. 203, 34 Pac. 917.

Aliter, if the judgment is only voidable. Martin *v.* Wagner, 124 Cal. 204, 56 Pac. 1023 (where a judgment rendered after the death of a party, without substitution, was held merely erroneous, not wholly void, for the correction of which a remittitur would not be recalled); Blanc *v.* Bowman, 22 Cal. 23 (where a judge who did not hear the argument participated in the decision).

42. Page *v.* Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 1119; Harper *v.* Keely, 17 Pa. St. 234; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

43. Raborg *v.* Columbia Bank, 1 Harr. & G. (Md.) 231; McCaw *v.* Blewitt, Bailey Eq. (S. C.) 98; Patten Paper Co. *v.* Green Bay, etc., Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.

44. Cotten *v.* McGehee, 54 Miss. 621; Mississippi, etc., R. Co. *v.* Wynne, 42 Miss. 315.

In Van Orman *v.* Spafford, 20 Iowa 215, where a judgment upon a misapprehension of the condition of the record, not upon the merits, was rendered, at the succeeding term, the court, though doubting its power to reopen the case for a hearing on the merits, modified the judgment by ordering that the former adjudication should not conclude either party, thus practically wiping out the results of the entire proceeding.

45. Des Portes *v.* Hunter, 51 S. C. 250, 28 S. E. 530.

46. Gayle *v.* Agee, 4 Port. (Ala.) 439; Hill *v.* Walker, 7 Baxt. (Tenn.) 310; Shepherd *v.* Shepherd, 12 Heisk. (Tenn.) 275; Wardlow *v.* Steele, 7 Coldw. (Tenn.) 573; Ridgeway *v.* Ward, 4 Humphr. (Tenn.) 430; Schell *v.* Dodge, 107 U. S. 629, 2 S. Ct. 830, 27 L. ed. 601.

47. Crane *v.* Reeder, 23 Mich. 92; Galveston, etc., R. Co. *v.* Wesch, 85 Tex. 593, 22 S. W. 957.

48. *California.*— Matter of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

Florida.— Merchants' Nat. Bank *v.* Grunthal, 39 Fla. 388, 22 So. 685.

South Carolina.— Taylor *v.* James, 4 Desauss. (S. C.) 1.

Tennessee.— Ward *v.* Thomas, 2 Coldw. (Tenn.) 565.

Vermont.— Barker *v.* Belknap, 27 Vt. 700.

United States.— Sibbald *v.* U. S., 2 How. (U. S.) 455, 11 L. ed. 337.

Statutory relief in favor of an infant — that he shall have six months after attaining majority in which to apply for an opening of a judgment against him — does not confer upon the appellate court jurisdiction anew after remand. Ewing *v.* Winters, 39 W. Va. 489, 20 S. E. 572.

49. James *v.* Western North Carolina R. Co., 123 N. C. 299, 31 S. E. 707 (where the supreme court declined, upon original application, to afford protection to a lower-court judgment, entered according to its mandate, from unwarranted interference by other courts

d. Relief From Neglect. Relief, by vacation or amendment, of an appellate judgment which is due to neglect of the party applying for such relief is, while the court has jurisdiction, a matter within the discretion of the court, and, except for very cogent reasons, will not be granted — as in case of failure to prosecute [50] or defend,[51] to complete the record,[52] to raise objections to the appeal,[53] to set up an additional defense,[54] to dismiss pursuant to a prior settlement,[55] or to present questions of practice which might have resulted in a different determination.[56]

4. Proceedings For Further Appeal. Proceedings for review by a successively higher tribunal are governed by the rules relating to appellate proceedings, generally, heretofore fully treated.[57] In addition thereto, it should be noted that, generally, in case a remittitur has issued upon the judgment of an intermediate appellate court, such court has no jurisdiction to effect a transfer of the cause to a higher court until the remittitur has been recalled;[58] also, that a suc-

and amounting to an unlawful obstruction of its enforcement); Remington *v.* Eastern R. Co., 109 Wis. 154, 85 N. W. 321 (where the supreme court declined to recall and amend a mandate so as to direct the manner of execution of a judgment by it directed to be entered).

50. Kent *v.* Dunham, 14 Gray (Mass.) 279; Watterson *v.* Payne, 154 U. S. 534, 14 S. Ct. 1157, 1214, 15 L. ed. 899.

With the imposition of reasonable terms, an affirmance upon failure to prosecute may be vacated, where no injury is done thereby and the failure may be excused (Rice *v.* Maddock, 7 N. Y. Suppl. 632, 28 N. Y. St. 413), even, in Wisconsin, after the term, where the motion to reinstate is made within sixty days and remittitur has not issued (Krall *v.* Lull, 46 Wis. 643, 1 N. W. 217).

A default in violation of a stipulation may, upon motion, be set aside, even though the stipulation be not in writing. Chamberlain *v.* Fitch, 2 Cow. (N. Y.) 243.

A good excuse for non-appearance may not warrant relief if it appears that, even if the judgment of affirmance for non-appearance be vacated, another judgment of the same character must, upon the record, be rendered. Bishop *v.* Glassen, (Cal. 1886) 12 Pac. 258.

After remand, relief from an affirmance for failure to prosecute cannot be granted, even upon terms and a good excuse for the default. Zorn *v.* Lamar, 71 Ga. 85; Martin *v.* Wilson, 1 N. Y. 240; Latson *v.* Wallace, 9 How. Pr. (N. Y.) 334; Delaplaine *v.* Bergen, 7 Hill (N. Y.) 591; Legg *v.* Overbagh, 4 Wend. (N. Y.) 188, 21 Am. Dec. 115.

51. Default without regular notice.— Though a party had not a regular notice, in writing, of a writ of error or of a judgment of reversal, yet, where he had sufficient information of the pendency of the writ of error to have pleaded in time, and of the judgment of reversal by default in season to have moved the court, at a former term, to set it aside, the court declined to vacate the judgment at a subsequent term on the ground of laches. Clement *v.* Crossman, 8 Johns. (N. Y.) 287.

52. A reëxamination cannot be had on a complete record, after a judgment upon an incomplete record for which the applicant is responsible.

Indiana.— Devoss *v.* Jay, 14 Ind. 400.

Iowa.— Green *v.* Ronen, 62 Iowa 89, 17 N. W. 180.

Mississippi.— Le Blanc *v.* Illinois Cent. R. Co., 73 Miss. 463, 19 So. 211; Peeler *v.* Peeler, 68 Miss. 141, 8 So. 392.

New York.— *In re* Tompkins, (N. Y. 1898) 49 N. E. 941; Fitch *v.* Livingston, 7 How. Pr. (N. Y.) 410.

Tennessee.— Shepherd *v.* Shepherd, 12 Heisk. (Tenn.) 275.

Aliter, where the incomplete record was due to a mistake of the clerk. Raborg *v.* Columbia Bank, 1 Harr. & G. (Md.) 231. *Compare* Ward *v.* Springfield F. & M. Ins. Co., 12 Wash. 631, 42 Pac. 119; Le More *v.* U. S., 131 U. S. lxxxv, appendix, 19 L. ed. 201.

After remand to the lower court, a motion to reinstate, upon proof that neither appellant nor his attorney were in fault, comes too late. Estey *v.* Sheckler, 36 Wis. 434.

53. Failure of seasonable objection to proceedings for appeal concludes appellee after a judgment upon the merits. Gimbel *v.* Green, 134 Ind. 628, 33 N. E. 964, 34 N. E. 217; Louisville, etc., R. Co. *v.* Connelly, 5 Ky. L. Rep. 579; Whiting *v.* Kimball, 6 Bosw. (N. Y.) 690; Gilbough *v.* Stahl Bldg. Co., 91 Tex. 621, 45 S. W. 385.

54. Person *v.* Merrick, 5 Wis. 231.

55. Ohio Valley R. Co. *v.* Lander, 20 Ky. L. Rep. 913, 48 S. W. 145, vacation refused after judgment upon full hearing. *Contra,* where the judgment was an affirmance for non-appearance. Morgan *v.* Hammett, 41 Wis. 687.

56. Matter of Laudy, 35 N. Y. App. Div. 542, 55 N. Y. Suppl. 98.

57. See *supra,* I *et seq.* [2 Cyc. 474]; XIII, D *et seq.*

58. Thompson *v.* Kearney, 14 Daly (N. Y.) 436; Compton *v.* Bowns, 6 Misc. (N. Y.) 594, 26 N. Y. Suppl. 18, 56 N. Y. St. 623.

In the federal courts, it is held that a recall of the mandate is unnecessary, since the transcript of the record is not remitted, but remains in the intermediate court. Merrill *v.* National Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640 [*affirming* 78 Fed. 208, 41 U. S. App. 645, 24 C. C. A. 63, 75 Fed. 148, 41 U. S. App. 529, 21 C. C. A. 282]; Ritter *v.* New York Mut. L. Ins. Co., 72 Fed. 567, 19 C. C. A. 41.

cessive appeal to the same appellate court cannot be taken by the same parties upon the same record,[59] nor upon a different record from the same judgment,[60] nor at all by the same parties, in the same case, until the lower court has rendered a new appealable judgment,[61] nor can an appellate judgment be corrected on appeal in a collateral proceeding.[62] Correction of clerical errors in an intermediate appellate judgment may sometimes be made after transfer to a higher court.[63]

G. Remission of Cause to Lower Court — 1. Mandate or Other Remanding Order — a. Necessity For. It is the general rule that, in order to reinvest the lower court with jurisdiction after the rendition of judgment on appeal, there should be a mandate or other order of remand issued by the appellate court;[64] and, in proper practice, such mandate should be copied in the record, so that the authority of the trial court to proceed may be apparent.[65] But the courts are not disposed to stand on technicalities in this regard, and it has been held, in some cases, that, where the lower court ascertains the judgment above and proceeds thereunder, its proceedings are not vitiated by the absence of a formal mandate.[66]

Orders not appealable.—A mandate will not be stricken out for the purpose of allowing an appeal from a judgment upon orders which are determined not to be appealable. Jenkins *v.* International Bank, 9 Ill. App. 488.

59. Higgins *v.* Haley, 28 La. Ann. 216; Kent *v.* Dunham, 14 Gray (Mass.) 279.

60. Devoss *v.* Jay, 14 Ind. 400; Green *v.* Ronen, 62 Iowa 89, 17 N. W. 180; Zimmerman *v.* Turner, 24 Wis. 483.

61. Phelps *v.* Davis, 2 J. J. Marsh. (Ky.) 368.

Writ of error after question reserved.— Where, after verdict for plaintiff, the question whether the action was maintainable upon the facts proved at the trial and reported by the presiding judge was reserved for the consideration of all the judges, and judgment was entered for plaintiff according to their opinion, this was held to be no bar to a writ of error, brought to vacate the judgment for a defect of substance in the declaration. Smith *v.* Moore, 6 Me. 274.

62. On appeal in proceedings against execution the appellate court has no power to modify the previously affirmed judgment under which the execution was issued. McArthur *v.* Dane, 61 Ala. 539. *Contra*, in Tuttle *v.* Gilmore, 42 N. J. Eq. 369, 7 Atl. 859, the appellate judgment had been wrongly entered in the appellate court, but, in the lower court, after remand, the judgment was entered and execution issued thereon according to its real intent, and, on appeal from the execution proceedings, the appellate court reversed the lower court and amended its former entry. See also Carlson *v.* Winterson, 147 N. Y. 652, 42 N. E. 347, 70 N. Y. St. 872.

63. Roberts *v.* Tobias, 120 N. Y. 665, 24 N. E. 1024, 31 N. Y. St. 950; Buckingham *v.* Dickinson, 54 N. Y. 682.

64. *Arkansas.*— Lafferty *v.* Rutherford, 10 Ark. 453.

Georgia.— Lyon *v.* Lyon, 103 Ga. 747, 30 S. E. 575; Hubbard *v.* McCrea, 103 Ga. 680, 30 S. E. 628.

Illinois.— People *v.* Wadlow, 166 Ill. 119, 46 N. E. 775; Austin *v.* Dufour, 110 Ill. 85.

Iowa.— Messenger *v.* Marsh, 6 Iowa 491.

Kentucky.—Lloyd *v.* Matthews, 92 Ky. 300, 17 S. W. 795; Bliar *v.* Bristoe, Litt. Sel. Cas. (Ky.) 20; Piel *v.* Covington Short Route Transfer R. Co., 11 Ky. L. Rep. 563, 12 S. W. 759.

Minnesota.— La Crosse, etc., Steam Packet Co. *v.* Reynolds, 12 Minn. 213.

New York.—Vermilye *v.* Seldon, 6 How. Pr. (N. Y.) 41; Wright *v.* Wright, 3 Redf. Surr. (N. Y.) 325.

Ohio.— Earl *v.* Shoulder, 6 Ohio 409.

Oregon.— Oregon R., etc., Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

Pennsylvania.— Cox *v.* Henry, 36 Pa. St. 445.

Tennessee.—Adams *v.* State, 1 Swan (Tenn.) 465.

Texas.— McAlpin *v.* Bennet, 21 Tex. 535.

Virginia.—Norris *v.* Tomlin, 2 Munf. (Va.) 336.

Wisconsin.— Trowbridge *v.* Sickler, 48 Wis. 424, 4 N. W. 563.

See 3 Cent. Dig. tit. "Appeal and Error," § 4642.

Terminology.— The terms "mandate," "remittitur" and "procedendo" are used indiscriminately to signify the order by which the cause is remanded to the lower court.

Illinois.—Under Ill. Rev. Stat. (1889), c. 110, § 83, a certified copy of an order affirming the judgment or dismissing the appeal operates to reinvest the lower court with jurisdiction when filed therein. Smith *v.* Stevens, 133 Ill. 183, 24 N. E. 511.

New York — When remittitur proper.— In New York, whenever the court of appeals makes any order finally disposing of the appeal, a remittitur should be sent down (Dresser *v.* Brooks, 2 N. Y. 559); but, on an order dismissing an appeal, a remittitur is improper (McFarlan *v.* Watson, 4 How. Pr. (N. Y.) 128).

Ohio — Where judgment affirmed.— On a simple affirmance of a judgment of the court of common pleas on error in the supreme court, a mandate from the latter court is not necessary to authorize the clerk of the common pleas to issue an execution on the original judgment. Howard *v.* Abbey, 2 Ohio Dec. (Reprint) 64.

65. McAlpin *v.* Bennet, 21 Tex. 535.

66. Paul *v.* Luttrell, 1 Colo. 491; Woodruff *v.* Bacon, 35 Conn. 97; Becker *v.* Becker, 50

b. Issuance — (i) *In General.* The mandate is issued out of the highest court to which the cause has been carried,[67] and is, usually, directed to the court in which the cause was originally tried.[68]

(ii) *Time of Issuance.* As to when the mandate shall issue is a question usually provided for by statute or rule of court.[69] The issuance of the mandate

Iowa 139; Benzinger Tp. Road, 135 Pa. St. 176, 19 Atl. 942. But see Trowbridge *v.* Sickler, 48 Wis. 424, 4 N. W. 563, wherein it was held that the judgment and record of the supreme court must be brought formally to the attention of the lower court before it can proceed.

Failure to file.— The issuance of the remittitur gives jurisdiction to the lower court, and the failure to file it is a mere irregularity which will not affect the validity of subsequent proceedings. Judson *v.* Gray, 17 How. Pr. (N. Y.) 289; Brooks *v.* Brooks, 16 S. C. 621. But see Lyon *v.* Lyon, 103 Ga. 747, 30 S. E. 575. In McCall *v.* Crousillat, 3 Serg. & R. (Pa.) 7, it was held that, where proceedings had been confirmed in the supreme court on error, and the record ordered to be sent back, it was to be considered as out of the supreme court, whether actually sent back or not.

Waiver.— The voluntary appearance of the parties and taking part in the subsequent proceedings without objection waives a formal remanding order. Gerard *v.* Gateau, 15 Ill. App. 520; Brooks *v.* Brooks, 16 S. C. 621; Pringle *v.* Sizer, 3 S. C. 335. In Foster *v.* Jordan, 54 Miss. 509, the court said: "It is the judgment of this court, reversing and remanding a case, which gives the lower court authority to enter upon a new trial. The mandate is the official mode of communicating that judgment to the inferior tribunal. The production of the mandate is the best evidence of the fact of reversal, and, if objection was made in the lower court, a second trial could not be gone into until the mandate was filed. But in this case the second trial took place without objection, and it is in this court that the objection is made for the first time that the Circuit Court had no jurisdiction. This is too late. Our own records show a reversal and issuance of a mandate two months before the second trial in the lower court; and the parties, by going into that trial without objection, must be held to have waived the filing of the mandate."

67. Case reserved in intermediate court.— When a case is reserved in a district court for decision by the supreme court, and the judgment of the latter requires no further proceedings to be had in the district court, the mandate ordered to be issued to the common pleas to carry the judgment of the supreme court into execution should be issued out of the supreme, and not out of the district, court. Chase *v.* Washburn, 2 Ohio St. 98.

68. *Iowa.*— Gilman *v.* Donovan, 59 Iowa 76, 12 N. W. 779; Bennett *v.* Carey, 57 Iowa 221, 10 N. W. 634.

Louisiana.— Chaney *v.* Williams, 22 La. Ann. 81.

Minnesota.—Irvine *v.* Marshall, 3 Minn. 72.

Missouri.— See, *contra*, Nofsinger *v.* Hartnett, 84 Mo. 549; St. Louis *v.* Kneper, 11 Mo. App. 587.

New York.— Matter of Hatten, 22 Abb. N. Cas. (N. Y.) 66.

Texas.— Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100.

See 3 Cent. Dig. tit. "Appeal and Error," § 4643.

United States supreme court reversing state court.— Where the judgment of the highest state court was reversed, and that of the subordinate state court affirmed, the mandate was sent to the subordinate court, and the costs of both courts allowed. Clerke *v.* Harwood, 3 Dall. (U. S.) 342, 1 L. ed. 628.

Territory admitted to statehood.— Where, pending an appeal from a territorial court to the federal supreme court, the territory is admitted as a state, the latter court, on reversing, will remand the cause to the state supreme court, no federal question being involved. Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068; Teague *v.* Maddox, 150 U. S. 128, 14 S. Ct. 46, 37 L. ed. 1025. And see Irvine *v.* Marshall, 3 Minn. 72.

69. For decisions touching the statutes and rules of court in the various jurisdictions see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

Indiana.— Burke *v.* Howard, 18 Ind. 143.

New York.— Latson *v.* Wallace, 9 How. Pr. (N. Y.) 334; Syme *v.* Ward, 3 How. Pr. (N. Y.) 342.

North Carolina.— Faircloth *v.* Isler, 76 N. C. 49.

South Carolina.— Milhous *v.* Sally, 43 S. C. 318, 21 S. E. 885, 49 Am. St. Rep. 834.

Wisconsin.— Hopkins *v.* Gilman, 23 Wis. 512.

See 3 Cent. Dig. tit. "Appeal and Error," § 4643 *et seq.*

In the absence of a statute limiting the time within which a mandate might be applied for, it was held that a mandate was properly granted six years after the reversal. Western Union Tel. Co. *v.* Norris, (Tex. Civ. App. 1901) 60 S. W. 982.

Thirty days after judgment.— In some jurisdictions no remittitur will be issued until the expiration of thirty days after the judgment on appeal. Hogs Back Consol. Min. Co. *v.* New Basil Consol. Gravel Min. Co., 65 Cal. 22, 2 Pac. 489; Louisville, etc., R. Co. *v.* Samuels, (Ky. 1900) 57 S. W. 467.

Denial of application.— The Florida supreme court will deny an application for the issuance of a mandate within thirty days after entry of judgment, when appellant objects and no necessity is shown for such spe-

before the proper time is a mere irregularity which will not affect the jurisdiction of the court below to proceed in pursuance thereof.[70]

(III) *Payment of Costs and Fees.* The mandate may be withheld until the payment of all costs and fees for which the party seeking such mandate is liable,[71] but it is not material by whom the payment is made.[72]

c. Form. In the absence of any statute or rule of court prescribing a specific form, none is necessary, and the mandate is to be drawn to suit the requirements of the particular case.[73] It is not necessary to recite thereunder every step in the various stages of the cause.[74]

d. Filing — (I) *In General.* The practice in regard to filing the mandate is governed, for the most part, by statutes and rules of court.[75] By statute, in

cial order. Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 233, 9 So. 251.

Notice of application.— Where application is made for the issuance of a mandate at any other than the usual time, notice should be given to the adverse party. Means *v.* Dowd, 128 U. S. 583, 9 S. Ct. 793, 32 L. ed. 578.

After a term has elapsed since the rendition of the judgment, reasonable notice of an application for an order of remand must be given the adverse party. Aiken *v.* Webster, 7 Ill. 416.

70. Caldwell *v.* Bruggerman, 8 Minn. 286.

Insufficient evidence of premature issuance. — The fact that a remittitur appears to have been issued before a decision refusing a petition for a rehearing was filed is not sufficient evidence that it was issued without authority. Trench *v.* Strong, 4 Nev. 87.

71. Cooper *v.* Cooper, 4 Ill. App. 167; Mobile, etc., R. Co. *v.* Watly, 69 Miss. 475, 12 So. 558; Woodward *v.* Oregon R., etc., Co., 23 Oreg. 331, 36 Pac. 571 [*affirmed* in 31 Oreg. 423, 51 Pac. 450]; Osborn *v.* United States, 131 U. S. cxxxvii, appendix, 23 L. ed. 871. See 3 Cent. Dig. tit. "Appeal and Error," § 4644.

Question for appellate court.— Under Minn. Gen. Stats. (1894), § 5517, the question whether costs shall be paid as a condition precedent to remitting the case is one exclusively for the supreme court. Fonda *v.* St. Paul City R. Co., 72 Minn. 1, 80 N. W. 366. And see Legg *v.* Overbagh, 4 Wend. (N. Y.) 188, 21 Am. Dec. 115.

Execution issued by clerk.— It is proper for the clerk of an appellate court, after a reversal, to issue, of his own motion, an execution for costs and a mandate on their payment. Ames Iron Works *v.* Chinn, 20 Tex. Civ. App. 382, 49 S. W. 665.

Suit prosecuted in forma pauperis.— Under the Texas statutes, the clerk will not be required to issue a mandate, on the motion of an appellee whose suit was prosecuted on an affidavit *in forma pauperis*, until all the costs are paid by some one. Storrie *v.* Marshall, 11 Tex. Civ. App. 156, 32 S. W. 334; International, etc., R. Co. *v.* Turner, (Tex. Civ. App. 1895) 31 S. W. 518.

72. Austin, etc., R. Co. *v.* McElmurry, (Tex. Civ. App. 1896) 34 S. W. 982; Very *v.* Watkins, 23 How. (U. S.) 469, 16 L. ed. 522.

73. Van Wert *v.* Boyes, 140 Ill. 89, 29 N. E. 710; Goshen Sweeper Co. *v.* Bissell Carpet-Sweeper Co., 72 Fed. 67, 37 U. S. App. 689, 19 C. C. A. 13.

See 3 Cent. Dig. tit. "Appeal and Error," § 4645.

For forms of mandate see Davis *v.* Packard, 10 Wend. (N. Y.) 50; Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481; U. S. *v.* Fremont, 18 How. (U. S.) 30, 15 L. ed. 302; Davis *v.* Packard, 8 Pet. (U. S.) 312, 8 L. ed. 957.

Opinion not part of remittitur.— The opinion of the supreme court is no part of the remittitur to the court below. Arhelger *v.* New York Mut. L. Ins. Co., (Ariz. 1899) 56 Pac. 720; Adams *v.* Yazoo, etc., R. Co., (Miss. 1898) 24 So. 317; *Ex p.* Dial, 14 S. C. 584.

Transcript of judgment not remittitur.— The filing and taking of a judgment of the supreme court in the district court of a county under Minn. Supreme Ct. Rules, No. 29, for the purpose of having execution issue thereon, is not a remittitur. La Crosse, etc., Steam Packet Co. *v.* Reynolds, 12 Minn. 213.

Remand from circuit to county court.— Under Va. Code (1873), c. 178, § 25, a judgment of the circuit court, remanding a cause to the county court for further proceedings instead of retaining the same to be there proceeded in, must show that it was done either for good cause shown or else by agreement of the parties, and a remanding order which fails to show this is void. Pettit *v.* Cowherd, 83 Va. 20, 1 S. E. 392.

Separate bills of costs.— In New York, where the court of appeals adjudges the appellant costs in all courts, the remittitur should award separate bills of costs. Hascall *v.* King, 165 N. Y. 288, 59 N. E. 132.

74. Andrews *v.* Thum, 72 Fed. 290, 33 U. S. App. 430, 18 C. C. A. 566.

75. Hosack *v.* Rogers, 7 Paige (N. Y.) 108. See 3 Cent. Dig. tit. "Appeal and Error," § 4646.

Either party may file the mandate. Murray *v.* Whittaker, 17 Ill. 230; Campbell *v.* Weakley, 7 B. Mon. (Ky.) 22.

Effect of filing.— Where the remittitur of the supreme court, confirming a decree of the circuit court and directing that it shall be executed through the action and report of a referee, is filed in the circuit court, no order or judgment need be entered by said court on the remittitur, but the referee may act under the decree. Adger *v.* Pringle, 13 S. C. 33.

Filing in vacation.— A remittitur may be

some states, a failure to file the mandate within a specified time operates as an abandonment of the suit.[76]

(11) *Notice of Filing.* By statute, in some jurisdictions, notice is required to be given to the adverse party of the filing of the mandate.[77] But such notice may be waived by agreement[78] or by voluntary appearance,[79] and, in the absence of a statutory requirement, would seem not to be necessary at all.[80]

2. Compliance With Mandate — a. Specific Directions. Specific directions contained in the mandate of the appellate court are beyond the judicial discretion of the lower court, and, hence, must be implicitly followed by the latter court[81] — as, for instance, directing the entry of a particular judgment below,[82]

filed in vacation (Dale *v.* Rosevelt, 1 Wend. (N. Y.) 25); and the cause is deemed to have reached the court at the first regular term after the filing (Sturges *v.* Knapp, 38 Vt. 540).

Staying filing.— The filing of a remittitur may be ordered stayed, in whosesoever hands it may be, at any time before it is actually and regularly filed in the court below. Cushman *v.* Hadfield, 15 Abb. Pr. N. S. (N. Y.) 109; Jarvis *v.* Shaw, 16 Abb. Pr. (N. Y.) 415.

What not a filing.— The mere coming of a remittitur to the hands of the clerk below was held not to be an actual filing where, on being served with the stay, the clerk handed the remittitur back to the attorney and expressly refused to file it. Cushman *v.* Hadfield, 15 Abb. Pr. N. S. (N. Y.) 109.

76. Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102; Bradshaw *v.* Atkins, 110 Ill. 323; Austin *v.* Dufour, 110 Ill. 85; Whereatt *v.* Ellis, 85 Wis. 340, 55 N. W. 407.

In the absence of statute, failure to file the mandate for any period of time is no cause of abatement. Cornish *v.* Sargent, 23 Ark. 277.

Waiver.— Where the other party procures the remand of the cause and takes further proceedings, a failure of plaintiff to procure the remittitur within the statutory period is waived. Whereatt *v.* Ellis, 85 Wis. 340, 55 N. W. 407. And see Foster *v.* Jordan, 54 Miss. 509.

77. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

Illinois.— Austin *v.* Dufour, 110 Ill. 85; Smith *v.* Brittenham, 94 Ill. 624; Taylor *v.* Brougham, 63 Ill. App. 283; Miller *v.* Glass, 14 Ill. App. 177.

Kentucky.— Lloyd *v.* Matthews, 92 Ky. 300, 17 S. W. 795; Baker *v.* Baker, 87 Ky. 461, 9 S. W. 382.

Missouri.—Meyer *v.* Hartman, 14 Mo. App. 130.

Wisconsin.— Trowbridge *v.* Sickler, 48 Wis. 424, 4 N. W. 563.

Where filed in open court.— Under Ky. Civ. Code, § 761, subsec. 2, no notice is required where the mandate is filed in open court. Baker *v.* Baker, 87 Ky. 461, 9 S. W. 382.

78. St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

79. Judson *v.* Blanchard, 4 Conn. 557; Baker *v.* Baker, 87 Ky. 461, 9 S. W. 382.

80. Reaugh *v.* McConnel, 36 Ill. 373; Murray *v.* Whittaker, 17 Ill. 230; Campbell *v.* Weakley, 7 B. Mon. (Ky.) 22.

81. Nature and effect of specific directions. — In State *v.* Anthony, 65 Mo. App. 543, 551, the court said: "When a cause has been remanded with special directions, it is out of the power of the court receiving such directions to open the cause and have a new trial. . . . The mandate in such case is in the nature of a special power of attorney. By it authority and jurisdiction are granted to the lower court to take such steps as are ordered, and such incidental steps as are necessary to carry the mandate into execution. It has no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed."

Presumption of compliance.— In the absence of an affirmative showing to the contrary, it will be presumed that a mandate has been complied with by the lower court. Moore *v.* Powers, 4 Ky. L. Rep. 536.

Presumption that all issues were decided.— Groves *v.* Sentell, 66 Fed. 179, 30 U. S. App. 119, 13 C. C. A. 386.

Dismissal of intermediate appeal should not be permitted after further appeal and remand to the intermediate court, with directions for a specific judgment in the trial court. Hough *v.* Harvey, 84 Ill. 308.

82. Entry of particular judgment.— *Alabama.*— Lanier *v.* Hill, 30 Ala. 111.

California.— Keller *v.* Lewis, 56 Cal. 466; Meyer *v.* Kohn, 33 Cal. 484; Argenti *v.* San Francisco, 30 Cal. 458.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 39 Fla. 243, 22 So. 697.

Illinois.— Union Nat. Bank *v.* Hines, 187 Ill. 109, 58 N. E. 405; Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277, 46 N. E. 214; Ogden *v.* Bowen, 5 Ill. 301; Cook *v.* Moulton, 64 Ill. App. 419.

Indiana.— Center Tp. *v.* Marion County, 110 Ind. 579, 10 N. E. 291; Burnett *v.* Curry, 42 Ind. 272.

Iowa.— Austin *v.* Wilson, 57 Iowa 586, 11 N. W. 8; McGregor *v.* McGregor, 21 Iowa 441; Lord *v.* Ellis, 11 Iowa 170.

Kentucky.— Scott *v.* Scott, 9 Bush (Ky.) 174; McLean *v.* Nixon, 18 B. Mon. (Ky.) 768; Kennedy *v.* Meredith, 4 T. B. Mon. (Ky.) 409; Holley *v.* Holley, 5 Litt. (Ky.) 290; Joseph *v.* Hotopp, 7 Ky. L. Rep. 285.

Minnesota.—Piper *v.* Sawyer, 78 Minn. 221, 80 N. W. 970.

Missouri.— Orvis *v.* Elliott, 147 Mo. 231, 48 S. W. 834; State *v.* Edwards, 144 Mo. 467, 46 S. W. 160; Young *v.* Thrasher, 123 Mo.

directing dismissal of the suit,[83] ordering a new trial,[84] ordering a reference,[85] ordering proceedings as to a particular matter before judgment,[86] ordering an

308, 27 S. W. 326; State *v.* Givan, 75 Mo. 516; Chouteau *v.* Allen, 74 Mo. 56; McIntyre *v.* McIntyre, 24 Mo. App. 166; Connor *v.* Pope, 23 Mo. App. 344.

Montana.— Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 16 Mont. 117, 40 Pac. 145.

New Hampshire.—Beebe *v.* Dudley, 30 N. H. 34.

New Jersey.— Hale *v.* Lawrence, 22 N. J. L. 72.

New York.— McGregor *v.* Buell, 3 Abb. Dec. (N. Y.) 86, 1 Keyes (N. Y.) 153, 33 How. Pr. (N. Y.) 450; Hascall *v.* King, 54 N. Y. App. Div. 441, 66 N. Y. Suppl. 1112.

North Carolina.— White *v.* Butcher, 97 N. C. 7, 2 S. E. 59; Johnston *v.* Haynes, 68 N. C. 516.

South Carolina.— *Ex p.* Knox, 17 S. C. 207.

West Virginia.— Peerce *v.* Carskadon, 6 W. Va. 383.

Wisconsin.— Patten Paper Co. *v.* Green Bay, etc., Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432; Raisbeck *v.* Anthony, 75 Wis. 300, 43 N. W. 900; Tipping *v.* Robbins, 71 Wis. 507, 37 N. W. 427; Miner *v.* Medbury, 7 Wis. 100.

United States.— Hickman *v.* Ft. Scott, 141 U. S. 415, 12 S. Ct. 9, 35 L. ed. 775; Groves *v.* Sentell, 66 Fed. 179, 30 U. S. App. 119, 13 C. C. A. 386.

Direction of judgment for costs upon dismissal does not authorize the entry of a judgment of affirmance. Matter of Blythe, 118 Cal. 347, 50 Pac. 545.

Docketing and notice is not necessary, unless specifically required, as a preliminary to entry of judgment under a mandate. Howe *v.* Jones, 71 Iowa 92, 32 N. W. 187; Williams *v.* Whiting, 94 N. C. 481; Cullins *v.* Overton, 7 Okla. 470, 54 Pac. 702; Pierce *v.* Kneeland, 9 Wis. 23. This is necessary only in case of remand for further proceedings on the merits. Evans *v.* Eastman, 84 Ill. App. 636.

Entry of judgment is ministerial and, therefore, may be effected by the clerk without an order of court. McMillan *v.* Richards, 12 Cal. 467; Berlin *v.* Gilly, 13 La. Ann. 461; Maskell *v.* Haifleigh, 8 La. Ann. 457; Doan *v.* Holly, 27 Mo. 256. *Aliter*, by statutory provision. Clapper *v.* House, 6 Paige (N. Y.) 149.

Immediate entry is impliedly required by a mandate which directs an entry of judgment, and an amendment of the mandate to expressly require immediate action is not necessary. Remington *v.* Eastern R. Co., 109 Wis. 154, 85 N. W. 321.

Judgment for a part of bond in suit, and a new trial as to the remainder, when directed, must be entered, though irregular. McRoberts *v.* McArthur, 66 Minn. 74, 68 N. W. 770.

Though the judge be disqualified to proceed judicially upon the merits because he had been of counsel in the case, yet, since the entry of judgment under a mandate is purely ministerial, it is not affected by the disqualification. Howe *v.* Jones, 71 Iowa 92, 32 N. W. 187.

Form of judgment under mandate.— Whether or not the form of the judgment as entered complies with the mandate is a question of law, not of fact. Leese *v.* Clark, 28 Cal. 26.

Forms held sufficient.—*California.*—Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488.

Illinois.— Ryan *v.* Newcomb, 141 Ill. 517, 30 N. E. 1040; Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191.

Kentucky.— B. M. Creel Co. *v.* Hill, 21 Ky. L. Rep. 586, 52 S. W. 798.

New York.— Murray *v.* Jones, 2 N. Y. Suppl. 486, 18 N. Y. St. 916; Davis *v.* Packard, 10 Wend. (N. Y.) 50.

North Carolina.— Bond *v.* Wool, 113 N. C. 20, 18 S. E. 77.

Forms held insufficient.— Leese *v.* Clark, 28 Cal. 26; Cochrane *v.* Justice Min. Co., 4 Colo. App. 234, 35 Pac. 752.

83. Dismissal of suit.— People *v.* Gibbons, 161 Ill. 510, 44 N. E. 282; Campbell *v.* James, 31 Fed. 525.

Correction of an error in dismissal under mandate, if not corrected during the term, can only be corrected under the rules for a second appeal, not by motion at a subsequent term. Campbell *v.* James, 31 Fed. 525.

84. Ordering a new trial.— *California.*— Fox *v.* Hale, etc., Silver Min. Co., 112 Cal. 568, 44 Pac. 1022.

Kentucky.— Cox *v.* Louisville, etc., R. Co., 11 Ky. L. Rep. 167, 11 S. W. 808.

Missouri.— State *v.* Judges St. Louis Cir. Ct., 41 Mo. 574.

New Hampshire.— Raynes *v.* Raynes, 55 N. H. 514.

New York.— Bruce *v.* Davenport, 5 Abb. Pr. N. S. (N. Y.) 185.

North Carolina.— McMillan *v.* Baker, 92 N. C. 110.

Costs.— A condition of a new trial that the party obtaining it first pay the costs of the former trial cannot be annexed by the lower court to an unconditional direction. Ely *v.* Com., 5 Dana (Ky.) 398; Garrison *v.* Singleton, 5 Dana (Ky.) 160; Chapman *v.* Yellow Poplar Lumber Co., 89 Fed. 903, 61 U. S. App. 499, 32 C. C. A. 402.

Nonsuit after new trial ordered is not improper, since a new trial, though directed, is not compulsory but merely is allowed if desired. Atlanta, etc., R. Co. *v.* Hooper, 105 Fed. 550, 44 C. C. A. 586.

85. Ordering reference.— Pim *v.* Nicholson, 10 Ohio St. 623; Barksdale *v.* Ward, (Tenn. Ch. 1900) 58 S. W. 880.

86. A further proceeding as to particular matters or items only, specially directed by the appellate court, or which becomes necessary because of vacation as to particular matters or items, leaving the judgment otherwise intact, precludes, by necessary implication, a reëxamination by the lower court of all other

accounting,[87] ordering appointment of designated administrators[88] or reinstatement of a court commissioner,[89] awarding certain costs[90] or damages,[91] and directing a particular method of execution.[92]

b. Incomplete or Inadequate Directions. Where the specific directions given in a mandate are incomplete, or insufficient to meet the requirements of the case, such action, not inconsistent with the directions given, may be taken by the lower court as necessity and the nature of the case requires.[93] *A fortiori*, this is true

matters or items not thus necessary to be determined.

Alabama.— Lyon *v.* Foscue, 60 Ala. 468.

Connecticut.— Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328.

Georgia.— Woodward *v.* Central Bank, 4 Ga. 323.

Illinois.— Blackaby *v.* Blackaby, 189 Ill. 342, 59 N. E. 602; Ryan *v.* Newcomb, 136 Ill. 57, 26 N. E. 513; Cook *v.* Moulton, 64 Ill. App. 419.

Iowa.— Croup *v.* Morton, 53 Iowa 599, 5 N. W. 1093.

Kentucky.— Mt. Sterling Nat. Bank *v.* Snyder, 17 Ky. L. Rep. 201, 30 S. W. 613; Worthington *v.* Miller, 7 Ky. L. Rep. 439; Shippen *v.* Stokes, 6 Ky. L. Rep. 449.

Louisiana.— Yard *v.* Srodes, 13 La. 427; Parquin *v.* Finch, 3 Mart. N. S. (La.) 27.

Michigan.— Grand Rapids Fifth Nat. Bank *v.* Clinton County Cir. Judge, 100 Mich. 67, 58 N. W. 648.

Missouri.— Rees *v.* McDaniel, 131 Mo. 681, 33 S. W. 178; Shroyer *v.* Nickell, 67 Mo. 589.

New York.— Adair *v.* Brimmer, 95 N. Y. 35; Reed *v.* Reed, 52 N. Y. 651; Clark *v.* Mackin, 34 Hun (N. Y.) 345; Mason *v.* Ring, 1 Rob. (N. Y.) 650, 19 Abb. Pr. (N. Y.) 405.

North Carolina.— White *v.* Butcher, 97 N. C. 7, 2 S. E. 59; North Carolina R. Co. *v.* Swepson, 73 N. C. 316.

Ohio.— Pim *v.* Nicholson, 10 Ohio St. 623.

South Carolina.— Bryce *v.* Massey, 43 S. C. 384, 21 S. E. 320; Fraser *v.* Davie, 15 S. C. 496; Austin *v.* Kinsman, 1 S. C. 97.

Tennessee.— Brown *v.* Brown, 11 Lea (Tenn.) 698.

West Virginia.— Atkinson *v.* Beckett, 36 W. Va. 438, 15 S. E. 179; Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

Wisconsin.— Hill *v.* Hoover, 9 Wis. 15.

United States.— Latta *v.* Granger, 167 U. S. 81, 17 S. Ct. 746, 42 L. ed. 85; Kneeland *v.* American L. & T. Co., 138 U. S. 89, 11 S. Ct. 426, 34 L. ed. 379.

In Louisiana, it has been held that a remand for the ascertainment of the *quantum* of damages does not conclude the question of whether averments necessary to maintain the action had been made by plaintiff. Burbank *v.* Harris, 32 La. Ann. 395.

87. Ordering accounting.— Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191; St. Patrick's Catholic Church *v.* Daly, 116 Ill. 76, 4 N. E. 241; Quayle *v.* Guild, 91 Ill. 378; Dunlop *v.* Hepburn, 3 Wheat. (U. S.) 231, 4 L. ed. 377.

88. The death of one administrator before the direction to make an appointment of two designated persons is carried into effect does not operate to prevent the appointment of the other according to the direction. Matter of Racheco, 29 Cal. 224.

89. Smith *v.* Cochran, 7 Bush (Ky.) 548, holding that a reference to a special commissioner, after reversal and remand of judgment removing the commissioner, was a disobedience of the mandate.

90. Awarding certain costs.— *California.*— Cline *v.* Robbins, (Cal. 1898) 55 Pac. 150; Marysville *v.* Buchanan, 3 Cal. 212.

Indiana.— Jared *v.* Hill, 1 Blackf. (Ind.) 155.

Iowa.— O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764.

Missouri.— Morse *v.* Hannibal, etc., R. Co., 72 Mo. 585.

New York.—Hascall *v.* King, 54 N. Y. App. Div. 441, 66 N. Y. Suppl. 1112; Isola *v.* Weber, 12 N. Y. App. Div. 267, 42 N. Y. Suppl. 615; Miller *v.* Coates, 2 Hun (N. Y.) 668.

South Carolina.— Williams *v.* Washington, 43 S. C. 355, 21 S. E. 259.

United States.— Clark *v.* Chicago, etc., R. Co., 105 Fed. 552.

91. Awarding damages.— Hodges *v.* Holeman, 5 Dana (Ky.) 136; Rennebaum *v.* Atkinson, 21 Ky. L. Rep. 587, 52 S. W. 828; Hoard *v.* Garner, 4 Sandf. (N. Y.) 677.

Dismissal of several appeal from joint judgment awarding damages does not warrant the inclusion of the damages in the judgment below. McMillan *v.* Vischer, 14 Cal. 232.

92. Fanning *v.* Fanning, 173 Ill. 83, 50 N. E. 126; Garnett *v.* Farmers Nat. Bank, 15 Ky. L. Rep. 643, 23 S. W. 866; Stafford *v.* Renshaw, 33 La. Ann. 443.

A specific distribution directed to be made among creditors cannot be altered after remand on application of one of the appellant creditors on the ground that a co-appellant creditor had not properly perfected his appeal. Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229.

A trustee may proceed without order of the lower court to sell property directed by the appellate court to be sold in accordance with a power of sale in a deed of trust. Reeside *v.* Peter, 35 Md. 220.

93. *Arkansas.*— Cunningham *v.* Ashley, 16 Ark. 181, 63 Am. Dec. 62.

Connecticut.— Trustees Donations, etc., *v.* Christ Church Parish, 68 Conn. 369, 36 Atl. 797.

District of Columbia.— Dodge *v.* Cohen, 14 App. Cas. (D. C.) 582.

Illinois.— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

Kentucky.—Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468; Lynam *v.* Green, 9

where the mandate recognizes a certain discretion.[94] And where discretion is necessary, its exercise will not be disturbed except in case of a manifest perversion thereof.[95]

c. Conditional Directions. The lower court has no power to alter, extend, or relieve from the precise fulfilment of a specified condition upon which the effect of the appellate judgment is made to depend. If the condition be not fulfilled according to its terms, the alternative directions become peremptory.[96]

B. Mon. (Ky.) 363; Logan *v.* McNitt, Litt. Sel. Cas. (Ky.) 119; Farris *v.* Farris, 16 Ky. L. Rep. 729, 29 S. W. 976; Rohmeiser *v.* Bannon, 15 Ky. L. Rep. 114, 22 S. W. 27; Avery *v.* Meikle, 5 Ky. L. Rep. 518.

Massachusetts.— Terry *v.* Brightman, 133 Mass. 536.

Missouri.— Chonteau *v.* Allen, 74 Mo. 56; State *v.* Judges St. Louis Cir. Ct., 41 Mo. 574.

Nebraska.— Oliver *v.* Lansing, 51 Nebr. 818, 71 N. W. 735.

New Jersey.—Johns *v.* Norris, 28 N. J. Eq. 147.

New York.— Carleton *v.* New York, 50 N. Y. Super. Ct. 177, 5 N. Y. Civ. Proc. 418; Patten *v.* Stitt, 34 N. Y. Super. Ct. 346.

North Carolina.— Faircloth *v.* Isler, 76 N. C. 49.

Pennsylvania.— Kleppner *v.* Lemon, 197 Pa. St. 430, 47 Atl. 353.

Texas.— Burck *v.* Burroughs, 64 Tex. 445.

Vermont.— Gale *v.* Butler, 35 Vt. 449.

Virginia.— Ruffin *v.* Commercial Bank, 90 Va. 708, 19 S. E. 790; Stuart *v.* White, 25 Gratt. (Va.) 300; White *v.* Atkinson, 2 Call (Va.) 376.

Washington.— Herrick *v.* Niesz, 18 Wash. 132, 51 Pac. 346.

United States.— *Re* City Nat. Bank, 153 U. S. 246, 14 S. Ct. 804, 38 L. ed. 705; Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609.

Damages upon dissolution of injunction may be assessed by the lower court after reversal and dissolution without directions. Garrity *v.* Chicago, etc., R. Co., 22 Ill. App. 404.

Failure to allow interest or damages upon affirmance has been held equivalent to a denial of them by the appellate court. *Ex p.* Washington, etc., R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. ed. 339; Boyce *v.* Grundy, 9 Pet. (U. S.) 275, 9 L. ed. 127; Green *v.* Chicago, etc., R. Co., 49 Fed. 907, 1 C. C. A. 478. *Aliter*, as to interest, in case of reversal and judgment for the other party. Thornton *v.* Ogden, 41 N. J. Eq. 345, 7 Atl. 619; Fairhaven Land Co. *v.* Jordan, 6 Wash. 551, 34 Pac. 142; Everett *v.* Gores, 92 Wis. 527, 66 N. W. 616; Metcalf *v.* Watertown, 68 Fed. 859, 34 U. S. App. 107, 16 C. C. A. 37.

Costs of appeal may be included against the losing party, though no directions be given. Union India Rubber Co. *v.* Babcock, 4 Duer (N. Y.) 620, 1 Abb. Pr. (N. Y.) 262; Frazer *v.* Western, 3 How. Pr. (N. Y.) 235.

The several items of costs is a matter for the trial court, after the appellate court has determined the liability therefor. Murphy *v.* Loos, 32 Ill. App. 595; Taylor's Estate, 3 Pa. Super. Ct. 275; Watkins *v.* Atwell, 21 Tex. Civ. App. 193, 50 S. W. 1047.

94. Davis *v.* Curtis, 70 Iowa 398, 30 N. W. 651; Johnson *v.* Fox, 5 J. J. Marsh. (Ky.) 647; Mason *v.* Ring, 1 Rob. (N. Y.) 650, 19 Abb. Pr. (N. Y.) 405; The Sydney, 47 Fed. 260.

95. *Illinois.*— King *v.* Mix, 80 Ill. 378.

Kentucky.— Johnson *v.* Fox, 5 J. J. Marsh. (Ky.) 647.

Massachusetts.— Terry *v.* Brightman, 133 Mass. 536.

Pennsylvania.— Taylor's Estate, 3 Pa. Super. Ct. 275.

Wisconsin.—McLennan *v.* Prentice, 79 Wis. 488, 48 N. W. 487.

96. *Georgia.*— Oglesby *v.* Gilmore, 8 Ga. 95.

Illinois.— Smith *v.* Brittenham, 94 Ill. 624.

Kentucky.— Rennebaum *v.* Atkinson, 20 Ky. L. Rep. 1346, 49 S. W. 1, 342.

New York.— Flatow *v.* Van Bremsen, 17 N. Y. Suppl. 506, 44 N. Y. St. 302; Flatow *v.* Van Bremsen, 12 N. Y. Suppl. 923, 36 N. Y. St. 863; 20 N. Y. Civ. Proc. 150; Figaniere *v.* Jackson, 2 Abb. Pr. (N. Y.) 237, 11 How. Pr. (N. Y.) 462.

Texas.— Houston *v.* Robertson, 3 Tex. 374.

United States.— Holladay's Case, 29 Fed. 226.

A new trial ordered upon condition that if plaintiff enter a *remittitur* for a certain amount within a given time, judgment for the balance should be affirmed, confers no discretion on the lower court to extend the time, and defendant cannot excuse non-compliance with the condition because the other party came into possession of the order and withheld it beyond the time, in consequence of which he claims ignorance of the condition. Loyd *v.* Hicks, 32 Ga. 499. So, where the condition was that plaintiff discontinue as to one of the joint defendants, it was held that the discontinuance must have been made before scire facias. Kennerly *v.* Walker, 1 McMull. (S. C.) 117.

Execution, directed upon condition that defendant first have an opportunity to pay a certain amount in satisfaction of the judgment, leaves the lower court without discretion; but it must proceed to execution unless the condition is fulfilled in the manner specified. McClellan *v.* Crook, 7 Gill (Md.) 333.

Judgment directed except upon additional showing which may make it appear that such judgment would be improper refers only to such further matters as are not involved in the issues already tried. Titusville Iron Works *v.* Keystone Oil Co., 130 Pa. St. 211, 18 Atl. 739.

d. General Orders — (I) *Of Affirmance* — (A) *Upon the Merits.* Upon a simple affirmance upon the merits, there is nothing further for the lower court to do in the case but to enter the mandate and enforce the judgment.[97] Thus, there is no discretion which permits the reëxamination of matters once concluded,[98] further inquiry into additional matters,[99] the rendition of a different judgment.[1]

Additional attachment security required as a condition of sustaining an attachment cannot be reviewed by the lower court as an unauthorized abuse of discretion by the appellate court. Corbit *v.* Nicoll, 12 N. Y. Civ. Proc. 235.

97. No discretion in lower court upon affirmance — Reasons.— In Lyon *v.* Ingham County Cir. Judge, 37 Mich. 377, the court, by Cooley, J., said: "The court rendering the conclusive judgment may have a discretionary authority to review and revise its own action, but if that court shall have taken the case on appeal, and shall have remanded it after judgment, the court below can have no similar authority, because, if it could and should exercise it, it would really be reviewing and revising the action of its superior, which would be absurd. All the discretion which the inferior court can have must concern the execution of the judgment or decree which has been sent down to it; if no directions have been given as to these it would have the ordinary powers in respect to it, as it would have had if it had been entered by itself."

A new judgment is not necessary, because an appealed judgment is not wholly vacated by the appeal, but only suspended. Bond *v.* Wool, 113 N. C. 20, 18 S. E. 77.

A substitution on appeal is no bar to immediate execution in the lower court against the substituted party after affirmance. Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717.

Special statutory relief from a judgment rendered through mistake, surprise, or excusable neglect, allowed within a specified time, has been held to have no application to an affirmed judgment so as to prevent a full compliance with the mandate. Ean *v.* Chicago, etc., R. Co., 101 Wis. 166, 76 N. W. 329.

98. No reexamination of matters concluded. —*Alabama.*— Lapsley *v.* Weaver, 44 Ala. 131.

Maine.— Lunt *v.* Stimpson, 70 Me. 250.

Michigan.— Lyon *v.* Ingham County Cir. Judge, 37 Mich. 377.

New York.— Matter of Folts St., 29 N. Y. App. Div. 69, 51 N. Y. Suppl. 390; Dodd *v.* Astor, 2 Barb. Ch. (N. Y.) 395.

Pennsylvania.— Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 197 Pa. St. 32, 46 Atl. 853; McCruden *v.* Jonas, 6 Pa. Dist. 146; Steinmeyer *v.* Siebert, 30 Pittsb. Leg. J. N. S. (Pa.) 117.

United States.— U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769; Chaires *v.* U. S., 3 How. (U. S.) 611, 11 L. ed. 749; Journeycake *v.* Cherokee Nation, 30 Ct. Cl. 172.

As to what matters may be deemed to have been concluded see *infra,* XVIII, F, 4, a.

A statutory new trial, permitted, within a limited time after judgment, as matter of right, upon motion, is not affected by an affirmance on appeal and mandate thereon. *Ex. p.* U. S., 16 Wall. (U. S.) 699, 21 L. ed. 507.

99. No further inquiry into additional matters.— *Alabama.*—Herstein *v.* Walker, 90 Ala. 477, 7 So. 821.

Iowa.— Steel *v.* Long, (Iowa 1900) 84 N. W. 677.

Kansas.— Greenwood Tp. *v.* Richardson, (Kan. App. 1900) 62 Pac. 430.

Kentucky.— McClanahan *v.* Henderson, 1 T. B. Mon. (Ky.) 260.

New York.— Hascall *v.* King, 54 N. Y. App. Div. 441, 66 N. Y. Suppl. 1112; Malcom *v.* Baker, 8 How. Pr. (N. Y.) 301.

North Carolina.— State *v.* Webb, 126 N. C. 760, 36 S. E. 174.

Wisconsin.— Crowns *v.* Forest Land Co., 100 Wis. 554, 76 N. W. 613.

An affirmance, with order for further proceedings, is not a simple and final affirmance, even where the judgment affirmed is for a stated amount, so as to authorize immediate execution. In such a case, where the affirmed judgment was upon a creditor's bill, it was held that the "further proceedings" necessarily implied an accounting of some kind. Bieber *v.* Fechheimer, 9 App. Cas. (D. C.) 548.

1. Different judgment cannot be rendered. — *Alabama.*—McArthur *v.* Dane, 61 Ala. 539.

California.— Parker *v.* Bernal, 68 Cal. 122, 8 Pac. 696; Argenti *v.* Sawyer, 32 Cal. 414; Mulford *v.* Estudillo, 32 Cal. 131.

Kentucky.— Rohmeiser *v.* Bannon, 15 Ky. L. Rep. 114, 22 S. W. 27.

Michigan.—Grand Rapids Fifth Nat. Bank *v.* Clinton County Cir. Judge, 100 Mich. 67, 58 N. W. 648.

New York.— Lyon *v.* Merritt, 6 Paige (N. Y.) 473.

North Carolina.— Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Dobson *v.* Simonton, 100 N. C. 56, 6 S. E. 369.

Pennsylvania.— Steinmeyer *v.* Siebert, 30 Pittsb. Leg. J. N. S. (Pa.) 117.

Tennessee.— Second Nat. Bank *v.* Smith, 103 Tenn. 57, 57 S. W. 156.

Texas.— Townsend *v.* Munger, 9 Tex. 300.

Virginia.— Price *v.* Campbell, 5 Call (Va.) 115.

Wisconsin.— Smith *v.* Armstrong, 25 Wis. 517.

United States.— Durant *v.* Storrow, 101 U. S. 555, 25 L. ed. 961; Continental Trust Co. *v.* Toledo, etc., R. Co., 99 Fed. 171; North Alabama Development Co. *v.* Orman, 71 Fed. 764, 30 U. S. App. 646, 18 C. C. A. 309.

An amendment of the affirmed judgment cannot be made in the lower court after re-

or decree, the vacation of the judgment or decree,[2] or a stay of execution to enforce the judgment or decree.[3]

(B) *Upon Errors Assigned.* An affirmance upon errors of law assigned which determines only that the errors assigned were not committed, without otherwise touching the merits of the controversy, has been held to leave the trial court with power to reopen the case for other cause on the merits as if no appeal had been taken.[4]

(II) *OF REVERSAL* — (A) *In General.* From the nature of the particular case and the condition and contents of the record, it must be determined, in case of a general order of reversal and remand for further proceedings, whether or not a new trial should be had,[5] how far the scope of the inquiry upon a new trial

mand, so as to defeat or modify the appellate judgment. Stephens *v.* Norris, 15 Ala. 79; Gamble *v.* Gibson, 19 Mo. App. 531; Hubbard *v.* Copcutt, 9 Abb. Pr. N. S. (N. Y.) 289; Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573. But such amendment may be made so as to effectuate the appellate judgment. Jones *v.* Clark, 31 Iowa 497; Salter *v.* Sutherland, (Mich. 1901) 85 N. W. 112.

Change of a judgment for costs, by the lower court, after a general affirmance of the principal judgment, of which the judgment for costs is a part, is improper. Marshall *v.* Boyer, 52 Hun (N. Y.) 181, 5 N. Y. Suppl. 150, 23 N. Y. St. 302; People *v.* Buffalo, 9 Misc. (N. Y.) 403, 29 N. Y. Suppl. 1071, 61 N. Y. St. 692; Texas Pac. R. Co. *v.* Connor, (Tex. Civ. App. 1896) 35 S. W. 330; *In re* Carroll, 53 Wis. 228, 10 N. W. 375; Gaines *v.* Caldwell, 148 U. S. 228, 13 S. Ct. 611, 37 L. ed. 432.

Allowance of interest after affirmance, where the allowance was not made in judgment before appeal, has been held improper. *Ex p.* Washington, etc., R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. ed. 339; Hagerman *v.* Moran, 75 Fed. 97, 21 C. C. A. 242.

Interest allowed may be computed and included in the judgment after affirmance.

Maryland.— Barnum *v.* Raborg, 2 Md. Ch. 516.

New York.— Hoyt *v.* Gelston, 15 Johns. (N. Y.) 221.

Pennsylvania.— Respublica *v.* Nicholson, 2 Dall. (Pa.) 256, 1 L. ed. 371.

Virginia.—Guerrant *v.* Tayloe, 2 Call (Va.) 208.

United States.— Brown *v.* Van Braam, 3 Dall. (U. S.) 344, 1 L. ed. 629.

And in case of affirmance in part, the computation may be on the affirmed part, from the date of the original judgment. Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001, [*affirming* 70 Ill. App. 355].

2. No vacation of judgment.— Hood *v.* Hood, 5 Dem. Surr. (N. Y.) 50; Matter of Griffin, 98 N. C. 225, 3 S. E. 515.

3. No stay of execution.— Lyon *v.* Ingham County Cir. Judge, 37 Mich. 377; Cochrane *v.* Van de Vanter, 13 Wash. 323, 43 Pac. 42.

Pending a second appeal from the denial of an application to reopen the case, after affirmance and remand, a stay of execution is improper. Merrimon *v.* Lyman, 126 N. C. 541, 36 S. E. 44.

4. Reynolds *v.* Newaygo Cir. Judge, 109 Mich. 403, 67 N. W. 529.

5. Where the facts are not disputed, a reversal as to the legal effect of the facts submitted does not require a new trial.

Connecticut.— Coughlin *v.* McElroy, 72 Conn. 444, 44 Atl. 743; Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328.

Illinois.— Lynn *v.* Lynn, 160 Ill. 307, 43 N. E. 482; Chicago *v.* Gregsten, 57 Ill. App. 94.

Indiana.— Burnett *v.* Curry, 42 Ind. 272.

Minnesota.— Babcock *v.* Murray, 61 Minn. 408, 63 N. W. 1076.

Missouri.— Treadway *v.* Johnson, 39 Mo. App. 176.

Pennsylvania.— *In re* Robert, 12 Montg. Co. Rep. (Pa.) 11.

South Carolina.— Bleckeley *v.* Branyan, 28 S. C. 445, 6 S. E. 291.

West Virginia.—McCoy *v.* McCoy, 33 W. Va. 60, 10 S. E. 19.

Where the facts are in dispute, a reversal, without directions, for error in ascertainment of the facts requires a new trial.

Illinois.— Paxton *v.* Bogardus, 188 Ill. 72, 58 N. E. 675; Updike *v.* Parker, 11 Ill. App. 356.

Iowa.— Kershman *v.* Swehla, 62 Iowa 654, 17 N. W. 908.

Kansas.— McDonald *v.* Swisher, 60 Kan. 610, 57 Pac. 507; Laithe *v.* McDonald, 7 Kan. 254.

Missouri.— Mason *v.* Crowder, 98 Mo. 352, 11 S. W. 743; Atkison *v.* Dixon, 96 Mo. 577, 10 S. W. 160; State *v.* Chaney, 49 Mo. App. 511.

Montana.— Collier *v.* Ervin, 2 Mont. 556.

Nebraska.— Missouri, etc., Trust Co. *v.* Clark, 60 Nebr. 406, 83 N. W. 202.

Washington.— Spinning *v.* Drake, 7 Wash. 1, 34 Pac. 212.

United States.— District of Columbia *v.* McBlair, 124 U. S. 320, 8 S. Ct. 547, 31 L. ed. 449; Hawkins *v.* Cleveland, etc., R. Co., 99 Fed. 322, 39 C. C. A. 538 [*refusing to modify* 89 Fed. 266, 60 U. S. App. 561, 32 C. C. A. 198].

Where the facts and their legal effect are determined by the appellate court, a general reversal requires only a judgment in accordance with such determination. Soule *v.* Dawes, 14 Cal. 247; Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277, 46 N. E. 214; Chicago *v.* Gregsten, 157 Ill. 160, 45 N. E.

may extend,[6] whether the suit should be dismissed,[7] and upon what terms;[8] whether a judgment should be entered for the other party,[9] whether another and

505 [*affirming* 57 Ill. App. 94]; Leiter *v.* Field, 24 Ill. App. 123; State *v.* Spokane County Super. Ct., 7 Wash. 234, 34 Pac. 930; Whitney *v.* Traynor, 76 Wis. 628, 45 N. W. 530.

Reversal of a judgment upon findings, on the ground that the findings do not support the judgment or because of irregularities in the judgment, does not require a new trial on the facts, but only a proper judgment on the findings to be made.

Alabama.— Smith *v.* Coleman, 59 Ala. 260.

Illinois.— Lynn *v.* Lynn, 160 Ill. 307, 43 N. E. 482.

Kansas.— Duffitt *v.* Crozier, 30 Kan. 150, 1 Pac. 69.

Minnesota.— Kurtz *v.* St. Paul, etc., R. Co., 65 Minn. 60, 67 N. W. 808; National Invest. Co. *v.* National Sav., etc., Assoc., 51 Minn. 198, 53 N. W. 546.

Missouri.— Gamble *v.* Gibson, 10 Mo. App. 327.

Wisconsin.— Whitney *v.* Traynor, 76 Wis. 628, 45 N. W. 530.

Aliter, if reversal is because the findings are unsupported (Gray *v.* Regan, 37 Iowa 688; Crockett *v.* Gray, 31 Kan. 346, 2 Pac. 809; Backus *v.* Burke, 52 Minn. 109, 53 N. W. 1013; Bannister *v.* Patty, 43 Wis. 427), because of the lack of findings (Myers *v.* McDonald, 68 Cal. 162, 8 Pac. 809; Bosquett *v.* Crane, 51 Cal. 505), for errors on the trial (Merrill *v.* Merrill, 65 Me. 79; Robinson *v.* Trofitter, 106 Mass. 51; Jordan *v.* Humphrey, 32 Minn. 522, 21 N. W. 713), in case of a statute permitting amendments "before or after judgment" (Burke *v.* Baldwin, 54 Minn. 514, 56 N. W. 173), or where the findings have not been sufficiently preserved (Ryner-son *v.* Allison, 30 S. C. 534, 9 S. E. 656).

Vacation of a judgment upon verdict for errors affecting the verdict, or for insufficiency of the evidence to support the judgment, requires a new trial. Schley *v.* Schofield, 61 Ga. 528; Miller *v.* Jourdan, 43 Ga. 316; Jordan *v.* Humphrey, 32 Minn. 522, 21 N. W. 713; State *v.* Omaha Nat. Bank, 60 Nebr. 232, 82 N. W. 850.

Aliter, where the judgment is not supported by the verdict, in which case the judgment is reversed that is rendered for the other party upon the facts found (National Invest. Co. *v.* National Sav., etc., Assoc., 51 Minn. 198, 53 N. W. 546; Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315, 68 N. W. 954), or for errors occurring after verdict (Peacock *v.* Peacock, 54 Ga. 255; Meyer *v.* Teutopolis, 131 Ill. 552, 23 N. E. 651; Muse *v.* Curtis, 9 Mart. (La.) 82; Woolman *v.* Garringer, 2 Mont. 405; Missouri, etc., Trust Co. *v.* Clark, 60 Nebr. 406, 83 N. W. 202).

Statutory new trial.— A statute giving a plaintiff the right to institute a new action within a limited time after vacation of a judgment in his favor is not applicable to a case where judgment of reversal is ordered for defendant upon the verdict of the jury. Wilkes *v.* Coopwood, 39 Miss. 348.

New trial in part held proper, see Clark's Code Civ. Proc. N. C. (1900), p. 802, and cases there cited; Central Trust Co. *v.* Ohio Cent. R. Co., 85 Fed. 342.

Reversal of ruling refusing a new trial, without specific directions, leaves the case in the same situation as though a new trial had been granted by the lower court. Irwin *v.* Towne, 43 Cal. 23.

The fact that no directions are given implies, in case of doubt, that a new trial is proper. Heidt *v.* Minor, 113 Cal. 385, 45 Pac. 700; Woods *v.* Jones, 56 Ga. 520.

6. As to the scope of the inquiry, upon further proceedings after remand, see NEW TRIAL.

7. Reversal of a decree for want of equity requires a dismissal of the bill after remand. Buck *v.* Buck, 119 Ill. 613, 8 N. E. 837; Gage *v.* Bailey, 119 Ill. 539, 9 N. E. 199; Newberry *v.* Blatchford, 106 Ill. 584.

Reversal for want of a cause of action requires a dismissal of the action. Edgar *v.* Greer, 14 Iowa 211.

Alternative relief after reversal.— Where relief was granted upon the primary prayer of a bill framed with a double aspect for alternative relief, and the decree was reversed without directions as to the alternative relief, it was held that the chancellor properly retained the bill after remand for decision of the alternative prayer. Polhemus *v.* Emson, 29 N. J. Eq. 583.

8. Dismissal without prejudice is not warranted upon a determination on appeal that a bill is without merits — the dismissal should be for want of equity, with costs. Flaherty *v.* McCormick, 123 Ill. 525, 14 N. E. 846; Wadhams *v.* Gay, 83 Ill. 250; Rynear *v.* Neilin, 4 Greene (Iowa) 524.

9. Judgment for other party held proper. — *Indiana.*— Smith *v.* Zent, 77 Ind. 474; Cutsinger *v.* Nebeker, 58 Ind. 401.

Iowa.— City Bank *v.* Radtke, 92 Iowa 207, 60 N. W. 615; Pomroy *v.* Parmlee, 10 Iowa 154.

Missouri.— Riley *v.* Sherwood, 155 Mo. 37, 55 S. W. 877.

Pennsylvania.— Com. *v.* McDonald, 170 Pa. St. 221, 32 Atl. 410.

Utah.— Coombs *v.* Salt Lake, etc., R. Co., 11 Utah 137, 39 Pac. 503.

Wisconsin.— Vanderpool *v.* La Crosse, etc., R. Co., 44 Wis. 652; Corwith *v.* State Bank, 11 Wis. 430, 78 Am. Dec. 719.

Upon reversal of a judgment, notwithstanding the verdict, it is the duty of the lower court to enter judgment for the amount of the verdict. Crane *v.* Eastern Transp. Line, 50 Conn. 341.

After reversal upon a question of law reserved, the lower court is not authorized to enter judgment for the other party, notwithstanding the verdict. Currier *v.* Bilger, 12

different judgment should be entered for the same party,[10] upon what, if any, conditions judgment should be given,[11] and how costs should be awarded.[12]

(B) *For Want of Jurisdiction.* Upon a vacation for want of jurisdiction of the subject-matter in the lower court, that court has no power further than to summarily remove the case from the docket.[13] Amendments to cure the defect cannot be permitted.[14]

e. Erroneous Directions. The lower court is not warranted in refusing to obey the mandate of the appellate court for supposed judicial error therein.[15] But, it has been held, a mandate should not be strictly followed, so as to work a manifest injustice, where it appears to have been framed upon a misapprehension.[16]

Pa. Co. Ct. 348, 2 Pa. Dist. 278. *Aliter*, where the parties had agreed for judgment if the evidence would support a contrary verdict. Stone *v.* St. Louis Stamping Co., 156 Mass. 598, 31 N. E. 654. And where the findings of fact in a chancery case were acquiesced in, judgment for the other party after reversal is proper. Andrews *v.* Burdick, 64 Iowa 692, 21 N. W. 140.

10. Different judgment for same party held proper.— *Florida.*— State *v.* Call, 36 Fla. 305, 18 So. 771.

Illinois.— Winchester *v.* Grosvenor, 48 Ill. 515.

Kentucky.—Garnett *v.* Farmers Nat. Bank, 15 Ky. L. Rep. 643, 23 S. W. 866.

Minnesota.—Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58.

South Carolina.— Tate *v.* Marco, 30 S. C. 614, 9 S. E. 269.

Upon a partial reversal as to severable items, and a new trial is not necessary as to the reversed portion of the judgment, the judgment should be entered simply for the unreversed items. Argenti *v.* San Francisco, 30 Cal. 458; Garnett *v.* Farmers Nat. Bank, 15 Ky. L. Rep. 643, 23 S. W. 866. *Aliter*, where a new trial is necessary which might necessitate two judgments (Fox *v.* Hale, etc., Silver Min. Co., 112 Cal. 568, 44 Pac. 1022), except in case of a statute which allows judgment at once for undisputed items — the items established on appeal being undisputed (Lackland *v.* Smith, 5 Mo. App. 153).

Upon a partial reversal consequent upon a partial appeal, that part of the judgment not appealed from remains intact, and it is not necessary, after remand, to make any order as to the unappealed portion. Jones *v.* Jones, 71 Wis. 513, 38 N. W. 88.

Where the adjudged method of distribution of property in controversy is held erroneous, this does not affect the rights of distributees to participate according to the proper method to be adopted in view of the appellate decision, and distribution should be made without further investigation of such rights. Hurck *v.* Erskine, 50 Mo. 116.

11. Foreclosure, conditioned on non-payment, held proper, see Gibson *v.* Barber, 103 N. C. 322, 9 S. E. 549.

12. Upon reversal and judgment for the other party the costs follow the judgment, and should be included therein. Padgett *v.* Cleveland, 37 S. C. 513, 16 S. E. 481; McKnight *v.* Craig, 6 Cranch (U. S.) 183, 3 L. ed. 193; Riddle *v.* Mandeville, 6 Cranch (U. S.) 86, 3 L. ed. 161.

Upon vacation and new trial, in the absence of specific instructions, costs of the former trial should abide the result of the second trial. Hamrick *v.* Danville, etc., Gravel Road Co., 41 Ind. 170; Garrison *v.* Singleton, 5 Dana (Ky.) 160.

A partial setting aside of the judgment does not authorize a complete reversal of the liability for costs. Ferrabow *v.* Green, 110 N. C. 414, 14 S. E. 973.

13. Fortenberry *v.* Frazier, 5 Ark. 200, 39 Am. Dec. 373; Wall *v.* Dodge, 3 Utah 168, 2 Pac. 206.

Dismissal with costs is, in such case, erroneous — the case must simply be stricken from the docket. Leeman *v.* Wheeler, 66 Tex. 154, 18 S. W. 446.

14. *Ex p.* Mansfield, 11 App. Cas. (D. C.) 558.

15. *Alabama.*— Johnson *v.* Glascock, 2 Ala. 519.

Arkansas.— Meyer *v.* Johnson, 60 Ark. 50, 28 S. W. 797; Fortenberry *v.* Frazier, 5 Ark. 200.

California.— Matter of Heydenfeldt, 117 Cal. 551, 49 Pac. 713.

Iowa.— Lombard *v.* Gregory, 88 Iowa 431, 55 N. W. 471.

Kentucky.—Watson *v.* Avery, 3 Bush (Ky.) 635.

Louisiana.—Lovelace *v.* Taylor, 6 Rob. (La.) 92; Cox *v.* Thomas, 11 La. 366.

Mississippi.— Henderson *v.* Winchester, 31 Miss. 290.

New York.— Kanouse *v.* Martin, 3 Duer (N. Y.) 664; Matter of Graduates, 11 Abb. Pr. (N. Y.) 301.

North Carolina.— Dobson *v.* Simonton, 100 N. C. 56, 6 S. E. 369; Murrill *v.* Murrill, 90 N. C. 120.

South Carolina.—Hardin *v.* Howze, 18 S. C. 73; Haskell *v.* Raoul, 1 McCord Eq. (S. C.) 22.

Virginia.— Lore *v.* Hash, 89 Va. 277, 15 S. E. 549.

United States.—Kennicott *v.* Wayne County, 6 Biss. (U. S.) 138, 14 Fed. Cas. No. 7,710.

Judicial insubordination.— In Perry *v.* Tupper, 71 N. C. 380, 381, the court, by Reade, J., said: "Is it for the judge below to refuse to obey the order because he thinks the supreme court erred? That would be judicial insubordination which is not to be tolerated."

16. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Baltimore

The lower court should not attempt the correction of mistakes in the mandate or appellate judgment,[17] nor send back the matter to the appellate court unless directed so to do.[18] But a manifest clerical error may be corrected.[19] For correction of a supposed error in the appellate judgment, another appeal will not lie from a compliance therewith — the only remedy is by rehearing in the appellate court.[20]

f. Void and Voidable Judgments. An appellate judgment which is clearly void for want of jurisdiction may be disregarded in the court below,[21] but not for

Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609. *Contra,* Cunningham *v.* Ashley, 13 Ark. 653; Matter of Heydenfeldt, 117 Cal. 551, 49 Pac. 713.

17. Correction of mistakes in mandate.— Tuttle *v.* Gilmore, 42 N. J. Eq. 369, 7 Atl. 859; Bogardus *v.* Rosendale Mfg. Co., 1 Duer (N. Y.) 592; Isler *v.* Brown, 69 N. C. 125.

In Massachusetts the supreme judicial court, by Gray, C. J., has held that: "The decision of this court, as stated in its rescript, on the question of law reserved is conclusive upon the superior court. But if it appears to the satisfaction of that court that, by mistake of parties or counsel, or misunderstanding of that court, a question of fact which is essential to the determination of the rights of the parties has not been tried, it is within the power and discretion of that court to suspend the entry of final judgment, and to set aside a verdict or discharge a statement of facts, in order to afford an opportunity of presenting that question to the court or jury." West *v.* Platt, 124 Mass. 353. See also Gray *v.* Cook, 135 Mass. 189.

In Vermont it has been held that the chancellor might rehear a cause remanded from the appellate court for "substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertence or oversight of an uncontroverted or settled fact, errors or mistake such as it is evident the supreme court would correct upon suggestion before the cause was remanded. In a cause remanded this remedy is in no sense applicable for the purpose of review." Canerdy *v.* Baker, 55 Vt. 578, 582. See also Gale *v.* Butler, 35 Vt. 449.

Under the guise of an amendment for clerical error, the lower court cannot, after remand, be permitted to correct supposed judicial errors in the judgment. Smith *v.* Armstrong, 25 Wis. 517.

18. Remand to appellate court.— Hillyer *v.* Vandewater, 11 N. Y. Suppl. 167, 32 N. Y. St. 136, 25 Abb. N. Cas. (N. Y.) 137; Vermilye *v.* Seldon, 6 How. Pr. (N. Y.) 41, 5 Sandf. (N. Y.) 683, 9 N. Y. Leg. Obs. 83.

19. Correction of manifest clerical error.— Johnson *v.* Glascock, 2 Ala. 519; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624.

Interest on items reversed which had been computed, together with interest on other items affirmed, up to the day of judgment, and included in the judgment as affirmed, should be deducted. Wilde *v.* New York Cent., etc., R. Co., Sheld. (N. Y.) 269.

20. Rehearing, not appeal, proper remedy. — *Georgia.*— Jackson *v.* Tift, 23 Ga. 46.

Illinois.— Boggs *v.* Willard, 70 Ill. 315, 22 Am. Rep. 77.

Louisiana.—Gillaspie *v.* Scott, 32 La. Ann. 767.

New Jersey.— Jenkins *v.* Guarantee Trust, etc., Co., 55 N. J. Eq. 798, 38 Atl. 695.

North Carolina.— Merrimon *v.* Lyman, 126 N. C. 541, 36 S. E. 44; Carter *v.* Long, 116 N. C. 44, 20 S. E. 1013.

South Carolina.— Anderson *v.* Woodward, 47 S. C. 203, 24 S. E. 1037.

Texas.— Lowell *v.* Ball, 58 Tex. 562.

United States.— Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052.

Reasons for rule.— In Perry *v.* Tupper, 71 N. C. 380, 381, the court, by Reade, J., said: "If the judge cannot refuse to obey the order because he thinks there is error, can the party frustrate it because *he* thinks there is error? That would be worse than for the judge to do it, because it might be supposed that the judge would exercise discretion, and refuse to obey only in case of palpable error; but the interested party would frustrate the order in every case. If, then, the judge cannot refuse to obey, and the party cannot be allowed to frustrate an erroneous decision of the supreme court; and if from it there is no *appeal,* are we driven to the revolting alternative that there is no *relief?* Of course not. The practice is well established and the relief perfect — a petition in this court to rehear."

Review of the former appellate judgment cannot be effected by a second appeal to determine the correctness of the lower court's action under the mandate. Gamble *v.* Gibson, 19 Mo. App. 531; Wright *v.* Southern R. Co., 128 N. C. 77, 38 S. E. 283; Shoaf *v.* Frost, 127 N. C. 306, 37 S. E. 271.

21. People *v.* Clerk New York Mar. Ct., 3 Abb. Pr. (N. Y.) 57; Doty *v.* Brown, 4 How. Pr. (N. Y.) 429; McCrimmin *v.* Cooper, 37 Tex. 423.

An appeal, without jurisdiction in the highest appellate court to entertain it, may be disregarded in the intermediate appellate court. Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567 [*affirming* (Tex. Civ. App. 1897) 40 S. W. 1022].

Jurisdictional matters which may be waived by failure to object cannot be considered by the lower court as a reason for disobeying the mandate or defeating the judgment after remand. Indiana, etc., R. Co. *v.* Scearce, 23 Ind. 223; Birney *v.* Haim, 2 Litt. (Ky.) 262; Paul *v.* Grimm, 183 Pa. St. 326, 41 Wkly. Notes Cas. (Pa.) 300, 38 Atl. 1006. And where the jurisdictional question was raised and determined on appeal, the determina-

fraud[22] or mere irregularities.[23] Relief may be had by application to the appellate court[24] or by a new proceeding in the lower court, or any court of competent jurisdiction, to annul the judgment.[25] However, such new proceeding cannot be maintained as of right for the correction of judicial error,[26] irregularities short of invalidity,[27] or on account of newly-discovered evidence.[28]

g. Remedy For Non-Compliance. Affirmative action of the lower court in defiance of a mandate may be disregarded by a party as being wholly void,[29] and the appellate court may, by mandatory writ or rule, enforce obedience[30] or itself

tion is conclusive. Sloan *v.* Cooper, 54 Ga. 486; Kirwin *v.* Hibernia Ins. Co., 31 La. Ann. 339; Rees *v.* Parish, 1 McCord Eq. (S. C.) 56; Miller *v.* Clark, 52 Fed. 900. A decision on the merits is, by implication, an adverse determination of an objection to jurisdiction.

Nevada.— Clarke *v.* Lyon County, 8 Nev. 181.

Pennsylvania.— Grim *v.* Paul, 16 Pa. Co. Ct. 670.

Virginia.— Kent *v.* Dickinson, 26 Gratt. (Va.) 1009, 25 Gratt. (Va.) 817.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

United States.— Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986.

A party to a judgment, affirmed on appeal of a co-defendant as to all of the defendants, has been held to have no right, after remand, to move in the lower court to annul the judgment on the ground that he was not properly served with process or notice of appeal, because: "The court of appeals is, by common law, independent of statute law, conclusively presumed to have done everything that was necessary to invest it with full and complete jurisdiction over all the parties to this joint judgment;" and because, further: "The rendition by this court of a judgment or decree against persons who should have been appellees is, at common law, equivalent to an affirmation on the record that such parties were before the court, as, without their so being, the Court could not have proceeded to decide the case." Newman *v.* Mollohan, 10 W. Va. 488, 502, 503.

22. See *supra*, XVIII, F, 3, a.

Where the case is not finally disposed of, it has been held that fraud, affecting the matters disposed of, which was not discovered until after the remand, might be set up by amendment or supplemental pleading. Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

23. **Mere irregularities, not amounting to absolute invalidity,** cannot be considered in the lower court after remand, whether they were raised or determined on the appeal or not. Herz *v.* Frank, 104 Ga. 638, 30 S. E. 797; New York *v.* Lyons, 1 Daly (N. Y.) 296; Griswold *v.* Havens, 16 Abb. Pr. (N. Y.) 413, 26 How. Pr. (N. Y.) 170; Matter of Graduates, 11 Abb. Pr. (N. Y.) 301; Scottish American Mortg. Co. *v.* Reeve, 7 N. D. 552, 75 N. W. 910; Brown *v.* Haines, 12 Ohio 1.

Death of some of defendants before judgment does not render the judgment absolutely void, so as to warrant a reopening of the judgment upon the suggestion of death made for the first time after remand for execution. Hill *v.* West, 4 Yeates (Pa.) 385.

As to *nunc pro tunc* entry because of death after submission see *supra*, XVIII, F, 2, b.

24. Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 169 Mass. 157, 47 N. E. 606; Newton *v.* Harris, 8 Barb. (N. Y.) 306.

25. De la Croix *v.* Gaines, 13 La. Ann. 177; Jewett *v.* Dringer, 31 N. J. Eq. 586; Calvert *v.* Peebles, 82 N. C. 334.

26. Land *v.* Williams, 12 Sm. & M. (Miss.) 362, 51 Am. Dec. 117; Haskell *v.* Raoul, 1 McCord Eq. (S. C.) 22; Campbell *v.* Campbell, 22 Gratt. (Va.) 649; Cochrane *v.* Van de Vanter, 13 Wash. 323, 43 Pac. 42.

Reasons stated.— In McCrimmin *v.* Cooper, 37 Tex. 423, affirming the denial of an injunction against an appellate court judgment, the court, by Walker, J., said: "Should this court render a judgment in any cause over which it had not jurisdiction, there can be no doubt that such judgment would be void, and might be attacked or set aside in any court of competent jurisdiction. But the proposition upon which this case has proceeded is a very different one. . . . We are not called on in this case to defend the judgment of the supreme court further than to declare that the court had undoubted jurisdiction to render the judgment in question. It may have been error so to do; but that error might have been corrected in this court."

27. Newton *v.* Harris, 8 Barb. (N. Y.) 306. See also cases cited *supra*, note 23.

28. As to bills of review for newly-discovered evidence see *infra*, XVIII, G, 4, f.

29. Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19.

An execution issued before modification which is required by the remittitur should be quashed on motion. The integrity of the judgment as an entirety is impeached by the directed modification, and it is, therefore, unenforceable until modified as directed. Dawson *v.* Waldheim, 81 Mo. App. 636.

An irregular entry of costs, though subject to be struck out on motion, does not render the whole judgment void for non-compliance with the mandate. Lawrence *v.* Bank of Republic, 6 Rob. (N. Y.) 497.

A merely erroneous action in failing to follow the remittitur does not render the action absolutely void, it appearing that the lower court "attempted to enter a judgment in accordance with that remittitur," which was not without its jurisdiction. Fischer *v.* Blank, 81 Hun (N. Y.) 579, 31 N. Y. Suppl. 10, 63 N. Y. St. 334.

30. **Mandatory writ or rule.**— *Florida.*— State *v.* White, 40 Fla. 297, 24 So. 160.

enter and execute the judgment.[31] But relief by another appeal must be resorted to where the ground for relief consists of a failure to follow the law of the case,[32] or to give appropriate relief outside the terms of the mandate,[33] or for a misinterpretation of the mandate not amounting to a refusal to act.[34] The appellate court will not act as upon a non-compliance with its mandate until application has been made to the lower court, and denied.[35]

3. Province of the Opinion — a. As Affecting the Mandate. In construing the mandate or in determining the action to be taken thereon, in case of a general order or incomplete directions, the lower court should look to the reasons stated in the opinion of the appellate court, and be governed thereby in the action

Indiana.— Jared *v.* Hill, 1 Blackf. (Ind.) 155.

Kentucky.— Watson *v.* Avery, 3 Bush (Ky.) 635.

Michigan.— Lyon *v.* Ingham County Cir. Judge, 37 Mich. 377.

United States.— *Re* Sanford Fork, etc., Co., 160 U. S. 247, 11 S. Ct. 291, 40 L. ed. 414; *Ex p.* Dubuque, etc., R. Co., 1 Wall. (U. S.) 69, 17 L. ed. 514; U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185.

31. Maguire *v.* Tyler, 17 Wall. (U. S.) 253, 21 L. ed. 576, where the supreme court of the United States proceeded to enter the judgment and award execution upon refusal of a state court to so enter and execute under a mandate of the supreme court.

Where the appellate court has the power of trial de novo, it may, on a second appeal, retain the cause for trial at its own bar, the lower court having disregarded the instructions given for its guidance on a former appeal. Fine *v.* Cockshut, 6 Call (Va.) 16.

32. **For a failure to follow the law of the case,** as laid down in the appellate decision, the proper remedy is another appeal, and not a mandamus. Ludlum *v.* Fourth Dist. Ct., 9 Cal. 7; Blatchford *v.* Newberry, 100 Ill. 484; Avery *v.* Meikle, 5 Ky. L. Rep. 518.

33. **Where the mandate does not specify the method of enforcement,** if the lower court does not absolutely refuse to enforce, the remedy for an inadequate enforcement is by appeal alone. Rohmeiser *v.* Bannon, 15 Ky. L. Rep. 114, 22 S. W. 27; Bey's Succession, 47 La. Ann. 219, 16 So. 825; Remington *v.* Eastern R. Co., 109 Wis. 154, 85 N. W. 321. So, a mandamus will not issue to compel entry of a judgment under a mandate merely reversing and remanding a cause. State *v.* Boyle, 6 Mo. App. 57; State *v.* Judge St. Louis Cir. Ct., 1 Mo. App. 543.

Liability of the executing officer, for failure to make a levy or return of the execution upon an affirmed judgment, is a question which cannot be brought to the attention of the appellate court except by appeal. Marchand *v.* Russell, 1 Ky. L. Rep. 126.

34. Pringle *v.* Sizer, 3 S. C. 335; *Re* City Nat. Bank, 153 U. S. 246, 14 S. Ct. 804, 38 L. ed. 705.

Motion to recall remittitur is not the proper method to obtain a review of the action of the lower court thereunder. Dorland *v.* Bernal, (Cal. 1885) 7 Pac. 792.

The record on former appeal will not be considered for the purpose of determining whether there has been a compliance with the mandate — an entirely new record, as for a new and distinct appellate proceeding, is necessary. Parsons Water Co. *v.* Hill, 3 Kan. App. 333, 45 Pac. 116.

Misinterpretation amounting to refusal.— In State *v.* Theard, 48 La. Ann. 926, 20 So. 286, where the lower court had so misinterpreted an incidental remark in the opinion as to paralyze its discretionary action in further proceedings which had been directed, the appellate court declined to issue a mandamus to the lower court ordering the particular course to be pursued, but merely "concluded to direct the district court" to dispose of the question raised in accordance with the proper interpretation, which was indicated, the court, by Nicholls, C. J., saying: "Under the circumstances we think a decision of this matter can be properly referred to us for immediate decision, so as to set matters at rest at once should the court below have misconceived the scope of the judgment."

In Rennebaum *v.* Atkinson, 20 Ky. L. Rep. 1346, 49 S. W. 1, 342, it was held that a proceeding by rule against the lower court judge was proper to present the question whether a judgment entered under the mandate conformed thereto; but it was further held that inasmuch "as the circuit judge evidently believed the judgment entered was in accordance with the mandate, the rule moved for will not be awarded until he has had an opportunity to enter a judgment in conformity with the mandate."

Where reversal would not benefit appellant, a reversal will not be awarded on appeal from action taken under a mandate, though its provisions have not been strictly complied with. Campbell *v.* Pratt, 2 Pet. (U. S.) 354, 7 L. ed. 449. This applies where appellant has not been prejudiced by the failure complained of. Joseph *v.* Hotopp, 7 Ky. L. Rep. 285.

35. Royall *v.* Virginia, 125 U. S. 696, 8 S. Ct. 1392, 31 L. ed. 855.

Correction of an erroneous action should be made upon special motion in the lower court (*In re* Mahon, 71 Cal. 586, 12 Pac. 868; Griswold *v.* Havens, 16 Abb. Pr. (N. Y.) 413, 26 How. Pr. (N. Y.) 170; Harmon *v.* Bowyer, 15 W. Va. 538), even after the term (Moran *v.* Hagerman, 64 Fed. 499, 29 U. S. App. 71, 12 C. C. A. 239). A mere formal irregularity which can at any time be corrected in the

taken.[36] Especially is this true when the remand is for further proceedings in accordance with, in conformity to, or not inconsistent with, the opinion, for in such case the opinion is practically a part of the mandate.[37] But where the mandate contains express directions it is sufficient of itself, unaided or uncontrolled by statements in an opinion which is not made a part of it.[38]

b. As the Law of the Case[39] — (i) *In General.* It is the general rule that, as to those questions embraced therein, the decision of the appellate court is binding on the lower court in its further proceedings, even though such decision be in fact erroneous; and, where there is no change in the facts, it is the duty of the court below to adopt and follow the views expressed.[40] The decision

lower court will not be noticed upon a subsequent appeal. Chautauqua County Bank *v.* White, 23 N. Y. 347.

36. Bloxham *v.* Florida Cent., etc., R. Co., 39 Fla. 243, 22 So. 697; Watson *v.* Avery, 3 Bush (Ky.) 635; Noonan *v.* Orton, 31 Wis. 265; West *v.* Brashear, 14 Pet. (U. S.) 51, 10 L. ed. 350.

37. *Alabama.*— Lanier *v.* Hill, 30 Ala. 111.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 39 Fla. 243, 22 So. 697.

Indiana.— Cutsinger *v.* Nebeker, 58 Ind. 401.

Kentucky.—Watson *v.* Avery, 3 Bush (Ky.) 635.

Missouri.— Riley *v.* Sherwood, 155 Mo. 37, 55 S. W. 877.

New Hampshire.—Beebe *v.* Dudley, 30 N. H. 34.

New York.— Matter of Edson, 38 N. Y. App. Div. 19, 56 N. Y. Suppl. 409 [*affirmed* in 159 N. Y. 568, 54 N. E. 1092].

Wisconsin.— Miner *v.* Medbury, 7 Wis. 100.

United States.— Graff *v.* Boesch, 50 Fed. 660.

38. McLane *v.* Cropper, 6 App. Cas. (D. C.) 422; Davidson *v.* Carroll, 23 La. Ann. 108.

If the directions of the mandate are precise and unambiguous, it is the duty of the lower court to carry it into execution without looking elsewhere, even to the opinion, for authority to alter its meaning. West *v.* Brashear, 14 Pet. (U. S.) 51, 10 L. ed. 350.

39. See also *supra*, XVII, K.

40. *Alabama.*— Douglass *v.* Montgomery, 124 Ala. 489, 27 So. 310; Donnell *v.* Hamilton, 77 Ala. 610; Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Arkansas.—Dyer *v.* Ambleton, 56 Ark. 170, 19 S. W. 574; Taliaferro *v.* Barnett, 47 Ark. 359, 1 S. W. 702.

California.— Buck *v.* Eureka, 124 Cal. 61, 56 Pac. 612; Wallace *v.* Sisson, 114 Cal. 42, 45 Pac. 1000.

Colorado.— Cache la Poudre Reservoir Co. *v.* Water Supply, etc., Co., 27 Colo. 532, 62 Pac. 420; Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858.

District of Columbia.— Averell *v.* Second Nat. Bank, 19 D. C. 246; Williams *v.* Gardiner, 2 Mackey (D. C.) 93.

Georgia.— Summerville Macadamized, etc., Road Co. *v.* Baker, 70 Ga. 513; Field *v.* Sisson, 40 Ga. 67.

Idaho.— Palmer *v.* Utah, etc., R. Co., 2 Ida. 350, 16 Pac. 553.

Illinois.— Clayton *v.* Feig, 188 Ill. 603, 59 N. E. 245; Union Nat. Bank *v.* Hines, 187 Ill. 109, 58 N. E. 405; Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277, 46 N. E. 214.

Indiana.— McClure *v.* Raben, 133 Ind. 507, 33 N. E. 275, 35 Am. St. Rep. 558; Poulson *v.* Simmons, 126 Ind. 227, 26 N. E. 152.

Iowa.— Agne *v.* Seitsinger, 104 Iowa 482, 73 N. W. 1048; McFall *v.* Iowa Cent. R. Co., 104 Iowa 47, 73 N. W. 355.

Kansas.— J. M. W. Jones Stationery, etc., Co. *v.* Western News Co., 30 Kan. 334, 1 Pac. 534; Demple *v.* Hofman, (Kan. App. 1898) 55 Pac. 558.

Kentucky.— Worthington *v.* Smith, 21 Ky. L. Rep. 834, 53 S. W. 1; Taylor *v.* George T. Stagg Co., 18 Ky. L. Rep. 680, 37 S. W. 954.

Louisiana.—State *v.* Judge Second Judicial Dist. Ct., 20 La. Ann. 521.

Maryland.— Abraham *v.* Mercantile Trust, etc., Co., 86 Md. 254, 37 Atl. 646; Worthington *v.* Hiss, (Md. 1891) 23 Atl. 198.

Michigan.— Hall *v.* Murdock, 119 Mich. 389, 78 N. W. 329; Wheeler *v.* Meyer, 101 Mich. 465, 59 N. W. 811.

Mississippi.— Chapman *v.* White Sewing Mach. Co., 78 Miss. 438, 28 So. 735; Smith *v.* Elder, 14 Sm. & M. (Miss.) 100.

Missouri.— May *v.* Crawford, 150 Mo. 504, 51 S. W. 693; Pitkin *v.* Shacklett, 117 Mo. 547, 23 S. W. 884.

Montana.— Daniels *v.* Andes Ins. Co., 2 Mont. 500; Creighton *v.* Hershfield, 2 Mont. 169.

Nebraska.— O'Brien *v.* Gaslin, 24 Nebr. 559, 39 N. W. 449.

New York.— Adair *v.* Brimmer, 95 N. Y. 35; Pearsall *v.* Westcott, 45 N. Y. App. Div. 34, 60 N. Y. Suppl. 816.

North Carolina.— Gordon *v.* Collett, 107 N. C. 362, 12 S. E. 332; Burwell *v.* Burgwyn, 105 N. C. 507, 10 S. E. 1100.

Ohio.— Matter of Stayner, 33 Ohio St. 481.

Oregon.— Portland Trust Co. *v.* Coulter, 23 Oreg. 131, 31 Pac. 280.

Pennsylvania.— Derr *v.* Ackerman, 196 Pa. St. 198, 46 Atl. 446.

South Carolina.— Jacobs *v.* Mutual Ins. Co., (S. C. 1900) 35 S. E. 221; Turner *v.* Interstate Bldg., etc., Assoc., 51 S. C. 33, 27 S. E. 947.

Tennessee.— Underwood *v.* Martin, 2 Overt. (Tenn.) 190.

Texas.— Crane *v.* Blum, 56 Tex. 325; Kendall *v.* Mather, 48 Tex. 585.

Utah.— *In re* Christensen, (Utah 1901) 63 Pac. 896.

Vermont.— Sherman *v.* Windsor Mfg. Co., 57 Vt. 57; McConnell *v.* Strong, 11 Vt. 280.

Virginia.— Turner *v.* Staples, 86 Va. 300,

stands as the law of that particular case, even though principles inconsistent with those on which it is based have been established in other cases.[41]

(II) *CHANGE IN STATE OF FACTS.* The decision of the appellate court, rendered upon a given state of facts, becomes the law of the case only as applicable to those facts; and if, on a retrial new evidence is introduced, establishing a new state of facts, the lower court is not conclusively bound by the decision above, but should apply the law applicable to the new and changed state of facts.[42]

9 S. E. 1123; Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474.

Washington.— Tibbals *v.* Mount Olympus Water Co., 16 Wash. 480, 48 Pac. 236; Furth *v.* Snell, 13 Wash. 660, 43 Pac. 935.

West Virginia.— Wick *v.* Dawson, (W. Va. 1900) 37 S. E. 639; Seabright *v.* Seabright, 33 W. Va. 152, 10 S. E. 265.

Wisconsin.— Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464; Miner *v.* Medbury, 7 Wis. 100.

United States.— *Re* Potts, 166 U. S. 263, 17 S. Ct. 520, 41 L. ed. 994; Bissell Carpet-Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 43 U. S. App. 47, 19 C. C. A. 25.

See 3 Cent. Dig. tit. "Appeal and Error," § 4661.

As to doctrine of *res judicata*, in general, see JUDGMENTS.

As to effect of decision by divided court see *supra*, XVIII, B, 2.

As to duty of lower court to comply with mandate see *supra*, XVIII, G, 2.

As to decision as law of case on subsequent appeal see *supra*, XVII, K.

Conclusion reached on inconsistent views.— A subordinate court is bound by the judgment of an appellate court reversing its decision, although it appears that the members of the appellate court have arrived at the same conclusion by opposite and inconsistent reasoning and views of the law. Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1.

Controlling principle decided in another case.— On appeal from a judgment entered on an order dismissing the complaint the commissioner granted a new trial, holding that the action could be maintained. The court of appeals decided in a case before it that such action could not be maintained. It was held, on the case coming up for a new trial, that such decision was the law of the case, and that an order dismissing the complaint was proper. Mechanics', etc., Bank *v.* Dakin, 8 Hun (N. Y.) 431.

Former decision governing second controversy.— Where the high court of errors and appeals have decided a controversy between two judgment creditors as to their respective rights to the proceeds of sales made on their executions, and a subsequent controversy between the same parties as to their respective rights to the proceeds of other sales made under like circumstances under executions on the same judgments arise, the former decision will be conclusive of the rights of the parties in the latter controversy. Martin *v.* Lofland, 10 Sm. & M. (Miss.) 317.

Interpretation of evidence.— Where a judgment is set aside by the court of appeals, and a new trial ordered, the interpretation of the evidence in the case, and the inferences drawn therefrom by the court of appeals, are binding on the trial court on the new trial. Moore *v.* Simmons, 133 N. Y. 695, 31 N. E. 513, 45 N. Y. St. 869.

Point not specifically mentioned.— Where, on appeal, question of the court's jurisdiction was raised and discussed, it is *res judicata*, on remanding of the case, though no specific mention was made in the opinion of such point. Hood *v.* Bain, (Kan. 1899) 59 Pac. 275.

Intermediate appellate court.— A former order or decree of the appellate court, unless vacated by the supreme court, is final and conclusive of the rights of the parties, and the questions therein determined cannot be again litigated by taking an appeal from the decree of the lower court carrying that decree into effect. Stapp *v.* Owens, 45 Ill. App. 488.

Ejectment — Doctrine of stare decisis.— In a second trial, upon the same state of facts, in an action in ejectment, taken under Minn. Gen. Stat. §§ 5845, 5846, authorizing a retrial in ejectment in stated cases, the decision on the former appeal controls on the doctrine of *stare decisis*, and not upon the doctrine of *res judicata*. Connecticut Mut. L. Ins. Co. *v.* King, 80 Minn. 76, 82 N. W. 1103.

41. Howard *v.* Dietrich, 11 Ky. L. Rep. 235; Thomson *v.* Albert, 15 Md. 268; Gaines *v.* Caldwell, 148 U. S. 228, 13 S. Ct. 611, 37 L. ed. 432. But see Delaware County *v.* Foote, 9 Hun (N. Y.) 527.

Second vacation upon different grounds.— When the judgment on second appeal in the same case is set aside on grounds other than upon the first appeal, the trial court at the next hearing is not to follow the rule adopted on the first appeal, where such rule has, in the meantime, been overruled in other cases. Barton *v.* Thompson, 56 Iowa 571, 9 N. W. 899, 41 Am. Rep. 119.

42. *California.*—Robinson *v.* Thornton, 114 Cal. 275, 46 Pac. 79; Wallace *v.* Sisson, 114 Cal. 42, 45 Pac. 1000.

Colorado.—Doherty *v.* Morris, 17 Colo. 105, 28 Pac. 85; Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Commercial Union Assur. Co. *v.* Scammon, (Ill. 1887) 12 N. E. 324; Studebaker Bros. Mfg. Co. *v.* Hinsey, 88 Ill. App. 234; Baker *v.* Hess, 53 Ill. App. 473; Magnusson *v.* Charlson, 32 Ill. App. 580.

Indiana.— Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Dodge *v.* Gaylord, 53 Ind. 365.

Kansas.— Conroy *v.* Perry, 26 Kan. 472.

(III) *OBITER DICTA*. *Obiter dicta*, on the part of the appellate court as to matters not before it for decision, are not binding on the lower court,[43] and the parties are not precluded from raising questions which were not submitted or considered on the appeal.[44] But, though a matter be not essential to the decision of the case on appeal, if it be important for the purposes of a new trial, and in that view passed upon, it becomes the law of the case.[45]

4. MATTERS ADMITTING OF FURTHER ACTION — a. Matters Deemed Concluded. No further action can be taken in the lower court upon matters which may be deemed to have been determined by the appellate court.[46] This applies, not only

Kentucky.— Smith *v.* Holloway, 17 Ky. L. Rep. 1087, 33 S. W. 828.

Michigan.— Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

Missouri.— Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339.

Montana.— Maddox *v.* Teague, 18 Mont. 512, 46 Pac. 535.

New York.— Thames L. & T. Co. *v.* Hagemeyer, 38 N. Y. App. Div. 449, 56 N. Y. Suppl. 689; Tompkins *v.* Hunter, 24 N. Y. Suppl. 8.

North Carolina.— Ashby *v.* Page, 108 N. C. 6, 13 S. E. 90.

Texas.—Cole *v.* Estell, (Tex. 1887) 6 S. W. 175.

Vermont.— Flint *v.* Johnson, 59 Vt. 190, 9 Atl. 364.

Washington.— Hughes *v.* Bravinder, 14 Wash. 304, 44 Pac. 530.

Wisconsin.—McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764.

United States.— Andrews *v.* National Foundry, etc., Works, 61 Fed. 782, 18 U. S. App. 458, 10 C. C. A. 60.

See 3 Cent. Dig. tit. "Appeal and Error," § 4665.

In McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814, the court said: "It is doubtless true, as a general proposition, that a previous ruling of the appellate court upon a matter directly in issue is, as to all subsequent proceedings, a final adjudication, and becomes the law of the case, from which the court ought not to depart, nor allow the parties to be relieved. But when such a ruling relates to a matter of fact, the principle can be invoked only when the fact appears again to the appellate court under the same circumstances in respect to which it was originally considered."

Trial on agreed facts.— Where judgment is rendered in a cause tried upon agreed facts, and the supreme court reverses such judgment and remands the case generally, the findings and conclusions of the supreme court are *res judicata* as to the facts embraced in the agreed statement, and the trial court should render such judgment as the supreme court should have rendered or directed on the findings and conclusions announced by said court. Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

43. *Alabama*.— Jesse *v.* Cater, 28 Ala. 475.

Arkansas.— Clark *v.* Hershy, 52 Ark. 473, 12 S. W. 1077.

California.— Luco *v.* De Toro, (Cal. 1893) 34 Pac. 516.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Magnusson *v.* Charlson, 32 Ill. App. 580.

Kentucky.— Smith *v.* Holloway, 17 Ky. L. Rep. 1087, 33 S. W. 828.

Michigan.— Hughes *v.* Detroit, etc., R. Co., 78 Mich. 399, 44 N. W. 396; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

New York.— Van Rensselaer *v.* Wright, 12 N. Y. Suppl. 330, 34 N. Y. St. 438.

Tennessee.— Easley *v.* Tarkington, 5 Baxt. (Tenn.) 592.

Vermont.— Lamoille Valley R. Co. *v.* Bixby, 57 Vt. 548.

See 3 Cent. Dig. tit. "Appeal and Error," § 4664.

An expression, ore tenus, of a justice of the supreme court after an appeal is dismissed for want of jurisdiction, cannot affect the law of the case. Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

Statement arguendo.— In an action to enjoin defendant from diverting the waters of a stream, a statement, made by way of argument in the opinion of the supreme court on a former appeal, reversing and remanding the case for a decree in accordance therewith, that "there may be times of flood or high water when no one below would be injured if defendant's canal should carry away from the river surplus waters to its full capacity," does not entitle defendant to a provision in the decree, in the absence of such issue by the pleadings, allowing him to divert such surplus waters. Heilbron *v.* '76 Land, etc., Co., 96 Cal. 7, 30 Pac. 802.

44. Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602; Kingsbury *v.* Buckner, 70 Ill. 514; Polhemus *v.* Emson, 28 N. J. Eq. 576; Meyers *v.* Myers, (Tenn. Ch. 1898) 50 S. W. 775.

Certified questions.— The certificate sent from the superior court to the common pleas upon questions transferred by the latter is conclusive upon the common pleas to the extent of the questions transferred, but no further. The action remains in the common pleas, to be disposed of by that court. Stevenson *v.* Cofferin, 20 N. H. 288.

45. Table Mountain Tunnel Co. *v.* Stranahan, 21 Cal. 548; Poag *v.* McDonald, 19 Fed. Cas. No. 11,238.

Opinion entitled to great weight.—The opinion of an appellate court dismissing an appeal is not binding on the court below upon the law questions involved in the merits of the action, but, if it carefully and deliberately treats those questions, it is entitled to great weight. Produce Bank *v.* Morton, 42 N. Y. Super. Ct. 472. See also Huttemeier *v.* Albro, 2 Bosw. (N. Y.) 546.

46. See *supra*, XVIII, G, 3, b.

to those matters which have been expressly presented and decided,[47] but also to all matters, properly a part of the case, which should have been presented, and which would, if presented, have been determined;[48] but it does not apply to matters which might have been litigated, but were not, and which were not, necessarily, involved,[49] though the appellate court assumes to decide them.[50]

b. Interlocutory and Ancillary Matters. The determination of interlocutory or ancillary matter on appeal decides merely as to the action already taken, leaving the matter as to subsequent action upon different facts discretionary with the trial court,[51] except in so far as the merits of the cause may be necessarily involved.[52]

47. Matters once determined by the appellate court cannot, after remand, again be raised in the lower court.

California.— Haggin *v.* Clark, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478.

Illinois.— Lombard *v.* Chicago Sinai Congregation, 75 Ill. 271; Henning *v.* Eldridge, 39 Ill. App. 273.

Iowa.— Adams County *v.* Burlington, etc., R. Co., 55 Iowa 94, 2 N. W. 1054, 7 N. W. 471; Croup *v.* Morton, 53 Iowa 599, 5 N. W. 1093.

Maryland.— McClellan *v.* Crook, 7 Gill (Md.) 333.

New York.— Stevens *v.* Central Nat. Bank, 24 Misc. (N. Y.) 344, 53 N. Y. Suppl. 193.

Virginia.— Robinson *v.* Crenshaw, 84 Va. 348, 5 S. E. 222.

48. Matters which might have been determined, but were not expressly determined because, through neglect or choice, not presented, cannot be presented for determination to the lower court after remand for judgment or execution.

Arkansas.— Porter *v.* Doe, 10 Ark. 186.

California.— Parker *v.* Bernal, 68 Cal. 122, 8 Pac. 696.

Georgia.— King *v.* Davidson, 72 Ga. 192.

Illinois.— Palmer *v.* Woods, 149 Ill. 146, 35 N. E. 1122.

Indiana.— Lake County *v.* Donch, 6 Ind. App. 337, 33 N. E. 663.

Kansas.— Duffitt *v.* Crozier, 30 Kan. 150, 1 Pac. 69.

Kentucky.— Speak *v.* Mattingly, 4 Bush (Ky.) 310.

Louisiana.— Thibodeaux *v.* Herpin, 6 La. Ann. 673.

New York.— New York, etc., R. Co. *v.* Schuyler, 8 Abb. Pr. (N. Y.) 239.

North Carolina.— Merrimon *v.* Lyman, 126 N. C. 541, 36 S. E. 44.

Pennsylvania.— Titusville Iron Works *v.* Keystone Oil Co., 130 Pa. St. 211, 18 Atl. 739.

Virginia.— Krise *v.* Ryan, 90 Va. 711, 19 S. E. 783; Atkinson *v.* Beckett, 36 W. Va. 438, 15 S. E. 179.

Wisconsin.— Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

Objections not taken at the original hearing, cannot, after remand, be raised in the lower court for the purpose of evading the effect of the determination on appeal. Coughlin *v.* McElroy, 72 Conn. 444, 44 Atl. 743; McCaw *v.* Blewitt, Bailey Eq. (S. C.) 98; Pierce *v.* Kneeland, 9 Wis. 23.

Exceptions.—For objections which go to the validity of the judgment see *supra*, XVIII, G, 2, f.

49. *Kentucky.*— Cavanaugh *v.* Willson, (Ky. 1900) 57 S. W. 620.

Mississippi.— Abbey *v.* Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401.

New York.— Hudson River Telephone Co. *v.* Watervliet Turnpike, etc., Co., 61 Hun (N. Y.) 140, 15 N. Y. Suppl. 752, 39 N. Y. St. 952.

North Carolina.— Morehead Banking Co. *v.* Morehead, 126 N. C. 279, 35 S. E. 593.

United States.— *Ex p.* Union Steamboat Co., 178 U. S. 317, 20 S. Ct. 904, 44 L. ed. 1084.

50. As to the effect of *obiter dicta* as law of the case see *supra*, XVIII, G, 3, b, (III).

51. *Alabama.*— Seymour *v.* Farquhar, 95 Ala. 527, 10 So. 650; Adams *v.* Sayre, 76 Ala. 509.

Georgia.— Lyon *v.* Lyon, 103 Ga. 747, 30 S. E. 575; State *v.* Fears, 103 Ga. 162, 29 S. E. 692.

New York.— Heine *v.* Rohner, 53 N. Y. Suppl. 464; Devlin *v.* New York, 63 How. Pr. (N. Y.) 206.

Oklahoma.— Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

South Carolina.— Barnwell *v.* Marion, 56 S. C. 54, 33 S. E. 719.

Texas.— San Antonio, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 30 S. W. 693.

Utah.— Warren *v.* Robinson, 21 Utah 429, 61 Pac. 28.

Virginia.— Wilson *v.* Triplett, 4 Hen. & M. (Va.) 433.

United States.— Edison Electric-Light Co. *v.* U. S. Electric-Lighting Co., 59 Fed. 501, 11 U. S. App. 600, 8 C. C. A. 200.

A judgment upon nonsuit, unless the case is finally disposed of by the appellate court, leaves the matter of further proceedings discretionary with the trial court. Meadows *v.* Hawkeye Ins. Co., 67 Iowa 57, 24 N. W. 591.

Special directions, requiring certain interlocutory action to be taken, must be complied with. Farmers, etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820.

If no further facts are shown which entitle a party to the relief denied by reversal of an interlocutory or ancillary order, the determination is final. Savannah Shoe Factory *v.* Kaiser, 108 Ga. 767, 33 S. E. 404.

52. The merits necessarily involved in an interlocutory or ancillary appeal may so far be disposed of, and no further. Jameson *v.*

c. Matters Pending the Appeal. Matters which occur outside the litigation pending the appeal, and which are not or cannot be made of record in the case, will not be permitted to directly affect the appellate decision or control the lower court in complying with the mandate.[53] But, to fully effectuate the mandate, action taken inconsistent therewith pending the appeal may and should be corrected, even though no specific directions to that effect are given.[54]

d. Matters Subsequent to Decision. Matters which occur subsequent to the appellate judgment, giving rise to new rights in contravention of those which have been determined, cannot be deemed to have been concluded;[55] but, though such rights must be recognized in an appropriate proceeding, they furnish no basis for non-compliance with the mandate so far as it may be complied with in view of another proper proceeding.[56]

e. New Parties. The rights of strangers to the record cannot be concluded by implication or otherwise.[57] But they cannot be allowed to interfere with enforcement of a mandate except in a new proceeding.[58] However, by way of

Moseley, 4 T. B. Mon. (Ky.) 414; Taylor *v.* George T. Stagg Co., 18 Ky. L. Rep. 680, 37 S. W. 954; Michigan Trust Co. *v.* Lansing Lumber Co., 121 Mich. 438, 80 N. W. 281; Schwartz *v.* Schendel, 24 Misc. (N. Y.) 701, 53 N. Y. Suppl. 773; National Park Bank *v.* Haas, 20 N. Y. Suppl. 767, 49 N. Y. St. 772; Dobson *v.* Simonton, 100 N. C. 56, 6 S. E. 369.

A perpetual injunction, though interlocutory in form and ancillary in effect, with reference to another principal proceeding, necessarily involves the merits of the cause as to that matter, and, upon affirmance, is final and conclusive. Bissell Carpet-Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 43 U. S. App. 47, 19 C. C. A. 25.

53. **Rights which accrue pending appeal** cannot be brought into the case for adjustment after remand for judgment. Young *v.* Thrasher, 123 Mo. 308, 27 S. W. 326. *Aliter*, if the remand is for new trial. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

The effect of a discharge in bankruptcy of defendant, pending the appeal, cannot be determined upon motion of plaintiff for entry of judgment in accordance with the mandate. Goodrich *v.* Wilson, 135 Mass. 31.

An agreement pending the appeal as to the subject-matter of the controversy, which is contingent upon the result of the appellate judgment but not made a part of the record, does not affect the power or authority of the lower court under the mandate after affirmance. Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191.

Further account of rents and profits, which accrued since the original accounting, upon which appellate judgment has been rendered, cannot, after remand, be had upon application to the lower court. McClanahan *v.* Henderson, 1 T. B. Mon. (Ky.) 260; Pearson *v.* Carr, 97 N. C. 194, 1 S. E. 916; White *v.* Butcher, 97 N. C. 7, 2 S. E. 59; O'Kie *v.* Depuy, 3 Pa. Co. Ct. 140.

A garnishment of the judgment creditor before receipt of the mandate cannot be considered as in anywise affecting a compliance with the mandate by the lower court. Tourville *v.* Wabash R. Co., 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 680.

Abolition of lower court pending appeal affects compliance with the mandate only to the extent of requiring compliance by the court upon which devolves the unfinished business of the defunct court. Simonton *v.* Chipley, 64 N. C. 152.

An affirmance is not an adjudication that the amount is due and unpaid, though the appellate judgment, in terms or by implication, does so state, so as to preclude a party from receiving the benefits of any payment made pending the appeal. Yale *v.* Heard, 26 Tex. 639.

54. *Illinois.*— Gage *v.* Chicago Theological Seminary, 106 Ill. 508.

Iowa.— Munson *v.* Plummer, 58 Iowa 736, 13 N. W. 71.

New York.—Carleton *v.* New York, 50 N. Y. Super. Ct. 177, 5 N. Y. Civ. Proc. 418.

Washington.—State *v.* Kings County Super. Ct., 17 Wash. 380, 49 Pac. 507.

United States.— South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479, 22 Fed. Cas. No. 13,189.

See also *supra*, XVIII, E, 8.

55. Cunningham *v.* Ashley, 13 Ark. 653; Davidson *v.* New Orleans, 32 La. Ann. 1245.

56. **Cause for stay in a proceeding instituted therefor** will not warrant the lower court in refusing to enter the judgment directed. Watson *v.* Avery, 3 Bush (Ky.) 635, 643, where the court, by Hardin, J., said: "Whether the court might have enjoined its own final judgment or not, after correcting previous errors and conforming the record to the mandate of this court, we are of opinion that it was not authorized, by granting the injunction, to suspend its own power to enter the corrective judgment asked by the defendants, in conformity with the opinion of this court and in execution of its mandate." See also Mackall *v.* Richards, 116 U. S. 45, 6 S. Ct. 234, 29 L. ed. 558.

57. As to parties concluded in a new proceeding see, generally, JUDGMENTS.

58. Kelly *v.* Chicago, 148 Ill. 90, 35 N. E. 752; Kennedy *v.* Meredith, 4 T. B. Mon. (Ky.) 409; Chouteau *v.* Allen, 70 Mo. 290.

exception, it has been held that new creditors may be allowed to come in for participation in a foreclosure,[59] and the rule does not, generally, apply so as to preclude additional parties in case of a new trial.[60]

f. Newly-Discovered Evidence. The lower court, as a general rule, has no power to grant a new trial, in contravention of the mandate, on account of newly-discovered evidence,[61] nor should it thereafter entertain a bill of review on this ground, in the absence of special leave from the appellate court[62] or a reservation to that effect in the mandate.[63]

g. New or Amended Pleadings. After a determination of the merits in the appellate court, amended or supplemental pleadings to avert the effect of the judgment should not be permitted in the lower court.[64] And an appellate judgment or demurrer, which finally disposes of the case, precludes amendment in the lower court;[65] but, if the case is not finally disposed of, amendments are discretionary with the trial court.[66] Amendments may be permitted to cure a defective pleading after vacation, for such defect, of a judgment on the merits,[67]

A claimant of attached property cannot dispute the debt which has been ascertained in an affirmed judgment. Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 324.

59. Chouteau *v.* Allen, 70 Mo. 290.

60. See, generally, NEW TRIAL.

61. Wells *v.* Littlefield, 62 Tex. 28. *Aliter*, by statute. Sanxey *v.* Iowa City Glass Co., 68 Iowa 542, 27 N. W. 747; Shorthill *v.* Ferguson, 47 Iowa 284; Adams County *v.* Baltimore, etc., R. Co., 44 Iowa 335; Carpenter *v.* Knapp, 74 Hun (N. Y.) 99, 26 N. Y. Suppl. 436, 57 N. Y. St. 745.

62. Jewett *v.* Dringer, 31 N. J. Eq. 586; Love *v.* Blewit, 21 N. C. 108; Archer *v.* Long, 36 S. C. 602, 15 S. E. 380; Haskell *v.* Raoul, 1 McCord Eq. (S. C.) 22; Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052; *In re* Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 33 U. S. App. 452, 20 C. C. A. 111; Kimberly *v.* Arms, 40 Fed. 548.

63. Stafford *v.* Bryan, 2 Paige (N. Y.) 45; Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052; *In re* Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 33 U. S. App. 452, 20 C. C. A. 111.

64. *California.*— Keller *v.* Lewis, 56 Cal. 466.

Illinois.—Buck *v.* Buck, 119 Ill. 613, 8 N. E. 837; Newberry *v.* Blatchford, 106 Ill. 584; Ogden *v.* Bowen, 5 Ill. 301; Chicago *v.* Gregsten, 57 Ill. App. 94; Leiter *v.* Field, 24 Ill. App. 123.

Indiana.— Burnett *v.* Curry, 42 Ind. 272.

Iowa.—Steel *v.* Long, (Iowa 1900) 84 N. W. 677; Sanxey *v.* Iowa City Glass Co., 68 Iowa 542, 27 N. W. 747; Sexton *v.* Henderson, 47 Iowa 131.

Kentucky.— Scott *v.* Scott, 9 Bush (Ky.) 174; Denny *v.* Wickliffe, 1 Metc. (Ky.) 216; Joseph *v.* Hotopp, 7 Ky. L. Rep. 285.

New Jersey.— Hale *v.* Lawrence, 22 N. J. L. 72.

New York.— Malcom *v.* Baker, 8 How. Pr. (N. Y.) 301; Bowen *v.* Idley, 6 Paige (N. Y.) 46.

North Carolina.— State *v.* Webb, 126 N. C. 760, 36 S. E. 174.

Pennsylvania.— Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 197 Pa. St. 32, 46 Atl. 853.

Wisconsin.— Patten Paper Co. *v.* Green Bay, etc., Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.

United States.— Mackall *v.* Richards, 116 U. S. 45, 6 S. Ct. 234, 29 L. ed. 558; *Ex p.* Story, 12 Pet. (U. S.) 339, 9 L. ed. 1108.

65. *Alabama.*—Herstein *v.* Walker, 90 Ala. 477, 7 So. 821.

Indiana.— Kinney *v.* State, 117 Ind. 26, 19 N. E. 613.

Michigan.— State Bank *v.* Niles, Walk. (Mich.) 398.

New Jersey.—Howe *v.* Lawrence, 22 N. J. L. 99; Hale *v.* Lawrence, 22 N. J. L. 72.

New York.— New York, etc., R. Co. *v.* Schuyler, 8 Abb. Pr. (N. Y.) 239.

South Dakota.—Northwestern Mortg. Trust Co. *v.* Bradley, 11 S. D. 12, 75 N. W. 269.

United States.— Hodgson *v.* Marine Ins. Co., 1 Cranch C. C. (U. S.) 569, 12 Fed. Cas. No. 6,566; Hitchcock *v.* Galveston, 3 Woods (U. S.) 269, 12 Fed. Cas. No. 6,533.

66. *Connecticut.*— McAlister *v.* Clark, 33 Conn. 253.

Georgia.— Pritchett *v.* Barton County, 93 Ga. 736, 19 S. E. 896; Thurmond *v.* Clark, 47 Ga. 500; Walker *v.* Cook, 17 Ga. 126.

Mississippi.— Trotter *v.* Parker, 38 Miss. 473; Haynes *v.* Covington, 9 Sm. & M. (Miss.) 470.

New Jersey.—Hale *v.* Lawrence, 22 N. J. L. 72; Corning *v.* Kirkpatrick, 48 N. J. Eq. 306, 24 Atl. 442.

North Carolina.— Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

Oregon.— Powell *v.* Dayton, etc., R. Co., 14 Oreg. 22, 12 Pac. 83.

Wisconsin.—Vliet *v.* Sherwood, 38 Wis. 159.

United States.— Sheehy *v.* Mandeville, 2 Cranch C. C. (U. S.) 15, 21 Fed. Cas. No. 12,740.

67. *Alabama.*— Price *v.* Bell, 96 Ala. 534, 11 So. 600.

Florida.— Waterson *v.* Seat, 10 Fla. 326.

Illinois.— Gage *v.* Stokes, 125 Ill. 40, 16 N. E. 925.

Indiana.— Rinard *v.* West, 92 Ind. 359.

Iowa.— Gray *v.* Regan, 37 Iowa 688.

Kentucky.— Louisville *v.* Muldoon, 20 Ky. L. Rep. 1576, 49 S. W. 791.

provided such amendment does not essentially change the original cause of action or create a new one.[68] And, where the merits were not involved or were not finally determined, amendments are within the discretion of the lower court as to matters not determined.[69]

h. Matters Involved in New Trial. Where a new trial under the mandate is proper, all matters not expressly or by necessary implication concluded by the appellate decision are, if otherwise fairly within the scope of the original inquiry, within the jurisdiction of the lower court for further inquiry.[70]

5. Issuance of Execution — a. Court of Issuance. From what court the execution of an appellate judgment should issue is a question to be determined by reference to the laws under which the appellate court is constituted. Generally, this power is given to the courts of original jurisdiction,[71] though often it is given to the appellate courts;[72] and, in the absence of a restraining statute, the power to render a judgment implies the power to execute it.[73] But even though the power exists, an appellate court will, generally, remand for execution to the trial court.[74] Execution from the trial court becomes necessary in case of a dismissal of the appeal,[75] a simple affirmance of the appealed judgment,[76]

Maryland.— Harwood *v.* Marshall, 10 Md. 451.

New York.— Rodgers *v.* Clement, 58 N. Y. App. Div. 54, 68 N. Y. Suppl. 594; Fox *v.* Davidson, 58 N. Y. Suppl. 147; McGrane *v.* New York, 19 How. Pr. (N. Y.) 144; Prindle *v.* Aldrich, 13 How. Pr. (N. Y.) 466.

Virginia.— Governor *v.* Withers, 5 Gratt. (Va.) 24, 50 Am. Dec. 95.

Wisconsin.— Hawes *v.* Woolcock, 30 Wis. 213.

United States.—Everhart *v.* Huntsville Female College, 120 U. S. 223, 7 S. Ct. 555, 30 L. ed. 623.

68. *Connecticut.*— Taylor *v.* Keeler, 51 Conn. 397.

Georgia.— Lowry *v.* Davenport, 80 Ga. 742, 7 S. E. 91.

Iowa.— Edgar *v.* Greer, 14 Iowa 211.

New York.— Farmers' L. & T. Co. *v.* United Lines Tel. Co., 47 Hun (N. Y.) 315.

South Carolina.— Bleckeley *v.* Branyan, 28 S. C. 445, 6 S. E. 291.

69. McAlister *v.* Clark, 33 Conn. 253; Sullivan *v.* Rome R. Co., 28 Ga. 29; Conover *v.* Ruckman, 34 N. J. Eq. 293.

As to amendments upon a new trial after remand see New Trial.

70. As to proceedings upon new trial after remand see New Trial.

As to whether, in a doubtful case, after reversal, a new trial may be had, or whether another judgment should be entered forthwith, see *supra*, XVIII, G, 2, b; XVIII, G, 2, d, (II), (A).

71. Stephens *v.* Koonce, 106 N. C. 222, 11 S. E. 996; Downer *v.* Dana, 22 Vt. 337.

72. Messerschmidt *v.* Baker, 22 Minn. 81; Grissett *v.* Smith, 61 N. C. 297; Cates *v.* Whitfield, 53 N. C. 266.

In a court having both original and appellate jurisdiction, the judgment on appeal may become, on final determination, the judgment of the appellate court, from which court execution properly issues. Brown *v.* Wilson, 59 Ga. 604; U. S. *v.* Reid, 21 Blatchf. (U. S.) 429, 17 Fed. 497. And, though a portion of the lower-court decree is not appealed, it may become, nevertheless, without specific affirmance, a portion of the appellate decree, enforceable as such. The Roarer, 1 Blatchf. (U. S.) 1, 20 Fed. Cas. No. 11,876.

Judgment upon trial de novo is an original judgment, upon which execution should issue from the appellate court. State *v.* New Jersey Traction Co., 57 N. J. L. 345, 30 Atl. 472.

Summary judgments against sureties on bail or appeal bonds, entered by statute in the appellate court, may also, by statute, be made enforceable by process from the same court. Miller *v.* White, 6 Yerg. (Tenn.) 269.

See also *supra*, IX, D [2 Cyc. 961].

73. Smit *v.* People, 15 Mich. 516; Carson *v.* Murray, 3 Paige (N. Y.) 483.

74. Gardner *v.* State, 21 N. J. L. 557; Person *v.* Merrick, 5 Wis. 231.

A judgment entered in the appellate court becomes a judgment of the lower court the same as if there originally rendered, where the records of appellate court are sent down for execution below. McMasters *v.* Blair, 31 Pa. St. 467; Lundy *v.* Pierson, 67 Tex. 233, 2 S. W. 737; Cope *v.* Lindsey, 17 Tex. Civ. App. 203, 43 S. W. 29.

The supreme court of the United States, in order to enforce its judgment, will send its process either to the inferior or intermediate court (Williams *v.* Bruffy, 102 U. S. 248, 26 L. ed. 135); or it may enforce its own judgment, if necessary (Magwire *v.* Tyler, 17 Wall. (U. S.) 253, 21 L. ed. 576).

Where title to real estate is affected, the judgment should be remanded for entry in the court of the county where the land is situated. Hait *v.* Ensign, 61 Iowa 724, 17 N. W. 163.

75. Sublette *v.* St. Louis, etc., R. Co., 76 Mo. App. 480.

Damages, upon dismissal of appeal of one defendant from a joint judgment, cannot be included in the joint judgment, but may be the basis of a separate execution against dismissed appellant. McMillan *v.* Vischer, 14 Cal. 232.

76. Rockwell *v.* Lake County Dist. Ct., 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265;

or in any case where final judgment is not or cannot be rendered in the appellate court.[77]

b. Time and Manner of Issuance. Upon entry of final judgment in the lower court, execution may thereafter be issued in regular course,[78] except it be otherwise specially provided by statute,[79] or unless execution be enjoined for proper cause in a proceeding for that purpose.[80]

APPEAL BOND. The bond given on taking an appeal, by which appellant binds himself to pay damages and costs if he fails to prosecute the appeal with effect.[1] (Appeal Bond: In Admiralty, see ADMIRALTY. In Civil Cases, Generally, see APPEAL AND ERROR. In Criminal Cases, see CRIMINAL LAW.)

APPEAL BOOK. See APPEAL AND ERROR.

APPEALED. Used in a general sense to show an election to change the forum.[2]

APPEAR. To be clear to the comprehension; to be satisfactorily or legally known or made known.[3] (See also APPEARANCES.)

APPEARANCE DAY. The day for appearing.[4]

Walter *v.* Fabor, 21 Mo. 75; Meyer *v.* Campbell, 12 Mo. 603; Sublette *v.* St. Louis, etc., R. Co., 76 Mo. App. 480; Gardner *v.* State, 21 N. J. L. 557; Hulett *v.* Fairbanks, 41 Ohio St. 401.

In Texas, under Tex. Rev. Stat. (1895), art. 941, the supreme court is authorized to render final judgment upon affirmance of a judgment of the court of civil appeals, even though the latter court had reversed and remanded, if the case is practically settled by the intermediate decision. Humphreys *v.* Edwards, 89 Tex. 512, 36 S. W. 434.

77. Henry *v.* Davis, 13 W. Va. 230.

78. **Before entry of the mandate** in the lower court, or before a session of that court after remand, it has been held that the clerk has no authority to issue execution. Clapper *v.* Bailey, 10 Ind. 160.

In Virginia, upon affirmance of an order in chancery dissolving an injunction of an execution upon a judgment at law, it has been held that an execution might be sued out at law before entering up the affirmance in chancery. Epes *v.* Dudley, 4 Leigh (Va.) 145.

Retransmission of records.— Where the appeal was heard upon paper-books, without the records of the lower court having been filed in the appellate court, the appellant has no valid objection to the issuance of execution, on the ground that no records in the case were retransmitted to the lower court. Pennsylvania R. Co. *v.* Com., 39 Pa. St. 403.

Additional judgment against sureties on the supersedeas bond need not first be entered up before taking out execution on the affirmed judgment. Manry *v.* Shepperd, 57 Ga. 68.

The issuance of execution is ministerial, and may, therefore, be effected by the clerk in the ordinary manner, without an express order of the lower court.

Illinois.— Kern *v.* Strasberger, 71 Ill. 303.

Indiana.— *Contra,* Clapper *v.* Bailey, 10 Ind. 160.

Louisiana.— State *v.* Porte, 10 La. Ann. 148.

Missouri.— Wilburn *v.* Hall, 17 Mo. 471.

Nebraska.— State *v.* Sheldon, 26 Nebr. 151, 42 N. W. 335.

New Jersey.— Reading *v.* Den, 6 N. J. L. 186.

New York.— Lyon *v.* Burtis, 2 Cow. (N. Y.) 510.

Virginia.— Epes *v.* Dudley, 4 Leigh (Va.) 145.

In Kentucky, under Bullitt's Civ. Code Ky. (1895), § 761, which provides for the issuance of execution by the clerk upon the filing of the mandate, it has been held that the clerk has no authority to execute a judgment for the recovery or sale of real estate. Mayes *v.* Spalding, (Ky. 1896) 56 S. W. 992.

Where all of defendants do not appeal, it is no valid objection, to the issuance of execution against all, that the affirmance runs only against the actual appellants. Morton *v.* Simmons, 2 Sm. & M. (Miss.) 601. Nor is it a valid objection, to the issuance of execution against one who did not appeal, that the judgment against his co-defendant was reversed. Nichols *v.* Dunphy, 58 Cal. 605. And a mandate affirming a decree in all respects, upon appeal by a principal, does not compel or warrant execution against his sureties who did not appeal, but who compromised their liability. The Sabine, 50 Fed. 215.

As to entry of judgment directed see *supra,* XVIII, G, 2, a.

79. **A statute prescribing that execution shall issue at the first term** after remand is directory merely, and, if the lower court should, for any cause, fail to issue execution at the first term, such a statute does not prevent execution at a subsequent term. Johnston *v.* Danville, etc., R. Co., 109 N. C. 504, 13 S. E. 881.

80. Brown *v.* Walker, 84 Fed. 532.

1. Black L. Dict.

2. Lawrence *v.* Souther, 8 Metc. (Mass.) 166, 168.

3. Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146, 165. See also Layworthy *v.* Chichester, Freem. 53, wherein it was said that "making it appear, and proving, are the same thing."

4. Black L. Dict.

APPEARANCES

By W. A. Martin

CROSS-REFERENCES

For Matters Relating to:

Appearance:

As Amicus Curiæ, see AMICUS CURIÆ.

Before Court of Equalization, see TAXATION.

In Particular Proceedings, see ADMIRALTY; ARBITRATION AND AWARD; ATTACHMENT; BASTARDS; CONTEMPT; CRIMINAL LAW; DIVORCE; EMINENT DOMAIN; GARNISHMENT; HABEAS CORPUS; JUSTICES OF THE PEACE; MOTIONS; REFERENCES; STREETS AND HIGHWAYS.

Of Particular Parties, see ABSENTEES; ALIENS; AMBASSADORS AND CONSULS; CORPORATIONS; HUSBAND AND WIFE; INFANTS; INSANE PERSONS; MUNICIPAL CORPORATIONS; STATES; UNITED STATES.

On Appeal or Error, see APPEAL AND ERROR.

Appearance — (*continued*)
Operation and Effect of:
For Person Deceased, see ABATEMENT AND REVIVAL.
Of Representative of Person Deceased, see ABATEMENT AND REVIVAL.
On Removal of Cause to Federal Court, see REMOVAL OF CAUSES.
To Sustain Judgment For:
Alimony, see DIVORCE.
Contempt, see CONTEMPT.
Deficiency on Foreclosure, see MORTGAGES.
Compelling Attorney to Disclose Client's Address, see ATTORNEY AND CLIENT.
Default at Trial, see TRIAL.
Intervention, see PARTIES.
Judgment by Default, see JUDGMENTS.
Notice to Appear and Defend in Ejectment, see EJECTMENT.
Security For Appearance, see BAIL; BASTARDS.
Vacating Judgment or Failure to Appear, see JUDGMENTS.
Warrant of Attorney to Confess Judgment, see JUDGMENTS.

I. DEFINITION.

In its broadest sense an appearance is the coming into court of either of the parties to an action;[1] but, ordinarily, the word is used particularly to signify the act by which a person against whom suit has been commenced submits himself to the jurisdiction of the court.[2]

II. KINDS.

A. Compulsory, Voluntary, or Optional. An appearance is compulsory, voluntary, or optional, according as it is compelled by plaintiff's action, entered freely, or made by one not obliged to appear, but who applies to do so to save a right.[3]

B. Conditional or De Bene Esse. A conditional appearance is one coupled with conditions as to its becoming general.[4] An appearance *de bene esse* is one which is to remain an appearance, except in a certain event.[5]

C. General or Special. An appearance is general if it is an absolute submission to the jurisdiction of the court.[6] It is special if made for the sole purpose of objecting to the jurisdiction of the court over the person of defendant,[7] because

1. Boehmer *v.* Big Rock Irrigation Dist., 117 Cal. 19, 28, 48 Pac. 908 [*quoting* Bouvier L. Dict.]; Burrill L. Dict. See also Schroeder *v.* Lahrman, 26 Minn. 87, 88, 1 N. W. 801 [*citing* Bouvier L. Dict.] to the effect that "when used to designate the act of any person with reference to an action pending, the word 'appear' means to come into court as a party to the suit."

2. Troubat & H. Pr. 226, 271 [*cited* in Bouvier L. Dict.]; People *v.* Cowan, 146 N. Y. 348, 41 N. E. 26, 69 N. Y. St. 185; Groves *v.* Grant County Ct., 42 W. Va. 587, 26 S. E. 460.

Other definitions are: "A submission to the jurisdiction of the court, in obedience, or in answer to process." Grigg *v.* Gilmer, 54 Ala. 425, 430.

"Perfecting bail, or taking some step in the action towards a defence." Wibright *v.* Wise, 4 Blackf. (Ind.) 137, 138.

"Being present in court." Larrabee *v.* Larrabee, 33 Me. 100, 102.

3. Anderson L. Dict.

4. Bouvier L. Dict.

5. Hoffman *v.* Kramer, 3 Pa. Dist. 238 [*citing* Anderson L. Dict.]. See also Blair *v.* Weaver, 11 Serg. & R. (Pa.) 84.

6. Bouvier L. Dict.

7. *Illinois.*— McNab *v.* Bennett, 66 Ill. 157.

Kansas.— Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403.

Michigan.—McCaslin *v.* Camp, 26 Mich. 390.

Nebraska.— South Omaha Nat. Bank *v.* Farmers' etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128.

New York.— Belden *v.* Wilkinson, 33 Misc. (N. Y.) 659, 68 N. Y. Suppl. 205.

Ohio.— Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577 [*approving* Handy *v.* Insurance Co., 37 Ohio St. 366].

Oregon.— Meyer *v.* Brooks, 29 Oreg. 203, 44 Pac. 281, 54 Am. St. Rep. 790.

Tennessee.— Sherry *v.* Divine, 11 Heisk. (Tenn.) 722; Boon *v.* Rahl, 1 Heisk. (Tenn.) 12; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

Wisconsin.— Sanderson *v.* Ohio Cent. R., etc., Co., 61 Wis. 609, 21 N. W. 818; Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220.

United States.— Halstead *v.* Manning, 34

there was no service,[8] or because of defective service,[9] of process, because of defects in the process,[10] or because the action was commenced in the wrong county.[11]

III. HOW MADE.

A. When General — 1. GENERALLY. Formerly, an appearance was by actual presence in court, either in person or by attorney, and such appearance still exists in contemplation or fiction of law.[12] A technical or formal appearance is no longer necessary, however,[13] even when particularly prescribed by rule of practice,[14] nor need there be any act done or words spoken in court.[15]

2. GIVING BAIL. At common law the filing of common or special bail amounted to a general appearance,[16] even though defendant and his bail were subsequently

Fed. 565; U. S. *v.* American Bell Telephone Co., 29 Fed. 17.

The test as to whether an appearance is general or special is the relief asked (Deming Invest. Co. *v.* Ely, 21 Wash. 102, 57 Pac. 353), and, in determining the character of an appearance, the court will always look to matters of substance rather than to matters of form (Bankers L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 80 N. W. 484; South Omaha Nat. Bank *v.* Farmers, etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128; Reedy *v.* Howard, 11 S. D. 160, 76 N. W. 304). If the appearance is, in effect, general, the fact that the party making it characterizes it as a special appearance does not alter its effect. Scarlett *v.* Hicks, 13 Fla. 314; Nicholes *v.* People, 165 Ill. 502, 46 N. E. 237; Crawford *v.* Foster, 84 Fed. 939, 56 U. S. App. 231, 28 C. C. A. 576. See also Cooke *v.* Second Universalist Soc., 7 R. I. 17. *E converso*, where it is evident that a special appearance is intended, the court cannot enlarge it and make it general, for the extent to which defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent. Schwab *v.* Mabley, 47 Mich. 512, 11 N. W. 390.

An appearance will be presumed to have been general, so as to give the court jurisdiction of the person, where the record fails to show that it was special.

Alabama.— Collier *v.* Falk, 66 Ala. 223.

Iowa.— Deshler *v.* Foster, Morr. (Iowa) 403.

Ohio.— Dunphy *v.* Gilliam Mfg. Co., 21 Ohio Cir. Ct. 696.

Oregon.— Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

Wisconsin.—Lowe *v.* Stringham, 14 Wis. 222.

8. Nye *v.* Liscombe, 21 Pick. (Mass.) 263.

9. Crary *v.* Barber, 1 Colo. 172; Sanderson *v.* Ohio Cent. R., etc., Co., 61 Wis. 609, 21 N. W. 818.

10. Gilbert *v.* Hall, 115 Ind. 549, 18 N. E. 28.

11. Belknap *v.* Charlton, 25 Oreg. 41, 34 Pac. 758.

12. Byrne *v.* Jeffries, 38 Miss. 533 [*citing* Bouvier L. Dict.; Stephen Pl. 22–26].

Mere presence of a party and his attorney in the court-room during the trial (Crary *v.* Barber, 1 Colo. 172; Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237; Tiffany *v.* Gilbert, 4 Barb. (N. Y.) 320), or at the taking of depositions, without participating therein (Scott *v.* Hull, 14 Ind. 136; Anderson *v.* Anderson, 55 Mo. App. 268. See also Bentz *v.* Eubanks, 32 Kan. 321, 4 Pac. 269; Turner *v.* Larkin, 12 Pa. Super. Ct. 284), or the fact that a defendant not served with process testifies in the case (Nixon *v.* Downey, 42 Iowa 78. See also Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801), does not amount to a general appearance.

13. Stoker *v.* Leavenworth, 7 La. 390 (where the entry of a formal appearance is said to be unknown to the practice of the state); Byrne *v.* Jeffries, 38 Miss. 533; Gardiner *v.* McDowell, Wright (Ohio) 762; Williams *v.* Strahan, 1 B. & P. N. R. 309.

It need not be in writing, though, in a court of record, it is undoubtedly the better practice to require it to be so made. Chave *v.* Iowa Town Co., 58 Kan. 814, 48 Pac. 916.

14. Grigg *v.* Gilmer, 54 Ala. 425; Romaine *v.* Union Ins. Co., 28 Fed. 625. But see Vrooman *v.* Li Po Tai, 113 Cal. 302, 45 Pac. 470; Powers *v.* Braly, 75 Cal. 237, 17 Pac. 197; Valentine *v.* Myers' Sanitary Depot, 36 Hun (N. Y.) 201; Benedict *v.* Arnoux, 38 N. Y. Suppl. 882, 74 N. Y. St. 776, 1 N. Y. Annot. Cas. 407; Bell *v.* Good, 19 N. Y. Suppl. 693, 46 N. Y. St. 572, 22 N. Y. Civ. Proc. 317; Douglas *v.* Haberstro, 8 Abb. N. Cas. (N. Y.) 230; Couch *v.* Mulhane, 63 How. Pr. (N. Y.) 79, in which cases it was held that, until an attorney has made an appearance by one of the methods pointed out by the code, he has no general standing in a cause either to protect or bind his client. *Compare*, however, Carter *v.* Koshland, 12 Oreg. 492, 498, 8 Pac. 556, where, in construing a similar statute, the court said: "It is very seldom that any formal notice of appearance is served upon the opposite party in any case; and when an attorney is authorized to manage a party's legal business, and has done so, and his adversary has made no objection on account of his neglect to give written notice of appearance, the party should certainly not be permitted to take advantage of the informality."

15. Humphreys *v.* Humphreys, Morr. (Iowa) 359; Salina Nat. Bank *v.* Prescott, 60 Kan. 490, 57 Pac. 121; Harrison *v.* Morton, 87 Md. 671, 40 Atl. 897. *Contra*, McCormack *v.* Greensburgh First Nat. Bank, 53 Ind. 466; Rhoades *v.* Delaney, 50 Ind. 468; Scott *v.* Hull, 14 Ind. 136.

16. Scott *v.* Hull, 14 Ind. 136 [*citing* Jacob L. Dict.]; Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112; Jacobs *v.* Stevens, 57 N. H. 610;

discharged on the motion of the former showing, that he was not legally liable to arrest.[17]

3. Entry on Docket. An entry on the margin of the docket, opposite the name of a party to a suit, of an attorney's name[18] or initials[19] is a sufficient appearance for such party, whether made by the attorney himself,[20] or by the clerk at his instance.[21]

4. Notice of Retainer and Appearance.[22] Service of a notice of general retainer or appearance,[23] or filing such notice with the clerk after a complaint has been filed, constitutes a general appearance in actions at law,[24] except where bail is required,[25] but not in equity.[26] Such notice must antedate, or be cotemporaneous with, the service of all other notices and papers.[27]

5. Acts Recognizing Case as in Court — a. In General. Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court will amount to a general appearance.[28]

Mann *v.* Carley, 4 Cow. (N. Y.) 148; Vanderpoel *v.* Wright, 1 Cow. (N. Y.) 209; De Wandelaer *v.* Coomer, 6 Johns. (N. Y.) 328; Chapman *v.* Snow, 1 B. & P. 132; Norton *v.* Danvers, 7 T. R. 375. *Contra*, Lanneau *v.* Ervin, 12 Rich. (S. C.) 31; and see Durand *v.* Hollins, 3 Duer (N. Y.) 686, holding that a party's appearing by the filing of special or common bail has no application to proceedings under the code.

17. Jacobs *v.* Stevens, 57 N. H. 610.

18. *Alabama.*— Grigg *v.* Gilmer, 54 Ala. 425; Cain *v.* Sullivan, Minor (Ala.) 31.

Florida.—Wood *v.* State Bank, 1 Fla. 424.

Mississippi.— Byrne *v.* Jeffries, 38 Miss. 533.

New York.— Middletown Bank *v.* Huntington, 13 Abb. Pr. (N. Y.) 402.

Pennsylvania.— Scott *v.* Israel, 2 Binn. (Pa.) 145.

Tennessee.— Pugsley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 130.

United States.— Romaine *v.* Union Ins. Co., 28 Fed. 625.

See 3 Cent. Dig. tit. "Appearance," § 17.

19. Anonymous, 2 N. C. 405.

20. Pugsley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 130.

21. Wood *v.* State Bank, 1 Fla. 424; Pugsley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 130.

22. Form of notice of retainer see Dikeman *v.* Struck, 76 Wis. 332, 45 N. W. 118.

23. Low *v.* Mills, 61 Mich. 35, 27 N. W. 877; Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. 884, 58 N. Y. St. 623; Dole *v.* Manley, 11 How. Pr. (N. Y.) 138; Webb *v.* Mott, 6 How. Pr. (N. Y.) 439; Catlin *v.* Moss, 2 N. Y. Civ. Proc. 201; Francis *v.* Sitts, 2 Hill (N. Y.) 362; Dikeman *v.* Struck, 76 Wis. 332, 45 N. W. 118; German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500. *Contra*, under the earlier New York practice. Mann *v.* Carley, 4 Cow. (N. Y.) 148; Vanderpoel *v.* Wright, 1 Cow. (N. Y.) 209; De Wandelaer *v.* Coomer, 6 Johns. (N. Y.) 328.

See 3 Cent. Dig. tit. "Appearance," § 26.

Acceptance of service of the summons and complaint by an attorney for defendant, and indorsement thereon of appearance in the case, constitute notice of appearance. Cornell University *v.* Denny Hotel Co., 15 Wash. 433, 46 Pac. 654. See also Shaw *v.* National State Bank, 49 Iowa 179, holding, under a statute providing that appearance may be made by delivering to plaintiff or clerk of the court a memorandum in writing to the effect that defendant appeared, signed either by defendant or his attorney, that a memorandum in writing, signed by defendant, stating that he waives further notice and makes a voluntary appearance, is sufficient to confer jurisdiction upon the court.

An order extending time to answer is equivalent to notice of an appearance. Krause v. Averill, 66 How. Pr. (N. Y.) 97.

With respect to removal of causes from state to federal courts a notice of retainer is not such entry of appearance as to preclude an application. Disbrow *v.* Driggs, 8 Abb. Pr. (N. Y.) 305 note, 16 How. Pr. (N. Y.) 346; Field *v.* Blair, Code Rep. N. S. (N. Y.) 292.

24. Dyer *v.* North, 44 Cal. 157. But see Matter of Halsey, 13 Abb. N. Cas. (N. Y.) 353, holding that, in the surrogate's court, a mere notice of appearance, transmitted by mail or otherwise to the court, is insufficient.

25. Cooley *v.* Lawrence, 5 Duer (N. Y.) 605, 12 How. Pr. (N. Y.) 176; Gardner *v.* Teller, 2 How. Pr. (N. Y.) 241.

26. Low *v.* Mills, 61 Mich. 35, 27 N. W. 877. But see Livingston *v.* Gibbons, 4 Johns. Ch. (N. Y.) 94, to the effect that, while the usual mode of appearing in chancery is by entering an appearance with one of the clerks of court, it seems that a notice of appearance by defendant's solicitor, given to plaintiff's solicitor without an entry in the clerk's minutes, is sufficient.

27. Steinbach *v.* Leese, 27 Cal. 295.

Notice may be served after default, if before entry of judgment, in all cases where an assessment of damages is necessary. Abbott *v.* Smith, 8 How. Pr. (N. Y.) 463.

The indorsement of a notice of appearance forming no part of the essence thereof, the fact that it bears date prior to the date of summons does not invalidate its effect. Steinam *v.* Strauss, 18 N. Y. Suppl. 48, 44 N. Y. St. 380.

28. *Alabama.*—Lampley *v.* Beavers, 25 Ala. 534.

Arkansas.— Touchstone *v.* Harris, 22 Ark.

b. Pleading — (1) *In General* — (A) *To Merits.* A defendant who files a plea to the merits or serves an answer to the merits on the opposite party thereby enters a general appearance,[29] and this is true where a judgment, rendered with-

365 (contesting assessment of damages under default judgment); Trice *v.* Crittenden County, 7 Ark. 159; Wilson *v.* Fowler, 3 Ark. 463; Gay *v.* Hanger, 3 Ark. 436.

California.— Foote *v.* Richmond, 42 Cal. 439, consent to entry of judgment.

Georgia.— Southern Bank *v.*. Mechanics' Sav. Bank, 27 Ga. 252.

Illinois.—Warren *v.* Cook, 116 Ill. 199, 5 N. E. 538 (filing objections against an application by a tax-collector in the county court, after judgment against a lot for taxes due thereon); Ryan *v.* Driscoll, 83 Ill. 415 (contesting assessment of damages under default judgment); Thompson *v.* Schuyler, 7 Ill. 271; Schafer *v.* Moe, 72 Ill. App. 50 (examination of witnesses on reinstatement of an action which has been dismissed, and calling witnesses in his own behalf); Baldwin *v.* Economy Furniture Co., 70 Ill. App. 49; Long *v.* Trabue, 8 Ill. App. 132 (motion to compel the adverse party to file a bond and for permission to attach a jurat to an affidavit on file in the cause).

Indiana.— Brake *v.* Stewart, 88 Ind. 422; McCarthy *v.* McCarthy, 66 Ind. 128 (objecting to report of sale in partition proceedings).

Iowa.—Wilsey *v.* Maynard, 21 Iowa 107.

Kansas.— Carver *v.* Shelly, 17 Kan. 472.

Michigan— Audretsch *v.* Hurst, (Mich. 1901) 85 N. W. 746, demand for jury trial after motion to quash for insufficient service of process is refused.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1 (moving to vacate an amendment of a judgment); Fisher *v.* Battaile, 31 Miss. 471 (motion to quash return of scire facias); Wilkinson *v.* Patterson, 6 How. (Miss.) 193 (consent to an order of court for examination of a claim against a decedent's estate, replevying property attached).

Missouri.— Tippack *v.* Briant, 63 Mo. 580 (consent to reinstatement of cause); Bankers' L. Assoc. *v.* Shelton, 84 Mo. App. 634 (pleading to merits, taking depositions, and obtaining continuance).

Nebraska.— Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; South Omaha Nat. Bank *v.* Farmers, etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128; Bucklin *v.* Strickler, 32 Nebr. 602, 49 N. W. 371 (arguing dismissal of a cause in addition to moving to quash the summons); Franse *v.* Armbuster, 28 Nebr. 467, 44 N. W. 481, 26 Am. St. Rep. 345 (procuring a stay of an order of sale under a decree of foreclosure); White *v.* Merriam, 16 Nebr. 96, 19 N. W. 703 (moving, before final judgment, to correct the record of an interlocutory order, arguing the motion, and procuring the correction); Ellis *v.* Ellis, 13 Nebr. 91, 13 N. W. 29 (application for extension of time to prepare a bill of exceptions); Crowell *v.* Galloway, 3 Nebr. 215; Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14.

New York.— People *v.* Cowan, 146 N. Y. 348, 41 N. E. 26, 69 N. Y. St. 185.

North Carolina.— Cooper *v.* Cooper, 127 N. C. 490, 37 S. E. 492; Dibbrell *v.* Georgia Home Ins. Co., 109 N. C. 314, 13 S. E. 739 (filing briefs).

Ohio.— Long *v.* Newhouse, 57 Ohio St. 348, 49 N. E. 79 (motion to require plaintiff to attach an account of the items of his claim to his petition); Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185 (arguing the costs on appeal in the court of last resort).

Oregon.— Belknap *v.* Charlton, 25 Oreg. 41, 34 Pac. 758.

Texas.— Herndon *v.* Crawford, 41 Tex. 267, objection to the report of commissioners to a partition made by them.

West Virginia.— Mahany *v.* Kephart, 15 W. Va. 609.

Wisconsin.— German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500 (contesting motion to modify judgment); Blackburn *v.* Sweet, 38 Wis. 578; Baizer *v.* Lasch, 28 Wis. 268 (demand for a bill of particulars).

Acts which have been held not to constitute a general appearance are a written request to suspend legal proceedings (Mojarrieta *v.* Saenz, 80 N. Y. 547); the assumption and conduct of defense by a nominal for actual defendant, pursuant to the previous contract between them (Bidwell *v.* Toledo Consol. St. R. Co., 72 Fed. 10); a letter from defendant to plaintiff's attorney, stating that plaintiff has testified falsely, but containing no specific denial and not properly verified nor entitled of any court, nor purporting to be a pleading (Matter of Kimball, 18 N. Y. App. Div. 320, 46 N. Y. Suppl. 177 [*affirmed* in 155 N. Y. 62, 49 N. E. 331]); a motion to set aside a sale in chancery, under a mortgage, for irregularities (Brown *v.* Thompson, 29 Mich. 72); joining, by defendants not served with process, with a defendant who was served in a motion to set aside service (Beck, etc., Lithographing Co. *v.* Wacker, 76 Fed. 10); and the fact that a layman, who is merely authorized to attend court to present an excuse for defendant's absence, goes upon the stand and testifies in her behalf, in the absence of herself and her attorney, does not constitute an appearance (Campbell *v.* Lumley, 24 Misc. (N. Y.) 196, 52 N. Y. Suppl. 684).

29. *Alabama.*— Grigg *v.* Gilmer, 54 Ala. 425; Freeman *v.* McBroom, 11 Ala. 943.

Arizona.— Clark *v.* Morrison, (Ariz. 1898) 52 Pac. 985.

Arkansas.— Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

California.— Ghiradelli *v.* Greene, 56 Cal. 629; Steinbach *v.* Leese, 27 Cal. 295; Hayes *v.* Shattuck, 21 Cal. 51.

Colorado.— Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893, whether the pleading is by an individual or a public officer.

Florida.— Florida R. Co. *v.* Gensler, 14 Fla. 122.

Georgia.— Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871; Moore *v.* Ferrell, 1 Ga. 7.

out an appearance by defendant, is set aside on his motion, and he then answers to the merits.[30]

(B) *Demurrer.* The filing of a demurrer to plaintiff's original[31] or sub-

Idaho.— Morris *v.* Miller, (Ida. 1895) 40 Pac. 60.

Illinois.— Kelly *v.* Donlin, 70 Ill. 378; Dart *v.* Hercules, 34 Ill. 395.

Indiana.— Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846.

Iowa.— O'Halloran *v.* Sullivan, 1 Greene (Iowa) 75.

Kansas.—Kauter *v.* Fritz, 5 Kan. App. 756, 47 Pac. 187.

Kentucky.— Tipton *v.* Wright, 7 Bush (Ky.) 448; Hunts *v.* Clay, Litt. Sel. Cas. (Ky.) 26.

Louisiana.— Marqueze *v.* Le Blanc, 29 La. Ann. 194; New Orleans *v.* Rousseau, 11 La. Ann. 195; Stoker *v.* Leavenworth, 7 La. 390.

Michigan.— Hicks *v.* Steel, (Mich. 1901) 85 N. W. 1121; Crane *v.* Hardy, 1 Mich. 56; Falkner *v.* Beers, 2 Dougl. (Mich.) 117.

Mississippi.— Memphis, etc., R. Co. *v.* Glover, 78 Miss. 467, 29 So. 89; Solomon *v.* Tupelo Compress Co., 70 Miss. 822, 12 So. 850; Davis *v.* Patty, 42 Miss. 509; Schirling *v.* Scites, 41 Miss. 644; Miller *v.* Ewing, 8 Sm. & M. (Miss.) 421; Jones *v.* Hunter, 4 How. (Miss.) 342.

Nebraska.— Kane *v.* People, 4 Nebr. 509.

New Jersey.— Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

New York.— Matter of Macaulay, 27 Hun (N. Y.) 577; Davis *v.* Packard, 6 Wend. (N. Y.) 327; Livingston *v.* Gibbons, 4 Johns. Ch. (N. Y.) 94.

North Carolina.— Hyatt *v.* Tomlin, 24 N. C. 149; Jones *v.* Penland, 19 N. C. 358.

Ohio.— Schæffer *v.* Waldo, 7 Ohio St. 309; Evans *v.* Iles, 7 Ohio St. 233.

Oklahoma.—Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229; Kelly-Goodfellow Shoe Co. *v.* Todd, 5 Okla. 360, 49 Pac. 53.

Pennsylvania.— McMurray *v.* Hopper, 43 Pa. St. 468; Hoffman *v.* Kramer, 3 Pa. Dist. 238; Com. *v.* Helms, 8 Pa. Co. Ct. 410; Philadelphia *v.* Hopple, 2 Pa. Co. Ct. 543.

South Carolina.— Oliver *v.* Fowler, 22 S. C. 534.

Tennessee.— Pugsley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 130.

Texas.— St. Louis, etc., R. Co. *v.* Traweek, 84 Tex. 65, 19 S. W. 370; York *v.* State, 73 Tex. 651, 11 S. W. 869; Randall *v.* Meredith, (Tex. 1889) 11 S. W. 170; Green *v.* Hill, 4 Tex. 465; Grizzard *v.* Brown, 2 Tex. Civ. App. 584, 22 S. W. 252.

Virginia.— Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

West Virginia.— Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414; Hunter *v.* Stewart, 23 W. Va. 549; Coleman *v.* Waters, 13 W. Va. 278.

Wisconsin.— Lowé *v.* Stringham, 14 Wis. 222.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

United States.— Kelsey *v.* Pennsylvania R. Co., 14 Blatchf. (U. S.) 89, 14 Fed. Cas. No. 7,679; Goodyear *v.* Chaffee, 3 Blatchf. (U. S.) 268, 10 Fed. Cas. No. 5,564.

See 3 Cent. Dig. tit. "Appearance," § 27.

An answer to the cross-complaint of a co-defendant constitutes an appearance thereto. Bradley *v.* Indianapolis Builders, etc., Assoc., 38 Ind. 101.

Filing affidavits opposing a motion for an injunction (Cooley *v.* Lawrence, 5 Duer (N. Y.) 605, 12 How. Pr. (N. Y.) 176), or controverting grounds on which an attachment issued, where the attachment and action constitute but one proceeding (Duncan *v.* Wickliffe, 4 Metc. (Ky.) 118), constitute a general appearance.

Filing plea of lis pendens amounts to a general appearance. New Orleans *v.* Walker, 23 La. Ann. 803.

Where a pleading is rejected as coming too late, such pleading does not constitute an appearance (Jordan *v.* Bell, 8 Port. (Ala.) 53); but, when defendant appears and pleads, the jurisdiction acquired by such appearance is not lost by the sustaining of a demurrer to the answer (Brooks *v.* Chatham, 57 Tex. 31).

30. *Indian Territory.*—Springston *v.* Wheeler, (Indian Terr. 1900) 58 S. W. 658.

Iowa.—Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45; Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49.

Kansas.— Beckwith *v.* Douglas, 25 Kan. 229.

Nebraska.— Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Warren *v.* Dick, 17 Nebr. 241, 22 N. W. 462.

Pennsylvania.— Jeannette *v.* Roehme, 197 Pa. St. 230, 47 Atl. 283; Philadelphia *v.* Adams, 15 Pa. Super. Ct. 483.

Washington.—Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

The filing without leave of a plea after entry of judgment by default, without service of process, cannot be considered such an appearance as will affect the case in any respect whatever. Moore *v.* Watkins, 1 Ark. 268.

31. *Alabama.*— *Ex p.* Henderson, 84 Ala. 36, 4 So. 284.

Arkansas.— Miller *v.* State, 35 Ark. 276.

California.— *In re* Clarke, 125 Cal. 388, 58 Pac. 22; Rowland *v.* Coyne, 55 Cal. 1; Steinbach *v.* Leese, 27 Cal. 295.

Georgia.— Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Paulk *v.* Tanner, 106 Ga. 219, 32 S. E. 99; Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010; Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.

Idaho.— Morris *v.* Miller, (Ida. 1895) 40 Pac. 60.

Illinois.— Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Indiana.— Gilbert *v.* Hall, 115 Ind. 549, 18 N. E. 28; Wabash, etc., R. Co. *v.* Lash, 103 Ind. 80, 2 N. E. 250; Crawfordsville *v.* Hays,

stituted[32] pleading, or to a counter-claim or cross-complaint,[33] or the taking of proceedings analogous to demurrer,[34] amounts to a general appearance unless the demurrer is based solely on the ground of want of jurisdiction of the person,[35] or, where it is filed for a defendant, constructively summoned, by an attorney appointed by the court.[36]

(c) *Disclaimer, Intervention, and Interpleader.* Where a party files a disclaimer[37] or a plea of intervention,[38] or where a non-resident of the state interpleads in accordance with an order therefor,[39] he thereby makes a general appearance.

(11) *Applying For Leave or Extension of Time to Answer.* A defendant is also considered to have made a general appearance when he applies

42 Ind. 200; Knight *v.* Low, 15 Ind. 374; Hust *v.* Conn, 12 Ind. 257; Kegg *v.* Welden, 10 Ind. 550; Ramsey *v.* Foy, 10 Ind. 493.

Iowa.— Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95; Polk County *v.* Hierb, 37 Iowa 361; Beard *v.* Smith, 9 Iowa 50.

Kansas.— Carter *v.* Tallant, 51 Kan. 516, 32 Pac. 1108.

Kentucky.— Chaffin *v.* Fulkerson, 95 Ky. 277, 15 Ky. L. Rep. 635, 24 S. W. 1066; Thomas *v.* Perry, 6 J. J. Marsh. (Ky.) 556; Fleming *v.* Sinclair, 22 Ky. L. Rep. 499, 58 S. W. 370; National Bldg., etc., Assoc. *v.* Gallagher, 21 Ky. L. Rep. 1140, 54 S. W. 209; Hendricks *v.* Settle, 21 Ky. L. Rep. 1058, 53 S. W. 1051.

Maine.— Mahan *v.* Sutherland, 73 Me. 158.

Michigan.— Thompson *v.* Michigan Mut. Ben. Assoc., 52 Mich. 522, 18 N. W. 247.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94.

Missouri.— Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86.

Montana.— Sanders *v.* Farwell, 1 Mont. 599.

Nevada.— Sweeney *v.* Schultes, 19 Nev. 53, 6 Pac. 44; Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

New York.— Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 63 N. Y. 176.

Ohio.— Handy *v.* Insurance Co., 37 Ohio St. 366; Myers *v.* Smith, 29 Ohio St. 120; Evans *v.* Iles, 7 Ohio St. 233; Klonne *v.* Bradstreet, 2 Handy (Ohio) 74; Miller *v.* Creighton, 7 Ohio Dec. (Reprint) 602, 4 Cinc. L. Bul. 139.

Texas.— Southern Rock Island Plow Co. *v.* Pitluk, (Tex. Civ. App. 1901) 63 S. W. 354.

Utah.— Keyser *v.* Pollock, 20 Utah 371, 59 Pac. 87.

Washington.—Williams *v.* Miller, 1 Wash. Terr. 88.

West Virginia.— Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627; Wetherill *v.* McCloskey, 28 W. Va. 195.

Wisconsin.— Coffee *v.* Chippewa Falls, 36 Wis. 121.

United States.— New Jersey *v.* New York, 6 Pet. (U. S.) 323, 8 L. ed. 414; Hale *v.* Continental L. Ins. Co., 20 Blatchf. (U. S.) 515, 12 Fed. 359; Dallmeyer *v.* Farmers', etc., F. Ins. Co., 6 Fed. Cas. No. 3,546, 4 Cent. L. J. 464 note.

See 3 Cent. Dig. tit. "Appearance," §§ 27, 45.

Presumption on appeal.—Where the record shows that defendants in a bill in chancery, not served with process, filed a demurrer to the bill, which demurrer is not set out in the record, it will be presumed that all the defendants joined in the demurrer and thereby entered their appearance. Beal *v.* Harrington, 116 Ill. 113, 4 N. E. 664.

32. Chaffin *v.* Fulkerson, 95 Ky. 277, 15 Ky. L. Rep. 635, 24 S. W. 1066.

33. Willman *v.* Friedman, (Ida. 1894) 38 Pac. 937; Salyer *v.* Napier, 21 Ky. L. Rep. 172, 51 S. W. 10; Talbott *v.* Planters Oil Co., 12 Tex. Civ. App. 49, 33 S. W. 745. See also Newman *v.* Moore, 94 Ky. 147, 15 Ky. L. Rep. 1, 21 S. W. 759, 42 Am. St. Rep. 343.

34. Proceedings analogous to demurrer.— A motion to dismiss the complaint (Townsend *v.* Stoddard, 26 Ga. 430), exceptions to the petition as disclosing no cause of action (State *v.* Buck, 46 La. Ann. 656, 15 So. 531), or a motion to dismiss a bill for want of equity (Albert *v.* Clarendon Land Invest., etc., Co., 53 N. J. Eq. 623, 23 Atl. 8; Edgell *v.* Felder, 84 Fed. 69, 52 U. S. App. 417, 28 C. C. A. 382), being equivalent to, or analogous to, a demurrer, amount to a general appearance.

35. In some states, by statute, the filing of a demurrer amounts to a general appearance even when filed merely for want of jurisdiction. McDonald *v.* Agnew, 122 Cal. 448, 55 Pac. 125; Reynolds *v.* La Crosse, etc., Packet Co., 10 Minn. 178.

Where a demurrer for want of jurisdiction is filed with a general demurrer to the petition, this is a general appearance. Standard Furniture Co. *v.* Stanley, 21 Ky. L. Rep. 452, 51 S. W. 611. See also Underwood *v.* Wood, 93 Ky. 177, 14 Ky. L. Rep. 129, 19 S. W. 405, 15 L. R. A. 825.

36. Henry *v.* Blackburn, 32 Ark. 445, 449 (in which it was said: "The attorney is appointed to protect the interest of the absent defendant, and not to give the court jurisdiction of his person"); Thomas *v.* Mahone, 9 Bush (Ky.) 111.

37. Fowler *v.* Brown, 51 Nebr. 414, 17 N. W. 54.

38. Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627; Bowdoin College *v.* Merritt, 59 Fed. 6.

39. German Bank *v.* American F. Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Whitney Holmes Organ Co. *v.* Petitt, 34 Mo. App. 536. See also Hall *v.* Craig, 125 Ind. 523, 25 N. E. 538.

for or obtains leave to answer,[40] or when he applies for or obtains an extension of time to answer.[41]

c. Motions[42]—(I) *In General.* The making, by a person in a cause, of any motion which involves the merits,[43] a motion for change of venue,[44] for a continuance[45]—especially where the motion is granted[46]—to discharge an order of arrest,[47] to dismiss the cause[48] or an appeal,[49] to modify judgment,[50] for security

40. Anderson *v.* Burchett, 48 Kan. 781, 30 Pac. 174; Kauter *v.* Fritz, 5 Kan. App. 756, 47 Pac. 187; Brundage *v.* Biggs, 25 Ohio St. 652.

After answer stricken from files.—Application for leave to answer over, after answer stricken from the files, constitutes a general appearance. Orr *v.* Seaton, 1 Nebr. 105.

After demurrer overruled.—Obtaining leave to answer on the overruling of defendant's demurrer constitutes a general appearance. Miller *v.* State, 35 Ark. 276.

After judgment by default.—Asking permission to plead to the merits after judgment by default is a general appearance. Mayer *v.* Mayer, 27 Oreg. 133, 39 Pac. 1002; Gray *v.* Gates, 37 Wis. 614.

41. *Alabama.*—Wilkins *v.* Wilkins, 4 Port. (Ala.) 245.

Illinois.— Fonville *v.* Monroe, 74 Ill. 126.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New Jersey.— Mulhearn *v.* Press Pub. Co., 53 N. J. L. 150, 20 Atl. 760.

Wisconsin.— State *v.* Messmore, 14 Wis. 115.

United States.— Hupfeld *v.* Automaton Piano Co., 66 Fed. 788; La Mothe Mfg. Co. *v.* National Tube Works, 15 Blatchf. (U. S.) 432, 14 Fed. Cas. No. 8,033.

Contra, under some statutes. Vrooman *v.* Li Po Tai, 113 Cal. 302, 45 Pac. 470; Powers *v.* Braly, 75 Cal. 237, 17 Pac. 197; Benedict *v.* Arnoux, 38 N. Y. Suppl. 882, 74 N. Y. St. 776, 1 N. Y. Annot. Cas. 407; Bell *v.* Good, 19 N. Y. Suppl. 693, 46 N. Y. St. 572, 22 N. Y. Civ. Proc. 317.

See 3 Cent. Dig. tit. "Appearance," § 46.

42. The service of motion papers on the adverse party by one acting as attorney for defendant has been held to constitute a general appearance. Woodruff *v.* Austin, 16 Misc. (N. Y.) 543, 38 N. Y. Suppl. 787, 74 N. Y. St. 138; Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117; Kelsey *v.* Covert, 15 How. Pr. (N. Y.) 92; Baxter *v.* Arnold, 9 How. Pr. (N. Y.) 445; McKenster *v.* Van Zandt, 1 Wend. (N. Y.) 13. But this is not now true under N. Y. Code Civ. Proc. § 421. Valentine *v.* Myers' Sanitary Depot, 36 Hun (N. Y.) 201.

43. Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577; Handy *v.* Insurance Co., 37 Ohio St. 366; Maholm *v.* Marshall, 29 Ohio St. 611.

44. Vanderbilt *v.* Johnson, 4 Ill. 48; Shaffer *v.* Trimble, 2 Greene (Iowa) 464; Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; Feedler *v.* Schroeder, 59 Mo. 364; Wagner *v.* Evers, 20 Nebr. 183, 29 N. W. 298; Freeman *v.* Burks, 16 Nebr. 328, 20 N. W. 207.

Filing affidavit of prejudice against the judge constitutes a general appearance. Howe *v.* Seiberling, 2 Ohio Dec. 51, 2 Ohio N. P. 8.

45. *Colorado.*— Jones *v.* Stevens, 1 Colo. 67.

Georgia.— Southern Bank *v.* Mechanics Sav. Bank, 27 Ga. 252.

Iowa.—Auspach *v.* Ferguson, 71 Iowa 144, 32 N. W. 249; Stockdale *v.* Buckingham, 11 Iowa 45; Ulmer *v.* Hiatt, 4 Greene (Iowa) 439.

Michigan.— Lane *v.* Leech, 44 Mich. 163, 6 N. W. 228.

New Jersey.— Houghton *v.* Potter, 23 N. J. L. 338.

New York.—Utica City Bank *v.* Buell, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. (N. Y.) 498.

Oregon.— Belknap *v.* Charlton, 25 Oreg. 41, 34 Pac. 758.

Virginia.— Harvey *v.* Skipwith, 16 Gratt. (Va.) 410.

Contra, Nelson *v.* Campbell, 1 Wash. 261, 24 Pac. 539, two judges dissenting.

See 3 Cent. Dig. tit. "Appearance," § 48.

An affidavit for continuance, filed by a defendant, is not such an appearance as will warrant the entry of judgment by default, it being neither a pleading nor a motion, but merely evidence to be used in support of a motion if one should be made. Hoyt *v.* Macon, 2 Colo. 113.

46. *Illinois.*— Ferris *v.* Ferris, 89 Ill. 452; Flagg *v.* Roberts, 67 Ill. 485.

Indiana.— Sargent *v.* Flaid, 90 Ind. 501; Thayer *v.* Dove, 8 Blackf. (Ind.) 567.

Missouri.— Bankers' L. Assoc. *v.* Shelton, 84 Mo. App. 634.

Montana.— Dyas *v.* Keaton, 3 Mont. 495.

New York.— People *v.* Haughton, 41 Hun (N. Y.) 558.

Texas.— Boone *v.* Roberts, 1 Tex. 147.

Wisconsin.— Tallman *v.* McCarty, 11 Wis. 401.

United States.— U. S. *v.* Wallace, 46 Fed. 569.

See 3 Cent. Dig. tit. "Appearance," § 48.

47. Dart *v.* Arnis, 19 How. Pr. (N. Y.) 429.

48. State *v.* Napton, 24 Mont. 450, 62 Pac. 686; Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577; Handy *v.* Insurance Co., 37 Ohio St. 366.

49. Jones *v.* Andrews, 10 Wall. (U. S.) 327, 19 L. ed. 935. *Compare* Thomson *v.* Williams, 86 Ky. 15, 9 Ky. L. Rep. 267, 4 S. W. 914, in which it was held that a motion by an administrator, not served with an order of revivor below, to dismiss an appeal as to him, if overruled, is an appearance to the action and dispenses with service of the order and reversal of the judgment; otherwise, however, if the motion was sustained.

50. Watson *v.* Paine, 25 Ohio St. 340.

for costs,[51] to set aside a default,[52] or to strike a petition from the files,[53] constitutes a general appearance.

(II) *To Vacate Judgment.* A motion to vacate a judgment, based on the sole ground of want of jurisdiction of the person, does not constitute a general appearance;[54] but, if the motion is based on other grounds, either alone[55] or coupled with this,[56] the appearance is general. And the same is true where defendant, after making a motion to vacate, voluntarily consents to the dismissal of the motion.[57]

d. Petition For Removal From State to Federal Court. Where a petition for the removal of a cause from a state to a federal court is limited to that special purpose,[58] or where a plea, based on want of jurisdiction of the person, is first made,[59] there is no general appearance; and, in spite of some cases to the contrary,[60] it may be laid down as the rule that a petition for removal, even though

51. Raymond *v.* Strine, 14 Nebr. 236, 15 N. W. 350; Healy *v.* Aultman, 6 Nebr. 349.

Contra, in Louisiana, where, under La. Acts (1880), No. 136, § 4, this is an *ex parte* proceeding, a matter of right, which is to relieve defendant from making any appearance for a contest of any kind until his demand has been satisfied. Collier *v.* Morgan's Louisiana, etc., R., etc., Co., 41 La. Ann. 37, 5 So. 537.

52. Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123.

53. Maholm *v.* Marshall, 29 Ohio St. 611; Miller *v.* Creighton, 7 Ohio Dec. (Reprint) 602, 4 Cinc. L. Bul. 139. See also Northrup *v.* Shephard, 26 Wis. 220.

54. *Arkansas.*— Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420; Baskins *v.* Wylds, 39 Ark. 347, the latter case holding that, where it does not appear on what ground motion to vacate the judgment was set aside, it will be presumed that the ground was want of jurisdiction of the person.

Kansas.— Green *v.* Green, 42 Kan. 654, 22 Pac. 730, 16 Am. St. Rep. 510; Shaw *v.* Rowland, 32 Kan. 154, 4 Pac. 146; Branner *v.* Chapman, 11 Kan. 118; Cohen *v.* Trowbridge, 6 Kan. 385.

Minnesota.—Covert *v.* Clark, 23 Minn. 539.

Missouri.— Lincoln *v.* Hilbus, 36 Mo. 149; Pomeroy *v.* Betts, 31 Mo. 419; Smith *v.* Rollins, 25 Mo. 408.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Schneider, 36 Nebr. 206, 54 N. W. 257; Cobbey *v.* Wright, 23 Nebr. 250, 36 N. W. 505.

New York.— Noble *v.* Crandall, 49 Hun (N. Y.) 474, 2 N. Y. Suppl. 265, 18 N. Y. St. 24, 15 N. Y. Civ. Proc. 265.

Ohio.— Greene *v.* Woodland Ave., etc., St. R. Co., 62 Ohio St. 67, 56 N. E. 642.

Pennsylvania.— Chahoon *v.* Hollenback, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441.

See 3 Cent. Dig. tit. "Appearance," § 52.

Motion in circuit court to vacate judgment of justice.— On appeal from a justice court to the circuit court, a motion by defendant to set aside the judgment of the justice is not such an appearance as will cure want of service of summons. Lutes *v.* Perkins, 6 Mo. 57.

55. *Kansas.*—Cohen *v.* Trowbridge, 6 Kan. 385.

Louisiana.— New Orleans *v.* Hall, 21 La. Ann. 438.

Nebraska.— Fisk *v.* Thorp, 60 Nebr. 713, 84 N. W. 79; Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824; Crowell *v.* Galloway, 3 Nebr. 215.

Ohio.—Watson *v.* Paine, 25 Ohio St. 340; Marsden *v.* Soper, 11 Ohio St. 503.

Wisconsin.— Gilbert-Arnold Land Co. *v.* O'Hare, 93 Wis. 194, 67 N. W. 38; Coad *v.* Coad, 41 Wis. 23; Gray *v.* Gates, 37 Wis. 614.

56. *Illinois.*— Dean *v.* Gerlach, 34 Ill. App. 233.

Indiana.— Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670.

Kansas.— Kaw L. Assoc. *v.* Lemke, 40 Kan. 142, 19 Pac. 337; Burdette *v.* Corgan, 26 Kan. 102; Cohen *v.* Trowbridge, 6 Kan. 385.

Missouri.— Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123.

North Dakota.— Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

Ohio.— Marsden *v.* Soper, 11 Ohio St. 503.

South Dakota.— Henry *v.* Henry, (S. D. 1901) 87 N. W. 522.

Wisconsin.— Dikeman *v.* Struck, 76 Wis. 332, 45 N. W. 118; Likens *v.* McCormick, 39 Wis. 313; Blackburn *v.* Sweet, 38 Wis. 578; Alderson *v.* White, 32 Wis. 308; Insurance Co. of North America *v.* Swineford, 28 Wis. 257; Anderson *v.* Coburn, 27 Wis. 558; Grantier *v.* Rosecrance, 27 Wis. 488.

United States.— Crane *v.* Penny, 2 Fed. 187.

57. Marsden *v.* Soper, 11 Ohio St. 503.

58. Goldey *v.* New Haven Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517 [*affirming* 42 Fed. 112]; Hawkins *v.* Peirce, 79 Fed. 452; Kinne *v.* Lant, 68 Fed. 436.

59. McGillin *v.* Claflin, 52 Fed. 657; Morris *v.* Graham, 51 Fed. 53; Miner *v.* Markham, 28 Fed. 387; Kauffman *v.* Kennedy, 25 Fed. 785; Elgin Canning Co. *v.* Atchison, etc., R. Co., 24 Fed. 866; Blair *v.* Turtle, 1 McCrary (U. S.) 372, 5 Fed. 394; Parrott *v.* Alabama Gold L. Ins. Co., 4 Woods (U. S.) 353, 5 Fed. 391.

60. New York Constr. Co. *v.* Simon, 53 Fed. 1; Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156; Edwards *v.* Connecticut Mut. L. Ins. Co., 20 Fed. 452; Sweeney *v.* Coffin, 1 Dill. (U. S.) 73, 23 Fed. Cas. No. 13,686; Sayles *v.* Northwestern Ins. Co., 2 Curt. (U. S.) 212, 21 Fed. Cas. No. 12,421.

in general terms and without any restriction as to the purpose of the appearance in the state court, does not constitute a general appearance.[61]

e. Stipulations — (i) *In General.* A stipulation between the parties as to the time and place of trial,[62] for a change of venue,[63] for a continuance,[64] for taking testimony,[65] or for a reference to a commissioner [66] or to arbitrators,[67] constitutes a general appearance.

(ii) *Waiving Process and Reciting Appearance.* So, too, it has been held that a stipulation waiving service of process and reciting an entry of appearance amounts to a general appearance when indorsed on the summons,[68] or when indorsed on, or filed with, the complaint, declaration, or petition.[69]

f. Taking Appeal. Taking an appeal[70] or suing out of a writ of error from an inferior court, to an intermediate appellate court, which tries the cause *de novo*,

61. Schwab *v.* Mabley, 47 Mich. 512, 11 N. W. 390; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490; Wabash Western R. Co. *v.* Brow, 164 U. S. 271, 17 S. Ct. 126, 41 L. ed. 431 [*reversing* 65 Fed. 941, 31 U. S. App. 192, 13 C. C. A. 222]; Spreen *v.* Delsignore, 94 Fed. 71; Ahlhauser *v.* Butler, 50 Fed. 705; O'Donnell *v.* Atchison, etc., R. Co., 49 Fed. 689; Reifsnider *v.* American Imp. Pub. Co., 45 Fed. 433; Bentlif *v.* London, etc., Finance Corp., 44 Fed. 667; Clews *v.* Woodstock Iron Co., 44 Fed. 31; Perkins *v.* Hendryx, 40 Fed. 657; Hendrickson *v.* Chicago, etc., R. Co., 22 Fed. 569; Small *v.* Montgomery, 5 McCrary (U. S.) 440, 17 Fed. 865; Atchison *v.* Morris, 11 Biss. (U. S.) 191, 11 Fed. 582.

62. Keeler *v.* Keeler, 24 Wis. 522. *Compare* Shirley *v.* Hagar, 3 Blackf. (Ind.) 225, holding that, where a cause is called for trial, the parties fix the next day for trial, and defendant is ruled to plead on the next day on plaintiff's motion, defendant reserving the right to plead in abatement, these circumstances did not constitute an appearance, and that defendant might thereafter plead in abatement or move to quash the writ.

63. Radcliff *v.* Noyes, 43 Ill. 318; Jones *v.* Wolverton, 15 Wash. 590, 47 Pac. 36; Cornell University *v.* Denny Hotel Co., 15 Wash. 433, 46 Pac. 654.

64. *Arkansas.*— Miller *v.* State, 35 Ark. 276; St. Louis, etc., R. Co. *v.* Barnes, 35 Ark. 95; Borden *v.* Fowler, 14 Ark. 471; State Bank *v.* Walker, 14 Ark. 234; Rogers *v.* Conway, 4 Ark. 70.

Iowa.— Shaffer *v.* Trimble, 2 Greene (Iowa) 464.

Missouri.— Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; Peters *v.* St. Louis, etc., R. Co., 59 Mo. 406; Orear *v.* Clough, 52 Mo. 55; Bohn *v.* Devlin, 28 Mo. 319.

Nebraska.— Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284; Bazzo *v.* Wallace, 16 Nebr. 290, 20 N. W. 315.

New York.— Grafton *v.* Union Ferry Co., 13 N. Y. Suppl. 878, 40 N. Y. St. 137, 20 N. Y. Civ. Proc. 238.

Texas.—Kelso *v.* Adams, 2 Tex. Unrep. Cas. 374.

Vermont.— Stanton *v.* Haverhill Bridge, 47 Vt. 172; Spaulding *v.* Swift, 18 Vt. 214.

Virginia.— Harvey *v.* Skipwith, 16 Gratt. (Va.) 410.

United States.— Marye *v.* Strouse, 5 Fed. 494.

See 3 Cent. Dig. tit. "Appearance," § 48.

Form of agreement immaterial.— It is immaterial whether the consent or agreement be made orally by the party or by his counsel, or by a writing filed in the cause. Auspach *v.* Ferguson, 71 Iowa 144, 32 N. W. 249.

A mere entry in the record that a cause was "continued by consent of parties," where one of several defendants had been duly served, does not constitute a waiver of service and confer jurisdiction as to defendants who were not served. Snow *v.* Grace, 25 Ark. 570.

Where defendant has appeared specially to object for want of jurisdiction of his person, the granting of a continuance on plaintiff's application, without any objection by defendant, does not amount to a general appearance. Talpey *v.* Doane, 3 Colo. 22; Crary *v.* Barber, 1 Colo. 172.

65. Ward *v.* Roy, 69 N. Y. 96.

66. Rittenhouse *v.* Harman, 7 W. Va. 380.

67. Robinson *v.* Potter, 43 N. H. 188; Kelso *v.* Adams, 2 Tex. Unrep. Cas. 374.

68. Harrison *v.* Morton, 87 Md. 671, 40 Atl. 897. *Contra*, Hastings First Nat. Bank *v.* Rogers, 12 Minn. 529; Weatherbee *v.* Weatherbee, 20 Wis. 499.

69. Epps *v.* Buckmaster, 104 Ga. 698, 30 S. E. 959; Humphreys *v.* Humphreys, Morr. (Iowa) 359; Salina Nat. Bank *v.* Prescott, 60 Kan. 490, 57 Pac. 121 [*overruling* Bradley *v.* Harwi, 2 Kan. App. 272, 42 Pac. 411]. *Contra*, Clary *v.* Morehouse, 3 Ark. 261; McCormack *v.* Greensburgh First Nat. Bank, 53 Ind. 466.

70. **Giving notice of appeal** does not constitute an appearance or waiver of service. Steinbach *v.* Leese, 27 Cal. 295; Llano Imp., etc., Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612. *Contra*, Fee *v.* Big Sand Iron Co., 13 Ohio St. 563.

Signing an appeal bond cannot, of itself, be regarded as an appearance by which the person could be made a party to the suit so as to authorize a judgment against him as a principal defendant. This act merely made him a security in the appeal, and as such only could judgment be rendered against him. Hendrick *v.* Kellogg, 3 Greene (Iowa) 215.

constitutes a general appearance in the intermediate court and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not.[71] If the appeal is to a reviewing court it is a general appearance in the sense that, on reversal and remand to the trial court, defendant is in court for the purpose of further proceedings without any further steps to bring him into court,[72] even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of defendant.[73]

B. When Special. Where, in accordance with his right,[74] a defendant wishes to raise the objection that the court is without jurisdiction over his person, he must, according to the weight of authority, limit his appearance to that single question, or he will be deemed to have waived the objection.[75] Such special

71. *Arkansas.*— Kansas City, etc., R. Co. *v.* Summers, 45 Ark. 295; Ball *v.* Kuykendall, 2 Ark. 195.

Colorado.— Cates *v.* Mack, 6 Colo. 401; Wyatt *v.* Freeman, 4 Colo. 14.

Illinois.— Ewbanks *v.* Ashley, 36 Ill. 177; Ohio, etc., R. Co. *v.* McCutchin, 27 Ill. 9; Swingley *v.* Haynes, 22 Ill. 214.

Indiana.—Jones *v.* Martin, 5 Blackf. (Ind.) 278.

Iowa.— Drake *v.* Achison, 4 Greene (Iowa) 297.

Massachusetts.— Briggs *v.* Humphrey, 1 Allen (Mass.) 371.

Minnesota.—McCubrey *v.* Lankis, 74 Minn. 302, 77 N. W. 144.

Missouri.— Gant *v.* Chicago, etc., R. Co., 79 Mo. 502; Reddick *v.* Newburn, 76 Mo. 423; Blunt *v.* Atlantic, etc., R. Co., 55 Mo. 157; Matlock *v.* King, 23 Mo. 400; Ser *v.* Bobst, 8 Mo. 506; Witting *v.* St. Louis, etc., R. Co., 28 Mo. App. 103; Gibbs *v.* Missouri Pac. R. Co., 11 Mo. App. 459.

Montana.— Gage *v.* Maryatt, 9 Mont. 265, 23 Pac. 337.

Ohio.— Foster *v.* Borne, 63 Ohio St. 169, 58 N. E. 66; Adams Express Co. *v.* St. John, 17 Ohio St. 641.

Texas.— Glass *v.* Smith, 66 Tex. 548, 2 S. W. 195; Perry *v.* McKinzie, 4 Tex. 154.

Wisconsin.— Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344; Blackwood *v.* Jones, 27 Wis. 498; Lowe *v.* Stringham, 14 Wis. 222; Barnum *v.* Fitzpatrick, 11 Wis. 81.

See 3 Cent. Dig. tit. "Appearance," § 52.

72. *Arkansas.*—Waggoner *v.* Fogleman, 53 Ark. 181, 13 S. W. 729; Hodges *v.* Frazier, 31 Ark. 58; Reeder *v.* Murray, 3 Ark. 450; Murphy *v.* Williams, 1 Ark. 376.

Florida.— Standley *v.* Arnow, 13 Fla. 361.

Kentucky.— Lillard *v.* Brannin, 91 Ky. 511, 13 Ky. L. Rep. 74, 16 S. W. 349; Chesapeake, etc., R. Co. *v.* Heath, 87 Ky. 651, 10 Ky. L. Rep. 646, 9 S. W. 832; Hockaday *v.* Com., 4 T. B. Mon. (Ky.) 12; Wharton *v.* Clay, 4 Bibb (Ky.) 167; Thompson *v.* Moore, 12 Ky. L. Rep. 664, 15 S. W. 6, 358.

Mississippi.— Bustamente *v.* Bescher, 43 Miss. 172.

United States.— Kuhn *v.* McMillan, 3 Dill. (U. S.) 372, 14 Fed. Cas. No. 7,945.

See 3 Cent. Dig. tit. "Appearance," § 52.

73. Bradford *v.* Gillaspie, 8 Dana (Ky.) 67; Hockaday *v.* Com., 4 T. B. Mon. (Ky.) 12; Graves *v.* Hughes, 4 Bibb (Ky.) 84, Thompson *v.* Moore, 12 Ky. L. Rep. 664, 15 S. W. 6, 358.

Such appearance does not relate back and cure any want of jurisdiction which might have existed at the time of entering judgment, so that the judgment cannot, upon appeal, be reversed merely on the ground of want of jurisdiction of the person. Bustamente *v.* Bescher, 43 Miss. 172; Hurlburt *v.* Palmer, 39 Nebr. 158, 57 N. W. 1019 [*overruling* Shawang *v.* Love, 15 Nebr. 142, 17 N. W. 264]; Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491; Zimmerman *v.* Gerdes, 106 Wis. 608, 82 N. W. 532 [*overruling* Dikeman *v.* Struck, 76 Wis. 332, 45 N. W. 118, and *approving* McConkey *v.* McCraney, 71 Wis. 576, 37 N. W. 822; Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836; Weis *v.* Schoerner, 53 Wis. 72, 9 N. W. 794]. See also Marin *v.* Thierry, 29 La. Ann. 362; Fee *v.* Big Sand Iron Co., 13 Ohio St. 563.

74. **A party has the right to appear specially** to object to the jurisdiction of the court over his person.

California.— Lyman *v.* Milton, 44 Cal. 630.

Indiana.— New Albany, etc., R. Co. *v.* Combs, 13 Ind. 490.

Nebraska.— Brown *v.* Rice, 30 Nebr. 236, 46 N. W. 489; Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237; Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14.

Ohio.— Mawiecke *v.* Wolf, 7 Ohio Dec. (Reprint) 476, 3 Cinc. L. Bul. 458.

United States.— Lung Chung *v.* Northern Pac. R. Co., 19 Fed. 254.

No leave to make such special appearance is necessary.— National Furnace Co. *v.* Moline Malleable Iron Works, 18 Fed. 863. *Compare* McLaughlin *v.* Sentman, (Del. 1900) 47 Atl. 1014, from which it appears to be the practice in Delaware to ask relief, and in which it is said to be better to embody the reasons in a petition.

75. *Illinois.*— Nichols *v.* People, 165 Ill. 502, 46 N. E. 237; Flake *v.* Carson, 33 Ill. 518; Abbott *v.* Semple, 25 Ill. 107.

Indiana.— Baily *v.* Schrader, 34 Ind. 260.

Kansas.— Salina Nat. Bank *v.* Prescott, 60 Kan. 491, 57 Pac. 121; Frazier *v.* Douglass, 57 Kan. 809, 48 Pac. 36; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Carver *v.* Shelly, 17 Kan. 472.

appearance may be made at any stage of the proceedings, without making any other appearance in the cause, provided it is the first step taken therein.[76]

IV. WHO MAY MAKE.

A. In General — 1. Party, Attorney, or Agent. Every litigant may appear in person or by attorney;[77] but an agent who is not a licensed attorney cannot make an appearance for his principal, whatever may be his authority in respect to other matters.[78]

2. Where There Are Several Defendants. In cases where there are several defendants the attorney may limit the appearance to one, or any number of them

Louisiana.— Heard *v.* Patton, 27 La. Ann. 542.

Minnesota.— St. Louis Car Co. *v.* Stillwater St. R. Co., 53 Minn. 129, 54 N. W. 1064. *Compare* Stearns County *v.* Smith, 25 Minn. 131.

Missouri.— Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123. *Compare* Byler *v.* Jones, 79 Mo. 261; Christian *v.* Williams, 35 Mo. App. 297.

Montana.— Kleinschmidt *v.* Morse, 1 Mont. 100.

Nebraska.— Welch *v.* Ayres, 43 Nebr. 326, 61 N. W. 635; Bucklin *v.* Strickler, 32 Nebr. 602, 49 N. W. 371; Aultman, etc., Co. *v.* Steinan, 8 Nebr. 109; Crowell *v.* Galloway, 3 Nebr. 215. *Compare* Hurlburt *v.* Palmer, 39 Nebr. 158, 57 N. W. 1019.

New Hampshire.— Woodbury *v.* Swan, 58 N. H. 380; Merrill *v.* Houghton, 51 N. H. 61; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York.— Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. 884, 58 N. Y. St. 623; Mahaney *v.* Penman, 4 Duer (N. Y.) 603; Woodruff *v.* Austin, 16 Misc. (N. Y.) 543, 38 N. Y. Suppl. 787, 74 N. Y. St. 138; Springfield Metallic Casket Co. *v.* Wielar, 56 N. Y. Suppl. 394; Hankinson *v.* Page, 19 Abb. N. Cas. (N. Y.) 274; Swift *v.* Tross, 55 How. Pr. (N. Y.) 255; Dole *v.* Manley, 11 How. Pr. (N. Y.) 138. *Compare* Hamburger *v.* Baker, 35 Hun (N. Y.) 455.

South Carolina.— Oliver *v.* Fowler, 22 S. C. 534.

West Virginia.— State *v.* Thacker Coal, etc., Co., (W. Va. 1901) 38 S. E. 539; Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761; Groves *v.* Grant County Ct., 42 W. Va. 587, 26 S. E. 460. *Compare* Price *v.* Pinnell, 4 W. Va. 296.

Wisconsin.— Grantier *v.* Rosecrance, 27 Wis. 488; Lowe *v.* Stringham, 14 Wis. 222.

United States.— St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. ed. 659; Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 31 U. S. App. 192, 13 C. C. A. 222. See also Goldstein *v.* New Orleans, 31 Fed. 626.

But see Allen *v.* Miller, 11 Ohio St. 274; Knight *v.* Buser, 6 Ohio Dec. (Reprint) 772; Robinson *v.* Schmidt, 48 Tex. 13; Hagood *v.* Dial, 43 Tex. 625.

76. Cleghorn *v.* Waterman, 16 Nebr. 226, 20 N. W. 636, 877.

77. *Kentucky.*— Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Holbert *v.* Montgomery, 5 Dana (Ky.) 11; Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267; Talbot *v.* Talbot, 2 J. J. Marsh. (Ky.) 3.

Louisiana.— Lallande *v.* Terrill, 12 La. 7.

Maryland.— Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.

New York.— Rogers *v.* McLean, 31 Barb. (N. Y.) 304.

West Virginia.— Groves *v.* Grant County Ct., 42 W. Va. 587, 26 S. E. 460; Perry *v.* McHuffman, 7 W. Va. 306.

United States.— Sweeney *v.* Coffin, 1 Dill. (U. S.) 73, 23 Fed. Cas. No. 13,686; Hightower *v.* Hawthorn, Hempst. (U. S.) 42, 12 Fed. Cas. No. 6,478*b*.

See also Jenkins *v.* Congreve, 92 Ill. App. 271.

"By the ancient common law a party cited to appear in court could not appear by attorney; but, after a personal appearance, he might, with the consent of the court, be represented by an attorney. Beecher's Case, 8 Coke 58, Cro. Jac. 211; Comyns Dig. tit. Attorney, B, 4. But now, under the sanction of various statutes, any suitor in a civil case may appear by attorney, even without a citation. Comyns Dig. tit. Attorney, B, 5. And though, by the modern common law, a written warrant of attorney was required to be filed, yet the statute of jeofails cured the want of one after verdict; and the universal practice of admitting attorneys without a warrant in writing has long prevailed. A parol authority is now deemed sufficient. Comyns Dig. tit. Attorney, B, 7." Holbert *v.* Montgomery, 5 Dana (Ky.) 11, 15.

"To deny the party the right to appear by attorney is at once shutting him out from that source of information and that exercise of his legal rights which would enable him to make a just and fair defense to the suit brought against him." Hightower *v.* Hawthorn, Hempst. (U. S.) 42, 12 Fed. Cas. No. 6,478*b*.

Right of defendant sentenced to imprisonment to appear.—Where, by statute, a defendant sentenced to a term of imprisonment is liable to be sued, this will necessarily carry with it the right to appear and defend. Werckman *v.* Werckman, 4 N. Y. Civ. Proc. 146.

78. Knope *v.* Reeves, (Ala. 1900) 28 So. 666.

Such appearance may be ratified, however, by subsequent acts of defendant. Miller *v.* Finn, 1 Nebr. 254.

less than all,[79] but, if all the defendants have been served with process, a general appearance, purporting to be for all of them, will be intended by the court to be in behalf of all.[80] So, where process has not been served on some of the defendants, it has been held, in a number of cases, that an appearance by an attorney for the defendants generally must be construed as an appearance for all,[81] though it has been held, in other jurisdictions, that such an appearance will be intended by the court to be an appearance only for those defendants who were duly served with process.[82]

B. Party Not Served or Defectively Served. A defendant, against whom process has issued and who has rights to protect, may appear without service of such process[83] or before the return thereof,[84] or on defective service,[85] whether the defendants be joint defendants or not.[86] A defendant may also appear with-

79. Spangel *v.* Dellinger, 42 Cal. 148; Kimmel *v.* Kimmel, 5 Serg. & R. (Pa.) 294.

Where counsel appears expressly for certain defendants in an action, his signature on papers in the case, after that time, as "attorney for defendants," will be construed as limited expressly to those defendants for whom he appeared (Spangel *v.* Dellinger, 42 Cal. 148), and, where the first of a series of pleas especially designates for whom counsel appears, the use of the words "the defendants" in the subsequent pleas cannot be held to be an appearance for a defendant served, but not named (Streeter *v.* Marshall Silver Min. Co., 4 Colo. 535).

80. Dougherty *v.* Shown, 1 Heisk. (Tenn.) 302; Whitney *v.* Silver, 22 Vt. 634. See also Kerr *v.* Swallow, 33 Ill. 379, in which it was said that, where defendants are brought into court by publication, and file a plea of the general issue, in the usual form, giving the title of the cause, and then stating: "And the said defendants come and defend the wrong," etc., and there is nothing in the previous proceedings by which the word "defendants" can be limited to a less number than all of them, the plea must be held to be that of all the defendants.

Appearance by partnership.—A general appearance made by defendants in the name of "Turner Casing Co.," a copartnership composed of four members, is not only an appearance by the company, but also by the members composing it. Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403.

81. *Florida.*— Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

Illinois.— Kenyon *v.* Shreck, 52 Ill. 382; Frazier *v.* Resor, 23 Ill. 88. *Compare* Gardner *v.* Hall, 29 Ill. 277; Clemson *v.* State Bank, 2 Ill. 45.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94; Schirling *v.* Scites, 41 Miss. 644; Jones *v.* Hunter, 4 How. (Miss.) 342.

Pennsylvania.— Hatch *v.* Stitt, 66 Pa. St. 264; Blair *v.* Weaver, 11 Serg. & R. (Pa.) 84; Scott *v.* Israel, 2 Binn. (Pa.) 145; McCullough *v.* Guetner, 1 Binn. (Pa.) 214; Waverly First Nat. Bank *v.* Furman, 4 Pa. Super. Ct. 415.

Vermont.— Blood *v.* Crandall, 28 Vt. 396. *Compare* Whitney *v.* Silver, 22 Vt. 634.

82. Crump *v.* Bennett, 2 Litt. (Ky.) 209; Swafford *v.* Howard, 20 Ky. L. Rep. 1793, 50 S. W. 43; Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Dougherty *v.* Shown, 1 Heisk. (Tenn.) 302.

Right of plaintiff to disregard appearance of defendants not served.—Although a general appearance by an attorney may be considered an appearance for all where there are several defendants, yet plaintiff may consider it as an appearance only for those arrested or summoned. Lentz *v.* Stroh, 6 Serg. & R. (Pa.) 34.

83. *Maine.*— State Bank *v.* Hervey, 21 Me. 38.

Michigan.— Ralston *v.* Chapin, 49 Mich. 274, 13 N. W. 888.

New York.— Merkee *v.* Rochester, 13 Hun (N. Y.) 157; Higgins *v.* Freeman, 2 Duer (N. Y.) 650; Duer *v.* Fox, 27 Misc. (N. Y.) 676, 59 N. Y. Suppl. 426; Wellington *v.* Claason, 9 Abb. Pr. (N. Y.) 175; Clinton *v.* King, 3 How. Pr. (N. Y.) 55; Waffle *v.* Vanderheyden, 8 Paige (N. Y.) 45.

United States.— Nelson *v.* Moon, 3 McLean (U. S.) 319, 17 Fed. Cas. No. 10,111.

England.— Oulton *v.* Radcliffe, L. R. 9 C. P. 189, 43 L. J. C. P. 87, 30 L. T. Rep. 22, 22 Wkly. Rep. 372.

Canada.— McTaggart *v.* Toothe, 10 Ont. Pr. 261.

See also Flagg *v.* Walker, 109 Ill. 494; Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Atty.-Gen. *v.* Pearson, 7 Sim. 290, 8 Eng. Ch. 290; Capel *v.* Butler, 2 Sim. & St. 457.

On being arrested on a ne exeat, defendant may immediately enter his voluntary appearance, without waiting for the service of a subpœna. Georgia Lumber Co. *v.* Bissell, 9 Paige (N. Y.) 225.

Defendant to counter-claim.— Under the English rules of court of 1875, order 22, rules 5–7, a person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance until service of the counter-claim. Fraser *v.* Hall, 23 Ch. D. 685, 52 L. J. Ch. 684, 42 L. T. Rep. N. S. 754, 31 Wkly. Rep. 714.

84. Hecht *v.* Feldman, 54 Ill. App. 144; Ralston *v.* Chapin, 49 Mich. 274, 13 N. W. 888; Heyman *v.* Uhlman, 34 Fed. 686; Richardson *v.* Daley, 7 Dowl. P. C. 25, 2 Jur. 946, 8 L. J. Exch. 13, 4 M. & W. 384; Wynne *v.* Wynne, 1 Wils. C. P. 39.

85. Perry *v.* McHuffman, 7 W. Va. 306.

86. Ralston *v.* Chapin, 49 Mich. 274, 13 N. W. 888; Pearl *v.* Robitschek, 2 Daly

out waiting for other defendants to be served,[87] but should not do so after notice not to and that the writ is abandoned.[88]

C. Party Against Whom Process Has Not Issued. It has also been said that, where a party has a right to be saved or an interest to be protected, he may enter an appearance, whether process has been issued or not.[89]

D. Person Not Made Party. It has been held that a person interested in the result of litigation, though not made a party, may voluntarily make himself a party thereto by appearing and pleading,[90] though other cases hold that a person who has not been named as a defendant may appear at the hearing only with the consent of all the parties to the action.[91]

V. EFFECT OF APPEARANCE.

A. When General — 1. Generally — a. On Defendant's General Rights. By making a voluntary general appearance defendant places himself under no disabilities under which he would not have labored had he been regularly brought into court by due service of process. He will be entitled to the same time in which to plead,[92] and he may take advantage of defects in the complaint,[93] or may make a default if he chooses to do so.[94] On the other hand, in consequence of a general appearance, he will be entitled to costs on a discontinuance of the action[95] or on a misentry ordered on motion of plaintiff,[96] and the fact that no summons has been served does not authorize plaintiff to refuse to accept service of his answer.[97] If the appearance is by appeal, defendant is entitled to make defense by demurrer or answer on reversal and remand of the cause.[98] In some jurisdictions, moreover, he is entitled to notice of all subsequent proceedings which could, in any respect, affect his rights,[99] though, according to the

(N. Y.) 50; Wellington *v.* Claason, 9 Abb. Pr. (N. Y.) 175; Waffle *v.* Vanderheyden, 8 Paige (N. Y.) 45; Elliott *v.* Espenhain, 59 Wis. 272, 18 N. W. 1; Fell *v.* Christ's College, 2 Bro. Ch. 279; Bowbee *v.* Grills, 1 Dick. 38. *Compare* McKnight *v.* Baker, 1 How. Pr. (N. Y.) 201.

87. Jones *v.* Fulghum, 3 Tenn. Ch. 193.

88. 1 Lush Pr. (3d ed.) 392 [*cited* in McTaggart *v.* Toothe, 10 Ont. Pr. 261].

89. Ralston *v.* Chapin, 49 Mich. 274, 13 N. W. 888 [*citing* Comyns Dig. tit. Pleader, B, 1; 1 Tidd Pr. 238].

90. Benson *v.* Shines, 107 Ga. 406, 33 S. E. 439; Moyer *v.* McCullough, 1 Ind. 339. See also Wilkins *v.* Wilkins, 4 Port. (Ala.) 245 (holding that, where an administrator of a mortgagor asks and obtains time to answer, he cannot afterward object that no proper proceedings were taken to make him a party); Wood *v.* Gumm, 67 Ill. App. 518 (holding that an entry of appearance in a cause, made by a writing entitled as a cross-bill in the cause, giving the number of the original suit in which such cross-bill is filed, is a sufficient entry of appearance in the original suit to bind the party, whether he was formally made a party to the original bill or not).

Contra, Plummer *v.* Crain, 5 T. B. Mon. (Ky.) 377. See also Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801; Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761.

91. Anderson *v.* Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Dyson *v.* Morris, 1 Hare 413, 6 Jur. 297, 11 L. J. Ch. 241, 23 Eng. Ch. 413; Bozon *v.* Bolland, 1 Russ. & M. 69, 5 Eng. Ch. 69.

Notice to opposite party necessary.—An appearance by a person having an interest in an action can be made only openly and to the knowledge of the opposite party, if at all, and in defense of his own interest. Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801.

Opposing proceedings to bring him in.— It has also been held that one may become a party by appearing to oppose a motion, and submitting to an order making him a party (Farmers' Nat. Bank *v.* Backus, 64 Minn. 43, 66 N. W. 5), or by opposing an order in a general creditor's suit to come in and assert his rights (Thomas *v.* Farmers' Bank, 46 Md. 43).

92. Harker *v.* Fahie, 2 Oreg. 89.

93. Syracuse Rapid Transit R. Co. *v.* Salt Springs Nat. Bank, 28 Misc. (N. Y.) 619, 59 N. Y. Suppl. 1066.

94. Pittman *v.* Searcey, 8 Iowa 352.

95. Averill *v.* Patterson, 10 N. Y. 500; Pignolet *v.* Daveau, 2 Hilt. (N. Y.) 584; McKenster *v.* Van Zandt, 1 Wend. (N. Y.) 13.

96. Whitney *v.* Brown, 30 Me. 557.

97. Fox *v.* Brooks, 7 Misc. (N. Y.) 426, 27 N. Y. Suppl. 975, 57 N. Y. St. 650, 23 N. Y. Civ. Proc. 345.

98. Allen *v.* Brown, 4 Metc. (Ky.) 342; Gill *v.* Johnson, 1 Metc. (Ky.) 649.

99. Martine *v.* Lowenstein, 68 N. Y. 456; Lochte *v.* Moeschler, 12 N. Y. St. 763; Wells *v.* Cruger, 5 Paige (N. Y.) 164. See also Grant *v.* Schmidt, 22 Minn. 1.

Notice of application for decree.—Where defendant in equity has appeared by solicitor, notice of application for decree, after order *pro confesso*, must be given such solicitor notwithstanding a rule providing that, after

practice in others, it has been held that he is bound to take notice of all subsequent proceedings.[1]

b. With Respect to Jurisdiction — (I) *Of Subject-Matter.* It being a fundamental principle of the law that consent of parties cannot give to a court jurisdiction of the subject-matter, and that the question of want of such jurisdiction may be raised at any stage of a trial, or even on appeal, it follows that a general or voluntary appearance does not give jurisdiction of the subject-matter, whatever may be its effect as regards jurisdiction of the person.[2]

(II) *Of Person* — (A) *In General.* A general or voluntary appearance is equivalent to service of process,[3] and confers jurisdiction of the person on the court.

the order *pro confesso*, the cause shall proceed *ex parte*. Bennett *v.* Hoefner, 17 Blatchf. (U. S.) 341, 3 Fed. Cas. No. 1,320.

Notice of assessment of damages must be given a party who has appeared in an action, even though he make default. Stonach *v.* Glessner, 4 Wis. 275. See also King *v.* Stafford, 5 How. Pr. (N. Y.) 30.

1. Domestic Bldg. Assoc. *v.* Nelson, 172 Ill. 386, 50 N. E. 194; Austin *v.* Dufour, 110 Ill. 85; Haggin *v.* Lorentz, 13 Mont. 406, 34 Pac. 607; Thompson *v.* Alford, 20 Tex. 491; Watrous *v.* Rodgers, 16 Tex. 410; Hopkins *v.* Donaho, 4 Tex. 336.

2. *Arkansas.*—Grimmett *v.* Askew, 48 Ark. 151, 2 S. W. 707.

Colorado.— Cort *v.* Newman, 6 Colo. App. 154, 40 Pac. 242.

Connecticut.— Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120.

Illinois.— Hubbard *v.* Harris, 3 Ill. 279.

Indiana.— Indianapolis, etc., R. Co. *v.* Renner, 17 Ind. 135; State *v.* Whitewater Valley Canal Co., 8 Ind. 320.

Maine.— Webb *v.* Goddard, 46 Me. 505.

Maryland.— Carroll *v.* Lee, 3 Gill & J. (Md.) 504. 22 Am. Dec. 350; Brooks *v.* Delaplaine, 1 Md. Ch. 351.

Massachusetts.— Osgood *v.* Thurston, 23 Pick. (Mass.) 110.

Michigan.— Two Hundred Thousand Feet Logs *v.* Sias, 43 Mich. 356, 5 N. W. 414.

Mississippi.— Brown *v.* State Bank, 31 Miss. 454.

Missouri.—Bank *v.* Doak, 75 Mo. App. 332; Ewing *v.* Donnelly, (Mo. 1885) 2 West. 445.

Nebraska.—Brondberg *v.* Babbott, 14 Nebr. 517, 16 N. W. 845.

New York.— Wheelock *v.* Lee, 74 N. Y. 495; Landers *v.* Staten Island R. Co., 53 N. Y. 450; Burckle *v.* Eckhart, 3 N. Y. 132; Garcie *v.* Sheldon, 3 Barb. (N. Y.) 232; Gray *v.* Ryle, 50 N. Y. Super. Ct. 198; Westervelt *v.* Westervelt, 46 N. Y. Super. Ct. 298; Dreyfus *v.* Carroll, 28 Misc. (N. Y.) 222, 58 N. Y. Suppl. 1116; Wands *v.* Robarge, 24 Misc. (N. Y.) 273, 53 N. Y. Suppl. 700; McCarty *v.* Parker, 14 N. Y. Suppl. 128, 26 Abb. N. Cas. (N. Y.) 235; Harriott *v.* New Jersey R. Co., 8 Abb. Pr. (N. Y.) 284; Ervin *v.* Oregon R., etc., Co., 62 How. Pr. (N. Y.) 490; Grocers' Nat. Bank *v.* Clark, 31 How. Pr. (N. Y.) 115; Latham *v.* Edgerton, 9 Cow. (N. Y.) 227; Mills *v.* Martin, 19 Johns. (N. Y.) 7; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225.

Ohio.— The Steamboat General Buell *v.* Long, 18 Ohio St. 521; Egan *v.* Lumsden, 2 Disn. (Ohio) 168.

Oregon.— Butterick *v.* Richardson, (Oreg. 1901) 64 Pac. 390.

Tennessee.— Agee *v.* Dement, 1 Humphr. (Tenn.) 331; Ferris *v.* Fort, 2 Tenn. Ch. 147.

Wisconsin.— State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702; Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85; Dykeman *v.* Budd, 3 Wis. 640.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

United States.— Creighton *v.* Kerr, 20 Wall. (U. S.) 8, 22 L. ed. 309; Crown Cotton Mills *v.* Turner, 82 Fed. 337; Lackett *v.* Rumbaugh, 45 Fed. 23; Kitchen *v.* Strawbridge, 4 Wash. C. C. (U. S.) 84, 14 Fed. Cas. No. 7,854.

See 3 Cent. Dig. tit. "Appearance," § 76.

3. *Georgia.*— Miller *v.* Whitehead, 66 Ga. 283.

Illinois.— Abbott *v.* Semple, 25 Ill. 107; Palmer *v.* Logan, 4 Ill. 56.

Kansas.— Anderson *v.* Burchett, 48 Kan. 781, 30 Pac. 174.

Missouri.— Lewis *v.* Nuckolls, 26 Mo. 278.

Nebraska.— Chicago, etc., R. Co. *v.* Hitchcock County, 60 Nebr. 722, 84 N. W. 97.

New Jersey.— North Hudson County R. Co. *v.* Flanagan, 57 N. J. L. 696, 32 Atl. 216.

New York.— Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. 884, 58 N. Y. St. 623; Christal *v.* Kelly, 88 N. Y. 285; Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272; Eleventh Ward Bank *v.* Powers, 43 N. Y. App. Div. 178, 59 N. Y. Suppl. 314; Reed *v.* Chilson, 16 N. Y. Suppl. 744, 40 N. Y. St. 960; Schwinger *v.* Hickox, 46 How. Pr. (N. Y.) 114; Carpenter *v.* New York, etc., R. Co., 11 How. Pr. (N. Y.) 481.

North Carolina.— Wheeler *v.* Cobb, 75 N. C. 21.

Oregon.— Kinkade *v.* Myers, 17 Oreg. 470, 21 Pac. 557.

Vermont.— Scott *v.* Niles, 40 Vt. 573.

West Virginia.— Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761.

Wisconsin.— Cudahy *v.* Crittenden, 74 Wis. 463, 44 N. W. 1152; Nichols *v.* Crittenden, 74 Wis. 459, 43 N. W. 105; Egan *v.* Sengpiel, 46 Wis. 703, 1 N. W. 467; Lindauer *v.* Clifford, 44 Wis. 597.

United States.— Hill *v.* Mendenhall, 21 Wall. (U. S.) 453, 22 L. ed. 616.

Extent of retroactive effect.— A general appearance, while it will dispense with process to bring a defendant into court, is not

Hence a defendant is estopped to object for want of such jurisdiction,[4] where he

equivalent to service in time to avoid the statute of limitations, when the statutory period has elapsed before the entry of appearance (Etheridge *v.* Woodley, 83 N. C. 11), nor will it make valid an attachment which was void because issued before service of summons on either of defendants (Granger *v.* Schwartz, 11 N. Y. Leg. Obs. 346), nor does it relate back so as to bring defendant into contempt for not appearing in time (Robinson *v.* Nash, 1 Anstr. 76).

4. *Alabama.*— Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73; Hunt *v.* Ellison, 32 Ala. 173; Johnston *v.* Shaw, 31 Ala. 592; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

California.— Matter of Cohen, 5 Cal. 494.

Colorado.— Boston, etc., Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; New York, etc., Min. Co. *v.* Gill, 7 Colo. 100, 2 Pac. 5; Smith *v.* Arapahoe County Dist. Ct., 4 Colo. 235; Crary *v.* Barber, 1 Colo. 172.

Connecticut.— Fowler *v.* Bishop, 32 Conn. 199.

Florida.— Lente *v.* Clarke, 22 Fla. 515, 1 So. 149; Florida R. Co. *v.* Gensler, 14 Fla. 122.

Georgia.— Stamps *v.* Hardigree, 100 Ga. 160, 28 S. E. 41; Gardner *v.* Granniss, 57 Ga. 539; Muscogee R. Co. *v.* Neal, 26 Ga. 120; Hall *v.* Mobley, 13 Ga. 318.

Illinois.— Jarrett *v.* Phillips, 90 Ill. 237; Crull *v.* Keener, 18 Ill. 65; Randolph County *v.* Ralls, 18 Ill. 29; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689; Duncan *v.* Charles, 5 Ill. 561; Martin *v.* Martin, 74 Ill. App. 215; Crews *v.* Chase, 66 Ill. App. 344; Hecht *v.* Feldman, 54 Ill. App. 144; Duggan *v.* Smyser, 46 Ill. App. 39; Kingman *v.* Decker, 43 Ill. App. 303; Stinnett *v.* Wilson, 19 Ill. App. 38.

Indiana.— Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Bauer *v.* Samson Lodge, K. of P., 102 Ind. 262, 1 N. E. 571; Slauter *v.* Hollowell, 90 Ind. 286; Reed *v.* Bodkin, 68 Ind. 325; Louisville, etc., R. Co. *v.* Nicholson, 60 Ind. 158; Louisville, etc., R. Co. *v.* Stover, 57 Ind. 559; Smith *v.* Denman, 48 Ind. 65; Hamrick *v.* Danville, etc., Gravel Road Co., 32 Ind. 347; Vanschoiack *v.* Farrow, 25 Ind. 310; Indianapolis, etc., R. Co. *v.* Renner, 17 Ind. 135; Lagow *v.* Patterson, 1 Blackf. (Ind.) 327.

Iowa.— Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463; Lodomillo Dist. Tp. *v.* Cass Dist. Tp., 54 Iowa 115, 6 N. W. 163.

Kansas.— Hentig *v.* Redden, 38 Kan. 496, 16 Pac. 820; Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403; Bentz *v.* Eubanks, 32 Kan. 321, 4 Pac. 269; Freeman *v.* Waynant, 25 Kan. 279; Bury *v.* Conklin, 23 Kan. 460; Carver *v.* Shelly, 17 Kan. 472; North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183; St. John State Bank *v.* Gruver, 7 Kan. App. 695, 51 Pac. 915.

Kentucky.— Baker *v.* Louisville, etc., R. Co., 4 Bush (Ky.) 619; Rives *v.* Rives, 4 J. J. Marsh. (Ky.) 533; Cavanaugh *v.* Willson, 18 Ky. L. Rep. 175, 35 S. W. 918.

Louisiana.— State *v.* Buck, 46 La. Ann. 656, 15 So. 531; U. S. *v.* U. S. Bank, 11 Rob. (La.) 418.

Maine.— State Bank *v.* Hervey, 21 Me. 38.

Maryland.— Yoe *v.* Gelston, 37 Md. 233.

Massachusetts.— Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337; Hazard *v.* Wason, 152 Mass. 268, 25 N. E. 465; Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705; Wright *v.* Andrews, 130 Mass. 149; Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; Loomis *v.* Wadhams, 8 Gray (Mass.) 557.

Michigan.— Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067; Ferguson *v.* Oliver, 99 Mich. 161, 58 N. W. 43, 41 Am. St. Rep. 593; Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Cofrode *v.* Gartner, 79 Mich. 339, 44 N. W. 623, 7 L. R. A. 511; Grand Rapids, etc., R. Co. *v.* Gray, 38 Mich. 461; Crane *v.* Hardy, 1 Mich. 56.

Minnesota.—Chouteau *v.* Rice, 1 Minn. 192.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244; Hemphill *v.* Hemphill, 34 Miss. 68; Brown *v.* State Bank, 31 Miss. 454.

Missouri.— Tippack *v.* Briant, 63 Mo. 580; Baker *v.* Stonebraker, 34 Mo. 172; Hembree *v.* Campbell, 8 Mo. 572.

Nebraska.— Shabata *v.* Johnston, 53 Nebr. 12, 73 N. W. 278; Ragan *v.* Morrill, 43 Nebr. 361, 61 N. W. 590; Thrailkill *v.* Daily, 16 Nebr. 114, 19 N. W. 595; White *v.* Merriam, 16 Nebr. 96, 19 N. W. 703.

Nevada.— Frankel *v.* Their Creditors, 20 Nev. 49, 14 Pac. 775; State *v.* McCullough, 3 Nev. 202.

New Hampshire.— Woodbury *v.* Swan, 58 N. H. 380; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York.— Matter of McLean, 138 N. Y. 158, 33 N. E. 821, 51 N. Y. St. 837, 20 L. R. A. 389; Sanborn *v.* Lefferts, 58 N. Y. 179; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Hamilton *v.* Wright, 37 N. Y. 502; Clapp *v.* Graves, 26 N. Y. 418; Powers *v.* Trenor, 3 Hun (N. Y.) 3; Kramer *v.* Gerlach, 28 Misc. (N. Y.) 525, 59 N. Y. Suppl. 855; Wheelock *v.* Lee, 15 Abb. Pr. N. S. (N. Y.) 24; Ballouhey *v.* Cadot, 3 Abb. Pr. N. S. (N. Y.) 122; Viburt *v.* Frost, 3 Abb. Pr. (N. Y.) 119; Schwinger *v.* Hickox, 46 How. Pr. (N. Y.) 114; Malone *v.* Clark, 2 Hill (N. Y.) 657; Davis *v.* Packard, 6 Wend. (N. Y.) 327.

Ohio.— Ohio Southern R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577; Handy *v.* Insurance Co., 37 Ohio St. 366; O'Neal *v.* Blessing, 34 Ohio St. 33; Fitzgerald *v.* Cross, 30 Ohio St. 444; Thomas *v.* Pennrich, 28 Ohio St. 55; Wood *v.* O'Ferrall, 19 Ohio St. 427; Gilliland *v.* Sellers, 2 Ohio St. 223; Harrington *v.* Heath, 15 Ohio 483.

Rhode Island.— Greene *v.* Austin, 10 R. I. 311.

has appeared generally and it is held to be immaterial whether he be a resident or non-resident.[5]

(B) *Want of Process or Defects in Service.* It follows, therefore, that any objection based on the want of issuance of process or of service thereof,[6] or on the

South Carolina.— *Ex p.* Perry Stove Co., 43 S. C. 176, 20 S. E. 980.

South Dakota.— Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176.

Tennessee.— Agee *v.* Dement, 1 Humphr. (Tenn.) 331; Chester *v.* Embree, Peck (Tenn.) 370.

Texas.— Glass *v.* Smith, 66 Tex. 548, 2 S. W. 195; Wilson *v.* Zeigler, 44 Tex. 657.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692; Hunter *v.* Stewart, 23 W. Va. 549; Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

Wisconsin.— Pfister *v.* Smith, 95 Wis. 51, 69 N. W. 984; Dikeman *v.* Struck, 76 Wis. 332, 45 N. W. 118; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Atkins *v.* Fraker, 32 Wis. 510; Baizer *v.* Lasch, 28 Wis. 268; Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197; Roy *v.* Union Mercantile Co., 3 Wyo. 416, 26 Pac. 996.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Bowdoin College *v.* Merritt, 59 Fed. 6; Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688.

England.— Humble *v.* Bland, 6 T. R. 255.

Canada.— Dudley *v.* Jones, 13 Nova Scotia 306.

See 3 Cent. Dig. tit. "Appearance," § 70.

5. *Georgia.*— Loyd *v.* Hicks, 31 Ga. 140.

Indiana.— Wabash, etc., R. Co. *v.* Lash, 103 Ind. 80, 2 N. E. 250, 1 West. 307.

Iowa.— German Bank *v.* American F. Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316.

Kentucky.— Hunts *v.* Clay, Litt. Sel. Cas. (Ky.) 26.

Maine.— Mahan *v.* Sutherland, 73 Me. 158; Thornton *v.* Leavitt, 63 Me. 384.

Maryland.— Carroll *v.* Lee, 3 Gill & J. (Md.) 504, 22 Am. Dec. 350.

Massachusetts.— Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Michigan.— Ferguson *v.* Oliver, 99 Mich. 161, 58 N. W. 43, 41 Am. St. Rep. 593; Cofrode *v.* Gartner, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

Missouri.— Orear *v.* Clough, 52 Mo. 55; Whitney Holmes Organ Co. *v.* Petitt, 34 Mo. App. 536.

Nevada.— Frankel *v.* Their Creditors, 20 Nev. 49, 14 Pac. 775.

New Hampshire.— Downer *v.* Shaw, 22 N. H. 277.

New York.— Olcott *v.* Maclean, 73 N. Y. 223; Clarke *v.* Boreel, 21 Hun (N. Y.) 594.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120.

South Carolina.— Townes *v.* Augusta, 46 S. C. 15, 23 S. E. 984.

Texas.— Evans *v.* Breneman, (Tex. Civ. App. 1898) 46 S. W. 80; Bartley *v.* Conn, 4 Tex. Civ. App. 299, 23 S. W. 382.

West Virginia.— Hunter *v.* Stewart, 23 W. Va. 549; Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

United States.— Pond *v.* Vermont Valley R. Co., 12 Blatchf. (U. S.) 280, 19 Fed. Cas. No. 11,265.

6. *Alabama.*— Tew *v.* Henderson, 116 Ala. 545, 23 So. 128; Baker *v.* Pope, 49 Ala. 415; Lampley *v.* Beavers, 25 Ala. 534; Walker *v.* Chapman, 22 Ala. 116; Hobson *v.* Emanuel, 8 Port. (Ala.) 442; Chapman *v.* Arrington, 3 Stew. (Ala.) 480.

Arkansas.— Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

California.— Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Matter of Johnson, 45 Cal. 257; Dyer *v.* North, 44 Cal. 157; Hayes *v.* Shattuck, 21 Cal. 51; Cronise *v.* Garghill, 4 Cal. 120.

Colorado.— Creighton *v.* Kerr, 1 Colo. 509.

Connecticut.— Haussman *v.* Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; Payne *v.* Farmers, etc., Bank, 29 Conn. 415; Dennison *v.* Hyde, 6 Conn. 508.

Florida.— Parkhurst *v.* Stone, 36 Fla. 456, 18 So. 594; Curtis *v.* Howard, 33 Fla. 251, 14 So. 812; Baars *v.* Gordon, 21 Fla. 25.

Georgia.— Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010; Saffold *v.* Foster, 74 Ga. 751; Central R. Co. *v.* Whitehead, 74 Ga. 441; Pike *v.* Stallings, 71 Ga. 860; Welman *v.* Polhill, R. M. Charlt. (Ga.) 235.

Illinois.— Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Bangor Furnace Co. *v.* Magill, 108 Ill. 656; Hale *v.* People, 87 Ill. 72; Filkins *v.* Byrne, 72 Ill. 101; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Dunn *v.* Keegin, 4 Ill. 292; Meilinger *v.* People, 83 Ill. App. 436; Duggan *v.* Smyser, 46 Ill. App. 39; Phillips *v.* Blatchford, 26 Ill. App. 606.

Indiana.— Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Cleveland *v.* Obenchain, 107 Ind. 591, 8 N. E. 624; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Louisville, etc., R. Co. *v.* Stover, 57 Ind. 559; Hardy *v.* Donellan, 33 Ind. 501; Whitney *v.* Lehmer, 26 Ind. 503; Symmes *v.* Major, 21 Ind. 443; Wiseman *v.* Risinger, 14 Ind. 461; Doe *v.* Scoggin, 2 Ind. 208; Eldridge *v.* Folwell, 3 Blackf. (Ind.) 207; Lagow *v.* Patterson, 1 Blackf. (Ind.) 327.

Iowa.— Willenburg *v.* Hersey, 104 Iowa 699, 74 N. W. 1; Lorimier *v.* State Bank, Morr. (Iowa) 223.

Kansas.— Hefferlin *v.* Stuckslager, 6 Kan. 166.

Kentucky.— Baker *v.* Kinnaird, 94 Ky. 5, 14 Ky. L. Rep. 695, 21 S. W. 237; Freeman *v.* Oldham, 4 T. B. Mon. (Ky.) 419; Handley *v.* Statelor, Litt. Sel. Cas. (Ky.) 186; Thomas *v.* Warford, 1 Bibb (Ky.) 261.

want of a return of process,[7] or on defects, of whatever nature, in the service of process, it being immaterial whether the defendant was served personally[8] or

Louisiana.— Penny's Succession, 11 La. Ann. 197.

Maine.— Buckfield Branch R. Co. *v.* Benson, 43 Me. 374; Woodman *v.* Smith, 37 Me. 21.

Maryland.—Belt *v.* Blackburn, 28 Md. 227; Swann *v.* Shemwell, 2 Harr. & G. (Md.) 283.

Michigan.— Cofrode *v.* Gartner, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

Minnesota.— State *v.* Ramsey County Dist. Ct., 51 Minn. 401, 53 N. W. 714.

Mississippi.— Redus *v.* State, 54 Miss. 712; Frisby *v.* Harrisson, 30 Miss. 452; Claughton *v.* Black, 24 Miss. 185; Harris *v.* Gwin, 10 Sm. & M. (Miss.) 563.

Missouri.— Mankameyer *v.* Egelhoff, 161 Mo. 200, 61 S. W. 836; State *v.* Scott, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11; Griffin *v.* Samuel, 6 Mo. 50; Market St. Bank *v.* Stumpe, 2 Mo. App. 545.

Montana.— Stephens *v.* Hartley, 2 Mont. 504; Kleinschmidt *v.* Morse, 1 Mont. 100.

Nebraska.— State *v.* Smith, 57 Nebr. 41, 77 N. W. 384; Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Merchants' Sav. Bank *v.* Noll, 50 Nebr. 615, 70 N. W. 247; Spencer *v.* Wolfe, 49 Nebr. 8, 67 N. W. 858.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742; Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

New York.— Catlin *v.* Ricketts, 91 N. Y. 668; Matter of Post, 30 Misc. (N. Y.) 551, 64 N. Y. Suppl. 369; Adams *v.* Gilbert, 9 Wend. (N. Y.) 499; Seebor *v.* Hess, 5 Paige (N. Y.) 85.

North Carolina.— Etheridge *v.* Woodley, 83 N. C. 11.

Ohio.— Evans *v.* Iles, 7 Ohio St. 233; Abernathy *v.* Latimore, 19 Ohio 286.

Oklahoma.— Houghton, etc., Mercantile Co. *v.* Dymont, 2 Okla. 365, 37 Pac. 1052.

Oregon.— White *v.* Northwest Stage Co., 5 Oreg. 99; Rogue River Min. Co. *v.* Walker, 1 Oreg. 341.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Skidmore *v.* Bradford, 4 Pa. St. 296; Fox *v.* Reed, 3 Grant (Pa.) 81; Zion Church *v.* St. Peter's Church, 5 Watts & S. (Pa.) 215.

Tennessee.— Terril *v.* Rogers, 3 Hayw. (Tenn.) 203.

Texas.— Yturri *v.* McLeod, 26 Tex. 84; Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

Vermont.— Spaulding *v.* Swift, 18 Vt. 214.

West Virginia.— Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

United States.— Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332; Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666; Bell *v.* Ohio Life, etc., Co., 1 Biss. (U. S.) 260, 3 Fed. Cas. No. 1,260; Segee *v.* Thomas, 3 Blatchf. (U. S.) 11, 21 Fed. Cas. No. 12,633; Marsh *v.* Bennett, 5 McLean (U. S.) 117, 16 Fed. Cas. No. 9,110; Virginia, etc., Steam Nav. Co. *v.* U. S., Taney (U. S.) 418, 28 Fed. Cas. No. 16,973; Brown *v.* Brown, 2 Hayw. & H. (U. S.) 221; Bradley *v.* Reed, 2 Pittsb. (Pa.) 519, 3 Fed. Cas. No. 1,785.

England.— Oulton *v.* Radcliffe, L. R. 9 C. P. 189, 43 L. J. C. P. 87, 30 L. T. Rep. 22, 22 Wkly. Rep. 372; Capel *v.* Butler, 2 Sim. & St. 457.

See 3 Cent. Dig. tit. "Appearance," § 91.

7. Hall *v.* Biever, Morr. (Iowa) 113; Wann *v.* Shemwell, 2 Harr. & G. (Md.) 283.

8. *Alabama.*— Birmingham Flooring Mills *v.* Wilder, 85 Ala. 593, 5 So. 307; Pool *v.* Minge, 50 Ala. 100; Kennedy *v.* Young, 25 Ala. 563.

Arizona.— Clark *v.* Morrison, (Ariz. 1898) 52 Pac. 985.

Arkansas.— Duncan *v.* Ripley, 7 Ark. 100; Gay *v.* Hanger, 3 Ark. 436.

California.— Desmond *v.* San Francisco Superior Ct., 59 Cal. 274.

Colorado.— Denver, etc., R. Co. *v.* Neis, 10 Colo. 56, 14 Pac. 105; New York, etc., Min. Co. *v.* Gill, 7 Colo. 100, 2 Pac. 5; Wyatt *v.* Freeman, 4 Colo. 14.

Connecticut.— Fowler *v.* Bishop, 32 Conn. 199.

Florida.— Parkhurst *v.* Stone, 36 Fla. 456, 18 So. 594; Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425; Bartley *v.* Bingham, 34 Fla. 19, 15 So. 592; Curtis *v.* Howard, 33 Fla. 251, 14 So. 812; Keil *v.* West, 21 Fla. 508; Wood *v.* State Bank, 1 Fla. 424.

Georgia.— Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155; Gardner *v.* Granniss, 57 Ga. 539; Townsend *v.* Stoddard, 26 Ga. 430; Irwin *v.* McKee, 25 Ga. 646.

Idaho.— Willman *v.* Friedman, (Ida. 1894) 38 Pac. 937.

Illinois.— Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119; Hercules Iron Works *v.* Elgin, etc., R. Co., 141 Ill. 491, 30 N. E. 1050; Tallon *v.* Schempf, 67 Ill. 472; O'Brien *v.* Haynes, 61 Ill. 494; Gilson *v.* Powers, 16 Ill. 355.

Indiana.— Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Reed *v.* Bodkin, 68 Ind. 325; White *v.* Rankin, 2 Blackf. (Ind.) 78.

Iowa.— Lodomillo Dist. Tp. *v.* Cass Dist. Tp., 54 Iowa 115, 6 N. W. 163; Burns *v.* Keas, 20 Iowa 16; Hale *v.* Van Saun, 18 Iowa 19; Chittenden *v.* Hobbs, 9 Iowa 417; Beard *v.* Smith, 9 Iowa 50; Winchester *v.* Cox, 3 Greene (Iowa) 575; Bell *v.* Pierson, Morr. (Iowa) 21.

Kansas.— Meixell *v.* Kirkpatrick, 29 Kan. 679; Bury *v.* Conklin, 23 Kan. 460; Cohen *v.* Trowbridge, 6 Kan. 385; Wheatley *v.* Tutt, 4 Kan. 240; McBride *v.* Hartwell, 2 Kan. 410.

Kentucky.— Broaddus *v.* Mason, 95 Ky. 421, 16 Ky. L. Rep. 38, 25 S. W. 1060; Sidwell *v.* Worthington, 8 Dana (Ky.) 74; Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; Wharton *v.* Clay, 4 Bibb (Ky.) 167; Reading *v.* Ford, 1 Bibb (Ky.) 338.

Maine.— Buckfield Branch R. Co. *v.* Benson, 43 Me. 374; State Bank *v.* Hervey, 21 Me. 38; Johnson *v.* Richards, 11 Me. 49.

whether he was served by publication,[9] or on defects, of whatever nature, in the

Maryland.— Ireton *v.* Baltimore, 61 Md. 432; Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317.

Massachusetts.— Lawrence *v.* Bassett, 5 Allen (Mass.) 140; Briggs *v.* Humphrey, 1 Allen (Mass.) 371; Greenwood *v.* Lake Shore R. Co., 10 Gray (Mass.) 373; Loomis *v.* Wadhams, 8 Gray (Mass.) 557; Belknap *v.* Gibbens, 13 Metc. (Mass.) 471; Smith *v.* Robinson, 13 Metc. (Mass.) 165; Carlisle *v.* Weston, 21 Pick. (Mass.) 535.

Michigan.— Austin *v.* Burroughs, 62 Mich. 181, 28 N. W. 862; Manhard *v.* Schott, 37 Mich. 234; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota.— Howland *v.* Jeuel, 55 Minn. 102, 56 N. W. 581; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Johnson *v.* Knoblauch, 14 Minn. 16; Williams *v.* McGrade, 13 Minn. 46.

Mississippi.— Bustamente *v.* Bescher, 43 Miss. 172; Davis *v.* Patty, 42 Miss. 509; Harris *v.* Gwin, 10 Sm. & M. (Miss.) 563; Young *v.* Rankin, 4 How. (Miss.) 27.

Missouri.— Schell *v.* Leland, 45 Mo. 289; Rechnitzer *v.* Missouri, etc., R. Co., 60 Mo. App. 409; Sheehan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224.

Montana.— Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589; Dyas *v.* Keaton, 3 Mont. 495.

Nebraska.—White *v.* Merriam, 16 Nebr. 96, 19 N. W. 703.

Nevada.— Iowa Min. Co. *v.* Bonanza Min. Co., 16 Nev. 64.

New Hampshire.—White *v.* White, 60 N. H. 210; Kittredge *v.* Emerson, 15 N. H. 227; Morse *v.* Calley, 5 N. H. 222.

New Jersey.— Clifford *v.* Overseers of Poor, 37 N. J. L. 152; Houghton *v.* Potter, 23 N. J. L. 338; Ayres *v.* Swayze, 5 N. J. L. 953; Crowell *v.* Botsford, 16 N. J. Eq. 458.

New York.—Mors *v.* Stanton, 51 N. Y. 649; People *v.* Haughton, 41 Hun (N. Y.) 558; Miln *v.* Russell, 3 E. D. Smith (N. Y.) 303; Abrahamson *v.* Koch, 7 Misc. (N. Y.) 122, 27 N. Y. Suppl. 310, 57 N. Y. St. 512; Bell *v.* Good, 19 N. Y. Suppl. 693, 46 N. Y. St. 572, 22 N. Y. Civ. Proc. 317; Ahner *v.* New York, etc., R. Co., 14 N. Y. Suppl. 365, 39 N. Y. St. 196; Georgia Lumber Co. *v.* Strong, 3 How. Pr. (N. Y.) 246; Gardner *v.* Teller, 2 How. Pr. (N. Y.) 241; Moss *v.* Raynor, 1 How. Pr. (N. Y.) 110; Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Chadwick *v.* Chase, 5 N. Y. Wkly. Dig. 589.

North Carolina.— Moody *v.* Moody, 118 N. C. 926, 23 S. E. 933; Hinsdale *v.* Underwood, 116 N. C. 593, 21 S. E. 401; White *v.* Morris, 107 N. C. 92, 12 S. E. 80; Penniman *v.* Daniel, 95 N. C. 341; Wheeler *v.* Cobb, 75 N. C. 21; Middleton *v.* Duffy, 73 N. C. 72; Moore *v.* North Carolina R. Co., 67 N. C. 209; Tripp *v.* Potter, 33 N. C. 121.

Ohio.— Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Handy *v.* Insurance Co., 37 Ohio St. 366; Whitman *v.* Keith, 18 Ohio St. 134; Schæffer *v.* Waldo, 7 Ohio St. 309; Eaton *v.* Morgan, Tappan (Ohio) 77.

Oregon.— White *v.* Northwest Stage Co., 5 Oreg. 99; Harker *v.* Fahie, 2 Oreg. 89.

Pennsylvania.—Beltzhoover *v.* Beltzhoover, 173 Pa. St. 213, 37 Wkly. Notes Cas. (Pa.) 573, 33 Atl. 1047; MacGeorge *v.* Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671; Schober *v.* Mather, 49 Pa. St. 21; McAlpin *v.* Newell, 2 Miles (Pa.) 339; Large *v.* Bristol Steam Tow-Boat, etc., Co., 2 Ashm. (Pa.) 394; Com. *v.* Helms, 8 Pa. Co. Ct. 410.

Rhode Island.— Cooke *v.* Second Universalist Soc., 7 R. I. 17.

South Carolina.— Smith *v.* Goudalock, 1 Brev. (S. C.) 468.

Texas.— Supreme Council, A. L. of H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633; Randall *v.* Meredith, (Tex. 1889) 11 S. W. 170; Erskine *v.* Wilson, 27 Tex. 117.

Vermont.— Stanton *v.* Haverhill Bridge, 47 Vt. 172; Howe *v.* Willard, 40 Vt. 654; Bennett *v.* Stickney, 17 Vt. 531.

Virginia.— Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348; Harvey *v.* Skipwith, 16 Gratt. (Va.) 410.

Washington.— Schwabacher *v.* Wells, 1 Wash. Terr. 506; Williams *v.* Miller, 1 Wash. Terr. 88.

West Virginia.— Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186; Burlew *v.* Quarrier, 16 W. Va. 108; Mahany *v.* Kephart, 15 W. Va. 609; Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

Wisconsin.— Pfister *v.* Smith, 95 Wis. 51, 69 N. W. 984; Garland *v.* McKittrick, 52 Wis. 261, 9 N. W. 160; Gray *v.* Gates, 37 Wis. 614; Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344; State *v.* Doane, 14 Wis. 483; Heeron *v.* Beckwith, 1 Wis. 17.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608; Farrar *v.* U. S., 3 Pet. (U. S.) 459, 7 L. ed. 741; Knox *v.* Summers, 3 Cranch (U. S.) 496, 2 L. ed. 510; Crawford *v.* Foster, 83 Fed. 975, 53 U. S. App. 669, 28 C. C. A. 242; Platt *v.* Manning, 34 Fed. 817; Friezen *v.* Allemania F. Ins. Co., 30 Fed. 349; Hale *v.* Continental L. Ins. Co., 20 Blatchf. (U. S.) 515, 12 Fed. 359; Marye *v.* Strouse, 5 Fed. 494; *In re* Ulrich, 3 Ben. (U. S.) 355, 24 Fed. Cas. No. 14,327; Brammer *v.* Jones, 2 Bond (U. S.) 100, 4 Fed. Cas. No. 1,806, 3 Fish. Pat. Cas. (U. S.) 340.

England.—Oulton *v.* Radcliffe, L. R. 9 C. P. 189, 43 L. J. C. P. 87, 30 L. T. Rep. 22, 22 Wkly. Rep. 372; Boyle *v* Sacker, 39 Ch. D. 249, 58 L. J. Ch. 141, 58 L. T. Rep. N. S. 822, 37 Wkly. Rep. 68; Royal Exch. Assur. Co. *v.* Short, 1 Y. & J. 570.

See 3 Cent. Dig. tit. "Appearance," § 118 *et seq.*

9. *Colorado.*— New York, etc., Min. Co. *v.* Gill, 7 Colo. 100, 2 Pac. 5.

Illinois.— Humphrey *v.* Newhall, 48 Ill. 116.

Kansas.— McBride *v.* Hartwell, 2 Kan. 410.

Kentucky.— Sprague *v.* Sprague, 7 J. J. Marsh. (Ky.) 331; Trimble *v.* Hunt, 15 Ky. L. Rep. 707, 25 S. W. 108.

return of process,[10] is waived by a voluntary general appearance on the part of defendant.

(c) *Defects in Process.* So, too, a general appearance operates as a waiver of all defects in process.[11]

Michigan.— Stone *v.* Welling, 14 Mich. 514.
Mississippi.— Cole *v.* Johnson, 53 Miss. 94.
Missouri.— Meyer *v.* Broadwell, 83 Mo. 571.
Nebraska.— Welch *v.* Ayres, 43 Nebr. 326, 61 N. W. 635; Helmer *v.* Rehm, 14 Nebr. 219, 15 N. W. 344.
South Carolina.— Meinhard *v.* Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771.

Insufficient proof of publication.— If a defendant makes a general appearance, proof of publication is thereby waived. Templeton *v.* Hunter, 10 Ind. 380; Starling *v.* Hardin, 2 Bibb (Ky.) 519.

10. *Alabama.*— Wright *v.* Lyle, 4 Ala. 112.
Arkansas.— Rose *v.* Ford, 2 Ark. 26.
Colorado.— Union Pac. R. Co. *v.* Moffatt, 12 Colo. 310, 20 Pac. 759; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350.
Florida.— Keil *v.* West, 21 Fla. 508; Florida R. Co. *v.* Gensler, 14 Fla. 122.
Illinois.— Gilson *v.* Powers, 16 Ill. 355; Vance *v.* Funk, 3 Ill. 263; Leopold *v.* Steel, 41 Ill. App. 17.
Indiana.— Campbell *v.* Swasey, 12 Ind. 70.
Kentucky.— Elizabeth, etc., R. Co. *v.* Gartnell, 10 Ky. L. Rep. 777.
Maryland.— Dugan *v.* Baltimore, 70 Md. 1, 16 Atl. 501.
Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.
Minnesota.— Johnson *v.* Knoblauch, 14 Minn. 16.
Mississippi.— Bustamente *v.* Bescher, 43 Miss. 172; Davis *v.* Patty, 42 Miss. 509.
Missouri.— Schell *v.* Leland, 45 Mo. 289; Delinger *v.* Higgins, 26 Mo. 180; Phillebart *v.* Evans, 25 Mo. 323; Spencer *v.* Medder, 5 Mo. 458; Bartlett *v.* McDaniel, 3 Mo. 55.
New Jersey.— Murat *v.* Hutchinson, 16 N. J. L. 46; Ayres *v.* Swayze, 5 N. J. L. 953; Stediford *v.* Ferris, 4 N. J. L. 125; Cook *v.* Hendrickson, 2 N. J. L. 323; Pedrick *v.* Shaw, 2 N. J. L. 54.
New York.— Ingersoll *v.* Gillies, 3 E. D. Smith (N. Y.) 119; Davis *v.* West, 5 Wend. (N. Y.) 63; Malcom *v.* Rogers, 1 Cow. (N. Y.) 1.
Ohio.— Schæffer *v.* Waldo, 7 Ohio St. 309.
Oregon.— Ankeny *v.* Blackiston, 7 Oreg. 407.
Pennsylvania.— Sherer *v.* Easton Bank, 33 Pa. St. 134.
Texas.— Thomson *v.* Bishop, 29 Tex. 154.
West Virginia.— Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.
Wisconsin.— German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500; Baizer *v.* Lasch, 28 Wis. 268.

11. *Alabama.*— Pool *v.* Minge, 50 Ala. 100; Winter *v.* Rose, 32 Ala. 447; Crawford *v.* Mobile Branch Bank, 7 Ala. 205; Hamner *v.* Eddins, 3 Stew. (Ala.) 192.
Arkansas.— Richardson *v.* White, 19 Ark. 241; Gay *v.* Hanger, 3 Ark. 436; Rose *v.* Ford, 2 Ark. 26.
California.— *In re* Yoell, 131 Cal. 581, 63 Pac. 913; Desmond *v.* San Francisco Super. Ct., 59 Cal. 274; Smith *v.* Curtis, 7 Cal. 584.
Colorado.— Union Pac. R. Co. *v.* Moffatt, 12 Colo. 310, 20 Pac. 759; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Wyatt *v.* Freeman, 4 Colo. 14; Smith *v.* Smith, 13 Colo. App. 295, 57 Pac. 747; People *v.* Weiss-Chapman Drug Co., 10 Colo. App. 507, 51 Pac. 1010.
Connecticut.—Parrott *v.* Housatonic R. Co., 47 Conn. 575; Woodruff *v.* Bacon, 34 Conn. 181.
Florida.— Bartley *v.* Bingham, 34 Fla. 19, 15 So. 592; Keil *v.* West, 21 Fla. 508; Florida R. Co. *v.* Gensler, 14 Fla. 122.
Georgia.— Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Regenstein *v.* Tyler, 84 Ga. 277, 10 S. E. 719; Moulton *v.* Baer, 78 Ga. 215, 2 S. E. 471; Gay *v.* Cheney, 58 Ga. 304; Rutherford *v.* Dixon, 21 Ga. 383; Fitzgerald *v.* Garvin, T. U. P. Charlt. (Ga.) 281. *Compare* Beall *v.* Blake, 13 Ga. 217, 58 Am. Dec. 513.
Idaho.— Morris *v.* Miller, (Ida. 1895) 40 Pac. 60.
Illinois.— Zeigler *v.* People, 164 Ill. 531, 45 N. E. 965; Baldwin *v.* Murphy, 82 Ill. 485; Roberts *v.* Formhalls, 46 Ill. 66; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; McFadden *v.* Fortier, 20 Ill. 509; Gilson *v.* Powers, 16 Ill. 355; Bowles *v.* Rouse, 8 Ill. 409; Beecher *v.* James, 3 Ill. 462; Easton *v.* Altum, 2 Ill. 250. *Contra,* Coleen *v.* Figgins, 1 Ill. 19.
Indiana.— Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976; McCormack *v.* Greensburgh First Nat. Bank, 53 Ind. 466; Andrews *v.* Powell, 27 Ind. 303; Topf *v.* King, 26 Ind. 391; Hust *v.* Conn, 12 Ind. 257; Rittenour *v.* McCausland, 5 Blackf. (Ind.) 540; Jones *v.* Martin, 5 Blackf. (Ind.) 278; Shirley *v.* Hagar, 3 Blackf. (Ind.) 225. *Contra,* Wibright *v.* Wise, 4 Blackf. (Ind.) 137.
Iowa.— Wood *v.* Young, 38 Iowa 102; Childs *v.* Limback, 30 Iowa 398; Wilsey *v.* Maynard, 21 Iowa 107; Wilgus *v.* Gettings, 19 Iowa 82; Van Vark *v.* Van Dam, 14 Iowa 232; Shaffer *v.* Trimble, 2 Greene (Iowa) 464; Bell *v.* Pierson, Morr. (Iowa) 21.
Kansas.— Newton First Nat. Bank *v.* Briggs, 6 Kan. App. 684, 50 Pac. 462.
Kentucky.— Frankfort Bank *v.* Anderson, 3 A. K. Marsh. (Ky.) 1; Marshall *v.* Bryam, 1 Bibb (Ky.) 341; Reading *v.* Ford, 1 Bibb (Ky.) 338.
Louisiana.— McCloskey *v.* Wingfield, 32 La. Ann. 38; Elmore *v.* Ventress, 24 La. Ann. 382; La Societe de Bienfaisance des Arts *v.* Morris, 24 La. Ann. 347; Bauduc *v.* Nicholson, 2 La. 201.

(D) *Venue*—(1) IN GENERAL—(a) STATE COURTS. If a court has jurisdiction of the subject-matter, a defendant, by making a general appearance, waives the

Maine.— State Bank *v.* Hervey, 21 Me. 38; Barker *v.* Norton, 17 Me. 416; Johnson *v.* Richards, 11 Me. 49.

Massachusetts.— Austin *v.* Lamar F. Ins. Co., 108 Mass. 338; Fay *v.* Hayden, 7 Gray (Mass.) 41; Brewer *v.* Sibley, 13 Metc. (Mass.) 175; Cady *v.* Eggleston, 11 Mass. 282.

Michigan.—Curran *v.* Norris, 58 Mich. 512, 25 N. W. 500; Maxwell *v.* Deens, 46 Mich. 35, 8 N. W. 561; Pierce *v.* Rehfuss, 35 Mich. 53; Pardee *v.* Smith, 27 Mich. 33; Stewart *v.* Hill, 1 Mich. 265; Falkner *v.* Beers, 2 Dougl. (Mich.) 117.

Minnesota.— Howland *v.* Jeuel, 55 Minn. 102, 56 N. W. 581.

Mississippi.—Spratley *v.* Kitchens, 55 Miss. 578; Harrison *v.* Agricultural Bank, 2 Sm. & M. (Miss.) 307.

Missouri.—Meyer *v.* Broadwell, 83 Mo. 571; Boulware *v.* Chicago, etc., R. Co., 79 Mo. 494; Hulett *v.* Nugent, 71 Mo. 131; Davis *v.* Wood, 7 Mo. 162 [*overruling* Little *v.* Little, 5 Mo. 227, 32 Am. Dec. 317]; Barnett *v.* Lynch, 3 Mo. 369; King *v.* King, 73 Mo. App. 78.

Nebraska.— Kane *v.* People, 4 Nebr. 509; Crowell *v.* Galloway, 3 Nebr. 215; Cropsey *v.* Wiggenhorn, 3 Nebr. 108; Orr *v.* Seaton, 1 Nebr. 105.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New Hampshire.— Lovell *v.* Sabin, 15 N. H. 29.

New Jersey.— Johnson *v.* Algor, (N. J. 1900) 47 Atl. 571; Clifford *v.* Overseers of Poor, 37 N. J. L. 152; Cornell *v.* Matthews, 27 N. J. L. 522; Seely *v.* Boon, 1 N. J. L. 161; ——— *v.* Camphell, 1 N. J. L. 109; Dare *v.* Ogden, 1 N. J. L. 107.

New York.— Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497; Clapp *v.* Graves, 26 N. Y. 418; Layton *v.* McConnell, 61 N. Y. App. Div. 447, 70 N. Y. Suppl. 679; Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Carpentier *v.* Minturn, 65 Barb. (N. Y.) 293; Vernon *v.* Palmer, 48 N. Y. Super. Ct. 231; Ingersoll *v.* Gillies, 3 E. D. Smith (N. Y.) 119; Stuyvesant *v.* Weil, 26 Misc. (N. Y.) 445, 57 N. Y. Suppl. 582; Townsend *v.* Hopkins, 9 N. Y. Civ. Proc. 257; Brett *v.* Brown, 13 Abb. Pr. N. S. (N. Y.) 295; Ballouhey *v.* Cadot, 3 Abb. Pr. N. S. (N. Y.) 122; Watson *v.* Morton, 27 How. Pr. (N. Y.) 294; Sprague *v.* Irwin, 27 How. Pr. (N. Y.) 51; Dix *v.* Palmer, 5 How. Pr. (N. Y.) 233; Hill *v.* Smith, 2 How. Pr. (N. Y.) 242; Legate *v.* Lagrille, 1 How. Pr. (N. Y.) 15; Pixley *v.* Winchell, 7 Cow. (N. Y.) 366, 17 Am. Dec. 525; Wright *v.* Jeffrey, 5 Cow. (N. Y.) 15; Bronson *v.* Earl, 17 Johns. (N. Y.) 63.

North Carolina.— Brooks *v.* Brooks, 97 N. C. 136, 1 S. E. 487; Wheeler *v.* Cobb, 75 N. C. 21; Duffy *v.* Averitt, 27 N. C. 455; Hyatt *v.* Tomlin, 24 N. C. 149; Jones *v.* Penland, 19 N. C. 358.

North Dakota.—Nashua Sav. Bank *v.* Lovejoy, 1 N. D. 211, 46 N. W. 411.

Ohio.— McVickar *v.* Ludlow, 2 Ohio 259; Williams *v.* Hamlin, 1 Handy (Ohio) 95; Gardiner *v.* McDowell, Wright (Ohio) 762; Bryans *v.* Taylor, Wright (Ohio) 245.

Oregon.— Harker *v.* Fahie, 2 Oreg. 89.

Pennsylvania.— Brinton *v.* Hogue, 172 Pa. St. 366, 33 Atl. 554; Schober *v.* Mather, 49 Pa. St. 21; Dewart *v.* Purdy, 29 Pa. St. 113; Temple *v.* Myers, 16 Pa. Co. Ct. 232.

South Carolina.— McCord *v.* Lloyd, 1 Brev. (S. C.) 29.

Tennessee.— Young *v.* Hare, 11 Humphr. (Tenn.) 302.

Texas.— Cartwright *v.* Chabert, 3 Tex. 261, 49 Am. Dec. 742.

Virginia.— Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348; Harvey *v.* Skipwith, 16 Gratt. (Va.) 410; Turberville *v.* Long, Hen. & M. (Va.) 309; Williams *v.* Campbell, 1 Wash. (Va.) 153.

West Virginia.— State *v.* Thacker Coal, etc., Co., (W. Va. 1901) 38 S. E. 539; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

Wisconsin.— Baizer *v.* Lasch, 28 Wis. 268; Fond du Lac *v.* Bonesteel, 22 Wis. 251; State *v.* Messmore, 14 Wis. 115; Ilsley *v.* Harris, 10 Wis. 95.

United States.— Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547; Chaffee *v.* Hayward, 20 How. (U. S.) 208, 15 L. ed. 804; Carroll *v.* Dorsey, 20 How. (U. S.) 204, 15 L. ed. 803; Whitcomb *v.* Hooper, 81 Fed. 946, 53 U. S. App. 410, 27 C. C. A. 19; Buerk *v.* Imhaeuser, 8 Fed. 457; Brown *v.* Pond, 5 Fed. 31; Daily *v.* Doe, 3 Fed. 903.

England.— Floyd *v.* Nangle, 3 Atk. 568; D'Argent *v.* Vivant, 1 East 330; Johnston *v.* Tottenham, 11 Ir. Eq. 271; Carvick *v.* Young, Jac. 524, 4 Eng. Ch. 524; Mulckern *v.* Doerks, 53 L. J. Q. B. 526, 51 L. T. Rep. N. S. 429; Caswall *v.* Martin, 2 Str. 1072; Rex *v.* Johnson, 1 Str. 261; Zuccato *v.* Young, 38 Wkly. Rep. 474.

Canada.— McNab *v.* Macdonnell, 15 Ont. Pr. 14.

See 3 Cent. Dig. tit. "Appearance," § 118 *et seq.*

Affidavit for arrest.— Defects in an affidavit for arrest are waived by a general appearance.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

Maine.— Shaw *v.* Usher, 41 Me. 102.

Michigan.— Wiest *v.* Luyendyk, 73 Mich. 661, 41 N. W. 839; Maxwell *v.* Deens, 46 Mich. 35, 8 N. W. 561.

New Jersey.—Foulkes *v.* Young, 21 N. J. L. 438.

South Carolina.— Saunders *v.* Hughes, 2 Bailey (S. C.) 504.

Defects in a notice to show cause why defendant should not be punished for contempt are waived by a general appearance. Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551.

objection that the venue of the action is wrong[12]—as where, although privileged to be sued only in the county of his domicile,[13] or in a particular court,[14] defendant is sued in a different county or court, where the cause of action arose in another county than the one in which suit is brought,[15] or where the action is brought in a county in which neither plaintiff nor defendant resides.[16]

(b) FEDERAL COURTS. So, too, in the federal courts, a general appearance waives the objection that suit is brought in the wrong district[17]—as where defendant is sued in a district other than where he resides or is found,[18] or where suit, in which

Failure to record præcipe before issuance.—Omission of a clerk of the circuit court to record a præcipe before issuing the original writ, as required by statute, cannot be objected to after general appearance. Jacksonville, etc., R. Co. *v.* Woodworth, 26 Fla. 368, 8 So. 177. See also O'Halloran *v.* Sullivan, 1 Greene (Iowa) 75.

Notice of application for judgment against real estate.—Where parties interested appear and contest an application for judgment against their real estate for special assessments, on the merits, it is immaterial whether the notice of application was regular or whether there was no notice at all. Frew *v.* Taylor, 106 Ill. 159; People *v.* Dragstran, 100 Ill. 286; Hale *v.* People, 87 Ill. 72; People *v.* Sherman, 83 Ill. 165. See also State *v.* Ramsey County Dist. Ct., 51 Minn. 401, 53 N. W. 714.

12. *Alabama.*— Freeman *v.* McBroom, 11 Ala. 943.

Georgia.— Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Varner *v.* Radcliff, 59 Ga. 448.

Illinois.— Peeples *v.* Peeples, 19 Ill. 269.

Louisiana.— Marqueze *v.* Le Blanc, 29 La. Ann. 194; Ferguson *v.* Glaze, 10 La. Ann. 635.

Maryland.— Ireton *v.* Baltimore, 61 Md. 432.

Massachusetts.— Morris *v.* Farrington, 133 Mass. 466.

New Jersey.— Funck *v.* Smith, 46 N. J. L. 484; Fraley *v.* Feather, 46 N. J. L. 429.

New York.— Donnelly *v.* Woolsey, 15 N. Y. Suppl. 490, 39 N. Y. St. 748.

North Carolina.— McMinn *v.* Hamilton, 77 N. C. 300.

Pennsylvania.— Fennell *v.* Guffey, 155 Pa. St. 38, 25 Atl. 785; Putney *v.* Collins, 3 Grant (Pa.) 72.

Texas.— Morris *v.* Runnells, 12 Tex. 175; Seley *v.* Parker, (Tex. Civ. App. 1898) 45 S. W. 1026; Kelso *v.* Adams, 2 Tex. Unrep. Cas. 374.

See 3 Cent. Dig. tit. "Appearance," § 111 *et seq.*

13. *Alabama.*— Stamphill *v.* Franklin County, 86 Ala. 392, 5 So. 487.

Illinois.— Northwestern Benev., etc., Assoc. *v.* Woods, 21 Ill. App. 372.

Massachusetts.— Dole *v.* Boutwell, 1 Allen (Mass.) 286; Brown *v.* Webber, 6 Cush. (Mass.) 560; Gleason *v.* Dodd, 4 Metc. (Mass.) 333; Cleveland *v.* Welsh, 4 Mass. 591.

Michigan.— Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; Thompson *v.* Michigan Mut. Ben. Assoc., 52 Mich. 522, 18 N. W. 247.

Nebraska.— Kane *v.* Union Pac. R. Co., 5 Nebr. 105.

New Hampshire.— Bishop *v.* Silver Lake Min. Co., 62 N. H. 455.

New York.— Kundolf *v.* Thalheimer, 12 N. Y. 593.

Texas.— Douglas *v.* Baker, 79 Tex. 499, 15 S. W. 801; Pool *v.* Pickett, 8 Tex. 122.

14. Wheelwright *v.* Dyal, 99 Ga. 247, 25 S. E. 170; Charlotte First Nat. Bank *v.* Morgan, 132 U. S. 141, 10 S. Ct. 37, 33 L. ed. 282. See also Mahlstadt *v.* Blanc, 34 Cal. 577.

15. East Tennessee, etc., R. Co. *v.* Sudderth, 86 Ga. 388, 12 S. E. 682; Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86; Green *v.* Mangum, 7 N. C. 39.

16. Webb *v.* Goddard, 46 Me. 505.

17. Texas, etc., R. Co. *v.* Saunders, 151 U. S. 105, 14 S. Ct. 257, 38 L. ed. 90; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. ed. 659; Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608; Charlotte First Nat. Bank *v.* Morgan, 132 U. S. 141, 10 S. Ct. 37, 33 L. ed. 282; *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853; Jones *v.* Andrews, 10 Wall. (U. S.) 327, 19 L. ed. 935; Irvine *v.* Lowry, 14 Pet. (U. S.) 293, 10 L. ed. 462; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157; Gracie *v.* Palmer, 8 Wheat. (U. S.) 699, 5 L. ed. 719; Logan *v.* Patrick, 5 Cranch (U. S.) 288, 3 L. ed. 103; Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666; Noonan *v.* Delaware, etc., R. Co., 68 Fed. 1; Southern Express Co. *v.* Todd, 56 Fed. 104, 12 U. S. App. 351, 5 C. C. A. 432; Betzoldt *v.* American Ins. Co., 47 Fed. 705; Foote *v.* Massachusetts Ben. Assoc., 39 Fed. 23; Romaine *v.* Union Ins. Co., 28 Fed. 625; Page *v.* Chillicothe, 6 Fed. 599; Kerp *v.* Michigan, Lake Shore R. Co., 14 Fed. Cas. No. 7,727, 6 Chi. Leg. News 101; Winans *v.* McKean R., etc., Co., 6 Blatchf. (U. S.) 215, 30 Fed. Cas. No. 17,862; McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888; Clarke *v.* New Jersey Steam Nav. Co., 1 Story (U. S.) 531, 5 Fed. Cas. No. 2,859; Flanders *v.* Ætna Ins. Co., 3 Mason (U. S.) 158, 9 Fed. Cas. No. 4,852; Kitchen *v.* Strawbridge, 4 Wash. C. C. (U. S.) 84, 14 Fed. Cas. No. 7,854; Wilson *v.* Graham, 4 Wash. C. C. (U. S.) 53, 30 Fed. Cas. No. 17,804; Harrison *v.* Rowan, Pet. C. C. (U. S.) 489, 11 Fed. Cas. No. 6,140.

See 3 Cent. Dig. tit. "Appearance," § 114.

18. St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. ed. 659; Toland

jurisdiction is based on diverse citizenship, is brought in a district in which neither plaintiff nor defendant resides.[19]

(2) CHANGE OF VENUE. Error in granting a change of venue, or in the proceedings to perfect a transfer of the cause after an order therefor, is waived by a general appearance in the court to which the cause is transferred, provided it has general jurisdiction of the subject-matter.[20] Where a cause transferred to another court is remanded to the court originally granting the change, the latter court acquires jurisdiction of defendant by his general appearance;[21] and, if the remand is made on the application of defendant, the case stands for trial in the court originally granting the change, as if defendant had appeared and answered there.[22]

c. With Respect to Irregularities in Pleadings or Other Proceedings — (I) *IN COMMENCEMENT OR CONDUCT OF CAUSE.* A general appearance waives any objection based on irregularities[23] in the commencement of the action — such as that it was commenced on Sunday;[24] that it was commenced without leave of court, where such leave was necessary;[25] that the manner of commencing suit was authorized only as against foreign corporations;[26] or that the complaint or declaration was not filed in the time allowed by law.[27] So, too, appearance and

v. Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Romaine *v.* Union Ins. Co., 28 Fed. 625; Kelsey *v.* Pennsylvania R. Co., 14 Blatchf. (U. S.) 89, 14 Fed. Cas. No. 7,679; Wilmer *v.* Atlanta, etc., Air Line R. Co., 2 Woods (U. S.) 447, 30 Fed. Cas. No. 17,776; Winans *v.* McKean R., etc., Co., 6 Blatchf. (U. S.) 215, 30 Fed. Cas. No. 17,862; McCloskey *v.* Cobb, 2 Bond (U. S.) 16, 15 Fed. Cas. No. 8,702.

19. Hatch *v.* Ferguson, 57 Fed. 966; Southern Express Co. *v.* Todd, 56 Fed. 104, 12 U. S. App. 351, 5 C. C. A. 432.

20. *Alabama.*— Berry *v.* Nall, 54 Ala. 446.

Arizona.—Solomon *v.* Norton, (Ariz. 1886) 11 Pac. 108.

Colorado.— Otero Canal Co. *v.* Fosdick, 20 Colo. 522, 39 Pac. 332.

Illinois.— Flagg *v.* Roberts, 67 Ill. 485.

Indiana.— Mannix *v.* State, 115 Ind. 245, 17 N. E. 565; Shirts *v.* Irons, 47 Ind. 445; Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315; Hamrick *v.* Danville, etc., Gravel-Road Co., 32 Ind. 347 (record was not transmitted in time); Street *v.* Chapman, 29 Ind. 142; Smith *v.* Jeffries, 25 Ind. 376; Cox *v.* Pruitt, 25 Ind. 90; Bosley *v.* Farquar, 2 Blackf. (Ind.) 61.

Kentucky.— Vinsen *v.* Lockard, 7 Bush (Ky.) 458; Baker *v.* Hopkins, 1 A. K. Marsh. (Ky.) 587; Jones *v.* Grugett, 1 Bibb (Ky.) 447; Owens *v.* Owens, Hard. (Ky.) 154.

Massachusetts.— Hazard *v.* Wason, 152 Mass. 268, 25 N. E. 465, cause removed before defendant's appearance in the court from which the change was taken.

Michigan.— People *v.* Judge Detroit Super. Co., 30 Mich. 10.

Missouri.— Smith *v.* Monks, 55 Mo. 106; Powers *v.* Browder, 13 Mo. 155 (informalities in application); Bettis *v.* Logan, 2 Mo. 2; Moore *v.* Wabash R. Co., 51 Mo. App. 504.

Texas.— Andrews *v.* Beck, 23 Tex. 455.

Virginia.— Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942.

Wisconsin.— State *v.* Wertzel, 84 Wis. 344, 54 N. W. 579; Carpenter *v.* Shepardson, 43 Wis. 406; Montgomery *v.* Scott, 32 Wis. 249, informalities in the affidavit.

See 3 Cent. Dig. tit. "Appearance," § 115.

A general appearance to which a second change is granted will confer jurisdiction on that court, such appearance being a waiver of any objection on the ground that the statute did not authorize a second change of venue. Schæffner's Estate, 45 Wis. 614. But see Johns *v.* Johns, 17 Fla. 806, in which the converse of this doctrine seems to be laid down.

Appearance after change of venue.—Where a change of venue from the county has been twice taken by the same party in the same action, and, without objection to its jurisdiction over him, he appears to the action in the court to which the last change was taken and by which it was tried, he cannot afterward question the jurisdiction over him of any of the courts in which the cause was pending, or of the judges presiding therein. Yater *v.* State, 58 Ind. 299.

Appearance after change denied.— If a defendant move for a change of venue, and he enters appearance after the motion is denied, he waives objection to the ruling on his motion. Wilson *v.* Fowler, 3 Ark. 463; Peabody *v.* Oleson, (Colo. App. 1900) 62 Pac. 234.

21. Lake Erie, etc., R. Co. *v.* Lowder, 7 Ind. App. 537, 34 N. E. 447.

22. Hazard *v.* Wason, 152 Mass. 268, 25 N. E. 465.

23. A fatal defect in the beginning of an action, so that, by the record, it appears that plaintiff had no right to sue defendant on the particular cause of action, is not cured by a general appearance. Person *v.* Fidelity, etc., Co., 84 Fed. 759.

24. Venable *v.* Ebenezer Baptist Church, 25 Kan. 177.

25. Hubbell *v.* Dana, 9 How. Pr. (N. Y.) 424.

26. Pryce *v.* New York Security Ins. Co., 29 Wis. 270.

27. Cole *v.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013; White *v.* Rankin, 2 Blackf. (Ind.) 78; Sidwell *v.* Worthington, 8 Dana (Ky.) 74. *Compare* Fish *v.* Regez, 46 Ill. App. 428, in which it was held that the mere entry of a general appearance by defendant is not a

pleading by the administrators of a decedent is a waiver of the objection that defendant was dead when the suit was instituted;[28] but an appearance does not waive the objection that suit was prematurely brought.[29] So, too, it waives objections based on a previous discontinuance[30] or continuances[31] of a cause, a failure to give security for costs[32] or the manner in which security was taken,[33] a clerical error in a remanding order,[34] a want of notice of the filing of an amendment to the pleadings[35] or of the taxation of costs in attachment,[36] or to the form of the proceedings.[37]

(II) *Defect of Parties.* A want of necessary,[38] proper,[39] or formal parties[40] is cured by a general appearance.

(III) *In Organization of Court.* A general appearance operates as a waiver of objections based on the organization of the court[41] or the disqualification of the judge.[42]

(IV) *In Pleadings*—(A) *Misnomer of Defendant.* A general appearance cures a misnomer of defendant in the process or pleading.[43]

(B) *Variance Between Pleading and Process.* In some cases the rule has been broadly stated that an objection based on a variance between process and pleadings is waived by a general appearance.[44] There are, however, decisions

waiver of his right to have the writ dismissed, where plaintiff's failure to file the declaration within ten days before the second term of court, as required by section 17 of the practice act, is not known by defendant until after the entry of his appearance.

28. Young *v.* Citizens' Bank, 31 Md. 66.

29. Randolph *v.* Cook, 2 Port. (Ala.) 286.

30. McDougle *v.* Gates, 21 Ind. 65; Breese *v.* Allen, 12 Ind. 426; Clark *v.* State, 4 Ind. 268.

31. Deputy *v.* Betts, 4 Harr. (Del.) 352; Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302.

An omission to enter a continuance in the record is likewise cured. Myrick *v.* Chamblain, Minor (Ala.) 357.

32. Heflin *v.* Rock Mills Mfg., etc., Co., 58 Ala. 613; Weeks *v.* Napier, 33 Ala. 568.

33. Ingersoll *v.* Gillies, 3 E. D. Smith (N. Y.) 119.

34. Levinson *v.* Sands, 81 Ill. App. 578.

35. Turner *v.* Houston, (Tex. Civ. App. 1899) 51 S. W. 642.

36. Shapleigh Hardware Co. *v.* Britain, 2 Indian Terr. 238, 48 S. W. 1067.

37. Ratliff *v.* Allgood, 72 Ala. 119; Shuster *v.* Finan, 19 Kan. 114; Lebœuf *v.* Merle, 1 La. Ann. 144; Levi *v.* Evans, 57 Fed. 677, 18 U. S. App. 293, 6 C. C. A. 500.

38. Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195.

39. Brunswick *v.* Finney, 54 Ga. 317.

40. Marsh *v.* Green, 79 Ill. 385.

The irregularity of an order, after trial ordered, directing a certified copy of the record to be served on a person, as defendant, who had not been served with process and was not in court, is cured by his appearance thereto, and his taking part in the trial as a party defendant. Kennedy *v.* Erdman, 150 Pa. St. 427, 24 Atl. 643.

41. Sherwood *v.* Stevenson, 25 Conn. 431 (that the court was held by a recorder and one alderman only, while the charter prescribed that the court should consist of a recorder and two aldermen); Landon *v.* Comet, 62 Mich. 80, 28 N. W. 788; Tracey *v.* Pendleton, 23 Pa. St. 171 (that the judge of an adjoining district presided); Kaysen *v.* Steele, 13 Utah 260, 44 Pac. 1042.

42. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557 (because he had acted as counsel for one of the parties); Baldwin *v.* Calkins, 10 Wend. (N. Y.) 166 (because he had an interest in the matter in litigation).

43. *California.*— Mahon *v.* San Rafael Turnpike Road Co., 49 Cal. 269.

Kansas.— School Dist. No. 14 *v.* Griner, 8 Kan. 224.

Louisiana.— New Orleans *v.* Saloy, 11 La. Ann. 420.

Maine.— Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377.

Maryland.— Rich *v.* Boyce, 39 Md. 314.

Massachusetts.—Gilbert *v.* Nantucket Bank, 5 Mass. 97.

Michigan.— Moore *v.* Lewis, 76 Mich. 300, 43 N. W. 11.

Missouri.— State *v.* Bacon Club, 44 Mo. App. 86; Murphy *v.* Sem, 3 Mo. App. 594.

New York.— Dole *v.* Manley, 11 How. Pr. (N. Y.) 138.

United States.—Deems *v.* Albany, etc., Line, 14 Blatchf. (U. S.) 474, 7 Fed. Cas. No. 3,736; Virginia, etc., Steam Nav. Co. *v.* U. S., Taney (U. S.) 418, 28 Fed. Cas. No. 16,973. *Contra*, Kentucky Silver Min. Co. *v.* Day, 2 Sawy. (U. S.) 468, 14 Fed. Cas. No. 7,719.

See 3 Cent. Dig. tit. "Appearance," § 146.

44. Bandman *v.* Gamble, 4 E. D. Smith (N. Y.) 463; Day *v.* Wilber, Col. & C. Cas. (N. Y.) 381; Waterhouse *v.* Freeman, 13 Wis. 339. See also Freeman *v.* Young, 3 Rob. (N. Y.) 666.

A variance between the amount as stated in the process and pleadings is cured by the appearance of defendant. Holmes *v.* Budd, 11 Iowa 186; Coyle *v.* Coyle, 26 N. J. L. 132.

A variance in the names of plaintiffs in the petition and the summons cannot be taken advantage of after appearance. Hite *v.* Hunton, 20 Mo. 285.

holding that, where the cause of action stated in the complaint is of a different nature than that stated in the summons, a general appearance is not a waiver of the irregularity, but that the complaint must be set aside.[45]

(c) *Want of Pleadings.* A general appearance and a judgment of *nil dicit*, or a judgment by default, does not cure the failure to file a declaration,[46] though it is otherwise where trial is had on issue joined,[47] under which circumstances it will be presumed that the declaration was dispensed with or lost.[48] When the statute provides that entry of appearance by defendant in the district court shall be equivalent to filing the general issue, such plea will, in case defendant has entered appearance, be deemed to have been filed, and to be a part of the record, not only while the case remains in the district court, but when it is certified to the common pleas division on defendant's claim for a jury trial.[49]

(v) *Void Judgment.* It has been held that, as to the immediate parties to the action, a general appearance validates a judgment that was theretofore absolutely void for want of jurisdiction.[50]

2. After Dismissal or Revival of Action. After entry of dismissal and reinstatement on the docket, a voluntary appearance constitutes a waiver of the dismissal,[51] and, where an action is dismissed as to some defendants and they obtain leave to answer, they thereby waive its benefits, and the fact that they fail to answer in time does not revive the original order of dismissal.[52] A voluntary appearance after the revival of a suit is a waiver of process.[53]

3. After Special Appearance. In many jurisdictions the rule is well settled that, where a defendant appears specially, any error of the court in deciding adversely to him is waived by a subsequent general appearance;[54] though, in

45. Tuttle *v.* Smith, 6 Abb. Pr. (N. Y.) 329, 14 How. Pr. (N. Y.) 395 (holding that the fact that the complaint has been served with the summons does not alter the rule, because the complaint is, in legal contemplation, a subsequent step in the proceeding); Shafer *v.* Humphrey, 15 How. Pr. (N. Y.) 564; Ridder *v.* Whitlock, 12 How. Pr. (N. Y.) 208. But see Fond du Lac *v.* Bonesteel, 22 Wis. 251, holding that, when the complaint is served either with the summons or afterward on the appearance of the defendant, a variance between it and the summons as to the nature of the cause cannot be taken advantage of by a defendant, but that the rule is confined to cases where the complaint is so served.

46. Emanuel *v.* Ketchum, 21 Ala. 257; Price *v.* Chevers, 9 Port. (Ala.) 511; Randolph *v.* Cook, 2 Port. (Ala.) 286. But see Walker *v.* King, 1 How. (Miss.) 17, holding that an entry of record: "Came the parties by their attorneys, and the defendant waives all service of writ, pleading," etc., estops defendant to object to the want of a writ, declaration, or pleadings.

Declaration entitled of subsequent term.— A general appearance and judgment *nil dicit* will waive an objection that the declaration was entitled as of a term subsequent to the judgment, as this will be intended to be a clerical misprision. Tunstall *v.* Donald, 15 Ala. 841.

47. Thomas *v.* Bibb, 44 Ala. 721; Allen *v.* Harper, 26 Ala. 686.

48. Thomas *v.* Bibb, 44 Ala. 721.

Irregularity in bringing in new matter by amendment, which has occurred after the original pleading, is waived by a general appearance. Beck *v.* Stephani, 9 How. Pr. (N. Y.) 193.

49. Conley *v.* Bryant, 19 R. I. 404, 35 Atl. 309.

50. Kaw L. Assoc. *v.* Lemke, 40 Kan. 142, 19 Pac. 337; Burdette *v.* Corgan, 26 Kan. 102; Gray *v.* Gates, 37 Wis. 614; Alderson *v.* White, 32 Wis. 308; Anderson *v.* Coburn, 27 Wis. 558; Grantier *v.* Rosecrance, 27 Wis. 488. See also Ryan *v.* Driscoll, 83 Ill. 415; Fisk *v.* Thorp, 60 Nebr. 713, 84 N. W. 79; Shafer *v.* Hockheimer, 36 Ohio St. 215; Henry *v.* Henry, (S. D. 1901) 87 N. W. 522.

Contra, Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657 [*overruling* Curtis *v.* Jackson, 23 Minn. 268, and *citing* Gray *v.* Hawes, 8 Cal. 562; Briggs *v.* Sneghan, 45 Ind. 14; Boals *v.* Shules, 29 Iowa 507]. The rule laid down in this case is quoted approvingly in Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095, which held that the fact that a party who had not been properly served with process appears and asks to have a decree against him set aside for want of jurisdiction of the person, and for the further reason that such decree is procured by fraud and deceit and without evidence to support it, does not validate the decree if invalid by reason of fraud and deceit practised in its procurement.

51. Mahon *v.* Mahon, 19 Ind. 324.

52. Gaines *v.* Cyrus, 23 Oreg. 403, 31 Pac. 833.

53. Carrington *v.* Brents, 1 McLean (U. S.) 167, 5 Fed. Cas. No. 2,446.

54. *Alabama.*— Lampley *v.* Beavers, 25 Ala. 534.

many others, and by what seems the sounder reasoning, it is held that a defendant does not lose the benefit of his attack on the jurisdiction by thereafter answering and pleading to the merits,[55] provided he obtain a ruling in relation to the objection to jurisdiction,[56] and save exceptions to such ruling.[57]

Arkansas.— Burriss *v.* Wise, 2 Ark. 33.

California.— Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Desmond *v.* San Francisco Super. Ct., 59 Cal. 274. *Contra*, Kent *v.* West, 50 Cal. 185; Lyman *v.* Milton, 44 Cal. 630; Gray *v.* Hawes, 8 Cal. 562; Deidesheimer *v.* Brown, 8 Cal. 339.

Colorado.— Ruby Chief Min., etc., Co. *v.* Gurley, 17 Colo. 199, 29 Pac. 668; Lord *v.* Hendrie, etc., Mfg. Co., 13 Colo. 393, 22 Pac. 782; Union Pac. R. Co. *v.* Moffatt, 12 Colo. 310, 20 Pac. 759; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Colorado Cent. R. Co. *v.* Caldwell, 11 Colo. 545, 19 Pac. 542; New York, etc., Min. Co. *v.* Gill, 7 Colo. 100, 2 Pac. 5.

Florida.— Stephens *v.* Bradley, 24 Fla. 201, 3 So. 415; Lente *v.* Clarke, 22 Fla. 515, 1 So. 149; Scarlett *v.* Hicks, 13 Fla. 314.

Idaho.— Morris *v.* Miller, (Ida. 1895) 40 Pac. 60.

Iowa.— Converse *v.* Warren, 4 Iowa 158.

Michigan.— Dailey *v.* Kennedy, 64 Mich. 208, 31 N. W. 125; Austin *v.* Burroughs, 62 Mich. 181, 28 N. W. 862; Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864; Manhard *v.* Schott, 37 Mich. 234.

Missouri.—Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362.

Nebraska.— Walker *v.* Turner, 27 Nebr. 103, 42 N. W. 918.

Oregon.— Sealy *v.* California Lumber Co., 19 Oreg. 94, 24 Pac. 197.

Wisconsin.— Coffee *v.* Chippewa Falls, 36 Wis. 121; Blackwood *v.* Jones, 27 Wis. 498; Lowe *v.* Stringham, 14 Wis. 222.

See 3 Cent. Dig. tit. "Appearance," § 143.

One limitation of this rule is recognized.— Where defendant has been arrested in a civil case, and his motion to quash proceedings under which he was arrested is overruled and he then pleads to the merits and goes to trial, he does not thereby waive the defects objected to (Dailey *v.* Kennedy, 64 Mich. 208, 31 N. W. 125); for that action is in no case voluntary which a party cannot decline to take, except at the peril of liberty (Warren *v.* Crane, 50 Mich. 300, 15 N. W. 465).

55. *Indiana.*— Hadley *v.* Gutridge, 58 Ind. 302; Secrest *v.* Arnett, 5 Blackf. (Ind.) 366.

Kansas.— Thompson *v.* Greer, 62 Kan. 522, 64 Pac. 48; St. Louis, etc., R. Co. *v.* Morse, 50 Kan. 99, 31 Pac. 676; Dickerson *v.* Burlington, etc., R. Co., 43 Kan. 702, 23 Pac. 936; Pennsylvania Mortg. Trust Co. *v.* Norris, 8 Kan. App. 699, 54 Pac. 283.

Louisiana.— State *v.* Dupre, 46 La. Ann. 117, 14 So. 907.

Massachusetts.— Walling *v.* Beers, 120 Mass. 548.

Montana.— Black *v.* Clendenin, 3 Mont. 44.

New York.— Baird *v.* Helfer, 12 N. Y. App. Div. 23, 42 N. Y. Suppl. 484; Horton *v.* Fancher, 14 Hun (N. Y.) 172; Lazzarone *v.* Oishei, 2 Misc. (N. Y.) 200, 21 N. Y. Suppl. 267, 49 N. Y. St. 520; Boynton *v.* Keeseville Electric Light, etc., Co., 28 N. Y. Suppl. 1117, 59 N. Y. St. 885 [*affirming* 5 Misc. (N. Y.) 118, 25 N. Y. Suppl. 741]; Hannaman *v.* Muckle, 15 N. Y. Suppl. 961, 20 N. Y. Civ. Proc. 296; Dewey *v.* Greene, 4 Den. (N. Y.) 93; Avery *v.* Slack, 17 Wend. (N. Y.) 85.

North Carolina.— Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

North Dakota.— Miner *v.* Francis, 3 N. D. 549, 58 N. W. 343.

Ohio.— Dunn *v.* Hazlett, 4 Ohio St. 435.

Oklahoma.— Jones *v.* Chicago Bldg., etc., Co., (Okla. 1901) 64 Pac. 7; Chicago Bldg., etc., Co. *v.* Pewthers, (Okla. 1901) 63 Pac. 964.

Oregon.— Kinkade *v.* Myers, 17 Oreg. 470, 21 Pac. 557.

Pennsylvania.— Coleman's Appeal, 75 Pa. St. 441; Ehrgood *v.* Orient Ins. Co., 1 Pa. Dist. 117.

South Dakota.— Benedict *v.* Johnson, 4 S. D. 387, 57 N. W. 66 [*explained* in Lower *v.* Wilson, 9 S. D. 252, 68 N. W. 545, 68 Am. St. Rep. 865].

Washington.—Woodbury *v.* Henningsen, 11 Wash. 12, 39 Pac. 243.

West Virginia.— Chapman *v.* Maitland, 22 W. Va. 329; Price *v.* Pinnell, 4 W. Va. 296.

United States.— Southern Pac. R. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237.

See 3 Cent. Dig. tit. "Appearance," § 143.

56. *Arizona.*— Hobson *v.* New Mexico, etc., R. Co., (Ariz. 1886) 11 Pac. 545.

Indiana.— Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670.

Minnesota.— Yale *v.* Edgerton, 11 Minn. 271.

Oklahoma.— Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

South Dakota.— Benedict *v.* Johnson, 4 S. D. 387, 57 N. W. 66.

United States.— German Ins. Co. *v.* Frederick, 58 Fed. 144, 19 U. S. App. 24, 7 C. C. A. 122.

See also 2 Cyc. 711.

57. Lawrence *v.* Bassett, 5 Allen (Mass.) 140; Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106; Jones *v.* Chicago Bldg., etc., Co., (Okla. 1901) 64 Pac. 7; Benedict *v.* Johnson, 4 S. D. 387, 57 N. W. 66. See also State *v.* Dupre, 46 La. Ann. 117, 14 So. 907; 2 Cyc. 714, 718.

Filing answer reserving objection.—Where the court has improperly overruled the objection to jurisdiction over defendant, and

B. When Special — 1. Generally — a. With Respect to Jurisdiction. Where the appearance is made for the purpose of objecting to the jurisdiction because of the absence of,[58] or defects in,[59] the process, or for defects in the service [60] or return thereof,[61] such special appearance does not, as a rule,[62] give the

he files answer expressly reserving the question, he need not thereafter, at every step, question that power of the court over him to save his right to make the objection on appeal. Lillard *v.* Brannin, 91 Ky. 511, 13 Ky. L. Rep. 349, 16 S. W. 349.

58. *Arkansas.*— Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420.

Illinois.— Klemm *v.* Dewes, 28 Ill. 317.

Ohio.— Smith *v.* Hoover, 39 Ohio St. 249.

South Carolina.— Whetstone *v.* Livingston, 54 S. C. 539, 32 S. E. 561.

Texas.— De Witt *v.* Monroe, 20 Tex. 289.

United States.— Dorr *v.* Gibboney, 3 Hughes (U. S.) 382, 7 Fed. Cas. No. 4,006.

59. *Arkansas.*— Reeder *v.* Murray, 3 Ark. 450.

California.— Eldridge *v.* Kay, 45 Cal. 49; Gray *v.* Hawes, 8 Cal. 562.

Colorado.— Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512.

Florida.— Tidwell *v.* Witherspoon, 18 Fla. 282.

Illinois.— Schoonhoven *v.* Gott, 20 Ill. 46, 71 Am. Dec. 247.

Indiana.— Houk *v.* Barthold, 73 Ind. 21; Briggs *v.* Sneghan, 45 Ind. 14; New Albany, etc., R. Co. *v.* Combs, 13 Ind. 490.

Iowa.— Boals *v.* Shules, 29 Iowa 507; Milbourn *v.* Fonts, 4 Greene (Iowa) 346; Hodges *v.* Brett, 4 Greene (Iowa) 345.

Maine.— State Bank *v.* Hervey, 21 Me. 38.

New York.— Voorhies *v.* Scofield, 7 How. Pr. (N. Y.) 51; Cunningham *v.* Goelet, 4 Den. (N. Y.) 71.

Texas.— De Witt *v.* Monroe, 20 Tex. 289.

United States.— Brown *v.* Pond, 5 Fed. 31.

60. *Alabama.*— Lampley *v.* Beavers, 25 Ala. 534.

California.— Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245.

Kansas.— Simcock *v.* Emporia First Nat. Bank, 14 Kan. 529.

Kentucky.— Chesapeake, etc., R. Co. *v.* Heath, 87 Ky. 651, 10 Ky. L. Rep. 646, 9 S. W. 832.

Massachusetts.— Ames *v.* Winsor, 19 Pick. (Mass.) 247.

Minnesota.— Houlton *v.* Gallow, 55 Minn. 443, 57 N. W. 141; Chubbuck *v.* Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864.

New Jersey.— Cobb *v.* Decker, 4 N. J. L. 138.

New York.— Henderson *v.* Stone, 2 Sweeny (N. Y.) 468, 40 How. Pr. (N. Y.) 333; Brett *v.* Brown, 13 Abb. Pr. N. S. (N. Y.) 295.

Wisconsin.— Kingsley *v.* Great Northern R. Co., 91 Wis. 380, 64 N. W. 1036; Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220; Allen *v.* Lee, 6 Wis. 478.

United States.— De Castro *v.* Compagnie Francaise du Telegraphe, 76 Fed. 425; Whittle *v.* Artis, 55 Fed. 919.

61. Ferguson *v.* Ross, 5 Ark. 517; Malcolm *v.* Rogers, 1 Cow. (N. Y.) 1.

62. In Iowa, by statute [Iowa Code, § 3541, subsec. 3], the appearance of a defendant, although special, gives to the court jurisdiction of his person. Teller *v.* Equitable Mut. L. Assoc., 108 Iowa 17, 78 N. W. 674; Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761; Marquardt *v.* Thompson, 78 Iowa 158, 42 N. W. 634; Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95; McFarland *v.* Lowry, 40 Iowa 467; Rahn *v.* Greer, 37 Iowa 627; Wilsey *v.* Maynard, 21 Iowa 107; Des Moines Branch Bank *v.* Van, 12 Iowa 523. For decisions to the contrary before the enactment of this statute see Weil *v.* Lowenthal, 10 Iowa 575; Converse *v.* Warren, 4 Iowa 158; Milbourn *v.* Fonts, 4 Greene (Iowa) 346; Hodges *v.* Brett, 4 Greene (Iowa) 345.

In Kentucky, by a recent enactment which has been held constitutional, special entry of appearance, by a defendant corporation, to object to the jurisdiction on the ground of insufficiency of the sheriff's return, is an appearance for all purposes. Maysville, etc., R. Co. *v.* Ball, 21 Ky. L. Rep. 1693, 56 S. W. 188.

In Texas, by a statute [Tex. Rev. Stat. art. 1243], which has been held to be not unconstitutional as being within the prohibition of the fourteenth amendment (York *v.* Texas, 137 U. S. 15, 11 S. Ct. 9, 34 L. ed. 604), a special appearance of defendant, to object to citation or service thereof, has the effect of a general appearance to the succeeding term of the court, so as to confer jurisdiction over the person of defendant (Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300; Ætna L. Ins. Co. *v.* Hanna, 81 Tex. 487, 17 S. W. 35; Kauffman *v.* Wooters, 79 Tex. 205, 13 S. W. 549; St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126, 13 S. W. 853; Sam *v.* Hochstadler, 76 Tex. 162, 13 S. W. 535; Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417; Rabb *v.* Rogers, 67 Tex. 335, 3 S. W. 303; Jones *v.* Keith, (Tex. Civ. App. 1893) 22 S. W. 773; Kauffman *v.* Wooters, 138 U. S. 285, 11 S. Ct. 298, 34 L. ed. 962; York *v.* Texas, 137 U. S. 15, 11 S. Ct. 9, 34 L. ed. 604 [*affirming* York *v.* State, 73 Tex. 651, 11 S. W. 869]), whether the motion is sustained or overruled (Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457). Before the enactment of this statute an appearance for the sole purpose of challenging the court's jurisdiction of the person of defendant did not operate to submit the party to the jurisdiction obtained (Robinson *v.* Schmidt, 48 Tex. 13; Hagood *v.* Dial, 43 Tex. 625; De Witt *v.* Monroe, 20 Tex. 289; Raquet *v.* Nixon, Dall. (Tex.) 386); and the statute applies only to actions brought in the state courts, and is not binding on the federal court sitting in that state (Galveston, etc., R. Co. *v.* Gonzales, 151 U. S. 496, 14 S. Ct. 401,

court jurisdiction of the person,[63] nor waive objections to the jurisdiction of the person on other grounds not mentioned.[64] The general rule applies even though the objections were made for the first time on motion to set aside a judgment rendered by default,[65] or on motion in arrest of such judgment.[66]

b. On Default Judgment. Where a judgment by default is rendered which is void for want of jurisdiction of the person of defendant, his appearance to set it aside, on the sole ground of want of jurisdiction, does not validate such void judgment.[67]

c. On Right to Decision on Merits. A special appearance necessarily precludes the party entering it from obtaining any decision on the merits of the controversy.[68]

2. After General Appearance. Where defendant has entered a general appearance it has been held that he cannot thereafter make a special appearance, no matter by what act the general appearance may have been made,[69] and this

38 L. ed. 248; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699).

63. *Colorado.*— Crary *v.* Barber, 1 Colo. 172.

Florida.— Standley *v.* Arnow, 13 Fla. 361.

Illinois.— McNab *v.* Bennett, 66 Ill. 157; Johnson *v.* Buell, 26 Ill. 66.

Indiana.— Slanter *v.* Hollowell, 90 Ind. 286; New Albany, etc., R. Co. *v.* Combs, 13 Ind. 490; Carson *v.* The Steam Boat Talma, 3 Ind. 194.

Iowa.— Jones, etc., Lumber Co. *v.* Boggs, 63 Iowa 589, 19 N. W. 678; Weil *v.* Lowenthal, 10 Iowa 575.

Kansas.— Thompson *v.* Greer, 62 Kan. 522, 64 Pac. 48; Green *v.* Green, 42 Kan. 654, 22 Pac. 730, 16 Am. St. Rep. 510; Simcock *v.* Emporia First Nat. Bank, 14 Kan. 529; Branner *v.* Chapman, 11 Kan. 118.

Kentucky.— Barbour *v.* Newkirk, 83 Ky. 529; Maude *v.* Rodes, 4 Dana (Ky.) 144.

Louisiana.— Jacobs *v.* Sartorius, 3 La. Ann. 9.

Maine.— State Bank *v.* Hervey, 21 Me. 38.

Massachusetts.—Brown *v.* Webber, 6 Cush. (Mass.) 560; Nye *v.* Liscombe, 21 Pick. (Mass.) 263; Ames *v.* Winsor, 19 Pick. (Mass.) 247; Gardner *v.* Barker, 12 Mass. 36; Blake *v.* Jones, 7 Mass. 28.

Minnesota.— Houlton *v.* Gallow, 55 Minn. 443, 57 N. W. 141.

Montana.— Murphy *v.* Ames, 1 Mont. 276.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Schneider, 36 Nebr. 206, 54 N. W. 257; Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14.

New Hampshire.— Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

New York.— Von Hesse *v.* Mackaye, 55 Hun (N. Y.) 365, 8 N. Y. Suppl. 894, 29 N. Y. St. 234; Sullivan *v.* Frazee, 4 Rob. (N. Y.) 616; Hankinson *v.* Page, 19 Abb. N. Cas. (N. Y.) 274; Avery *v.* Slack, 17 Wend. (N. Y.) 85; Malcolm *v.* Rogers, 1 Cow. (N. Y.) 1.

North Dakota.— Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714.

Ohio.— Handy *v.* Insurance Co., 37 Ohio St. 366; Howard *v.* Levering, 8 Ohio Cir. Ct. 614.

Oregon.—Belknap *v.* Charlton, 25 Oreg. 41, 34 Pac. 758; Kinkade *v.* Myers, 17 Oreg. 470, 21 Pac. 557.

Pennsylvania.—Ehrgood *v.* Orient Ins. Co., 11 Pa. Co. Ct. 665.

Vermont.— Society For Propagating Gospel *v.* Ballard, 4 Vt. 119.

Virginia.— Wynn *v.* Wyatt, 11 Leigh (Va.) 612.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441.

United States.—Goldey *v.* New Haven Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Southern Pac. R. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; *Ex p.* Shaw, 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237; Reinstadler *v.* Reeves, 33 Fed. 308; Hankinson *v.* Page, 24 Blatchf. (U. S.) 422, 31 Fed. 184; Van Antwerp *v.* Hulburd, 7 Blatchf. (U. S.) 426, 28 Fed. Cas. No. 16,826.

England.— Anonymous, 3 Atk. 567.

See 3 Cent. Dig. tit. "Appearance," § 142.

64. Finch *v.* Galligher, 71 Ill. App. 75; Cobb *v.* Decker, 4 N. J. L. 138; Deming Invest. Co. *v.* Ely, 21 Wash. 102, 57 Pac. 353; Ellsworth Trust Co. *v.* Parramore, 108 Fed. 906; American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276; Fairbank *v.* Cincinnati, etc., R. Co., 54 Fed. 420, 9 U. S. App. 212, 4 C. C. A. 403, 38 L. R. A. 271.

65. Gray *v.* Hawes, 8 Cal. 562; Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Briggs *v.* Sneghan, 45 Ind. 14; Boals *v.* Shules, 29 Iowa 507.

66. Higgins *v.* Beckwith, 102 Mo. 456, 14 S. W. 931.

67. Gray *v.* Hawes, 8 Cal. 562; Boals *v.* Shules, 29 Iowa 507; Newton First Nat. Bank *v.* Wm. B. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56; Green *v.* Green, 42 Kan. 654, 22 Pac. 730, 16 Am. St. Rep. 510; Shaw *v.* Rowland, 32 Kan. 154, 4 Pac. 146; Cohen *v.* Trowbridge, 6 Kan. 385.

68. Bankers L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 80 N. W. 484.

69. *Florida.*— Parkhurst *v.* Stone, 36 Fla. 456, 18 So. 594.

Georgia.— Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010.

appears to be true even though the step constituting a general appearance was unsuccessful.[70]

VI. WITHDRAWAL OF APPEARANCE.

A. In General. Whether or not an appearance shall be withdrawn is within the discretion of the court,[71] which should, in all cases, except for good cause shown, refuse to allow a withdrawal.[72] As a general rule, a withdrawal should be allowed when the appearance was unauthorized[73] or in case it was procured by

Illinois.— Roberts *v.* Thomson, 28 Ill. 79; Kingman *v.* Decker, 43 Ill. App. 303.

Indiana.— Sargent *v.* Flaid, 90 Ind. 501; Slauter *v.* Hollowell, 90 Ind. 286.

Kansas.— Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403.

Kentucky.— Baker *v.* Louisville, etc., R. Co., 4 Bush (Ky.) 619; Rives *v.* Rives, 4 J. J. Marsh. (Ky.) 533.

Michigan.— Lane *v.* Leech, 44 Mich. 163, 6 N. W. 228.

Missouri.— Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123; Peters *v.* St. Louis, etc., R. Co., 59 Mo. 406.

New York.— Carpentier *v.* Minturn, 65 Barb. (N. Y.) 293; Mack *v.* American Express Co., 20 Misc. (N. Y.) 215, 45 N. Y. Suppl. 362; Woodruff *v.* Austin, 16 Misc. (N. Y.) 543, 38 N. Y. Suppl. 787, 74 N. Y. St. 138; Reed *v.* Chilson, 16 N. Y. Suppl. 744, 40 N. Y. St. 960; Palmer *v.* Phœnix Mut. L. Ins. Co., 10 N. Y. Wkly. Dig. 179.

Rhode Island.— Cooke *v.* Second Universalist Soc., 7 R. I. 17.

Utah.— Keyser *v.* Pollock, 20 Utah 371, 59 Pac. 87.

West Virginia.— State *v.* Thacker Coal, etc., Co., (W. Va. 1901) 38 S. E. 539.

United States.— Briggs *v.* Stroud, 58 Fed. 717; Fife *v.* Bohlen, 22 Fed. 878.

70. Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010.

71. Young *v.* Dickey, 63 Ind. 31; New Albany, etc., R. Co. *v.* Combs, 13 Ind. 490; Butler *v.* Butler, 162 Mass. 524, 39 N. E. 182 (holding that no exception lies to this discretion); Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468. See also Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

72. McArthur *v.* Leffler, 110 Ind. 526, 10 N. E. 81; Brower *v.* Kahn, 76 Hun (N. Y.) 68, 27 N. Y. Suppl. 592, 59 N. Y. St. 629. See also Williams *v.* Huling, 43 Tex. 113.

Failure to take certificate as attorney.— The application will be denied where the sole ground is that the solicitor entering the appearance had not at the time taken out his certificate for the year, if he was then, and still continued, duly entered on the roll. Sparling *v.* Brereton, 14 Wkly. Rep. 515.

Laches.— The application will, in general, be denied for laches in making it (Young *v.* Citizens' Bank, 31 Md. 66; Vilas *v.* Butler, 9 N. Y. Suppl. 82, 29 N. Y. St. 664; Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037; Kerr *v.* Malpus, 2 Ont. Pr. 135), especially where the granting thereof will operate to the injury of plaintiff (Talladega Ins. Co. *v.* Landers, 43 Ala. 115).

On application of attorney alone.— It has been held that an attorney or solicitor will not be permitted to withdraw appearance on his own application alone, defendant himself not disavowing the right to appear. Mallet *v.* Girard, 3 Edw. (N. Y.) 372; Sambroke *v.* Hayes, 4 L. J. Ch. 175. *Compare* Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300, in which it was said that, where an attorney of record applies for permission to have his appearance struck out, the presumption is that he does it by the authority of his client, and at the latter's request.

Presumption as to sufficiency of grounds.— Where permission has been granted to withdraw an appearance, it will be presumed, on appeal, that sufficient grounds were shown. Symmes *v.* Major, 21 Ind. 443.

73. *Alabama.*—Foreman *v.* Lay, 6 Ala. 784.

California.— Forbes *v.* Hyde, 31 Cal. 342.

Colorado.— Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185.

District of Columbia.— Woods *v.* Dickinson, 7 Mackey (D. C.) 301.

Illinois.— Douglas *v.* Hoffman, 72 Ill. App. 110.

Kentucky.— Bell *v.* Ursury, 4 Litt. (Ky.) 334.

Massachusetts.—Tilden *v.* Johnson, 6 Cush. (Mass.) 354.

Missouri.— Prior *v.* Kiso, 96 Mo. 303, 9 S. W. 898.

New Hampshire.— Bodge *v.* Butler, 57 N. H. 204.

New York.— Norlinger *v.* De Mier, 54 Hun (N. Y.) 276, 7 N. Y. Suppl. 463, 27 N. Y. St. 16, 18 N. Y. Civ. Proc. 47; Hunt *v.* Brennan, 1 Hun (N. Y.) 213; Dillingham *v.* Barron, 6 Misc. (N. Y.) 600, 26 N. Y. Suppl. 1109, 57 N. Y. St. 870; Holy Trinity Church *v.* St. Stephen's Church, 15 N. Y. Suppl. 117, 38 N. Y. St. 120.

Pennsylvania.— Jones *v.* Orum, 5 Rawle (Pa.) 249.

South Carolina.— Haslet *v.* Street, 2 McCord (S. C.) 310, 13 Am. Dec. 724.

England.— Buckle *v.* Roach, 1 Chit. 193, 18 E. C. L. 115; Gray *v.* Coles, 65 L. T. Rep. N. S. 743.

See 3 Cent. Dig. tit. "Appearance," § 162.

Imposing conditions.— If defendant has lost no rights by the mere unauthorized appearance of an attorney, conditions may be imposed on granting leave to him to withdraw the notice of appearance. Gall *v.* Funkenstein, 10 N. Y. St. 331.

Application by only one defendant.—A joint and several answer, filed for two persons by a solicitor having authority from one only, will not be ordered to be taken off the file

fraud,[74] and a non-resident defendant should be permitted to withdraw his appearance where plaintiff is permitted to amend so as to state an entirely new cause of action.[75]

B. Application For, and Leave to, Withdraw. To authorize the withdrawal of an appearance, special application must be made,[76] and leave of court obtained.[77]

C. Effect of Withdrawal — 1. By Attorney. The withdrawal of an appearance by counsel, for himself, does not amount to a withdrawal of appearance for defendant,[78] nor does it withdraw any pleading which the attorney had filed in defendant's behalf.[79]

2. By Defendant. The withdrawal of an appearance by defendant leaves the case as if there had been no appearance,[80] and, if made after demurring[81] or

on the application of one party, in the absence of the other. Wiggins *v.* Peppin, 2 Beav. 403, 3 Jur. 721, 17 Eng. Ch. 403.

74. Dana *v.* Adams, 13 Ill. 691; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132.

75. Indigo Co. *v.* Ogilvy, [1891] 2 Ch. 31, 64 L. T. Rep. N. S. 846, 39 Wkly. Rep. 646.

76. *District of Columbia.*—Woods *v.* Dickinson, 7 Mackey (D. C.) 301.

Illinois.— Dana *v.* Adams, 13 Ill. 691.

Massachusetts.— See Tilden *v.* Johnson, 6 Cush. (Mass.) 354.

New York.— Abeel *v.* Conhyser, 42 How. Pr. (N. Y.) 252.

Pennsylvania.— Wright *v.* Galloway, 8 Wkly. Notes Cas. (Pa.) 163.

Entitling of affidavit.— An affidavit to set aside an appearance, entitled in the matter of the attorney, in a cause between "A B and C D, plaintiffs, and John G., sued by the name of Henry G., defendants," is properly entitled. Belcher *v.* Goodered, 4 C. B. 472, 56 E. C. L. 472.

77. Dana *v.* Adams, 13 Ill. 691; Symmes *v.* Major, 21 Ind. 443; Galt *v.* Provident Sav. Bank, 18 Abb. N. Cas. (N. Y.) 431 (holding that a notice, withdrawing a prior general appearance, and service of a qualified appearance for the purpose of objecting to the jurisdiction of the court, is altogether ineffectual); *In re* Ulrich, 3 Ben. (U. S.) 355, 24 Fed. Cas. No. 14,327.

The withdrawal of a plea to the merits does not operate as a withdrawal of the appearance (Grigg *v.* Gilmer, 54 Ala. 425; Kennedy *v.* Young, 25 Ala. 563; Dart *v.* Hercules, 34 Ill. 395; Whitehead *v.* Fost, 2 Ohio Dec. (Reprint) 468; Eldred *v.* Michigan Ins. Bank, 17 Wall. (U. S.) 545, 21 L. ed. 685); and defendant is still in court so as to be bound personally by a judgment rendered against him in the cause, and plaintiff is not required to take any further steps to bring him again within the jurisdiction of the court (Eldred *v.* Michigan Ins. Bank, 17 Wall. (U. S.) 545, 21 L. ed. 685).

The withdrawal of a demurrer does not withdraw appearance. Stevens *v.* Harris, 99 Mich. 230, 58 N. W. 230.

Failure to withdraw when leave obtained. — Where a defendant waives defects by appearing in a cause and moving to rule plaintiff to file a more specific bill of particulars, and demurring to the declaration, the subsequent granting of leave to withdraw the appearance, which is not done, will not abrogate the waiver. Bills *v.* Stanton, 69 Ill. 51.

78. Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Mason *v.* Abbott, 83 Ill. 445; Wilson *v.* Hilliard, (Pa. 1886) 5 Atl. 258; Creighton *v.* Kerr, 20 Wall. (U. S.) 8, 22 L. ed. 309. See also Harrison *v.* Holley, 46 Ala. 84; Ethridge *v.* Fuller, 6 Ala. 58.

79. Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Mason *v.* Abbott, 83 Ill. 445, in which latter case it was held that, though the attorney had withdrawn his appearance, the defendant could not be regarded as in default, nor a judgment be rendered against him except upon a trial.

80. Wilson *v.* Blakeslee, 16 Oreg. 43, 16 Pac. 872; Dubois *v.* Glaub, 52 Pa. St. 238; Michew *v.* McCoy, 3 Watts & S. (Pa.) 501; Graham *v.* Spencer, 14 Fed. 603.

Withdrawal without prejudice to plaintiff. — Where the withdrawal of an appearance is allowed on the condition that it should be without prejudice to the position of the plaintiff, this leaves plaintiff at liberty to enter a personal judgment against defendant, as upon default after appearance. Creighton *v.* Kerr, 20 Wall. (U. S.) 8, 22 L. ed. 309 [*affirming* 1 Colo. 509]. See also White *v.* Ewing, 69 Fed. 451, 37 U. S. App. 365, 16 C. C. A. 296.

Withdrawal after pleading to merits and agreeing to judgment.—Where a defendant withdraws, after pleading to the merits and agreeing to a judgment, his withdrawal is without effect, and merely means that he does not wish to incur further costs. Habich *v.* Folger, 20 Wall. (U. S.) 1, 22 L. ed. 307.

Withdrawal of part of defendants.— If an attorney, who appears for a part only of several defendants, afterward inadvertently files an answer for all, and, when he discovers his mistake, obtains an order allowing him to withdraw his answer and substitute a new one limited to the defendants for whom he intended to answer, the court will acquire jurisdiction only of those defendants for whom he finally appears. Forbes *v.* Hyde, 31 Cal. 342.

81. Gunel *v.* Cue, 72 Ind. 34.

Withdrawal of appearance after overruling of demurrer.— The fact that a demurrer by

pleading,[82] he thereby withdraws his demurrer, plea, or answer, and judgment by default may be entered against defendant, if he takes no further steps, and provided he has been served with process,[83] without notice of application for such judgment to defendant.[84]

D. Remedy For Wrongful Allowance of Withdrawal. Where, over plaintiff's objections, the court wrongfully permits defendant to withdraw and disclaim the defense, his remedy is by appeal from the judgment rendered in the cause.[85]

VII. UNAUTHORIZED APPEARANCE.

A. Presumption as to Authority. An attorney who has entered an appearance is always presumed to have authority to do so until the contrary is shown.[86]

B. Rights of Defendant Arising Out of Unauthorized Appearance in His Behalf — 1. In General. In England it was first laid down that, when an attorney takes it upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action

defendant to the complaint is overruled, and that he then withdraws his appearance and makes default without reserving any exception to the decision upon the demurrer, will not estop him from questioning the sufficiency of the complaint in the supreme court, where the case stands as if no demurrer had been filed. Terrell *v.* State, 66 Ind. 570.

82. Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334; Dana *v.* Adams, 13 Ill. 691; McArthur *v.* Leffler, 110 Ind. 526, 10 N. E. 81; Dunkle *v.* Elston, 71 Ind. 585; Young *v.* Dickey, 63 Ind. 31; Sloan *v.* Wittbank, 12 Ind. 444; Carver *v.* Williams, 10 Ind. 267; Coffin *v.* Evansville, etc., R. Co., 7 Ind. 413; Ellison *v.* Cain, 2 Ind. 236; Michew *v.* McCoy, 3 Watts & S. (Pa.) 501.

83. Baker *v.* Ludlam, 118 Ind. 87, 20 N. E. 648; McArthur *v.* Leffler, 110 Ind. 526, 10 N. E. 81; Dunkle *v.* Elston, 71 Ind. 585; Young *v.* Dickey, 63 Ind. 31; Smith *v.* Foster, 59 Ind. 595; Coffin *v.* Evansville, etc., R. Co., 7 Ind. 413; Dubois *v.* Glaub, 52 Pa. St. 238. See also Good *v.* Martin, 1 Colo. 406; Jones *v.* Stevens, 1 Colo. 67.

Where there was not due service of process, it is erroneous to render a judgment against defendant on default. Forbes *v.* Hyde, 31 Cal. 342; McArthur *v.* Leffler, 110 Ind. 526, 10 N. E. 81; Young *v.* Dickey, 63 Ind. 31; Lodge *v.* State Bank, 6 Blackf. (Ind.) 557; Michew *v.* McCoy, 3 Watts & S. (Pa.) 501. But, where plaintiff withdrew appearance after the filing of a cross-complaint, a default judgment against him on the cross-complaint was not void, on the ground that he had not been summoned, since no summons is necessary on the cross-complaint, and the dismissal of the complaint and withdrawal of plaintiff's appearance does not carry the cross-complaint with it. Judd *v.* Gray, 156 Ind. 278, 59 N. E. 849.

Presumption as to service of process.— Where, after withdrawal of an appearance, judgment by default is rendered against defendant and the judgment is collaterally attacked in another action, it will be presumed, in support of the assumption, that defendant was duly served with process. Abdil *v.* Abdil, 33 Ind. 460.

84. Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037. See also Wilson *v.* Blakeslee, 16 Oreg. 43, 16 Pac. 872, in which it was held that a statute providing that notice of motion and other proceedings need not be served on a defendant who has not appeared, applies to a defendant who has entered his appearance and afterward withdraws the same, as to all proceedings subsequent to such withdrawal.

85. Cunningham *v.* Spillman, 72 Ind. 62.

86. *California.*— Garrison *v.* McGowan, 48 Cal. 592; Hayes *v.* Shattuck, 21 Cal. 51.

Colorado.—Williams *v.* Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806; Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Georgia.— Dobbins *v.* Dupree, 39 Ga. 394.

Illinois.— Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Lawrence *v.* Jarvis, 32 Ill. 304; Thompson *v.* Emmert, 15 Ill. 415; Whittaker *v.* Murray, 15 Ill. 293.

Kentucky.— Handley *v.* Statelor, Litt. Sel. Cas. (Ky.) 186.

Louisiana.— Bender *v.* McDowell, 46 La. Ann. 393, 15 So. 21.

Massachusetts.—Lewis *v.* Sumner, 13 Metc. (Mass.) 269.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Kepley *v.* Irwin, 14 Nebr. 300, 15 N. W. 719.

New Hampshire.— Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144; Manchester Bank *v.* Fellows, 28 N. H. 302.

New Jersey.— Price *v.* Ward, 25 N. J. L. 225; New York Mut. L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184.

New York.— Brown *v.* Nichols, 42 N. Y. 26, 9 Abb. Pr. N. S. (N. Y.) 1.

North Carolina.— England *v.* Garner, 90 N. C. 197.

Ohio.— Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427.

United States.— Hill *v.* Mendenhall, 21 Wall. (U. S.) 453, 22 L. ed. 616; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Bonnifield *v.* Thorp, 71 Fed. 924.

England.— Lloyd *v.* Rossmore, Ir. R. 9 Eq. 488.

against him;[87] but this rule was soon modified to the extent of holding that, if the attorney was insolvent, the judgment might be set aside;[88] and that it had no application where defendant was in custody by reason of an unauthorized act of an attorney, or where plaintiff or his attorney was a party to the wrong.[89] The present rule, which is, substantially, the law in Canada,[90] seems to be that, if process has been served and plaintiff be innocent of any fraud or collusion and the attorney is solvent, the party for whom the attorney appeared is confined to his remedy against the latter,[91] but that, if no process has been served and judgment is rendered on an unauthorized appearance, the judgment should be set aside.[92] In the United States some cases have followed the first English decision upon the subject,[93] while others have held that redress must be sought from the attorney, unless he is insolvent and unable to respond in damages, or unless there is fraud or collusion between him and plaintiff[94] — at least, where defendant has been served with process.[95] There are many other decisions, however, which either expressly or by necessary implication lay down the doctrine, without qualification, that a defendant against whom a judgment has been rendered on an unauthorized appearance may be relieved against it.[96]

See also Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081.

87. Anonymous, 1 Salk. 86.

88. Anonymous, 1 Salk. 88. See also Stanhope *v.* Firmin, 3 Bing. N. Cas. 301, 32 E. C. L. 145, holding that it must appear that the attorney was insolvent.

89. Hambidge *v.* De la Crouée, 3 C. B. 742, 54 E. C. L. 742.

90. Roissier *v.* Westbrook, 24 U. C. C. P. 91. See also Warely *v.* Poapst, 7 Can. L. J. 294: Clark *v.* Galbraith, 24 U. C. Q. B. 25.

Effect of collusion between plaintiffs and defendants.—Where it appears that suit is brought by collusion between plaintiffs and defendants to enable defendant to cheat his creditors, the judge will not interfere summarily to remove an unauthorized appearance, and thus assist the parties in the perpetration of a fraud. Warely *v.* Poapst, 7 Can. L. J. 294.

91. The reason assigned being, that plaintiff is without blame and defendant guilty of negligence for not appearing and making defense by his own attorney, if he has any defense. Bailey *v.* Buckland, 1 Exch. 1, 16 L. J. Exch. 204.

92. Bailey *v.* Buckland, 1 Exch. 1, 16 L. J. Exch. 204.

93. Smith *v.* Bowditch, 7 Pick. (Mass.) 137; Jackson *v.* Smith, 6 Johns. (N. Y.) 34.

94. *California.*—Carpentier *v.* Oakland, 30 Cal. 439; Holmes *v.* Rogers, 13 Cal. 191; Suydam *v.* Pitcher, 4 Cal. 280.

Maryland.— Munnikuyson *v.* Dorsett, 2 Harr. & G. (Md.) 374.

Mississippi.— Schirling *v.* Scites, 41 Miss. 644.

New Hampshire.—Everett *v.* Warner Bank, 58 N. H. 340; Smyth *v.* Balch, 40 N. H. 363; Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144.

New York.— Powers *v.* Trenor, 3 Hun (N. Y.) 3; Bogardus *v.* Livingston, 7 Abb. Pr. (N. Y.) 428; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Hoffmire *v.* Hoffmire, 3 Edw. (N. Y.) 173.

See also Rust *v.* Frothingham, 1 Ill. 331.

95. Blodget *v.* Conklin, 9 How. Pr. (N. Y.) 442; Governor *v.* Lassiter, 83 N. C. 38.

Where defendant has not been served with process, he will be entitled to be relieved from the judgment, irrespective of the attorney's solvency or insolvency.

California.— Baker *v.* O'Riordan, 65 Cal. 368, 4 Pac. 232.

Colorado.— Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Dakota.— Williams *v.* Neth, 4 Dak. 360, 31 N. W. 630.

Iowa.— Macomber *v.* Peck, 39 Iowa 351.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911.

Nebraska.— Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489; Kepley *v.* Irwin, 14 Nebr. 300, 15 N. W. 719.

New Jersey.— McKelway *v.* Jones, 17 N. J. L. 345.

Ohio.— Cox *v.* Hill, 3 Ohio 411, 412.

Pennsylvania.— Compher *v.* Anawalt, 2 Watts (Pa.) 490; Coxe *v.* Nicholls, 2 Yeates (Pa.) 546; Lawrence *v.* Rutherford, 1 Pearson (Pa.) 555, which last case assigns as a reason that defendant is wholly free from blame that plaintiff accepts the unauthorized appearance at his peril and is, consequently, first in fault.

96. *Arkansas.*—Sneed *v.* Town, 9 Ark. 535.

District of Columbia.— Woods *v.* Dickinson, 7 Mackey (D. C.) 301.

Georgia.— Dobbins *v.* Dupree, 39 Ga. 394.

Illinois.— Anderson *v.* Hawhe, 115 Ill. 33, 3 N. E. 566; Lyon *v.* Boilvin, 7 Ill. 629.

Iowa.— Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445; Powell *v.* Spaulding, 3 Greene (Iowa) 443; De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491.

Kansas.— Newton First Nat. Bank *v.* Wm. B. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56; Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

Kentucky.— Handley *v.* Statelor, Litt. Sel. Cas. (Ky.) 186.

2. Form of Remedy — a. In Case of Domestic Judgment — (1) *Generally.* While it has been held that a domestic judgment, entered on an unauthorized appearance, may be collaterally attacked,[97] the weight of authority is to the effect that a direct attack on the judgment is necessary,[98] the decisions being practically unanimous that a motion in the original action to open or vacate the judgment is a proper method of obtaining relief,[99] and some cases holding that

Louisiana.—Decuir *v.* Lejeune, 15 La. Ann. 569; Ridge *v.* Alter, 14 La. Ann. 866; Marvel *v.* Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Legere *v.* Richard, 10 La. Ann. 669.

Maine.— McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856.

Michigan.— Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

Minnesota.— Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116; New York Mut. L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184.

Ohio.— Abernathy *v.* Latimore, 19 Ohio 286; Critchfield *v.* Porter, 3 Ohio 518.

Tennessee.— Boro *v.* Harris, 13 Lea (Tenn.) 36; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371.

Virginia.— Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933.

See 3 Cent. Dig. tit. "Appearance," § 68.

Many reasons may be adduced against the earlier rules making the solvency or insolvency of the attorney an important element in determining whether or not defendant was entitled to be relieved against the judgment. Probably the strongest reason is that the rule is in derogation of the doctrine that a man does nothing when he acts neither in person nor by agent, or attorney duly authorized. Allen *v.* Stone, 10 Barb. (N. Y.) 547; Bean *v.* Mather, 1 Daly (N. Y.) 440. It obliges a person to be bound by the unauthorized act of a mere stranger. Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520. It relieves the other party of a duty which in reason belongs to him — namely, to serve his process and to see, at his peril, that his adversary is in court, and it carries out its unsoundness by calling the wrong party to look to the attorney. Dillon, J., in Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520. If the judgment be set aside, plaintiff has his remedy against defendant as before, and suffers only the delay and possible loss of interest. Bailey *v.* Buckland, 1 Exch. 1, 16 L. J. Exch. 204.

97. Anderson *v.* Hawhe, 115 Ill. 33, 3 N. E. 566; Chicago, etc., R. Co. *v.* Hitchcock County, 60 Nebr. 722, 84 N. W. 97; Hess *v.* Cole, 23 N. J. L. 116; Hatch *v.* Ferguson, 57 Fed. 966, defendant in this last case being a minor.

98. *California.*—Carpentier *v.* Oakland, 30 Cal. 439.

Massachusetts.— Young *v.* Watson, 155 Mass. 77, 28 N. E. 1135.

Michigan.— Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

New York.— Washbon *v.* Cope, 144 N. Y. 287, 39 N. E. 388, 63 N. Y. St. 716; Donohue *v.* Hungerford, 1 N. Y. App. Div. 528, 37 N. Y. Suppl. 628, 73 N. Y. St. 78; Ferguson *v.* Crawford, 7 Hun (N. Y.) 25; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

North Carolina.—Doyle *v.* Brown, 72 N. C. 393.

Ohio.— Callen *v.* Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

Pennsylvania.—Cyphert *v.* McClune, 22 Pa. St. 195.

Vermont.— Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; Spaulding *v.* Swift, 18 Vt. 214.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692.

United States.— Bonnifield *v.* Thorp, 71 Fed. 924.

99. *Colorado.*— Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Dakota.— Williams *v.* Neth, 4 Dak. 360, 31 N. W. 630.

District of Columbia.— Woods *v.* Dickinson, 7 Mackey (D. C.) 301.

Georgia.— Dobbins *v.* Dupree, 39 Ga. 394.

Illinois.— Lyon *v.* Boilvin, 7 Ill. 629.

Kansas.— Newton First Nat. Bank *v.* Wm. B. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56; Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

Michigan.— Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

Minnesota.— Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911.

Nebraska.— Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489; Kepley *v.* Irwin, 14 Nebr. 300, 15 N. W. 719.

New Jersey.— McKelway *v.* Jones, 17 N. J. L. 345; New York Mut. L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184.

New York.— Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 34 N. Y. St. 67, 20 Am. St. Rep. 771, 9 L. R. A. 844; New York *v.* Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Suppl. 666, 48 N. Y. St. 586; Gall *v.* Funkenstein, 10 N. Y. St. 331.

North Carolina.— Weaver *v.* Jones, 82 N. C. 440.

Ohio.— Abernathy *v.* Latimore, 19 Ohio 286; Critchfield *v.* Porter, 3 Ohio 518, the latter case holding that the remedy was by motion to vacate only, and that a bill in equity would not lie on the ground that, there being an adequate remedy at law, there could be no recourse to equity.

Pennsylvania.—Cyphert *v.* McClune, 22 Pa. St. 195; Compher *v.* Anawalt, 2 Watts (Pa.) 490.

United States.— Field *v.* Gibbs, Pet. C. C. (U. S.) 155, 9 Fed. Cas. No. 4,766.

relief must be sought in a direct application to the court by a motion in the action,[1] except, perhaps, under special circumstances.[2]

(II) *Against Non-Residents.* In an action on a domestic judgment against non-residents, it may be shown that such judgment was rendered on an unauthorized appearance for defendant, and without service of process.[3] Defendant is not, however, restricted to relief by a collateral attack of this character, but may move to open the judgment and be allowed to plead,[4] or the unauthorized appearance may be set aside.[5]

b. In Case of Foreign Judgment. Whatever the conflict of authority with respect to domestic judgments, the decisions are nearly unanimous to the effect that, in an action on a foreign judgment, it may be shown that defendant's appearance was not authorized, whether the action be brought in a state court on a judgment rendered in the court of another state,[6] or in a federal court on a judg-

Appeal or error.—A party cannot, ordinarily, by appeal or writ of error negative the presumption of authority in the attorney, and, as this is necessary to entitle him to relief from a judgment entered on the appearance of an unauthorized attorney, he cannot obtain relief by this method. Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Abernathy *v.* Latimore, 19 Ohio 286.

Audita querela.— Relief against such a judgment cannot be obtained by audita querela. Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; Spaulding *v.* Swift, 18 Vt. 214.

Bill or action to set aside judgment.— In a number of cases, without going into the question of whether a motion in the original action would lie, it has been held that a bill in equity will lie to set aside a judgment rendered on an unauthorized appearance.

California.— Baker *v.* O'Riordan, 65 Cal. 368, 4 Pac. 232.

Colorado.— Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Illinois.— Rust *v.* Frothingham, 1 Ill. 331.

Iowa.— Powell *v.* Spaulding, 3 Greene (Iowa) 443; De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491.

Kentucky.— Handley *v.* Statelor, Litt. Sel. Cas. (Ky.) 186.

Tennessee.— Boro *v.* Harris, 13 Lea (Tenn.) 36; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371; Coles *v.* Anderson, 8 Humphr. (Tenn.) 489.

There are other decisions holding that the remedies by motion in the original action and by bill in equity are concurrent (Du Bois *v.* Clark, 12 Colo. App. 22, 55 Pac. 750; Truett *v.* Wainwright, 9 Ill. 411; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520); and, under the civil law procedure, it is similarly held that an action will lie to set aside the judgment (Ridge *v.* Alter, 14 La. Ann. 866; Marvel *v.* Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424).

Bill to enjoin enforcement of judgment.— In some cases it has been held that a bill in equity will lie to enjoin the enforcement of the judgment. Sneed *v.* Town, 9 Ark. 535; Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Smyth *v.* Balch, 40 N. H. 363; Mills *v.* Scott, 43 Fed. 452.

Petition to review judgment.— Under the statutes of one state, a petition will lie to review the judgment. McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856. See also Brewer *v.* Holmes, 1 Metc. (Mass.) 288.

1. Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 34 N. Y. St. 67, 20 Am. St. Rep. 771, 9 L. R. A. 844; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Brown *v.* Nichols, 42 N. Y. 26; Hamilton *v.* Wright, 37 N. Y. 502; Denton *v.* Noyes, 6 Johns. (N. Y.) 296; Campbell *v.* Bristol, 19 Wend. (N. Y.) 101; Adams *v.* Gilbert, 9 Wend. (N. Y.) 499; Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437.

2. Thus, where the question of the unauthorized appearance is complicated with fraud or the rights of the purchasers, or the circumstances are such that the court can see that the right to, or measure of, relief cannot properly be determined on motion, having regard to all interests affected, resort may be had to a bill in equity, or, in states where the code practice prevails, to an equitable action. Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 34 N. Y. St. 67, 20 Am. St. Rep. 771, 9 L. R. A. 844; New York *v.* Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Suppl. 666, 48 N. Y. St. 586.

3. Bodurtha *v.* Goodrich, 3 Gray (Mass.) 508; Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 34 N. Y. St. 67, 20 Am. St. Rep. 771, 9 L. R. A. 844; Myers *v.* Prefontaine, 40 N. Y. App. Div. 603, 58 N. Y. Suppl. 70; Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387. But see, *contra*, the *dictum* in Eaton *v.* Pennywit, 25 Ark. 144.

In support of this view it was said that, where defendant has not been within the jurisdiction of the court, it would not be just to compel him to come under that jurisdiction and establish his defense to the action in order to claim relief from a judgment obtained without notice, and, therefore, the relief granted here must be an absolute immunity from the judgment. Wiley *v.* Pratt, 23 Ind. 628.

4. Pennsylvania Mortg. Trust Co. *v.* Cowles, 3 Kan. App. 660, 45 Pac. 605.

5. Norlinger *v.* De Mier, 54 Hun (N. Y.) 276, 7 N. Y. Suppl. 463, 27 N. Y. St. 16, 18 N. Y. Civ. Proc. 47.

6. *Alabama.*— Kingsbury *v.* Yuiestra, 59 Ala. 320.

ment rendered by a federal court sitting in another district[7] or on a judgment rendered by a state court of another state.[8]

3. EFFECT OF LACHES. Whatever may be the form of relief to which defendant is entitled, he must move promptly to obtain it, and, if he is guilty of gross laches, he loses all right thereto.[9] A delay in making application to vacate, so long as the parties have no notice of the judgment or of the action, will not bar, however, their right to have the judgment vacated,[10] even though others have taken title, innocently relying on the judgment.[11]

4. WHAT MUST BE SHOWN TO AUTHORIZE RELIEF. To obtain relief against a judgment entered on an unauthorized appearance as attorney, it is, of course, necessary to show clearly that the attorney was without authority to appear,[12] and it has also been held that defendant must show a meritorious defense.[13]

APPELLANT. The party appealing.[1]

APPELLATE COURTS. See COURTS.

Arkansas.— Eaton *v.* Pennywit, 25 Ark. 144.

Connecticut.— Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Illinois.— Lawrence *v.* Jarvis, 32 Ill. 304; Thompson *v.* Emmert, 15 Ill. 415; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689.

Indiana.— Boylan *v.* Whitney, 3 Ind. 140; Sherrard *v.* Nevius, 2 Ind. 241.

Iowa.— Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Lattourett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kansas.— Brinkman *v.* Shaffer, 23 Kan. 528.

Louisiana.— Walworth *v.* Henderson, 9 La. Ann. 339; Miller *v.* Gaskins, 3 Rob. (La.) 94.

Massachusetts.— Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; Finneran *v.* Leonard, 7 Allen (Mass.) 54, 83 Am. Dec. 665; Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Gleason *v.* Dodd, 4 Metc. (Mass.) 333.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911; Napton *v.* Leaton, 71 Mo. 358; Eager *v.* Stover, 59 Mo. 87; Marx *v.* Fore, 51 Mo. 69, 11 Am. Rep. 432. But see, *contra*, the earlier Missouri decisions. Baker *v.* Stonebraker, 34 Mo. 172; Warren *v.* Lusk, 16 Mo. 102.

New Jersey.— Price *v.* Ward, 25 N. J. L. 225; Monlin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222; Hess *v.* Cole, 23 N. J. L. 116.

New York.— Norlinger *v.* De Mier, 54 Hun (N. Y.) 276, 7 N. Y. Suppl. 463, 27 N. Y. St. 16, 18 N. Y. Civ. Proc. 47; New York *v.* Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Suppl. 666, 48 N. Y. St. 586; Shumway *v.* Stillman, 6 Wend. (N. Y.) 447; Starbuck *v.* Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172. *Contra*, Reed *v.* Pratt, 2 Hill (N. Y.) 64.

Ohio.— Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340.

Texas.— Norwood *v.* Cobb, 24 Tex. 551.

Virginia.— Wilson *v.* Mt. Pleasant Bank, 6 Leigh (Va.) 570.

United States.— Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; Harris *v.* Hardeman, 14 How. (U. S.) 334, 14 L. ed. 444; Graham *v.* Spencer, 14 Fed. 603; Arnott *v.* Webb, 1 Dill. (U. S.) 362, 1 Fed. Cas. No. 562. *Contra*, Field *v.* Gibbs, Pet. C. C. (U. S.) 155, 9 Fed. Cas. No. 4,766.

Contra, Newcomb *v.* Peck, 17 Vt. 302; Hoxie *v.* Wright, 2 Vt. 263.

The reason assigned for this distinction between domestic and foreign judgments is "that in the case of a foreign judgment it is impossible, or at least unreasonable, to require the defendant to go to the courts of the state which rendered it and attack it directly by a hill or motion; hence, he is permitted to plead the want of authority in the attorney, defensively and collaterally." Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520 [*cited* with approval in New York *v.* Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Suppl. 656, 48 N. Y. St. 586]. See also Finneran *v.* Leonard, 7 Allen (Mass.) 54, 83 Am. Dec. 665.

7. Hill *v.* Mendenhall, 21 Wall. (U. S.) 453, 22 L. ed. 616; Citizens' Bank *v.* Brooks, 23 Blatchf. (U. S.) 137, 23 Fed. 21.

8. Arnott *v.* Webb, 1 Dill. (U. S.) 362, 1 Fed. Cas. No. 562.

9. Garrison *v.* McGowan, 48 Cal. 592; Macomber *v.* Peck, 39 Iowa 351; Cyphert *v.* McClune, 22 Pa. St. 195. See also Saffold *v.* Foster, 74 Ga. 751.

10. Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507; Lawrence *v.* Rutherford, 1 Pearson (Pa.) 555.

11. Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507.

12. Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489.

13. Garrison *v.* McGowan, 48 Cal. 592; Weaver *v.* Jones, 82 N. C. 440. See also Wiley *v.* Pratt, 23 Ind. 628, in which it was held that a defendant will not be relieved against the judgment, if he was within the jurisdiction of the court, unless he can establish a defense on the merits in the cause of action in which the judgment was rendered. No such restriction, it seems, is made in this case, if defendant is without the jurisdiction of the court.

1. Wharton L. Lex.

APPELLATE JURISDICTION. The cognizance which a superior court takes of a case removed to it, by appeal or writ of error, from the decision of an inferior court.[2] (Appellate Jurisdiction: In Admiralty, see ADMIRALTY. In Bankruptcy, see BANKRUPTCY. In Civil Causes — Generally, see APPEAL AND ERROR; Before Justices of the Peace, see JUSTICES OF THE PEACE. In Criminal Causes, see CRIMINAL LAW. In Insolvency, see INSOLVENCY. Of Particular Courts, see COURTS.)

APPELLATIO. In the civil law, appeal.[3]

APPELLEE. The party against whom an appeal is taken.[4]

APPELLOR. A criminal who accuses his accomplices.[5]

APPENDAGE. Something added to a principal or greater thing, though not necessary to it;[6] something added as an accessory to, or the subordinate part of, another thing;[7] something added, attached, or annexed; a concomitant;[8] an appurtenance.[9] (Appendages: To Property Conveyed, see DEEDS; FIXTURES. To Property Devised, see WILLS. To Railroads, see RAILROADS. To School-Houses, see SCHOOLS AND SCHOOL DISTRICTS.)

APPENDANT. See APPURTENANT; EASEMENTS; ESTATES; WATERS.

APPENDIX. In the practice of the house of lords and privy council in appeals, a printed volume containing the material documents or other evidence used in the court below, and referred to in the cases of the parties.[10]

APPERTAINING. Usually occupied with, or lying to;[11] peculiar to.[12]

APPLIANCES. See MASTER AND SERVANT.

APPLICATIO EST VITA REGULÆ. A maxim meaning "Application is the life of a rule."[13]

APPLICATION. The act of making a request;[14] a petition;[15] the disposition made of a thing.[16] (Application: For Insurance, see INSURANCE. For License, see INTOXICATING LIQUORS; LICENSES. For Pardon, see PARDONS. For Patent, see PATENTS. For Public Lands, see PUBLIC LANDS. Of Assets, see MARSHAL-

2. Cavanaugh *v.* Wright, 2 Nev. 166, 168; Piqua Branch of State Bank *v.* Knoup, 6 Ohio St. 342, 349. See also *Ex p.* Batesville, etc., R. Co., 39 Ark. 82, 87, where it is defined as "the review, by a superior court, of the final judgment, order, or decree of some inferior court."

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 505, 7 Am. Rep. 575 [*quoting* Story Comm. Const. § 1761]; Tierney *v.* Dodge, 9 Minn. 166; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 175, 2 L. ed. 60. See also Smith *v.* Carr, Hard. (Ky.) 305, 308, where it is said that "appellate jurisdiction, *ex vi termini*, implies a resort, from an inferior tribunal of justice, to a superior, for the purpose of revising the judgments of the inferior tribunal."

"Appellate jurisdiction, strictly speaking, is exercised by revising the action of the inferior court, and remanding the cause for the rendition and execution of the proper judgment." Dodds *v.* Duncan, 12 Lea (Tenn.) 731, 734.

3. U. S. *v.* Wonson, 1 Gall. (U. S.) 5, 13, 28 Fed. Cas. No. 16,750.

4. Abbott L. Dict.

5. Bouvier L. Dict.

6. State *v.* Fertig, 70 Iowa 272, 273, 30 N. W. 633; Hemme *v.* School Dist. No. 4, 30 Kan. 377, 381, 1 Pac. 104 [*quoting* Webster Dict.]. See also Matter of Bozeman, 42 Kan. 451, 456, 22 Pac. 628.

7. State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21, 26.

8. Hemme *v.* School Dist. No. 4, 30 Kan. 377, 381, 1 Pac. 104 [*quoting* Worcester Dict.]. See also Matter of Bozeman, 42 Kan. 451, 456, 22 Pac. 628.

9. Smith *v.* State, 22 Ala. 54, 57.

10. Sweet L. Dict.

11. Burrill L. Dict.

Distinguished from "adjoining."— In Miller *v.* Mann, 55 Vt. 475, 479, the court said: "The words 'adjoining' and 'appertaining' are not synonymous. As descriptive word in a deed, 'adjoining' usually imports contiguity; 'appertaining,' use, occupancy. One thing may appertain to another without adjoining or touching it. Proof that pieces of land adjoin would not be proof that one appertained to the other. Neither in literal meaning nor as used in deeds are they equivalent."

12. Herndon *v.* Moore, 18 S. C. 339, wherein it was held that jurisdiction, given by the constitution to probate courts, of "business appertaining to minors" means "business peculiar to minors."

13. Burrill L. Dict.

14. Burrill L. Dict.

Not necessarily in writing.— The term "on application" does not necessarily imply that the application is in writing. State *v.* Stiles, 12 N. J. L. 296.

Applications for vacant lands in Pennsylvania have been called "the expressions of wishes to hold lands at or near a certain spot." Biddle *v.* Dougal, 5 Binn. (Pa.) 142, 150; Duncan *v.* Curry, 3 Binn. (Pa.) 14, 21.

15. Scott *v.* Strobach, 49 Ala. 477, 489.

16. Bouvier L. Dict.

ING ASSETS AND SECURITIES; PARTNERSHIP. Of Payment, see PAYMENT; USURY. Of Taxes, see TAXATION. See, generally, MOTIONS.)

APPLY. To use or employ for a particular purpose, or in a particular case; to appropriate; to devote.[17]

APPOINT. To nominate;[18] to designate;[19] to choose or select;[20] to assign to;[21] to constitute.[22]

APPOINTING POWER. The power of appointment to office; the power to select and indicate by name individuals to hold office and to discharge the duties and exercise the powers of officers.[23]

APPOINTMENT. The designation of a person to discharge the duties of an office or trust by the person or persons having authority therefor;[24] the exercise of the right to designate the person who is to take the use of realty.[25] (Appointment: Of Administrator, see EXECUTORS AND ADMINISTRATORS. Of Agent, see PRINCIPAL AND AGENT. Of Arbitrator, see ARBITRATION AND AWARD. Of Assignee — For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; In Bankruptcy, see BANKRUPTCY; In Insolvency, see INSOLVENCY. Of Auditors, see ACCOUNTS AND ACCOUNTING. Of Commissioners — In Condemnation Proceedings, see EMINENT DOMAIN; In Highway Proceedings, see STREETS AND HIGHWAYS. Of Corporate Officers, see BANKS AND BANKING; CORPORATIONS; RAILROADS. Of Curator *Ad Hoc*, see ABSENTEES. Of Executor, see EXECUTORS AND ADMINISTRATORS. Of Guardian, see DRUNKARDS; GUARDIAN AND WARD; INFANTS; INSANE PERSONS; SPENDTHRIFTS. Of Public Officers, see OFFICERS. Of Receivers, see RECEIVERS. Of Referees, see REFERENCES. Of Teachers, see SCHOOLS AND SCHOOL DISTRICTS. Of Trustees, see TRUSTS. Powers of, see POWERS.)

APPOINTOR. One who executes a power of appointment.[26]

APPORTION. To divide or partition.[27]

APPORTIONMENT. A dividing or making into parts.[28] (Apportionment: Of Annuity, see ANNUITIES. Of Assessment for Public Improvements, see BETTERMENTS. Of Assets and Liabilities on Change of Territorial Division, see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS; TOWNS. Of Charges on Property, see DESCENT AND DISTRIBUTION; ESTATES; WILLS. Of Compensation for Property, see EMINENT DOMAIN. Of Corporate Stock, see CORPORATIONS. Of Costs, see COSTS. Of Damages, see COLLISIONS; DEATH; TRIAL. Of Dividends, see CORPORATIONS. Of Election Districts, see ELECTIONS. Of Excess or Deficiency on Apportionment of Boundary, see BOUNDARIES. Of Interest, see INTEREST. Of Liability, see CONTRIBUTION; CORPORATIONS; PARTNERSHIP; PRINCIPAL AND SURETY. Of Mortgage on Part Conveyance, see MORTGAGES. Of Rent, see LANDLORD AND TENANT. Of Representatives in Congress, see UNITED STATES. Of Rewards, see REWARDS. Of Salvage, see SALVAGE. Of School Funds, see SCHOOLS AND SCHOOL DISTRICTS. Of Taxes, see TAXATION. Of Wages, see MASTER AND SERVANT.)

17. Pryor *v.* Kansas City, 153 Mo. 135, 146, 54 S. W. 499 [*quoting* Webster Dict.].

18. Brown *v.* O'Connell, 36 Conn. 432, 447, 4 Am. Rep. 89; State *v.* Dews, R. M. Charlt. (Ga.) 397, 403; People *v.* Fitzsimmons, 68 N. Y. 514, 519.

19. Brown *v.* O'Connell, 36 Conn. 432, 447, 4 Am. Rep. 89; People *v.* Fitzsimmons, 68 N. Y. 514, 519.

20. People *v.* Fitzsimmons, 68 N. Y. 514, 519.

21. Brown *v.* O'Connell, 36 Conn. 432, 447, 4 Am. Rep. 89.

22. State *v.* Dews, R. M. Charlt. (Ga.) 397, 403.

23. State *v.* Kennon, 7 Ohio St. 546, 556.

24. Bouvier L. Dict.

Implies a discretionary power. — Rex *v.* Adams, 2 A. & E. 409, 29 E. C. L. 199.

Distinguished from "election." — The words "appointment" and "election" represent different tenures. The people elect — the governor or some other functionary appoints. Conger *v.* Gilmer, 32 Cal. 75, 78; Speed *v.* Crawford, 3 Metc. (Ky.) 207, 210; State *v.* McCollister, 11 Ohio 46.

25. 2 Washburn Real Prop. 202.

26. Burrill L. Dict.

27. Coke Litt. 147*b*.

It is not necessary to divide equally in order to apportion. Stotesbury *v.* St. Giles, 53 J. P. 5, 57 L. J. M. C. 114, 59 L. T. Rep. N. S. 493.

28. Burrill L. Dict.

APPOSAL OF SHERIFFS. The charging of sheriffs with money received upon their accounts in the exchequer.[29]

APPOSER. An officer in the English exchequer, whose business it was to examine the sheriff's estreats with the record, and to ask [appose] the sheriff what he could say to every particular sum therein.[30]

APPRAISAL. A valuation of, or an estimation of the value of, property.[31] (Appraisal: By Arbitrators, see ARBITRATION AND AWARD. Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS; TAXATION. Of Dutiable Merchandise, see CUSTOMS DUTIES. Of Exempt Property, see EXEMPTIONS; HOMESTEADS. Of Loss on Insured Property, see FIRE INSURANCE; MARINE INSURANCE. Of Property Sold — On Foreclosure, see MORTGAGES; On Partition, see PARTITION; Under Judgment or Order, see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; JUDICIAL SALES. Of Property Subject to Taxation, see TAXATION. Of Property Taken — For Public Use, see EMINENT DOMAIN; On Attachment, see ATTACHMENT; On Execution, see EXECUTIONS. Under Provisions of Lease, see LANDLORD AND TENANT.)

APPRAISEMENT. An APPRAISAL,[32] *q. v.*

APPRAISER. A person appointed by competent authority to ascertain and state the true value of property submitted to his inspection, and who is usually sworn to perform such duty.[33]

APPRECIATE. To estimate justly.[34]

APPREHEND. To believe;[35] to understand or conceive;[36] to take or take hold of; to take a person on criminal process.[37]

APPREHENSION. The seizing or taking hold of a man.[38]

29. Jacob L. Dict.
30. Burrill L. Dict.
31. Cocheco Mfg. Co. *v.* Strafford, 51 N. H. 455, 482.
32. Anderson L. Dict.
33. Burrill L. Dict.
34. Brace *v.* Black, 125 Ill. 33, 39, 17 N. E. 66.
35. Golden *v.* State, 25 Ga. 527, 531; Trogdon *v.* State, 133 Ind. 1, 9, 32 N. E. 725.
36. Golden *v.* State, 25 Ga. 527, 531.
37. Burrill L. Dict., wherein the word is said to be derived from the Latin *apprehendere* — to take hold of.
38. Reg. *v.* Weil, 9 Q. B. D. 701, 703, 47 L. T. Rep. N. S. 631, 15 Reports 413.

APPRENTICES

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CROSS-REFERENCES

For Matter Relating to:

Contracts by Minors, see INFANTS.

Custody of Parent After Relinquishment by Indenture, see PARENT AND CHILD.

Master and Servant, Generally, see MASTER AND SERVANT.

Settlement Under Poor Laws, see POOR PERSONS.

I. DEFINITION.

The word "apprentice" is derived from the French word *apprendre*, and signifies an "apprehender" or "learner."[1] An apprentice is defined to be a person, usually a minor, bound, in due form of law, to a master to learn from him his art, trade, or business, and to serve him during the time of the apprenticeship.[2]

II. WHO MAY BE APPRENTICED.

A. Infants — 1. In General. Besides the general power of a parent to bind his infant child as an apprentice, an infant orphan whose estate is insufficient for his support,[3] or an infant pauper,[4] whether an orphan or not,[5] may be apprenticed by the overseers of the poor or other similar officers.

2. Whose Parents Fail or Are Unable to Provide. In some cases it has been held that the mere fact that a parent neglects to provide properly for his children

1. Adams Gloss. [*citing* Broom & H. Comm. bk. I, 19, 510] *sub voce Apprendre*. See also 1 Bl. Comm. 426.

2. Black L. Dict.; 1 Bl. Comm. 426; 2 Kent Comm. 211; Rex *v.* Rainham, 1 East 531.

Other definitions are: "A young person bound by indenture to a tradesman or artificer who, upon certain covenants, is to teach him his mystery or trade." Lyon *v.* Whitmore, 3 N. J. L. 413.

"A person bound to work for a party . . . with a view of learning and becoming acquainted with the business thereof." Hill *v.* Spencer, 61 N. Y. 274, 279.

See also Wakefield *v.* Fargo, 90 N. Y. 213, 219, where it is said that "'laborer or apprentice' are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed . . . without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another."

Distinguished from "servant."—Apprentices and servants are characters perfectly distinct: the one receives instruction, and the other a stipulated price for his labor. Hopewell *v.* Amwell, 3 N. J. L. 16; Matter of Goodenough, 19 Wis. 274; Rex *v.* St. Paul's Bedford, 6 T. R. 452. See also Dwyer *v.* Rathbone, 5 N. Y. Suppl. 505, 24 N. Y. St. 366; Winstone *v.* Linn, 1 B. & C. 460, 8 E. C. L. 196.

An articled clerk to an attorney is an apprentice within 3 Wm. & Mary, c. 11, § 8. St. Pancras Parish *v.* Clapham Parish, 2 El. & El. 742, 6 Jur. N. S. 700, 29 L. J. M. C. 146, 8 Wkly. Rep. 493, 105 E. C. L. 742.

3. Insufficiency of orphan's estate.—As a general rule the statutes provide for the apprenticing of orphan children whose estates are insufficient for their maintenance and education. Ashby *v.* Page, 108 N. C. 6, 13 S. E. 90; Spears *v.* Snell, 74 N. C. 210; Ferrell *v.* Boykin, 61 N. C. 9; Midgett *v.* McBryde, 48 N. C. 21.

4. A minor who is not one of the poor of a town is not liable to be bound out as an apprentice by the selectmen. King *v.* Brockway, 2 Root (Conn.) 86.

5. Adams *v.* Adams, 36 Ga. 236; Comas *v.* Reddish, 35 Ga. 236; Rolfe *v.* Rolfe, 15 Ga. 451; Demar *v.* Simonson, 4 Blackf. (Ind.) 132; Reidell *v.* Morse, 19 Pick. (Mass.) 358; People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414; People *v.* Hanna, 3 How. Pr. (N. Y.) 39. See 3 Cent. Dig. tit. "Apprentices," § 2.

A child who has no legal settlement in the district or county cannot be bound out as an apprentice by the overseers of the poor or other county officers, such settlement being essential to jurisdiction. Mendall *v.* Rickets, 6 J. J. Marsh. (Ky.) 592; *Ex p.* McDonald, 4 Luz. Leg. Reg. (Pa.) 255, 7 Leg. Gaz. (Pa.) 333. And see, generally, POOR PERSONS.

will not give the authorities power to bind them out against the parent's wishes;[6] but the statutes of several states have been construed to mean that wherever the parents are unable to provide for their children, or are bringing them up in idle and immoral habits, the courts may apprentice them.[7] In other cases it has been held that unless the parents of a child are actually chargeable to the town or county the overseers of the poor have no right to bind him out.[8]

B. Adults. One who has arrived at full age may bind himself[9] as an apprentice, and will, as such, be subject to the provisions of law in relation to apprentices.[10]

III. WHO MAY BIND APPRENTICES.

A. Father — 1. IN GENERAL. Both at common law and under the statutes of the various states a father has a right, with the assent of the child,[11] to bind the latter as an apprentice until he shall reach the age of twenty-one years.[12]

2. OF ILLEGITIMATE CHILD. The father of an illegitimate child has no control over him, and consequently cannot bind him as an apprentice, or give his consent to the child's being bound by the court.[13]

B. Mother. Generally, if the father is living, a mother cannot bind out her

6. Stanton *v.* State, 6 Blackf. (Ind.) 83; Matter of Whiting, 3 Pittsb. (Pa.) 129.

7. *Alabama.*— Owen *v.* State, 48 Ala. 328.

Kentucky.— Baker *v.* Winfrey, 15 B. Mon. (Ky.) 499.

Mississippi.— Howry *v.* Calloway, 48 Miss. 587.

New York.—People *v.* Weissenbach, 60 N. Y. 385; Matter of Forsyth, 66 How. Pr. (N. Y.) 180.

Pennsylvania.— Com. *v.* Walker, 12 Serg. & R. (Pa.) 169; Com. *v.* Martin, 1 Pearson (Pa.) 30; Com. *v.* Farley, 4 Pa. L. J. 396.

Vermont.— Warner *v.* Swett, 7 Vt. 446.

See POOR PERSONS; 3 Cent. Dig. tit. "Apprentices," § 2.

8. Reidell *v.* Morse, 19 Pick. (Mass.) 358; People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414; Welborn *v.* Little, 1 Nott & M. (S. C.) 263.

Where a person was, on his own application, relieved by overseers, without a previous order for that purpose, this was held in New York to be sufficient to authorize the overseers of the poor to bind out the children of such person as poor apprentices, the want of the order only coming in question on the settlement of the overseers' account, and not invalidating the indentures of apprenticeship — at least so far as to prevent the master from using them as a defense in an action to recover the value of the services of an apprentice after the indentures are executed. Schermerhorn *v.* Hull, 13 Johns. (N. Y.) 270.

9. A person over age cannot be bound as an apprentice against his will (Rex *v.* Ripon, 9 East 295), and hence, where a woman attains her majority at the age of eighteen, an indenture of apprenticeship made after she has passed that age is inoperative, null, and void (McClintock *v.* Chamberlin, Wright (Ohio) 547).

10. Com. *v.* St. German, 1 Browne (Pa.) 24.

11. Age at which child may be bound.— Where no limitation is placed by statute upon the age at which an infant may give his assent to an apprenticeship, it has been held that an infant under seven years of age may be bound out. The period of seven years, under which an infant is at common law considered as not having discretion, applies only to criminal cases, and has no connection with his ability to bind himself to learn a trade. Brotzman *v.* Bunnell, 5 Whart. (Pa.) 128, 34 Am. Dec. 537.

12. *Maryland.*— Baker *v.* Lauterbach, 68 Md. 64, 11 Atl. 703.

Massachusetts.— Day *v.* Everett, 7 Mass. 145.

New Jersey.— Ivins *v.* Norcross, 3 N. J. L. 531.

New York.— Van Dorn *v.* Young, 13 Barb. (N. Y.) 286; Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309; Matter of McDowle, 8 Johns. (N. Y.) 328.

North Carolina.—Musgrove *v.* Kornegay, 52 N. C. 71 (when the child is above twelve years of age, before which he cannot be bound).

Ohio.—Francis *v.* Thompson, Tappan (Ohio) 248.

Pennsylvania.— Com. *v.* Addicks, 5 Binn. (Pa.) 520; Respublica *v.* Keppele, 2 Dall. (Pa.) 197, 1 Yeates (Pa.) 233, 1 L. ed. 347; Com. *v.* Baird, 1 Ashm. (Pa.) 267; Com. *v.* Moore, 1 Browne (Pa.) 275.

Tennessee.— Stringfield *v.* Heiskell, 2 Yerg. (Tenn.) 545.

Vermont.— Hudson *v.* Worden, 39 Vt. 382.

Virginia.— Pierce *v.* Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333.

United States.— U. S. *v.* Bainbridge, 1 Mason (U. S.) 71, 24 Fed. Cas. No. 14,497.

England.— Rex *v.* Arnesby, 3 B. & Ald. 584, 5 E. C. L. 337; Cuming *v.* Hill, 3 B. & Ald. 59, 5 E. C. L. 44; Rex. *v.* Cromford, 8 East 25.

See 3 Cent. Dig. tit. "Apprentices," § 5; and *infra*, VI, A, 4.

Consent of mother unnecessary.—Where the parents are living together, the father can bind out a minor son without the mother's assent. Com. *v.* Senneff, 9 Haz. Reg. (Pa.) 78.

13. Timmins *v.* Lacy, 30 Tex. 115. See, generally, BASTARDS.

child as an apprentice,[14] although such a binding is not invalid where the father does not dissent;[15] but if the father is dead, or for any cause incompetent to act,[16] or if he has abandoned his child,[17] she may do so.

C. Guardian or Next Friend. A guardian can sign the indenture only when there is no parent, and a next friend only when there is neither parent nor guardian.[18]

D. Courts, Justices, Overseers, and Other Officers — 1. In General. Under the statutes both of England and the United States, such officers, judicial or ministerial, as the various statutes may direct, have power to bind out certain children;[19] but, generally, such children must have gained a settlement in the jurisdiction in which they are bound.[20]

14. Wigley *v.* Nobley, 101 Ga. 124, 28 S. E. 640; Baker *v.* Lauterbach, 68 Md. 64, 11 Atl. 703; Com. *v.* Crommie, 8 Watts & S. (Pa.) 339; Com. *v.* Martin, 1 Pearson (Pa.) 30; Com. *v.* Williams, 14 Lanc. Bar (Pa.) 16; Ballard *v.* Edmonston, 2 Cranch C. C. (U. S.) 419, 2 Fed. Cas. No. 817. See 3 Cent. Dig. tit. "Apprentices," § 5.

15. Overseers of Poor *v.* Overseers of Poor, 5 Cow. (N. Y.) 527; Overseers of Poor *v.* Overseers of Poor, 13 Johns. (N. Y.) 245. See also Cockran *v.* State, 46 Ala. 714, where an order of court, apprenticing a child on application of its mother, was held valid, it not appearing that the father was living.

16. Baker *v.* Winfrey, 15 B. Mon. (Ky.) 499 (but under Ky. Rev. Stat. c. 64, § 3, the court must consent to the master); People *v.* Gates, 43 N. Y. 40 (holding that such was the mother's right at common law); Com. *v.* Eglee, 6 Serg. & R. (Pa.) 340; Com. *v.* Coxe, 1 Ashm. (Pa.) 71 (where the father had been found by inquisition to be an habitual drunkard).

Effect of second marriage.— The mother, although married to a second husband, is a parent within the Pennsylvania statute, and may, as such, independently of her second husband, give assent to an indenture. Com. *v.* Eglee, 6 Serg. & R. (Pa.) 340.

17. Com. *v.* Dodge, 6 Wkly. Notes Cas. (Pa.) 214. *Compare* Wigley *v.* Nobley, 101 Ga. 124, 28 S. E. 640.

18. Com. *v.* Atkinson, 8 Phila. (Pa.) 375.

A sister may act as next friend even though she be a *feme covert* and the binding out be to her own husband. Com. *v.* Leeds, 1 Rawle (Pa.) 191. So, too, can a half-sister (Com. *v.* Roach, 1 Ashm. (Pa.) 27), but not a minor sister (Com. *v.* Penott, Brightly N. P. (Pa.) 189).

A master may not act as a next friend of his apprentice so as to bind him out, and an indenture executed by the master is invalid. Com. *v.* Kendig, 1 Serg. & R. (Pa.) 366. See also *infra*, VIII.

19. See *supra*, II, A, 1.

Statutes strictly construed.— The power of taking children from their parents, families, and homes and binding them to strangers as servants is high and arbitrary, if not dangerous. It should be exercised only in cases of clear necessity, where all the circumstances concur to justify and require so extraordinary an interposition in the domestic relations of private families. Nothing is to be presumed in aid of it, but everything which is required for its support must be shown affirmatively.

Massachusetts.— Bardwell *v.* Purrington, 107 Mass. 419; Reidell *v.* Morse, 19 Pick. (Mass.) 358; Reidell *v.* Congdon, 16 Pick. (Mass.) 44.

New Hampshire.— Glidden *v.* Unity, 30 N. H. 104; Rumney *v.* Ellsworth, 4 N. H. 138.

New York.— Johnson *v.* Dodd, 56 N. Y. 76; People *v.* New York Juvenile Asylum, 2 Thomps. & C. (N. Y.) 475; Matter of Barre, 14 Abb. Pr. N. S. (N. Y.) 426; People *v.* Hanna, 3 How. Pr. (N. Y.) 39.

North Carolina.— Prue *v.* Hight, 51 N. C. 265.

Pennsylvania.— Com. *v.* Walker, 12 Serg. & R. (Pa.) 169; Com. *v.* Jennings, 1 Browne (Pa.) 197; *Ex p.* McDonald, 4 Luz. Leg. Reg. (Pa.) 255, 7 Leg. Gaz. (Pa.) 333.

Tennessee.— Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

Vermont.— Warner *v.* Swett, 7 Vt. 446.

United States.— *Ex p.* Emma, 48 Fed. 211; Gody *v.* Plant, 4 Cranch C. C. (U. S.) 670, 10 Fed. Cas. No. 5,499; Smith *v.* Elwood, 4 Cranch C. C. (U. S.) 670, 22 Fed. Cas. No. 13,042; Barrett *v.* McPherson, 4 Cranch C. C. (U. S.) 475, 2 Fed. Cas. No. 1,049; Lynch *v.* Ashton, 3 Cranch C. C. (U. S.) 367, 15 Fed. Cas. No. 8,636; May *v.* Bayne, 3 Cranch C. C. (U. S.) 335, 16 Fed. Cas. No. 9,331; Cannon *v.* Davis, 1 Cranch C. C. (U. S.) 457, 5 Fed. Cas. No. 2,385; Bell *v.* English, 1 Cranch C. C. (U. S.) 332, 3 Fed. Cas. No. 1,250.

See also *infra*, V, A.

20. *Illinois.*— Hays *v.* Borders, 6 Ill. 46.

Kentucky.— Curry *v.* Jenkins, Hard. (Ky.) 493.

Massachusetts.— Powers *v.* Ware, 2 Pick. (Mass.) 451.

New Hampshire.— Rumney *v.* Ellsworth, 4 N. H. 138.

New Jersey.—Franklin *v.* South Brunswick, 3 N. J. L. 35.

Pennsylvania.— Com. *v.* Jones, 3 Serg. & R. (Pa.) 158; Com. *v.* Jennings, 1 Browne (Pa.) 197.

South Carolina.— Welborn *v.* Little, 1 Nott & M. (S. C.) 263.

Virginia.— Cooper *v.* Saunders, 1 Hen. & M. (Va.) 413.

See 3 Cent. Dig. tit. "Apprentices," § 6.

Retention of jurisdiction.—In Prue *v.* Hight, 51 N. C. 265, it was held that a court which had originally apprenticed an infant to one

2. Bond to Prevent Binding Out. Where the statute provides that certain persons may enter into a bond for the maintenance and education of a child brought before the court for the purpose of being bound out as an apprentice, it is a matter within the sound discretion of the court whether to accept such bond or not.[21]

E. Power of Infant to Bind Himself. In some jurisdictions it is held that an infant may bind himself as an apprentice, since it is for his benefit;[22] while in others this power is denied on the general ground of the inability of infants to make binding contracts.[23]

F. Effect of Action by Unauthorized Persons. It has been held that where a stranger having no authority over a minor undertakes to bind him as an apprentice, and covenants for his faithful services, the contract is not valid at common law as to either of the parties.[24]

IV. Who May Take Apprentices.

Any person *sui juris*[25] may take an apprentice. But where the minor is bound out under a statute, the officers should inquire into the fitness of the master to have charge of the education, both moral and intellectual, of the apprentice; and where an infant has been bound to an improper person the courts will interfere and cancel the indenture.[26]

master had jurisdiction of his person so as to apprentice him to a second master where the first had left the state.

Liability of successor of public official.—Where an engagement is entered into by a public officer in his official capacity, his contract attaches to him in his official capacity only, and hence his successor in office will be held to be bound by the covenants of his predecessor. Dowd *v.* Davis, 15 N. C. 61 [*following* Anonymous, 2 N. C. 144].

21. Johnson *v.* Brannaman, 10 Md. 495, wherein it was held that the lower court properly refused to receive a bond, offered by the keeper of a house of ill-fame in order that she might retain possession of a female child against the application for the latter's apprenticeship, made by a relative competent in character and means to maintain and educate her.

22. Woodruff *v.* Logan, 6 Ark. 276, 42 Am. Dec. 695; Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 221; Pierce *v.* Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333 [*citing* Rex *v.* Chillesford, 4 B. & C. 94, 10 E. C. L. 496; Rex *v.* Great Wigston, 3 B. & C. 484, 10 E. C. L. 223]; Gilbert *v.* Fletcher, Cro. Car. 179; Rex *v.* Arundel, 5 M. & S. 257; Rex *v.* Mountsorrel, 3 M. & S. 497. See also *infra*, VI, B. 2.

In Ohio an infant over fourteen may, with the consent of his parent or guardian, make a valid covenant of apprenticeship. Berry *v.* Wallace, Wright (Ohio) 657; Francis *v.* Thompson, Tappan (Ohio) 248.

23. Langam *v.* State, 55 Ala. 114; Clark *v.* Goddard, 39 Ala. 164, 74 Am. Dec. 777; Harney *v.* Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; Handy *v.* Brown, 1 Cranch C. C. (U. S.) 610, 11 Fed. Cas. No. 6,019. See also *infra*, VI, B, 2.

At most, the effect of such a contract is to subject the infant to the control and discipline of his master and to the statutory penalties prescribed for the misconduct of an apprentice. In no event can he be held liable under the covenants contained in the articles of apprenticeship. Brock *v.* Parker, 5 Ind. 538; Harney *v.* Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; Haley *v.* Taylor, 3 Dana (Ky.) 221; McNight *v.* Hogg, 1 Treadw. (S. C.) 117; Frazier *v.* Rowan, 2 Brev. (S. C.) 47; Gilbert *v.* Fletcher, Cro. Car. 179. See *infra*, VI, B, 2.

24. Butler *v.* Hubbard, 5 Pick. (Mass.) 250.

25. Feme covert.—At common law the binding of an apprentice to a *feme covert* was held to be void (Rex *v.* Guildford, 2 Chit. 284, 18 E. C. L. 637); but, under the enabling statutes of many of the states, it would seem that this disability has been removed (Com. *v.* Medwinter, (Phila. C. P.) 1 Brightly Purd. Dig. Pa. (1894), p. 118).

See, generally, Husband and Wife.

Corporation.—An apprentice may be bound to a corporation. Burnley Equitable Co-operative, etc., Soc. *v.* Casson, [1891] 1 Q. B. 75. See also 25 Ir. L. T. 157.

Infants.—An indenture of apprenticeship, entered into between infants, is not absolutely void, but only voidable. Rex *v.* St. Petrox, 4 T. R. 196.

26. Farmers.—Under a statute providing that children may be bound out to do such work and business as may be suitable to their circumstances and condition, a child may be bound to a farmer as well as to a mechanic or tradesman. Warner *v.* Swett, 7 Vt. 446; 1 Bl. Comm. 426.

Religious societies.—Where the practices of a religious society do not infringe upon the municipal law, a court, whatever may be its own views on the principles and supposed practices of that society, has no right to act upon them in administering justice. Consequently, indentures binding an infant to one of the trustees of the Shaker Society have been upheld. People *v.* Gates, 43 N. Y. 40; Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309; People *v.* Pillow, 1 Sandf. (N. Y.) 672, 6 N. Y. Leg. Obs. 106.

The superintendent and manager of a busi-

V. PROCEEDINGS FOR APPRENTICING.

A. In General. Statutes providing for the execution of indentures of apprenticeship which shall be obligatory upon the infant are to be strictly construed. They are not merely directory, but are peremptory and absolute in their requirements.[27]

B. Notice to Parent or Guardian and Infant. Where a court is given power to bind out infant poor persons, notice should always be given to the parent or guardian, and usually to the infant himself,[28] and, as a general rule, the latter should be present in the court during the proceedings.[29]

C. Order of Court — 1. CONTENTS. The order of a court apprenticing a child should set forth all the facts required by law to give it jurisdiction.[30]

2. EFFECT. The order of the court is not of itself sufficient to bind an apprentice unless an indenture is actually executed;[31] but a strict and minute compliance with the order of the court as to indenting an apprentice is not necessary.[32]

ness may, under the Pennsylvania act of Sept. 29, 1770, make a valid contract of apprenticeship by which boys are to be taught and employed in the business. O'Connor *v.* Simonson, 24 Pa. Co. Ct. 576.

Two or more masters.— It is against the policy of the law and inconsistent with the relationship that should subsist between master and apprentice that there should be several masters who are not partners, and an indenture by which an apprentice is bound to serve a certain person for a specified period, and another for the remainder of his term, is invalid. Thorpe *v.* Rankin, 19 N. J. L. 36, 38 Am. Dec. 531. *Compare* Popham *v.* Jones, 13 C. B. 225, 76 E. C. L. 225; and see Rex *v.* Louth. 8 B. & C. 247, 2 M. & R. 273, 15 E. C. L. 129, in which it was held that an indenture by which an apprentice was bound for seven years, to serve one person for the first four years, and his father for the last three, was valid.

Partners.— An indenture, signed, in the prosecution of the firm's business, in the firm-name by only one of the partners, and repeatedly recognized and confirmed by all the partners, is valid, and is, at least, binding on such partner for the proper performance of the covenants contained therein. Com. *v.* Linker, 8 Phila. (Pa.) 455. But in Taylor's Case, 1 Browne (Pa.) 73, appendix, it was held that an indenture of apprenticeship, executed on behalf of a firm by one partner without an express power of attorney from his copartner, was void.

27. *Alabama.*—Englehardt *v.* Yung, 76 Ala. 534.

Indiana.—Hunsucker *v.* Elmore, 54 Ind. 209.

Massachusetts.— Butler *v.* Hubbard, 5 Pick. (Mass.) 250.

New York.— People *v.* Gates, 57 Barb. (N. Y.) 291. See also Matter of McDowle, 8 Johns. (N. Y.) 328.

South Carolina.— Austin *v.* McCluney, 5 Strobh. (S. C.) 104.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

England.— Rex *v.* Stoke Damerel, 7 B. & C. 563, 14 E. C. L. 254; Rex *v.* Little Bolton, Cald. Cas. 367. But see Rex *v.* Eccleston, 2 East 298, in which Lord Ellenborough, C. J., said that, although he held himself bound by the case of Rex *v.* Little Bolton, Cald. Cas. 367, if the question were one of first impression he would be inclined to hold that, if the relation of master and apprentice were in fact created by a contract of service between the parties, it would be sufficient to establish that relation even though the very words "master and apprentice" were not used. And again in Rex *v.* Burbach, 1 M. & S. 370, the same learned justice cast doubts upon the correctness of the rules laid down in Rex *v.* Little Bolton. Cald. Cas. 367.

See also *supra*, III, D, 1.

28. Rachel *v.* Emerson, 6 B. Mon. (Ky.) 280; Mendall *v.* Rickets, 6 J. J. Marsh. (Ky.) 592; Coffee *v.* Watt, 1 J. J. Marsh. (Ky.) 306; Payne *v.* Long, 2 A. K. Marsh. (Ky.) 158; Robarts *v.* Desforges, 2 A. K. Marsh. (Ky.) 39; Curry *v.* Jenkins, Hard. (Ky.) 493; Reidell *v.* Morse, 19 Pick. (Mass.) 358; Moore *v.* Allen, 72 Miss. 273, 16 So. 600; Howry *v.* Calloway, 48 Miss. 587; Jack *v.* Thompson, 41 Miss. 49; Norris *v.* Stephens, 9 Baxt. (Tenn.) 433. *Contra*, Ackley *v.* Tinker, 26 Kan. 485.

See 3 Cent. Dig. tit. "Apprentices," § 8.

29. Mitchell *v.* Mitchell, 67 N. C. 307; Matter of Ambrose, 61 N. C. 91 [*disapproving* Owens *v.* Chaplain, 48 N. C. 323]; Smith *v.* Elliot, 4 Cranch C. C. (U. S.) 710, 22 Fed. Cas. No. 13,040; Smith *v.* Elwood, 4 Cranch C. C. (U. S.) 670, 22 Fed. Cas. No. 13,042.

30. Chaudet *v.* Stone, 4 Bush (Ky.) 210; Small *v.* Small, 2 Bush (Ky.) 45; Freeman *v.* Strong, 6 Dana (Ky.) 282; Mass *v.* Rogers, 6 Harr. & J. (Md.) 492; Howry *v.* Calloway, 48 Miss. 587. But see Parsons *v.* Hand, Litt. Sel. Cas. (Ky.) 220, where it was held unnecessary, under the statute respecting poor orphans, for the order of the county court to state the ground of its proceeding.

31. Mass *v.* Rogers, 6 Harr. & J. (Md.) 492; Howry *v.* Calloway, 48 Miss. 587; Hines *v.* Hewitt, 4 Cranch C. C. (U. S.) 471, 12 Fed. Cas. No. 6,520; Stewart *v.* Duffey, 1 Cranch C. C. (U. S.) 551, 23 Fed. Cas. No. 13,425.

See also *infra*, VI, A, 1.

32. Thus, where the order of the county court directed a bastard child to be bound out by the overseers of the poor, and one overseer of the poor of the county executed the indentures, it was sufficient. Brewer *v.* Harris, 5 Gratt. (Va.) 285.

D. Review. The right of a higher court to review the action of a lower court or officers in an apprenticeship case depends upon the constitutions and statutes of the various states. Where no enabling provision exists it would seem that the higher courts should not interfere with the discretion vested in the lower courts or public officers.[33]

VI. INDENTURE OR OTHER CONTRACT.

A. Form[34] and Validity — 1. IN GENERAL. In order to constitute a valid contract of apprenticeship there must be a deed,[35] duly signed,[36] sealed,[37] and executed by all the parties thereto.[38] Where there is no indenture, but only a binding by parol, the relation of master and apprentice does not exist.[39] The indenture should substantially comply with statutes relating thereto;[40] but, even where the statute declares an indenture void if not made in conformity with its provisions,

33. A review was allowed in Moody *v.* Benson, 4 Harr. (Del.) 115; Mendall *v.* Rickets, 6 J. J. Marsh. (Ky.) 592; Timmins *v.* Lacy, 30 Tex. 115.

The right was denied in Ackley *v.* Tinker, 26 Kan. 485; Johnson *v.* Brannaman, 10 Md. 495; Cooper *v.* Saunders, 1 Hen. & M. (Va.) 413.

See, generally, APPEAL AND ERROR.

34. For forms of indentures of apprenticeship see Davis' Case, 1 Harr. (Del.) 17; Rex *v.* Rainham, 1 East 531.

35. An indenture of apprenticeship is regarded as a deed, and, if offered in evidence, its execution must be proved as in the case of any other deed. Owen *v.* State, 48 Ala. 328. See also St. Clair *v.* Jones, Add. (Pa.) 343.

36. Signature of counterpart unnecessary. — It is not necessary to the validity of an indenture that the master sign a counterpart. Rex *v.* St. Peters' on the Hill, 2 Bott P. L. 367; Rex *v.* Fleet, Cald. Cas. 31.

37. *Connecticut.*— Peters *v.* Lord, 18 Conn. 337; Hall *v.* Rowley, 2 Root (Conn.) 161.

Indiana.— Tague *v.* Hayward, 25 Ind. 427; Bolton *v.* Miller, 6 Ind. 262.

Kentucky.— Davenport *v.* Gentry, 9 B. Mon. (Ky.) 427; Hambell *v.* Hamilton, 3 Dana (Ky.) 501; Haley *v.* Taylor, 3 Dana (Ky.) 221.

Missouri.— Lally *v.* Cantwell, 40 Mo. App. 44.

New Jersey.—Overseers of Poor *v.* Overseers of Poor, 16 N. J. L. 535; Overseers of Poor *v.* Overseers of Poor, 6 N. J. L. 169; State *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399.

New York.— Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 537.

Pennsylvania.— Phelps *v.* Pittsburgh, etc., R. Co., 99 Pa. St. 108; Com. *v.* Wilbank, 10 Serg. & R. (Pa.) 416; Com. *v.* Atkinson, 8 Phila. (Pa.) 375.

Vermont.— Squire *v.* Whipple, 1 Vt. 69.

England.—Reg. *v.* Callingwood, 2 Ld. Raym. 1116.

Canada.— Judge *v.* Thomson, 29 U. C. Q. B. 523.

See 3 Cent. Dig. tit. "Apprentices," § 11.

38. But where an indenture had four seals and was signed by plaintiff, his son, and one of the defendants, but not by the other, it was held that there was evidence of execution by four defendants. Judge *v.* Thomson, 29 U. C. Q. B. 523.

39. Lally *v.* Cantwell, 40 Mo. App. 44; Lyon *v.* Whitmore, 3 N. J. L. 413; Squire *v.* Whipple, 1 Vt. 69; Rex *v.* Whitechurch, 1 Bott P. L. 532, Burr. Sett. Cas. 540; Rex *v.* Margram, 5 T. R. 153; Rex *v.* Kingsweare, Burr. Sett. Cas. 839; Rex *v.* Mawman, Burr. Sett. Cas. 290; Rex *v.* Stratton, Burr. Sett. Cas. 272. But *compare* Huntington *v.* Oxford, 4 Day (Conn.) 189 (where an illegitimate child, who, under a parol agreement between his mother and a mechanic, went with the latter and lived with him as an apprentice until the age of twenty-one, was held to be an apprentice), and State *v.* Jones, 16 Fla. 306 (where it was held that an actual binding out was unnecessary).

40. *Georgia.*— Ballenger *v.* McLain, 54 Ga. 159.

Maine.— Doane *v.* Covel, 56 Me. 527.

Massachusetts.— Reidell *v.* Congdon, 16 Pick. (Mass.) 44.

New Hampshire.— Campbell *v.* Cooper, 34 N. H. 49.

New York.— People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414.

Pennsylvania.— Com. *v.* Wilbank, 10 Serg. & R. (Pa.) 416.

United States.— Charles *v.* Matlock, 3 Cranch C. C. (U. S.) 230, 5 Fed. Cas. No. 2,615; Ballard *v.* Edmonston, 2 Cranch C. C. (U. S.) 419, 2 Fed. Cas. No. 817.

Binding for less than statutory term.— The law in regard to the term of service by the infant is merely directory, and a departure from its direction, where manifestly for the benefit of the apprentice, may not be objected to. Brewer *v.* Harris, 5 Gratt. (Va.) 285. See also Fish *v.* Doyle, Draper (U. C.) 328, holding such an indenture voidable but not void.

Inserting infant's age.—A requirement that the infant's age be inserted in the indenture is sufficiently complied with by inserting the year, without the month and day, of his birth. State *v.* Taylor, 3 N. J. L. 58.

Presumption of compliance.— In Smith *v.* Elliot, 4 Cranch C. C. (U. S.) 710, 22 Fed. Cas. No. 13,040, it was held not necessary to state in the indenture that the apprentice was present in court, since this would be presumed unless the contrary appeared.

it has been held that such provision should be construed to mean voidable only.[41]

2. USE OF WORD "APPRENTICE." The use of the word "apprentice" is not necessary to the formation of a contract of apprenticeship.[42]

3. STATEMENT OF PREMIUM PAID. The premium given by public officers upon the binding out of a poor apprentice need not be stated in the indenture.[43]

4. CONSENT, EXECUTION, AND APPROVAL. Statutory provisions as to the consent of persons interested,[44] the execution of the indentures by the proper parties,[45] and their approval by the proper court or officers,[46] are mandatory, and must be strictly pursued. When so required, such consent must appear in the indenture[47] or in a separate certificate;[48] but, unless otherwise required by statute, it is sufficient if the assent of the parent or guardian is shown by his signing the indentures.[49]

5. PROVISIONS FOR BENEFIT OF APPRENTICE — a. In General. Indentures imposing upon the master duties not required by the statute will be upheld as being for the apprentice's benefit.[50] Under the civil rights act an indenture binding a child of negro descent, which does not contain the same provisions for the security and

41. Luby *v.* Cox, 2 Harr. (Del.) 184; Gray *v.* Cookson, 16 East 13; Smith *v.* Birch, 1 Sess. Cas. 82; St. Nicholas Parish *v.* St. Peter Parish, Str. 1066; Gye *v.* Felton, 4 Taunt. 876; Fish *v.* Doyle, Draper (U. C.) 328.

See also *infra*, XI.

De facto apprenticeship.—Although a contract of apprenticeship be void, yet while the parties reside together, mutually performing the conditions of the contract, the relation of master and apprentice subsists as if the indentures had been binding. Nickerson *v.* Easton, 12 Pick. (Mass.) 110; Maltby *v.* Harwood, 12 Barb. (N. Y.) 473; Williams *v.* Finch, 2 Barb. (N. Y.) 208. And see Adams *v.* Miller, 1 Cranch C. C. (U. S.) 5, 1 Fed. Cas. No. 63.

42. Rex *v.* Laindon, 8 T. R. 379.

43. Rex *v.* Oadby, 1 B. & Ald. 477.

44. **Consent of parent or guardian.**—Chapman *v.* Crane, 20 Me. 172; Maltby *v.* Harwood, 12 Barb. (N. Y.) 473; Com. *v.* Vanlear, 1 Serg. & R. (Pa.) 248; Com. *v.* Atkinson, 8 Phila. (Pa.) 375; Barrett *v.* McPherson, 4 Cranch C. C. (U. S.) 475, 2 Fed. Cas. No. 1,049.

See 3 Cent. Dig. tit. "Apprentices," § 12.

Consent of infant.—An infant cannot be bound as an apprentice unless he is a party to, and executes the deed or indenture.

Maine.— Dodge *v.* Hills, 13 Me. 151.

Massachusetts.— Harper *v.* Gilbert, 5 Cush. (Mass.) 417; Butler *v.* Hubbard, 5 Pick. (Mass.) 250.

New Hampshire.— Balch *v.* Smith, 12 N. H. 437.

New Jersey.— Fisher *v.* Lunger, 33 N. J. L. 100; Stokes *v.* Hatcher, 4 N. J. L. 95; Ivins *v.* Norcross, 3 N. J. L. 531; Lyon *v.* Whitmore, 3 N. J. L. 413.

New York.— People *v.* Hanna, 3 How. Pr. (N. Y.) 39; Matter of McDowle, 8 Johns. (N. Y.) 328.

Pennsylvania.— Com. *v.* Moore, 1 Ashm. (Pa.) 123; Com. *v.* Atkinson, 8 Phila. (Pa.) 375. But see Com. *v.* Jones, 3 Serg. & R. (Pa.) 158, holding that under the Pennsylvania act of 1771 an infant put out by overseers need not join in the indenture.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277.

Tennessee.— Stringfield *v.* Heiskell, 2 Yerg. (Tenn.) 545.

Virginia.— Pierce *v.* Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333.

United States.— Studer *v.* Glenn, 3 Cranch C. C. (U. S.) 650, 23 Fed. Cas. No. 13,558.

England.— Rex *v.* Arnesby, 3 B. & Ald. 584, 5 E. C. L. 337; Rex *v.* Cromford, 8 East 25.

See 3 Cent. Dig. tit. "Apprentices," § 12.

Consent of parent obtained by fraud.— Where the consent of a parent is obtained through fraudulent misrepresentations as to the effect of the indenture, the court will, upon habeas corpus, return the children to the parent's custody. Hatcher *v.* Cutts, 42 Ga. 616. And see Mitchell *v.* McElvin, 45 Ga. 558, in which a mother was induced, by threats, to sign articles.

45. **The master must sign** the indenture. People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414.

46. Englehardt *v.* Young, 76 Ala. 534; Morrill *v.* Kennedy, 22 Ark. 324; Owens *v.* Frager, 119 Ind. 532, 21 N. E. 1115; Hunsucker *v.* Elmore, 54 Ind. 209; People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414.

The approval may appear anywhere in or upon the indenture (State *v.* Hooper, 1 Houst. Crim. Cas. (Del.) 17), and consent indorsed on only one of the indentures is sufficient (Franklin *v.* South Brunswick, 3 N. J. L. 35).

47. Harper *v.* Gilbert, 5 Cush. (Mass.) 417, holding that the insertion of the minor's name in the attestation clause, and the execution of the instrument by such minor, are not a sufficient expression of his assent.

48. People *v.* Judge, 2 Hill (N. Y.) 596, holding that a mere signing by the parent was insufficient.

49. Chapman *v.* Crane, 20 Me. 172.

50. State *v.* Hooper, 1 Houst. Crim. Cas. (Del.) 17; Cochran *v.* Davis, 5 Litt. (Ky.) 118; Finch *v.* Gore, 2 Swan (Tenn.) 326; Davis *v.* Bratton, 10 Humphr. (Tenn.) 178; Brewer *v.* Harris, 5 Gratt. (Va.) 285.

benefit of the apprentice which are required by the general law of the state in the case of white apprentices, was held to be void.[51]

b. Relating to Education — (I) *Generally.* Unless it appears that the education of the apprentice has been sufficiently attended to before the apprenticing,[52] an indenture which does not contain a covenant to educate the apprentice is void as against the child,[53] but not as against the master;[54] and where the statute provides that the master shall cause the apprentice to be instructed in certain branches of learning the master should covenant in the statutory language so to do.[55]

(II) *In Art, Trade, or Business.* Although not required by statute,[56] the indenture should contain a covenant, on the part of the master, to teach the apprentice some art or business,[57] which should be the one designated by the order of the court when there is an order.[58]

c. Relating to Support. An indenture which does not provide for the support of the minor during the whole time which he has to serve is fatally defective.[59]

B. Construction and Effect — 1. In General — a. What Law Governs — (I) *In General.* As in other cases of contract relating to the person, contracts of apprenticeship are to be construed according to the *lex loci contractus;* but if, from the terms or nature of the instrument, it appears that it is to be executed in another jurisdiction, then the *lex loci contractus* becomes immaterial, and its validity must be tested according to the *lex loci solutionis.*[60]

(II) *Extraterritorial Effect of Indenture.* Where a master removes his apprentice to another jurisdiction, the courts of the latter jurisdiction will not enforce the indenture.[61] If, however, a state enacts that indentures shall be valid

51. *In re* Turner, 1 Abb. (U. S.) 84, Chase (U. S.) 157, 6 Int. Rev. Rec. 147, 1 Am. Law T. Rep. 7, 24 Fed. Cas. No. 14,247. See, generally, Civil Rights; Constitutional Law.

52. Com. *v.* Leeds, 1 Rawle (Pa.) 191; Com. *v.* Clark, 4 Pa. Co. Ct. 90.

53. Com. *v.* Penott, Brightly (Pa.) 189; Com. *v.* Bowen, 5 Phila. (Pa.) 220, 20 Leg. Int. (Pa.) 392; Com. *v.* Atkinson, 1 Leg. Gaz. (Pa.) 232.

54. Francis *v.* Thompson, Tappan (Ohio) 248.

55. Burnham *v.* Chapman, 17 Me. 385 (holding that a covenant to see that the minor is "properly educated and instructed" is not sufficient under a statute requiring the apprentice to be instructed "to read, write, and cipher"); Reidell *v.* Congdon, 16 Pick. (Mass.) 44 (holding that a covenant to give the apprentice "the privilege of all the town school usually taught in the town" is not sufficient under a statute requiring him to be taught "to read, write, and cipher"); Butler *v.* Hubbard, 5 Pick. (Mass.) 250; People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414 (holding that a stipulation to teach a child "to cipher" is not a compliance with a statute requiring him to be taught "the general rules of arithmetic"); Dowd *v.* Davis, 15 N. C. 61.

See 3 Cent. Dig. tit. "Apprentices," § 13.

Covenant to pay penalty for failure unnecessary.— Where the statute provides a penalty in case the master fails to teach the apprentice to read and write, it is not essential to a recovery of the penalty by the apprentice that the indenture should stipulate for the payment of such penalty. Sayers *v.* Downs, 5 Ky. L. Rep. 683.

56. Baker *v.* Winfrey, 15 B. Mon. (Ky.) 499.

57. Matter of Barre, 14 Abb. Pr. N. S. (N. Y.) 426; Dowd *v.* Davis, 15 N. C. 61; Respublica *v.* Keppele, 2 Dall. (Pa.) 197, 1 Yeates (Pa.) 233, 1 L. ed. 347; Com. *v.* Airey, 5 Kulp (Pa.) 83; Matter of Goodenough, 19 Wis. 274.

"Housewifery" is an art within the meaning of the statute. Com. *v.* Jennings, 1 Browne (Pa.) 197.

Distinct branch of art or occupation.—An indenture is not void where it provides that the apprentice shall be instructed in a distinct part of a special vocation. Com. *v.* Clark, 4 Pa. Co. Ct. 90.

No specific art mentioned.— An indenture providing for teaching the apprentice such manual occupation as should be found best adapted or most suitable to his genius and capacity has been held valid although it did not specify a particular employment. Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309; People *v.* Pillow, 1 Sandf. (N. Y.) 672, 6 N. Y. Leg. Obs. 106.

58. Baker *v.* Winfrey, 15 B. Mon. (Ky.) 499.

59. Com. *v.* Bowen, 5 Phila. (Pa.) 220, 20 Leg. Int. (Pa.) 392; Com. *v.* Atkinson, 1 Leg. Gaz. (Pa.) 232.

An agreement to pay a certain weekly sum in lieu of board and lodging is sufficient. Com. *v.* Conrow, 2 Pa. St. 402.

60. Dyer *v.* Hunt, 5 N. H. 401; Petrie *v.* Voorhees, 18 N. J. Eq. 285. See, generally, Contracts.

61. Himes *v.* Howes, 13 Metc. (Mass.) 80; Dyer *v.* Hunt, 5 N. H. 401 [*citing* Davis *v.* Coburn, 8 Mass. 299; Com. *v.* Hamilton, 6 Mass. 273; Hall *v.* Gardner, 1 Mass. 172]; Com. *v.* Deacon, 6 Serg. & R. (Pa.) 526; Com. *v.* Edwards, 6 Binn. (Pa.) 202; U. S. *v.* Schol-

if certain specified stipulations are inserted, when entered into in another state to be performed within the jurisdiction of the former, an indenture made in accordance with the statutes of the state where made, and also in compliance with the requirements of the statutes of the state wherein it is to be performed, is valid.[62]

b. Conclusiveness of Recitals — (I) *Upon Parties.* As in case of other sealed instruments, an adult party signing an indenture is concluded by the recitals contained therein;[63] but the apprentice himself is not estopped from showing the falsity thereof.[64]

(II) *Upon Third Persons.* A person not connected with the indenture of apprenticeship cannot take advantage of any defects or omissions therein;[65] but, on the other hand, third persons are not concluded by recitals contained in the articles.[66]

2. When Made by Infant. Where an infant cannot make a binding contract of apprenticeship,[67] he may avoid such a contract either during his minority or on becoming of age;[68] but where an infant is allowed to enter into a contract of apprenticeship as being for his benefit,[69] he will not be permitted to avoid it unless the avoidance also is clearly shown to be for his benefit.[70]

field, 1 Cranch C. C. (U. S.) 255, 27 Fed. Cas. No. 16,231.

See also *infra*, VII, A, 3, a, (VI); XI, A, 10.

Voluntary accompaniment of the master by the apprentice does not affect the rule. Com. *v.* Deacon, 6 Serg. & R. (Pa.) 526; Com. *v.* Edwards, 6 Binn. (Pa.) 202.

62. People *v.* New York Juvenile Asylum, 2 Thomps. & C. (N. Y.) 475.

63. Glidden *v.* Unity, 30 N. H. 104; McCutchin *v.* Jamieson, 1 Cranch C. C. (U. S.) 348, 16 Fed. Cas. No. 8,743.

64. Matter of Brennan, 1 Sandf. (N. Y.) 711; Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408; Banks *v.* Metcalfe, 1 Wheel. Crim. (N. Y.) 381; Houston *v.* Turk, 7 Yerg. (Tenn.) 13.

Recital of age only prima facie evidence.— An indenture of apprenticeship reciting the age of the apprentice is not conclusive, and, notwithstanding a statute declares that it shall be taken to be his true age, it is only *prima facie* evidence, and his true age may be shown by extrinsic testimony. Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408; Banks *v.* Metcalfe, 1 Wheel. Crim. (N. Y.) 381; Bonnel *v.* Brotzman, 3 Watts & S. (Pa.) 178.

65. Glidden *v.* Unity, 30 N. H. 104; Heinecke *v.* Rawlings, 4 Cranch C. C. (U. S.) 699, 11 Fed. Cas. No. 6,326.

66. Thus, in a suit by a master to recover his apprentice's wages from one who has employed the latter after he has left his master's service, defendant is not concluded by the recital in the indenture as to the age of the apprentice. Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408. But see, *contra*, Hooks *v.* Perkins, 44 N. C. 21.

67. See *supra*, III, E.

68. *Alabama.*— Clark *v.* Goddard, 39 Ala. 164, 74 Am. Dec. 777.

Connecticut.— Peters *v.* Lord, 18 Conn. 337, where the contract was by parol.

Delaware.— Walker *v.* Chambers, 5 Harr. (Del.) 311, holding that a contract to serve beyond full age was invalid unless ratified by the apprentice after his majority.

Indiana.— Harney *v.* Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662.

Kentucky.— Haley *v.* Taylor, 3 Dana (Ky.) 221, holding that while an infant may bind himself so as to be subject to a master, he may plead infancy to a suit on the indenture.

Maine.— Whitmore *v.* Whitcomb, 43 Me. 458, holding that where a minor above the age of fourteen is bound for service the indenture should be made by the parent, the minor consenting, and not by the minor with the consent of the parent.

New York.— Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408, holding that an apprentice, on becoming of age, has the right to elect whether to abandon the contract or not.

Pennsylvania.— Guthrie *v.* Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681.

South Carolina.— McNight *v.* Hogg, 1 Treadw. (S. C.) 117.

United States.— Handy *v.* Brown, 1 Cranch C. C. (U. S.) 610, 11 Fed. Cas. No. 6,019.

England.— *Ex p.* Davis, 5 T. R. 715.

Canada.— Dillingham *v.* Wilson, 6 U. C. Q. B. O. S. 85.

See 3 Cent. Dig. tit. "Apprentices," § 15.

How avoided.— Some formal act on the part of the apprentice, and notice to the master of an intention to dissolve the contract, are essential. A mere leaving of his master's employment is not sufficient to show an avoidance of the contract. Dowd *v.* Davis, 15 N. C. 61; Rex *v.* Evered [*cited* in Gray *v.* Cookson, 16 East 27]; Gray *v.* Cookson, 16 East 13; Barber *v.* Dennis, 6 Mod. 69; Smedley *v.* Gooden, 3 M. & S. 189; Ashcroft *v.* Bertles, 6 T. R. 652.

Effect of avoidance.— The avoidance by an apprentice of a voidable indenture does not render the instrument void *ab initio*. It is a subsisting indenture until avoided (Overseers of Poor *v.* Overseers of Poor, 8 N. J. L. 257), and he cannot, after avoidance, sue for money or property advanced or labor performed by him under the same (Harney *v.* Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662. See also Wilhelm *v.* Hardman, 13 Md. 140.)

69. See *supra*, III, E.

70. Woodruff *v.* Logan, 6 Ark. 276, 42 Am. Dec. 695; Wilhelm *v.* Hardman, 13 Md. 140; Berry *v.* Wallace, Wright (Ohio) 657; Rex *v.*

VII. RIGHTS AND LIABILITIES OF PARTIES.

A. In General — 1. Dependent on Terms of Indenture. The rights and liabilities of the parties to an indenture of apprenticeship are defined by the terms of the covenants contained therein, and, as a rule, a party is only liable upon his personal covenants.[71]

2. Construction of Covenants — a. In General. No particular form of words is prescribed by law as necessary to make a covenant in an indenture of apprenticeship, but the court will be governed by what appears to be the intent of the parties.[72]

b. Mutual and Independent. The covenants in an indenture of apprenticeship are mutual and independent, entitling each party to a remedy for a breach of them.[73]

c. Limitation of Liability. Where the parties bind themselves to the fulfilment of the covenants so far as it may be in their power, such a covenant will be construed to limit their obligations to their legal ability.[74]

d. Place of Performance. A contract of apprenticeship is to be performed at the place where the master's business is carried on and the parties reside at the date of the indenture.[75]

e. Proviso as to Health of Apprentice. A proviso attached to the covenants of a master, to the effect that the minor shall continue to be a healthy boy and to be a faithful servant during his minority, will be construed to apply to all the covenants of the master, and not merely to that particular one to which it is attached.[76]

Great Wigston, 3 B. & C. 484, 5 D. & R. 339, 10 E. C. L. 223.

Compare Walter *v.* Everard, [1891] 2 Q. B. 369, 55 J. P. 693, 65 L. T. Rep. N. S. 443, 39 Wkly. Rep. 676; Ashcroft *v.* Bertles, 6 T. R. 652; Rex *v.* Hindringham, 6 T. R. 557, in which last case Lord Kenyon distinctly refused to discuss the question of an infant's power to put an end to his contract of indenture during his minority.

71. *Indiana.*— Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Sacket *v.* Johnson, 3 Blackf. (Ind.) 61.

Kentucky.— Moore *v.* Ann, 9 B. Mon. (Ky.) 36; McLure *v.* Rush, 9 Dana (Ky.) 64.

Massachusetts.— Lobdell *v.* Allen, 9 Gray (Mass.) 377; Holbrook *v.* Bullard, 10 Pick. (Mass.) 68; Phelps *v.* Townsend, 8 Pick. (Mass.) 392; Blunt *v.* Melcher, 2 Mass. 228.

New Hampshire.— Balch *v.* Smith, 12 N. H. 437.

New Jersey.— Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 221; Woodruff *v.* Corey, 3 N. J. L. 129.

New York.—Van Dorn *v.* Young, 13 Barb. (N. Y.) 286; Ackley *v.* Hoskins, 14 Johns. (N. Y.) 374. See also People *v.* Pillow, 1 Sandf. (N. Y.) 672, 6 N. Y. Leg. Obs. 106.

North Carolina.— Clancy *v.* Overman, 18 N. C. 402.

Ohio.— Berry *v.* Wallace, Wright (Ohio) 657; Campbell *v.* Criss, Tappan (Ohio) 289. See also Haber *v.* Heis, Wright (Ohio) 19, holding that, where a master neglected to record the indentures pursuant to the requirements of the act of 1824, he did not thereby discharge himself from the covenant.

Pennsylvania.—Velde *v.* Levering, 2 Rawle (Pa.) 269; Com. *v.* Leeds, 1 Rawle (Pa.) 191.

Tennessee.— Davis *v.* Bratton, 10 Humphr. (Tenn.) 178.

Vermont.— See Baldwin *v.* Rupert, 8 Vt. 256, in which it was held that, in apprenticing a pauper child, an overseer of the poor does not bind the town by his covenant for apprentice's fidelity during his term.

See 3 Cent. Dig. tit. "Apprentices," § 25.

72. Wright *v.* Tuttle, 4 Day (Conn.) 313; Rex *v.* Laindon, 8 T. R. 379.

Where the object of an engagement is to learn, and not to serve, even though the contract may be imperfect as to form it will nevertheless be construed as a contract of apprenticeship (Rex *v.* Newtown, 1 A. & E. 238, 28 E. C. L. 127; Rex *v.* Crediton, 2 B. & Ad. 493, 22 E. C. L. 209; Rex *v.* Bilborough, 1 B. & Ald. 115; Rex *v.* Edingale, 10 B. & C. 739, 21 E. C. L. 312; Rex *v.* Combe, 8 B. & C. 82, 15 E. C. L. 48; Rex *v.* St. Margarets, 6 B. & C. 97, 13 E. C. L. 55. *Compare* Rex *v.* Burbach, 1 M. & S. 370); but where an instrument contains no provision for learning or teaching, that fact will be taken as evidence that the contract was one of hiring and service, and not of apprenticeship (Rex *v.* Billinghay, 5 A. & E. 676, 31 E. C. L. 779).

73. McLure *v.* Rush, 9 Dana (Ky.) 64; Powers *v.* Ware, 2 Pick. (Mass.) 451; Havens *v.* Bush, 2 Johns. (N. Y.) 387; Sears *v.* Fowler, 2 Johns. (N. Y.) 272; Winstone *v.* Linn, 1 B. & C. 460, 8 E. C. L. 196.

74. Van Dorn *v.* Young, 13 Barb. (N. Y.) 286.

75. Eaton *v.* Westerm, 9 Q. B. D. 636, 52 L. J. Q. B. 41 [*overruling* Royce *v.* Charlton, 8 Q. B. D. 1, 45 L. T. Rep. N. S. 712, 30 Wkly. Rep. 274].

76. Glidden *v.* Unity, 33 N. H. 571 [*affirming* 30 N. H. 104].

f. Time For Election Under Alternative Covenants. Where a master covenants to pay his apprentice a sum of money or teach him to read and write, he has until the expiration of the term to make an election.[77]

3. Of Master — a. In General — (i) *Custody and Control of Apprentice.* A master is entitled to the custody and control of his apprentice[78] and may retake him, if a runaway, wherever found;[79] and, in a proper case, the courts will interfere and restore an absconding apprentice to the custody of his master.[80] It is the duty of the master at all times to look to the apprentice's deportment, and restrain him from vicious courses,[81] and he may use moderate correction in case of misconduct on the apprentice's part;[82] but his power of chastisement cannot be delegated,[83] is limited to cases of misconduct,[84] and in no event should he exercise it in a wanton and cruel manner.[85]

(ii) *Injury to Apprentice by Third Person.* A master may maintain an action, *per quod servitium amisit*, for injuries to his apprentice, where they cause disability, either partial or total.[86]

(iii) *Instruction in Art, Trade, or Business.* A master is bound to give his apprentice specific instructions, and it is not sufficient merely to keep him at work.[87] However, the master is not bound in every event to compel the apprentice to learn his trade, but only to act toward him in the matter of coercion as an ordinarily prudent and sensible parent would act toward his own child.[88]

(iv) *Medical Attendance.* From the very nature of the relation between master and apprentice, the former is bound to pay for the care of, and medical attendance on, his apprentice during illness;[89] but it has been held that where the master did not call in the physician, and the professional treatment was not in the master's own house, the latter, in the absence of a special agreement, is not liable.[90]

(v) *Religious Instruction.* A covenant to give an apprentice religious instruction is complied with where the master sends the apprentice to the church where he and his family worship, and puts him under the Sabbath-school instruction of the same denomination.[91]

(vi) *Removal of Master From Jurisdiction.* The removal of a master from the jurisdiction in which a minor has been apprenticed to him is a breach of

77. Strader *v.* Mardis, 4 Ky. L. Rep. 995.

78. Com. *v.* Harrison, 11 Mass. 63.

79. Com. *v.* Kerr, Add. (Pa.) 324.

A master is not bound to receive back a runaway apprentice or return part of the apprentice fee. Cuff *v.* Brown, 5 Price 297, 19 Rev. Rep. 621.

80. Beard *v.* Hudson, 61 N. C. 180; Com. *v.* Linker, 8 Phila. (Pa.) 455; Boaler *v.* Cummines, 3 Fed. Cas. No. 1,584, 10 Leg. Int. (Pa.) 122, 5 Pa. L. J. Rep. 246, 1 Am. L. Reg. 654.

81. Com. *v.* Conrow, 2 Pa. St. 402.

82. *Louisiana.*— Mitchell *v.* Armitage, 10 Mart. (La.) 38.

New York.— See People *v.* Sniffen, 1 Wheel. Crim. (N. Y.) 502; People *v.* Philips, 1 Wheel. Crim. (N. Y.) 155.

North Carolina.— State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687.

Pennsylvania.— Com. *v.* Baird, 1 Ashm. (Pa.) 267; Dougherty *v.* Bement, 5 Phila. (Pa.) 458, 21 Leg. Int. (Pa.) 29.

South Carolina.— McKnight *v.* Hogg, 3 Brev. (S. C.) 44.

See 3 Cent. Dig. tit. "Apprentices," § 31.

83. People *v.* Philips, 1 Wheel. Crim. (N. Y.) 155.

84. Thus, a master has no right to chastise his apprentice for attending a trial without his knowledge, in pursuance of a subpœna. People *v.* Sniffen, 1 Wheel. Crim. (N. Y.) 502.

85. Mitchell *v.* Armitage, 10 Mart. (La.) 38; State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687; State *v.* Jones, 95 N. C. 588, 59 Am. Rep. 282; State *v.* Harris, 63 N. C. 1.

86. Ames *v.* Union R. Co., 117 Mass. 541, 19 Am. Rep. 426; Hodsoll *v.* Stallebrass, 11 A. & E. 301, 39 E. C. L. 178, 9 C. & P. 63, 38 E. C. L. 49, 9 Dowl. P. C. 482, 3 P. & D. 200; Lewis *v.* Fog, Str. 944. See, generally, Master and Servant; Seduction.

87. Barger *v.* Caldwell, 2 Dana (Ky.) 129; Strader *v.* Mardis, 4 Ky. L. Rep. 995.

88. Wright *v.* Brown, 5 Md. 37.

89. Rice *v.* Breheny, 2 Houst. (Del.) 74; Emmons *v.* Lord, 18 Me. 351; Easley *v.* Craddock, 4 Rand. (Va.) 423 (holding that a parent is only liable when the services were rendered at his request); Reg. *v.* Smith, 8 C. & P. 153, 34 E. C. L. 662.

90. Dunbar *v.* Williams, 10 Johns. (N. Y.) 249; Percival *v.* Nevill, 1 Nott & M. (S. C.) 452.

91. Com. *v.* Farley, 3 Pa. L. J. Rep. 49.

his contract for which he will be held liable, even though he offers to take the boy with him.[92]

(VII) *SERVICE AND EARNINGS OF APPRENTICE.* In default of an agreement to the contrary, the master[93] is entitled to the full services and ordinary earnings of his apprentice,[94] unless, by reason of some unauthorized act on the part of the master, the apprentice is relieved of the obligations of the indenture;[95] but he has no claim to extraordinary earnings which in no wise interfere with his profits from the apprentice's service.[96]

(VIII) *SUPPORT.* It is the duty of the master to support and maintain his apprentice;[97] but this duty is limited to the time of service, and ceases when that ends.[98]

b. Signing in Representative Capacity. Where the master signs in a representative capacity, the additional words are merely *descriptio personæ*, and he will be held to be individually and personally liable upon the covenants.[99]

92. Walters *v.* Morrow, 1 Houst. (Del.) 527. See also *infra*, XI, A, 10.

93. Personal representatives of the master of an apprentice whose indenture does not extend to executors or administrators are not entitled to receive wages earned by the apprentice after his master's death, and before the expiration of the apprenticeship. Kennedy *v.* Savage, 2 Browne (Pa.) 178.

94. Olney *v.* Myers, 3 Ill. 311; Kerwin *v.* Wright, 59 Ind. 369; Graham *v.* Kinder, 11 B. Mon. (Ky.) 60; Eades *v.* Vandeput, 4 Dougl. 1, 5 East 39, note 1, 26 E. C. L. 303; Foster *v.* Stewart, 3 M. & S. 191; Hill *v.* Allen, 1 Ves. 83; Meriton *v.* Hornsby, 1 Ves. 48.

Where an apprentice is employed by a third person, without the knowledge of the master, the master is entitled to all of the apprentice's earnings, whether the person who employed him was aware that he was an apprentice or not.

Maine.— Bowes *v.* Tibbets, 7 Me. 457.

Massachusetts.— Bardwell *v.* Purrington, 107 Mass. 419. But see Ayer *v.* Chase, 19 Pick. (Mass.) 556, where it was held that the master could not recover an absconding apprentice's wages as seaman from the ship's owners, who did not know that the minor was apprenticed until after they had paid him.

New Hampshire.— Munsey *v.* Goodwin, 3 N. H. 272.

New York.— James *v.* Le Roy, 6 Johns. (N. Y.) 274 [*reversing* Anth. N. P. (N. Y.) 159].

Vermont.—Conant *v.* Raymond, 2 Aik. (Vt.) 243.

If rendered under a voidable contract the master is none the less entitled to such services and is not liable to an action for compensation therefor.

Illinois.— Ford *v.* McVay, 55 Ill. 119; Olney *v.* Myers, 3 Ill. 311.

New Hampshire.— Page *v.* Marsh, 36 N. H. 305; Campbell *v.* Cooper, 34 N. H. 49.

New Jersey.— Mead *v.* Morrison, 3 N. J. L. 296.

New York.— Potter *v.* Greene, 39 Hun (N. Y.) 72; Maltby *v.* Harwood, 12 Barb. (N. Y.) 473.

Ohio.—Abbott *v.* Inskip, 29 Ohio St. 59.

Tennessee.— Stewart *v.* Rickets, 2 Humphr. (Tenn.) 151.

Vermont.— Phelps *v.* Culver, 6 Vt. 430. See also Squires *v.* Whipple, 2 Vt. 111.

Contra, Kerwin *v.* Myers, 71 Ind. 359; Hunsucker *v.* Elmore, 54 Ind. 209.

See 3 Cent. Dig. tit. "Apprentices," § 29.

95. Thus, where a cooper's apprentice was sent on a whaling voyage under an agreement made between the apprentice and the master that the latter should furnish the former with outfits and receive all the earnings of the voyage, it was held that the contract was not reasonable and beneficial to the minor, and that he was entitled to recover to his own use his earnings on the voyage. Nickerson *v.* Easton, 12 Pick. (Mass.) 110; Randall *v.* Rotch, 12 Pick. (Mass.) 107.

96. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266.

Bounty money received by a minor apprentice upon his enlistment as a soldier belongs to him, and not to his master.

Delaware.— Turner *v.* Smithers, 3 Houst. (Del.) 430.

Massachusetts.— Kelly *v.* Sprout, 97 Mass. 169.

New York.— Johnson *v.* Dodd, 56 N. Y. 76.

Pennsylvania.— Cain *v.* Snyder, 6 Phila. (Pa.) 24, 22 Leg. Int. (Pa.) 253.

Vermont.— Hudson *v.* Worden, 39 Vt. 382.

Money allowed a drafted man to buy a substitute should be paid to the apprentice, and not to the master, and an agreement between the master and the drafted man that the money shall be paid to the former is void as being against the policy of the law, and the apprentice may recover from the drafted man the value of his services. Turner *v.* Smithers, 3 Houst. (Del.) 430.

Prize-money.—An apprentice is entitled, as against his master, to prize-money gained by himself. Carsan *v.* Watts, 3 Dougl. 350, 26 E. C. L. 232.

97. See *supra*, VI, A, 5, c.

98. Petrie *v.* Voorhees, 18 N. J. Eq. 285.

Testamentary provision for support.— Provision for support made by a master in his will, if liberal according to his circumstances and the apprentice's condition, will be taken as a satisfaction of his obligation to support. Petrie *v.* Voorhees, 18 N. J. Eq. 285.

99. Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309; People *v.* Pillow, 1 Sandf. (N. Y.) 672.

4. Of Apprentice — a. In General. The fact that the minor is not named in an indenture as a party thereto, or that it contains no covenant on his part, will not relieve him from liability under the indenture, where he gave his consent, evidenced by signing and sealing the instrument.[1]

b. Additional Services. No services can be required of the apprentice other than those expressly or impliedly contracted for;[2] but it has been held that he cannot recover from his master for extra work done by him during the term of his apprenticeship, even though there has been an express promise by the master to pay for it.[3]

c. Contempt of Court. An apprentice may be punished as for contempt in case of his failure to obey an order of court.[4]

d. Making Up Lost Time. An apprentice will be compelled, after the expiration of his term of service, to serve the number of days lost by reason of his absence without his master's consent.[5]

5. Of Parent. A parent who binds himself is liable upon the indenture by reason of his signature and seal, although there are no express words of covenant binding him;[6] but where it clearly appears that the parent has become a party to the indenture merely for the purpose of giving his consent to the apprenticeship, as required by statute, he is not liable for any breach of covenant on the part of the infant.[7]

6. Of Guardian. So, too, persons *in loco parentis*, who sign the indenture merely to show their consent, will not be held liable for the failure of the apprentice to perform the stipulated services;[8] but where they personally covenant that the latter shall perform the stipulated services, they will be liable in case of a breach of covenant by the apprentice.[9]

B. Under Defective Indenture — 1. In General. A contract of apprenticeship not conformable to statutory requirements is generally voidable only at the election of the apprentice.[10]

1. Studer *v.* Glenn, 3 Cranch C. C. (U. S.) 650, 23 Fed. Cas. No. 13,558. See also *supra*, VI, B, 2.

2. Com. *v.* Hemperly, 4 Pa. L. J. Rep. 440, 3 Am. L. J. N. S. 17.

Where an apprentice covenants to perform additional labor when required, he is liable to perform such additional labor as may be reasonable under the contract. McPeck *v.* Moore, 51 Vt. 269.

3. Bailey *v.* King, 1 Whart. (Pa.) 113, 29 Am. Dec. 42.

4. Easby *v.* Fletcher, 1 Hayw. & H. (U. S.) 35, 8 Fed. Cas. No. 4,250.

5. Easby *v.* Fletcher, 1 Hayw. & H. (U. S.) 35, 8 Fed. Cas. No. 4,250.

6. Bull *v.* Follett, 5 Cow. (N. Y.) 170; Mead *v.* Billings, 10 Johns. (N. Y.) 99; Woodrow *v.* Coleman, 1 Cranch C. C. (U. S.) 171, 30 Fed. Cas. No. 17,982.

7. Sacket *v.* Johnson, 3 Blackf. (Ind.) 61; Campbell *v.* Criss, Tappan (Ohio) 289. See also Branch *v.* Ewington, Dougl. 500.

A covenant that the apprentice shall faithfully serve his master is not the covenant of the parent or guardian, and he will not be held liable if the apprentice fails in his duty. Chapman *v.* Crane, 20 Me. 172; Holbrook *v.* Bullard, 10 Pick. (Mass.) 68; Blunt *v.* Melcher, 2 Mass. 228; People *v.* Hoster, 14 Abb. Pr. N. S. (N. Y.) 414; Ackley *v.* Hoskins, 14 Johns. (N. Y.) 374.

8. *Indiana.*— Sacket *v.* Johnson, 3 Blackf. (Ind.) 61.

Maine.— Chapman *v.* Crane, 20 Me. 172.

Massachusetts.— Holbrook *v.* Bullard, 10 Pick. (Mass.) 68; Blunt *v.* Melcher, 2 Mass. 228.

New Jersey.— Woodruff *v.* Corey, 3 N. J. L. 129.

New York.— Ackley *v.* Hoskins, 14 Johns. (N. Y.) 374.

Pennsylvania.— Velde *v.* Levering, 2 Rawle (Pa.) 269; Com. *v.* Leeds, 1 Rawle (Pa.) 191.

But see Clement *v.* Wheeler, 2 Root (Conn.) 466; Hewit *v.* Morgan, 2 Root (Conn.) 363; Paddock *v.* Higgins, 2 Root (Conn.) 316.

9. Berry *v.* Wallace, Wright (Ohio) 657.

10. *Maine.*—Doane *v.* Covel, 56 Me. 527.

Massachusetts.— Curtis *v.* Curtis, 5 Gray (Mass.) 535.

New Hampshire.—Brown *v.* Whittemore, 44 N. H. 369; Page *v.* Marsh, 36 N. H. 305.

New York.— Potter *v.* Greene, 39 Hun (N. Y.) 72; People *v.* Gates, 57 Barb. (N. Y.) 291, 39 How. Pr. (N. Y.) 74; Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309; Overseers of Poor *v.* Overseers of Poor, 13 Johns. (N. Y.) 245; Matter of McDowle, 8 Johns. (N. Y.) 328.

North Carolina.— Dowd *v.* Davis, 15 N. C. 61.

Ohio.— Haber *v.* Heis, Wright (Ohio) 19; Francis *v.* Thompson, Tappan (Ohio) 248. *Compare* Newman's Case, 1 Ohio Dec. 22.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277; Austin *v.* McCluney, 5 Strobh. (S. C.) 104.

2. When Executed by Public Officer. Where, under statutory authority, an apprentice is bound out by public officials, defects in the proceedings are usually available to neither the master, the apprentice, nor third persons;[11] but where the indenture is void it is of binding force upon no one.[12]

3. Where Contract Is Performed — a. By Apprentice. Where an apprentice performs the stipulated services under a defective indenture, the master is liable on his covenants contained therein.[13]

b. By Master.[14] Where an apprentice, serving under a voidable contract, terminates the contract by leaving the service without cause a long time before the end of the term, the master may recover a reasonable compensation for the instruction given.[15]

VIII. ASSIGNMENT OF APPRENTICES.

A. In General. The relation of master and apprentice being one of personal trust and confidence, it has been generally held, in the absence of statutory authority therefor, that the master cannot assign his apprentice and transfer the relation to another;[16] and this doctrine is much more stringently enforced where the assignment is to a person in another trade or business than that of the master.[17]

B. Who May Assign. Where an assignment is allowed only he who has the right to the services of the apprentice has power to assign those services.[18]

Canada.— Dillingham *v.* Wilson, 6 U. C. Q. B. O. S. 85; Webster *v.* McBride, 5 U. C. C. P. 109; Fish *v.* Doyle, Draper (U. C.) 328.

See 3 Cent. Dig. tit. "Apprentices," § 30.

Where a contract of apprenticeship is absolutely prohibited under statute, any agreement for the apprenticing of an infant will be held void. Rex *v.* Gravesend, 3 B. & Ad. 240, 23 E. C. L. 112.

Where the indenture stipulates for no definite period of service, either party may terminate the contract at pleasure. Wright *v.* Delano, 62 N. H. 252.

11. State *v.* Hooper, 1 Houst. Crim. Cas. (Del.) 17 (holding the indenture voidable only in a direct proceeding); People *v.* Weissenbach, 60 N. Y. 385; Adams *v.* Miller, 1 Cranch C. C. (U. S.) 5, 1 Fed. Cas. No. 63.

12. Butler *v.* Hubbard, 5 Pick. (Mass.) 250.

13. Page *v.* Marsh, 36 N. H. 305; Austin *v.* McCluney, 5 Strobh. (S. C.) 104; Stewart *v.* Rickets, 2 Humphr. (Tenn.) 151.

Part performance — Enforcement of balance.— Under Md. Act (1793), c. 45, § 7, providing that where a contract of apprenticeship, whether defective in form or not, has been partly performed, the court may compel a full performance, an indenture of apprenticeship for five years, irregularly made by one, instead of two, justices of the peace, may be enforced where the apprentice has been with the master for some time, and is able to earn eight or nine dollars a week at the trade. Charles *v.* Matlock, 3 Cranch C. C. (U. S.) 230, 5 Fed. Cas. No. 2,615.

14. Liability for services rendered by apprentice see *supra*, VII, A, 3, a, (VII).

15. Hambell *v.* Hamilton, 3 Dana (Ky.) 501; Squires *v.* Whipple, 2 Vt. 111.

16. *Kentucky.*— Graham *v.* Kinder, 11 B. Mon. (Ky.) 60; Hudnut *v.* Bullock, 3 A. K. Marsh. (Ky.) 299.

Massachusetts.— Randall *v.* Rotch, 12 Pick. (Mass.) 107; Coffin *v.* Bassett, 2 Pick. (Mass.) 357; Davis *v.* Coburn, 8 Mass. 299; Hall *v.* Gardner, 1 Mass. 172.

New York.—Nickerson *v.* Howard, 19 Johns. (N. Y.) 113. But see Overseers of Poor *v.* Overseers of Poor, 5 Cow. (N. Y.) 363.

North Carolina.— Biggs *v.* Harris, 64 N. C. 413; Allison *v.* Norwood, 44 N. C. 414; Futrell *v.* Vann, 30 N. C. 402.

Tennessee.— Stringfield *v.* Heiskell, 2 Yerg. (Tenn.) 545 [*approved* in Stewart *v.* Rickets, 2 Humphr. (Tenn.) 151].

Vermont.— Phelps *v.* Culver, 6 Vt. 430.

England.— Rex *v.* Stockland, Dougl. 69; Coventry *v.* Woodhall, Hob. 189; Rex *v.* East-Bridgeford, Str. 1115; Bedell *v.* Constable, Vaugh. 177. *Compare* Holy Trinity Parish *v.* Shoreditch Parish, Str. 10; St. George Hanover Square Parish *v.* St. James Westminster Parish, Str. 1001.

See 3 Cent. Dig. tit. "Apprentices," §§ 17, 18.

Dissolution of partnership.— See Eaton *v.* Western, 9 Q. B. D. 636.

Enlistment in army.—Under the act of congress of 1812, the enlistment in the army, with the consent of his master, of an apprentice who had been bound by the managers of the almshouse, was valid, although the master had covenanted not to assign the indenture without the consent of the managers, whose consent was not given to the enlistment. Com. *v.* Barker, 5 Binn. (Pa.) 423.

17. Randall *v.* Rotch, 12 Pick. (Mass.) 107; Gusty *v.* Diggs, 2 Cranch C. C. (U. S.) 210, 11 Fed. Cas. No. 5,878.

18. Com. *v.* King, 4 Serg. & R. (Pa.) 109, holding that an indenture binding an apprentice to a man, his heirs, and assigns, without naming executors, cannot be assigned by executors.

C. Consent to Assignment — 1. Of Infant. Where an infant's consent is required to indentures of apprenticeship,[19] a like consent is requisite to an assignment of the indenture by the master to another,[20] but the consent of an apprentice bound out by the overseers of the poor is not necessary.[21]

2. Of Parent or Guardian. In Pennsylvania no arrangement or contract between a master and his apprentice, by which the apprentice's services are assigned to another, is valid unless ratified in writing by the consent of the parent or person standing *in loco parentis*.[22]

D. Validity — 1. In General. Where an assignment of the services of an apprentice is not against public policy,[23] and the formalities required by statutes on the subject are observed, the validity of the assignment cannot be impeached.[24] And even though an indenture may not be assignable, yet an assignment, as between the old and new master, is valid as a covenant for the services of the apprentice; and if the apprentice serves the new master there is no failure of the consideration of the assignment.[25]

2. Where Indenture Was Void. If the indentures are themselves void in their inception, an assignment of them, otherwise valid, is also void unless accompanied by all the formalities essential to the validity of indentures of apprenticeship.[26]

IX. Enticing Away and Harboring Apprentices.

A. In General. The enticing away and harboring of an apprentice[27] will subject the person so doing to an action on the part of the master either in tort

19. See *supra*, VI, A, 4.

20. *Alabama.*—Tucker *v.* Magee, 18 Ala. 99.

Indiana.— Burger *v.* Rice, 3 Ind. 125.

Kentucky.— Graham *v.* Kinder, 11 B. Mon. (Ky.) 60; Davenport *v.* Gentry, 9 B. Mon. (Ky.) 427; Hudnut *v.* Bullock, 3 A. K. Marsh. (Ky.) 299; Pigman *v.* Ward, Ky. Dec. 305; Shult *v.* Travis, Ky. Dec. 142.

Louisiana.— Versailles *v.* Hall, 5 La. 281, 25 Am. Dec. 178.

Massachusetts.— Davis *v.* Coburn, 8 Mass. 299; Hall *v.* Gardner, 1 Mass. 172.

North Carolina.— Futrell *v.* Vann, 30 N. C. 402.

Tennessee.— Stewart *v.* Rickets, 2 Humphr. (Tenn.) 151; Stringfield *v.* Heiskell, 2 Yerg. (Tenn.) 545.

United States.— Walker *v.* Johnson, 2 Cranch C. C. (U. S.) 203, 29 Fed. Cas. No. 17,073; Handy *v.* Brown, 1 Cranch C. C. (U. S.) 610, 11 Fed. Cas. No. 6,019.

See 3 Cent. Dig. tit. "Apprentices," § 17.

21. Phelps *v.* Culver, 6 Vt. 430.

22. Com. *v.* Jones, 3 Serg. & R. (Pa.) 158; Com. *v.* Vanlear, 1 Serg. & R. (Pa.) 248; Com. *v.* Leeds, 1 Ashm. (Pa.) 405.

Parol evidence will not be subsequently received to prove that an assent to an assignment of an indenture was given. Com. *v.* Jones, 3 Serg. & R. (Pa.) 158.

23. Turner *v.* Smithers, 3 Houst. (Del.) 430; Huffman *v.* Rout, 2 Metc. (Ky.) 50; Allison *v.* Norwood, 44 N. C. 414; Rex *v.* Delaval, 3 Burr. 1434. See also *supra*, VIII, A.

24. Huffman *v.* Rout, 2 Metc. (Ky.) 50; McKee *v.* Hoover, 1 T. B. Mon. (Ky.) 32; Com. *v.* Vanlear, 1 Serg. & R. (Pa.) 248. See also Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 221, holding that where an apprentice executes an assignment by his master to a third person of his services, it will be held binding upon him even though the deed is not executed by his master.

25. *Kentucky.*— McKee *v.* Hoover, 1 T. B. Mon. (Ky.) 32.

Maine.— Johnson *v.* Bicknell, 23 Me. 154.

New Jersey.—Middleton *v.* Taylor, 1 N. J. L. 508.

New York.— Williams *v.* Finch, 2 Barb. (N. Y.) 208; Overseers of Poor *v.* Overseers of Poor, 5 Cow. (N. Y.) 363; Nickerson *v.* Howard, 19 Johns. (N. Y.) 113.

North Carolina.— Futrell *v.* Vann, 30 N. C. 402. But *compare* Biggs *v.* Harris, 64 N. C. 413; and see, *contra*, Allison *v.* Norwood, 44 N. C. 414.

Pennsylvania.— Martin *v.* Rice, 2 Browne (Pa.) 191.

South Carolina.— Shoppard *v.* Kelly, 2 Bailey (S. C.) 93.

Contra, Walker *v.* Johnson, 2 Cranch C. C. (U. S.) 203, 29 Fed. Cas. No. 17,073, in which it was held that a note given for the assignment of the services of an apprentice, being for an illegal consideration, is void.

Right of apprentice to recover from assignee.—Where indentures of apprenticeship were assigned, with the consent of the apprentice, who voluntarily continued thereafter to live with, and work for, the assignee during the term of the apprenticeship, it was held that this must be deemed a continuance of the apprenticeship with the apprentice's own consent, and that he could not recover of the assignee for his services during that time, on an implied assumpsit. Williams *v.* Finch, 2 Barb. (N. Y.) 208.

26. Welborn *v.* Little, 1 Nott & M. (S. C.) 263.

27. Where a contract of apprenticeship is voidable at the election of the apprentice, no action will lie in favor of the master against a

or upon implied contract,[28] and, under some statutes, will subject him to criminal responsibility.[29]

B. Defendant's Knowledge of Relation. In an action or criminal prosecution for harboring an apprentice, knowledge of the apprenticeship by defendant is an indispensable requisite to recovery or conviction;[30] but a master may sue and recover against any one who employs his apprentice, either with or without knowledge of the fact that the employee has been indented.[31]

C. Defenses — 1. Abandonment of Rights — (I) *In General.* Where the master has abandoned any of his rights, or has been wanting in due and reasonable exertions and diligence to reclaim the apprentice, or has knowingly suffered the apprentice to make and perform contracts for service to another, he is not entitled to recover from the employer for the services rendered.[32]

(II) *Refusal to Receive Back Absconding Apprentice.* If a master whose apprentice has left him wrongfully announces that he will not receive him again, others may lawfully employ him, though specifically forbidden by the master to harbor him.[33]

2. Illegality of Indentures. In order to make one responsible for enticing away or harboring an apprentice, the apprenticeship must have been entered into in accordance with the law.[34]

D. Declaration. A declaration in an action for wrongfully harboring an apprentice should allege the tenor or substance and legal effect of the indenture of apprenticeship.[35]

E. Measure of Damage. In an action for enticing away an apprentice

third person who employs and harbors the apprentice after the latter has exercised his right of election by leaving the master's service. Peters *v.* Lord, 18 Conn. 337. See, generally, Master and Servant; Seduction.

28. *Connecticut.*— Merriman *v.* Bissel, 2 Root (Conn.) 378.

Illinois.— Holliday *v.* Gamble, 18 Ill. 35.

Maryland.— Ferguson *v.* Tucker, 2 Harr. & G. (Md.) 182.

New Hampshire.— Munsey *v.* Goodwin, 3 N. H. 272.

New Jersey.— Lyon *v.* Whitmore, 3 N. J. L. 413.

New York.— Fowler *v.* Hollenbeck, 9 Barb. (N. Y.) 309.

North Carolina.— Stout *v.* Woody, 63 N. C. 37; Ferrell *v.* Boykin, 61 N. C. 9.

Vermont.—Conant *v.* Raymond, 2 Aik. (Vt.) 243.

England.—Foster *v.* Stewart, 3 M. & S. 191; Lightly *v.* Clouston, 1 Taunt. 112.

See 3 Cent. Dig. tit. "Apprentices," § 42.

Habeas corpus is not the proper remedy for a master to regain the control of his apprentice where the apprentice is not restrained against his will. In such a case he must resort to an action against the person who harbors his apprentice. Com. *v.* Robinson, 1 Serg. & R. (Pa.) 353; *Ex p.* Landsdown, 5 East 38; Eades *v.* Vandeput, 5 East 39 note. And see Rex *v.* Edwards, 7 T. R. 745; Rex *v.* Reynolds, 6 T. R. 497.

29. Owen *v.* State, 48 Ala. 328; Rex *v.* Edwards, 7 T. R. 745.

30. *Maine.*— Bowes *v.* Tibbets, 7 Me. 457.

Maryland.— Ferguson *v.* Tucker, 2 Harr. & G. (Md.) 182.

New Hampshire.— Munsey *v.* Goodwin, 3 N. H. 272.

New York.— Stuart *v.* Simpson, 1 Wend. (N. Y.) 376 [*citing* Fores *v.* Wilson, Peake 55].

Vermont.— Conant *v.* Raymond, 2 Aik. (Vt.) 243.

31. *Maine.*— Bowes *v.* Tibbets, 7 Me. 457.

Massachusetts.— Harper *v.* Gilbert, 5 Cush. (Mass.) 417.

New Hampshire.— Munsey *v.* Goodwin, 3 N. H. 272.

New York.— James *v.* Le Roy, 6 Johns. (N. Y.) 274.

Vermont.— Conant *v.* Raymond, 2 Aik. (Vt.) 243, holding that knowledge is necessary when the action is in tort.

England.— Foster *v.* Stewart, 3 M. & S. 191.

32. Ames, J., in Bardwell *v.* Purrington, 107 Mass. 419.

33. Conant *v.* Raymond, 2 Aik. (Vt.) 243.

34. *Connecticut.*— Peters *v.* Lord, 18 Conn. 337; King *v.* Brockway, 2 Root (Conn.) 86.

New Hampshire.— Campbell *v.* Cooper, 34 N. H. 49.

New Jersey.— Lyon *v.* Whitmore, 3 N. J. L. 413.

New York.—Barton *v.* Ford, 35 Hun (N. Y.) 32.

England.— Cox *v.* Muncey, 6 C. B. N. S. 375, 95 E. C. L. 375; Smith *v.* Birch, 1 Sess. Cas. 82.

But see Dowd *v.* Davis, 15 N. C. 61; Jones *v.* Mills, 13 N. C. 540.

But where the indentures are merely voidable, not void, a person sued for enticing away an apprentice cannot avail himself of such voidability as a defense. Doane *v.* Covel, 56 Me. 527.

35. Ferguson *v.* Tucker, 2 Harr. & G. (Md.) 182.

plaintiff will be entitled to recover the value of the services lost up to the time of the commencement of the suit, the reasonable expenses necessarily incurred in getting said services back again, and damages for loss of time, trouble, and injury sustained until the commencement of the suit, in consequence of the enticing away of his apprentice.[36]

X. ACTIONS FOR BREACH OF CONTRACT.

A. Form of Remedy. The same remedies lie in the case of broken covenants of indenture as in other cases of breach of contract,[37] and where statutes have been enacted providing special remedies, these, generally, are merely cumulative, and do not preclude recourse to the ordinary forms of action.[38]

B. Parties. As a rule, only those who are parties to the covenants and who are *sui juris* should sue or be sued,[39] though it seems that, upon reaching his majority, an infant may sue in his own name for a breach of covenant,[40] and in some cases it has been held that, where the broken covenant is for his benefit, suit may be brought in his name notwithstanding his infancy.[41]

C. When Right of Action Accrues. Actions for breach of covenants of indenture may be brought immediately upon the breach, without waiting for the expiration of the term.[42]

D. Defenses — 1. To Actions by Master — a. Illegality of Service Required. That a service required of an apprentice by his master is illegal constitutes a good defense to an action by the master for the failure of the apprentice to perform the service.[43]

b. Illness. The illness of an apprentice, whereby he is incapacitated from per-

36. Hays *v.* Borders, 6 Ill. 46; Stille *v.* Jenkins, 15 N. J. L. 302; McKay *v.* Bryson, 27 N. C. 216. See, generally, DAMAGES.

37. Cann *v.* Williams, 3 Houst. (Del.) 78; Hand *v.* West, 28 La. Ann. 145; Berry *v.* Wallace, Wright (Ohio) 657; McGunigal *v.* Mong, 5 Pa. St. 269; Pollock *v.* Chapman, 8 Wkly. Notes Cas. (Pa.) 433. See, generally, CONTRACTS.

Covenant by infant.— In some jurisdictions an action of covenant will not lie in behalf of an infant apprentice, but an action on the case is his appropriate remedy. McGunigal *v.* Mong, 5 Pa. St. 269; Pollock *v.* Chapman, 8 Wkly. Notes Cas. (Pa.) 433; Bullock *v.* Sebrell, 6 Leigh (Va.) 560; Lylly's Case, 7 Mod. 15.

38. Hand *v.* West, 28 La. Ann. 145; Berry *v.* Wallace, Wright (Ohio) 657. But see McKnight *v.* Hogg, 3 Brev. (S. C.) 44, holding that a statute giving two justices of the peace jurisdiction to settle all differences between masters and apprentices according to justice and equity excluded other forms of relief against an apprentice for leaving his master without leave.

39. *Illinois.*—Chicago Stove Works *v.* Lally, 41 Ill. App. 249.

Massachusetts.— Dickinson *v.* Talmage, 138 Mass. 249; Caden *v.* Farwell, 98 Mass. 137.

New Jersey.— Thorpe *v.* Rankin, 19 N. J. L. 36, 38 Am. Dec. 531.

North Carolina.— Waddell *v.* Creech, 98 N. C. 155, 3 S. E. 814.

Ohio.— Berry *v.* Wallace, Wright (Ohio) 657.

Pennsylvania.— See Leech *v.* Agnew, 7 Pa. St. 21.

South Carolina.— Rantin *v.* Robertson, 2 Strobh. (S. C.) 366.

England.— Branch *v.* Ewington, Dougl. 500. See 3 Cent. Dig. tit. "Apprentices," § 37.

40. Cann *v.* Williams, 3 Houst. (Del.) 78; Vinalhaven *v.* Ames, 32 Me. 299; McAdams *v.* Stilwell, 13 Pa. St. 90.

41. Brock *v.* Parker, 5 Ind. 538; Ziegler *v.* Fallon, 28 Mo. App. 295; McGunigal *v.* Mong, 5 Pa. St. 269; Poindexter *v.* Wilton, 3 Munf. (Va.) 183.

Where bound by overseers, an action in behalf of an apprentice ought not to be brought in the name of the overseers of the poor, but in the name of the apprentice (Poindexter *v.* Wilton, 3 Munf. (Va.) 183); but where the binding by the overseers is defective as a statutory deed, owing to their failure to obtain the required order of court, the action can only be maintained in the name of the overseers (Bullock *v.* Sebrell, 6 Leigh (Va.) 560).

42. Stokes *v.* Hatcher, 4 N. J. L. 95.

Time in which instruction should be given. — A master has the whole term of the apprenticeship in which to perform his stipulation to teach the apprentice, and it has been held that if he should die without performing it, but so long before the expiration of the term as to leave time for the performance had he lived, no action will lie for breach of the covenant to teach. Goodbread *v.* Wells, 19 N. C. 476.

Statute of limitations.— In Massachusetts all actions in favor of an apprentice against the master must be brought during the term of apprenticeship, or within two years after its termination. Johnson *v.* Gibbs, 140 Mass. 186, 3 N. E. 17.

43. Phillips *v.* Innes, 4 C. & F. 234, 7 Eng. Reprint 90.

forming the services stipulated for in the indenture, is a valid defense to an action by the master for breach of covenant.[44]

c. Ill Treatment. Where an apprentice leaves his master because of cruel and inhuman treatment, the master cannot recover on a covenant that the apprentice shall serve him faithfully.[45]

d. Infancy. Infancy is a good plea in bar to an action of covenant on indentures of apprenticeship.[46]

e. Performance of Defective Agreement. The performance by the apprentice, whether partial or complete, of defective agreements of apprenticeship is a good defense to an action by the master either for the taking away of the apprentice, or for his board, lodging, and instruction during the apprentice's stay with him.[47]

f. Relinquishment of Trade or Business. The relinquishment by a master, during the continuance of the term, of the trade or business to which an apprentice has been indented is a good defense to an action brought by the master against the father of the apprentice for a desertion of his services by the latter.[48]

g. Removal of Master From State. It is a good defense to an action by the master on the covenants in an indenture of apprenticeship that he has left the state, with intent to remain out of its jurisdiction, and has continued absent to the time of the bringing of the action.[49]

2. To Actions Against Master — a. Breach of Indenture by Apprentice. The covenants in an indenture of apprenticeship are independent covenants,[50] and, consequently, acts of misconduct on the part of the apprentice are no answer to an action brought for a breach of the master's covenant to support[51] or to instruct and maintain[52] the apprentice during the term agreed upon in the indenture.

b. Discharge in Bankruptcy. The duties of a master toward his apprentice, being for the most part of a purely personal nature, are unaffected by a discharge in bankruptcy.[53]

c. Evasion of Internal Revenue Law. Splitting of the consideration of an indenture so as to avoid stamp duties is no defense to an action for a breach of covenant.[54]

d. Incapacity of Apprentice — (i) *To Learn Trade.* If an apprentice is incapable of learning the trade or mystery which the master has covenanted to teach him, the master is excused from his covenant;[55] but it has been held that

44. Caden *v.* Farwell, 98 Mass. 137; Boast *v.* Firth, L. R. 4 C. P. 1, 38 L. J. C. P. 1, 19 L. T. Rep. N. S. 264, 17 Wkly. Rep. 29. See also MacGregor *v.* Sully, 31 Ont. 535.

45. McGrath *v.* Herndon, 2 T. B. Mon. (Ky.) 82, 4 T. B. Mon. (Ky.) 480.

46. McNight *v.* Hogg, 1 Treadw. (S. C.) 117.

47. Attwaters *v.* Courtney, C. & M. 51, 41 E. C. L. 34; Wilkins *v.* Wells, 2 C. & P. 231, 12 E. C. L. 543; Keene *v.* Parsons, 2 Stark. 506, 3 E. C. L. 507; Harrison *v.* James, 7 H. & N. 804, 31 L. J. Exch. 248.

48. Ellen *v.* Topp, 6 Exch. 424, 15 Jur. 451, 20 L. J. Exch. 241.

49. Coffin *v.* Bassett, 2 Pick. (Mass.) 357.

50. See *supra*, VII, A, 2, b.

51. Winstone *v.* Linn, 1 B. & C. 460, 2 D. & R. 465, 8 E. C. L. 196.

52. Orphan House *v.* Magill, 1 Cheves (S. C.) 56.

But where an apprentice refuses to perform a reasonable duty coming within the terms of his contract he cannot afterward sue the master for failing to give him further work. McPeck *v.* Moore, 51 Vt. 269.

53. Strader *v.* Mardis, 4 Ky. L. Rep. 995. *Contra*, Allen *v.* Costa, 1 Beav. 274, 17 Eng. Ch. 274. See also *infra*, XI, A, 3.

54. Hankins *v.* Clutterbuck, 2 C. & K. 810, 61 E. C. L. 810.

55. Barger *v.* Caldwell, 2 Dana (Ky.) 129; Strader *v.* Mardis, 4 Ky. L. Rep. 995; Wright *v.* Brown, 5 Md. 37; Clancy *v.* Overman, 18 N. C. 402. *Compare* Dunten *v.* Richards, Quincy (Mass.) 67, in which it was held that a guardian who has executed his ward's indentures of apprenticeship has no power to release the master from his covenant of payment to the ward, in settlement of a claim against himself for deceit, grounded on the ward's alleged incapacity to perform his covenants of service.

Burden of proof.— Where a master, sued upon his covenants, defends upon the ground of the apprentice's inability to learn, the burden of proving the defense rests upon him. Barger *v.* Caldwell, 2 Dana (Ky.) 129; Wright *v.* Brown, 5 Md. 37; Clancy *v.* Overman, 18 N. C. 402. See also Strader *v.* Mardis, 4 Ky. L. Rep. 995.

Insufficient evidence.— In an action for breach of a covenant to teach an apprentice a trade it is not competent for defendant to

where the failure to learn arises, not from inability, but from obstinacy and unwillingness, the master is not excused.[56]

(II) *To Acquire Education.* Similarly, where the apprentice is mentally incapable of acquiring the education covenanted for, the master is not liable upon his covenant to teach him, if he has used means appropriate to that end.[57]

e. Settlement With Overseers. Courts of law being alone authorized to determine the amount of damages which a minor, apprenticed by the overseers of the poor, is entitled to recover for ill treatment suffered at the hands of the master, an agreement between the overseers and master upon an amount, and a payment made to them, will not bar a claim against the master by the apprentice when he becomes of age.[58]

f. Voluntary Labor. The voluntary performance of services by a minor, under a voidable indenture, will bar an action by him against his master for the value of such services.[59]

E. Pleading and Evidence. In actions for breach of covenant upon indentures of apprenticeship all matters of defense relied upon must be averred and proved.[60]

F. Damages — 1. In General. In an action predicated upon the covenants of an indenture, brought before the term of apprenticeship has expired, damages are recoverable only to the date of the writ.[61]

show that he employed the apprentice at the same work as others of like experience, making no distinction between them, it having no tendency to show that the apprentice was properly employed in learning the trade agreed upon. Bell *v.* Walker, 48 N. C. 320.

56. Bell *v.* Walker, 50 N. C. 43. *Compare* Clancy *v.* Overman, 18 N. C. 402 (where it was held that a covenant to teach an apprentice a trade is not an absolute engagement that he shall at all events learn that trade, but is only a covenant for faithful, diligent, and skilful instruction); Raymond *v.* Minton, L. R. 1 Exch. 244.

57. Wyatt *v.* Morris, 19 N. C. 108.

58. Vinalhaven *v.* Ames, 32 Me. 299.

59. Olney *v.* Myers, 3 Ill. 311; Potter *v.* Greene, 39 Hun (N. Y.) 72; Abbott *v.* Inskip, 29 Ohio St. 59.

E converso, where an infant voluntarily performs the stipulated services under a voidable indenture, the master is liable under his covenants contained therein. Balch *v.* Smith, 12 N. H. 437.

60. Barger *v.* Caldwell, 2 Dana (Ky.) 129; Strader *v.* Mardis, 4 Ky. L. Rep. 995; Wright *v.* Gihon, 3 C. & P. 583, 14 E. C. L. 726.

Special plea — Effect of general verdict. — Where, in an action by an apprentice against his master, sufficient breaches are alleged, a discharge pleaded as to part, issue taken as to the residue, and there is a general verdict for plaintiff it will be presumed that the verdict is for such breaches only as are not covered by the special plea. Eastman *v.* Chapman, 1 Day (Conn.) 30.

Parol evidence is admissible, on a plea of not guilty, in an action of covenant against a master for sending his apprentice out of the country, in order to prove that plaintiff consented to the act. Burden *v.* Skinner, 3 Day (Conn.) 126.

Evidence in mitigation of damages. — In an action by an apprentice against his master for the latter's failure to use, during the term of apprenticeship, his utmost endeavors to instruct the apprentice in the trade to which he had been indentured, it may be shown in mitigation of damages that the apprentice, after his term of service, could do, and had done, good work in the trade specified in the indenture. Barger *v.* Cashman, 4 Bibb (Ky.) 278.

61. Trigg *v.* Northcutt, Litt. Sel. Cas. (Ky.) 414; Bruce *v.* Mathers, 2 Bibb (Ky.) 294; Powers *v.* Ware, 4 Pick. (Mass.) 106; Waddell *v.* Creech, 98 N. C. 155, 3 S. E. 814; Hiatt *v.* Gilmer, 28 N. C. 450; Addams *v.* Carter, 6 L. T. Rep. N. S. 130; Parker *v.* Cathcart, 17 Ir. C. L. 787; Lewis *v.* Peachey, 1 H. & C. 518, 31 L. J. Exch. 496, 10 Wkly. Rep. 797; Russell *v.* Shinn, 2 F. & F. 695. But see Kuhlman *v.* Blow, 31 Tex. 628, in which it was held that, in an action brought by an apprentice against his master to recover damages for alleged breach of the contract of apprenticeship, it was proper to charge the jury that the measure of damages was the value of labor and services of plaintiff from the date of the contract of apprenticeship up to the time plaintiff attained his majority.

See, generally, DAMAGES.

Partnership apprentice — Dissolution of partnership. — Where an apprentice to a copartnership is taken away before the end of the term, and the copartnership is subsequently dissolved, damages can be recovered only for the value of the services of the apprentice up to the time of the dissolution of the partnership. Hiatt *v.* Gilmer, 28 N. C. 450.

Where a master arbitrarily discharges his apprentice he is liable for all damages sustained by the apprentice by reason of his discharge. Darling *v.* Vulcan Iron Works, 26 Oreg. 405, 38 Pac. 342. And see Hand *v.* West, 28 La. Ann. 145, in which it was held that a statute providing that a laborer dismissed

2. Exemplary and Punitive Damages. In an action upon an apprentice bond, where evidence was offered tending to prove that the health of the apprentice had been impaired by the master's improper treatment, but no evidence was produced showing the extent of the damage, it was not error for the court to instruct the jury that they might inquire if there was damage from that cause, and fix the amount thereof.[62]

XI. Termination or Cancellation.

A. What Acts Terminate Relation — 1. Appointment of Guardian. The appointment of a guardian for an apprentice will not *ipso facto* terminate the apprenticeship.[63]

2. Arrival of Apprentice at Given Age. Where an infant apprentice arrives at the age of majority the relationship between him and his master instantly ceases, no matter by what form or ceremony he may have been originally bound.[64]

3. Bankruptcy of Master. The issuance of a decree of bankruptcy against the master of an apprentice has the effect of annuling the indenture of apprenticeship.[65]

4. Change of Apprentice's Name. A statute which provides that the name of an infant received into institutions supported by the public may not be changed is not effective to invalidate indentures of apprenticeship, made by officers of such institutions, where the change of name occurs after the child has been apprenticed.[66]

5. Consent of Parties. An indenture of apprenticeship may be vacated by consent of all the parties.[67]

without cause before the end of his term of service may recover entire wages applies to apprentices.

Where an apprentice unjustifiably leaves the service of his master the latter may recover against the apprentice's parent or guardian for necessary expenses incurred by him on account of the minor. Hapgood *v.* Wesson, 7 Pick. (Mass.) 47.

62. Waddell *v.* Creech, 98 N. C. 155, 3 S. E. 814.

63. Wright *v.* Delano, 62 N. H. 252.

64. Banks *v.* Metcalfe, 1 Wheel. Crim. (N. Y.) 381; *Ex p.* Davis, 5 T. R. 715. See also Flaccus *v.* Smith, 30 Pittsb. Leg. J. N. S. (Pa.) 129; Coghlan *v.* Calaghan, 7 Ir. C. L. 291 (in which it is said that the apprentice must give his master reasonable notice of his intention to terminate the relationship); Eden's Case, 2 M. & S. 226.

The arrival of a female apprentice at eighteen years of age will not avoid her indentures as being in restraint of her right of marriage at that age. Dent *v.* Cock, 65 Ga. 400.

Where a parent may bind only an infant under a certain age without the infant's consent, when that age is arrived at the infant may avoid the indenture and legally revoke his services, although the master and parent have agreed for a term of service extending beyond that age. Hudson *v.* Worden, 39 Vt. 382 [*distinguishing* Phelps *v.* Culver, 6 Vt. 430].

65. Allen *v.* Coster, 1 Beav. 274, 17 Eng. Ch. 274. *Contra*, Strader *v.* Mardis, 4 Ky. L. Rep. 995. See also *supra*, X, D, 2, b.

66. People *v.* Weissenbach, 60 N. Y. 385.

67. Graham *v.* Graham, 1 Serg. & R. (Pa.) 330; Rex *v.* Weddington, Burr. Sett. Cas. 766. See also Crombie *v.* McGrath, 139 Mass. 550, 2 N. E. 100.

Where binding out is by overseers of the poor, an agreement between the parent and master to terminate the apprenticeship is ineffective unless the indenture which is held by the overseers of the poor has been delivered up. Rex *v.* Skeffington, 3 B. & Ald. 382, 5 E. C. L. 224. See also Rex *v.* Warminster, 3 B. & Ald. 121, 5 E. C. L. 78.

Giving up indentures.— An apprenticeship may be determined by the indentures being given up, though not canceled. Rex *v.* Notton, Burr. Sett. Cas. 629; Rex *v.* Titchfield, Burr. Sett. Cas. 511; Rex *v.* Devonshire, Cald. Cas. 32. See also Rex *v.* Harberton, 1 T. R. 139, in which it was held that, where there has been such an agreement between the master and the apprentice to give up the indentures, the latter could plead the agreement in bar, to an action of covenant brought by the former, the indentures being considered as canceled, though they still subsisted in fact.

License to leave.—Where a master grants an apprentice license to leave his service he cannot afterward revoke such license or prosecute the apprentice's surety on his covenant for such departure (Lewis *v.* Wildman, 1 Day (Conn.) 153; Anonymous, 6 Mod. 69; 1 Rolle's Abr. 455; 4 Comyns Dig. 582; Black *v.* Stevenson, 3 U. C. Q. B. 160); but where a master agrees to release his apprentice provided the latter shall not do a certain thing, and subsequently the apprentice breaks the condition, the master is entitled to recall him into his service (Gray *v.* Cookson, 16 East 13).

6. Death — a. Of Master. A contract to teach an apprentice a trade is personal, and dies with the master;[68] but his representatives are bound to perform every other covenant contained in the indenture.[69]

b. Of Parent. The death of the father, by emancipating his child, will relieve the latter from his duties under indentures executed by the father.[70]

7. Discontinuance of Trade by Master. Where a master discontinues one of several trades to which an apprentice has been indentured, it will have the effect of discharging the apprentice and his surety.[71]

8. Enlistment of Apprentice. Enlistment of an apprentice into the military services of the government, although voluntary and without the consent of the master, will nevertheless dissolve the relation of master and apprentice.[72]

9. Marriage of Apprentice. The marriage of a female apprentice is not an abandonment and violation of the indentures of apprenticeship, but is held to annul her indentures;[73] but the marriage of a male apprentice, without the privity of his master and in contravention of the covenants of his indenture, will not justify the master in turning him off. His relief is a suit upon the covenant.[74]

10. Removal From Jurisdiction. Where an apprentice is bound in one jurisdiction the indenture is generally invalidated by his involuntary removal from the original jurisdiction;[75] but the mere intention, on the part of the master, to

68. *Kentucky.*— Cochran *v.* Davis, 5 Litt. (Ky.) 118.

Massachusetts.— Hennessey *v.* Deland, 110 Mass. 145.

North Carolina.— Allison *v.* Norwood, 44 N. C. 414; Goodbread *v.* Wells, 19 N. C. 476. See also Owens *v.* Chaplain, 48 N. C. 323; Futrell *v.* Vann, 30 N. C. 402.

Vermont.— Phelps *v.* Culver, 6 Vt. 430.

England.— Rex *v.* Clark, Burr. Sett. Cas. 782; Baxter *v.* Burfield, 1 Bott P. L. 696, Str. 1266. *Compare* Cooper *v.* Simmonds, 7 H. & N. 707, 8 Jur. N. S. 81, 31 L. J. M. C. 138, 5 L. T. Rep. N. S. 712, 10 Wkly. Rep. 270.

Canada.— Frazer *v.* Wright, 16 U. C. Q. B. 514.

If the apprentice serve the administrator he acquires the right and incurs the duties of an apprentice; and if he leave such service he cannot avoid the indenture so as to recover for his services upon a *quantum valebat.* Phelps *v.* Culver, 6 Vt. 430. See also Hennessey *v.* Deland, 110 Mass. 145, holding that where the master died, and the apprentice continued to live and work for the master's widow, both believing that they were bound by the provisions of the indenture, the apprentice was not entitled to recover from the widow a sum which the indenture provided the master should pay the apprentice upon the termination of the period stipulated for in the indenture.

Where an apprentice is bound to two partners, on the death of one he becomes in law the apprentice of the survivor. Rex *v.* St. Martin's Parish, 2 A. & E. 655, 1 H. & W. 69, 4 N. & M. 385, 29 E. C. L. 304.

69. Eastman *v.* Chapman, 1 Day (Conn.) 30; Cochran *v.* Davis, 5 Litt. (Ky.) 118; Goodbread *v.* Wells, 19 N. C. 476. But see Com. *v.* King, 4 Serg. & R. (Pa.) 109, holding that an executor was not liable on the covenants in the indenture to provide meat, drink, and clothing for the apprentice.

70. Campbell *v.* Cooper, 34 N. H. 49. See also Day *v.* Everett, 7 Mass. 145; Jenness *v.* Emerson, 15 N. H. 486; State *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399; People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; and, generally, Contracts; Master and Servant; Parent and Child.

71. Ellen *v.* Topp, 6 Exch. 424. See also Popham *v.* Jones, 13 C. B. 225, 76 E. C. L. 225.

72. Johnson *v.* Dodd, 56 N. Y. 76. See also Hudson *v.* Worden, 39 Vt. 382.

73. King *v.* Snedeker, 137 Ind. 503, 37 N. E. 396.

74. Stephenson *v.* Houlditch, 2 Vern. 491.

75. Randall *v.* Rotch, 12 Pick. (Mass.) 107; Coffin *v.* Bassett, 2 Pick. (Mass.) 357; Davis *v.* Coburn, 8 Mass. 299; Com. *v.* Hamilton, 6 Mass. 273; Hall *v.* Gardner, 1 Mass. 172; Com. *v.* Deacon, 6 Serg. & R. (Pa.) 526; Gusty *v.* Diggs, 2 Cranch C. C. (U. S.) 210, 11 Fed. Cas. No. 5,878; U. S. *v.* Scholfield, 1 Cranch C. C. (U. S.) 255, 27 Fed. Cas. No. 16,231; Coventry *v.* Woodhall, Hob. 189 (holding, however, that an apprentice may be sent out of the jurisdiction where it is so agreed in the indenture, or the nature of the apprenticeship of itself imports it).

A change of place of business within the jurisdiction was, under special circumstances, held to be a breach of an implied condition of the contract. Eaton *v.* Western, 9 Q. B. D. 636, 52 L. J. Q. B. 41. *Contra,* Royce *v.* Charlton, 8 Q. B. D. 1, 46 J. P. 197, 45 L. T. Rep. N. S. 712, 30 Wkly. Rep. 274.

Where an apprentice voluntarily follows the master into another jurisdiction, it has been held that the contract of apprenticeship will not be thereby terminated. Com. *v.* Hamilton, 6 Mass. 273.

Where the parent or guardian of an apprentice consents to the latter's removal to another jurisdiction, no action will lie against the master for breach of covenant. Lobdell *v.* Allen, 9 Gray (Mass.) 377.

remove to a distant state, and, against the apprentice's will, to carry the latter with him, will not justify the apprentice in leaving the master's services.[76]

B. Proceedings to Discharge or Set Aside — 1. Grounds of Relief — a. Failure of Indentures to Contain Statutory Requirements. Where indentures of apprenticeship fail to contain requirements made obligatory by statute, they will be set aside upon the application of the apprentice.[77]

b. Acts of Master — (I) *Acts Injurious to Mind and Morals.* A court will discharge an apprentice for acts of the master injurious to the former's mind and morals.[78]

(II) *Cruelty.* An apprentice may be discharged from his indentures on account of the cruelty or ill treatment of his master.[79]

(III) *Employment in Different Trade.* An apprentice will be discharged where it appears that the master has compelled him to perform menial services in no way connected with the trade which he was apprenticed to learn.[80]

(IV) *Insolvency.* Indentures of apprenticeship will not be vacated merely because a master is compelled to take the benefit of the insolvency law; but if the master do not thereafter continue his business, so that the apprentice may obtain competent knowledge of the trade, the latter will be granted relief from the indentures.[81]

c. Acts of Apprentice — (I) *Abandonment of Service.* The mere abandonment of service by the apprentice does not avoid the apprenticeship, and a master cannot, without leave of court, release himself from his obligation to maintain and educate the apprentice.[82]

(II) *Illness.* If the apprentice, by reason of incurable illness, become unable to learn his master's trade or to perform the stipulated services, the master cannot, on his own authority, put an end to the contract.[83]

(III) *Misconduct.* An apprenticeship cannot be terminated by the master, of his own motion, on the ground of the misconduct of the apprentice,[84] unless,

Refusal of an apprentice to go with his master into a foreign jurisdiction is not a breach of his covenant "well and faithfully to serve." Vickere *v.* Pierce, 12 Me. 315.

76. Coffin *v.* Bassett, 2 Pick. (Mass.) 357.

77. Hazzard *v.* Cashall, 4 Del. Ch. 30, wherein indentures were annulled because they contained "no provision stipulating for payment of any sum of money to the petitioner, at the expiration of her term, in lieu of education."

78. Warner *v.* Smith, 8 Conn. 14; Berry *v.* Wallace, Wright (Ohio) 657; Com. *v.* St. German, 1 Browne (Pa.) 24.

Interference with religious belief.— Where an apprentice has arrived at the age of discretion an arbitrary attempt by the master to control him in the performance of his religious duties is a ground for the discharge of the apprentice from his indentures. Com. *v.* Farley, 3 Pa. L. J. Rep. 49.

Sunday work.—In Warner *v.* Smith, 8 Conn. 14, an apprentice was discharged by the court because his master neglected to instruct him properly in his trade, and unnecessarily obliged him to work on Sunday.

79. Vinalhaven *v.* Ames, 32 Me. 299; Berry *v.* Wallace, Wright (Ohio) 657; Cannon *v.* Davis, 1 Cranch C. C. (U. S.) 457, 5 Fed. Cas. No. 2,385.

80. Com. *v.* Hemperly, 4 Pa. L. J. Rep. 440, 3 Am. L. J. N. S. 17; Com. *v.* Aitken, (Phila. C. P. Dec. 22, 1845) 1 Brightly Purd. Dig. Pa. (1894), p. 119. The master is not, however, liable to indictment for every mistaken exercise of authority. Com. *v.* Hemperly, 4 Pa. L. J. Rep. 440, 3 Am. L. J. N. S. 17.

81. Davis' Case, 1 Harr. (Del.) 17. See also Bedford *v.* Newark Mach. Co., 16 N. J. Eq. 117.

82. Cockran *v.* State, 46 Ala. 714; Smedley *v.* Gooden, 3 M. & S. 189; Coghlan *v.* Calaghan, 7 Ir. C. L. 291. But see Bright *v.* Lucas, Peake Add. Cas. 121, in which it was held that an absconding apprentice could not maintain an action for wages.

83. Caden *v.* Farwell, 98 Mass. 137; Powers *v.* Ware, 2 Pick. (Mass.) 451; Rex *v.* Hales Owen, Str. 99.

Where the apprentice became an idiot a different rule was applied. Viner Abr. tit. Apprentice (H), pl. 5; Anonymous, Skin. 114. And see Boast *v.* Firth, 38 L. J. C. P. 1, L. R. 4 C. P. 1, 19 L. T. Rep. N. S. 264, 17 Wkly. Rep. 29.

84. Powers *v.* Ware, 2 Pick. (Mass.) 451; Phillips *v.* Clift, 4 H. & N. 168, 5 Jur. N. S. 74, 28 L. J. Exch. 153, 7 Wkly. Rep. 295; Hawkesworth, etc., Case, 1 Saund. 314; Rex *v.* Evererd, Cald. Cas. 26; Gilbert *v.* Fletcher, Cro. Car. 179. *Compare* Wise *v.* Wilson, 1 C. & K. 662, 47 E. C. L. 662; Westwick *v.* Theodor, L. R. 10 Q. B. 224, 44 L. J. Q. B. 110, 32 L. T. Rep. N. S. 696, 23 Wkly. Rep. 620. And see Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447.

indeed, the apprentice's misconduct is of an habitual and criminal character, as where he is an habitual thief.[85]

2. JURISDICTION — a. In General. Jurisdiction to discharge or set aside indentures of apprenticeship is generally conferred by statute upon a particular court or courts.[86]

b. Necessity of Complaint by Master or Apprentice. The complaint of the master or apprentice is the very foundation for the authority of a court to act with regard to the dissolution of the indenture, and is indispensable to confer jurisdiction on it.[87]

3. FORM OF PROCEEDING. The usual and proper mode for the release of an apprentice from his indentures is by a writ of habeas corpus,[88] and such action should be brought in the name of the apprentice, not in that of his father.[89]

4. WHO MAY INSTITUTE. As a general rule, proceedings to discharge or set aside indentures of apprenticeship can be instituted only by a party to the indenture,[90] and since, *prima facie*, the right of action to set aside an indenture is in the father of the child, an action is not well brought by the mother unless she avers facts showing that she is entitled to sue.[91]

5. NOTICE TO MASTER. In proceedings by an apprentice against his master to be discharged from service, the master should have notice.[92]

6. REVIEW. An appeal will not lie from an order discharging an apprentice pursuant to statute.[93]

C. Effect of Discharge. The discharge of an apprentice by a court does not affect the validity of the indentures as to services rendered prior thereto.[94]

APPRENTICESHIP. The state or condition of an apprentice; a contract by which a person is bound to serve another in his trade, art, or occupation on condition of being instructed in it; the term for which an apprentice is bound to serve.[1] (See APPRENTICES.)

85. **Where the apprentice an habitual thief.** — In Cox *v.* Matthew, 2 F. & F. 397, it was held that if an apprentice, whose master's business lies in precious articles which are constantly lying about, is a habitual thief, the master may discharge him. To like effect see Learoyd *v.* Brook, [1891] 1 Q. B. 431, 55 J. P. 265, 60 L. J. Q. B. 373, 64 L. T. Rep. N. S. 458, 38 Wkly. Rep. 480. And see Phillips *v.* Clift, 4 H. & N. 168, 5 Jur. N. S. 74, 28 L. J. Exch. 153, 7 Wkly. Rep. 295.

86. *Kentucky.*— Spradling *v.* Gilmore, 11 B. Mon. (Ky.) 116.

New Jersey.— Ackerman *v.* Taylor, 9 N. J. L. 65.

North Carolina.— Owens *v.* Chaplain, 48 N. C. 323.

Pennsylvania.— Pidgeon's Case, 1 Browne (Pa.) 374 note.

United States.— Cannon *v.* Davis, 1 Cranch C. C. (U. S.) 457, 5 Fed. Cas. No. 2,385.

87. Ackerman *v.* Taylor, 9 N. J. L. 65.

88. Cannon *v.* Stuart, 3 Houst. (Del.) 223; Com. *v.* Airey, 5 Kulp (Pa.) 83; Com. *v.* Atkinson, 8 Phila. (Pa.) 375. See also Musgrove *v.* Kornegay, 52 N. C. 71; and, generally, HABEAS CORPUS.

89. McDaniel *v.* McGowen, 3 T. B. Mon. (Ky.) 9; Ackerman *v.* Taylor, 9 N. J. L. 65. But see Lammott *v.* Maulsby, 8 Md. 5, in which it was held that under the statute [Md. Acts (1842), c. 25] the orphans' court might set aside indentures upon suggestion in writing by counsel, without making the apprentice a formal party.

90. Fenn *v.* Bancroft, 49 Conn. 216.

91. Owens *v.* Frager, 119 Ind. 532, 21 N. E. 1115.

92. Broadwell *v.* Everett, 6 J. J. Marsh. (Ky.) 603.

93. Smith *v.* Hubbard, 11 Mass. 24; Carmand *v.* Wall, 1 Bailey (S. C.) 209. *Compare* Lammott *v.* Maulsby, 8 Md. 5.

94. Schermerhorn *v.* Hull, 13 Johns. (N. Y.) 270, holding that such indenture may be set up as a defense to an action by the apprentice for his services.

Restitution of premium.—Where a premium is given with an apprentice, and afterward the relationship is dissolved before its appointed termination, the master will be forced to refund a proportional part thereof. Hirst *v.* Tolson, 2 Macn. & G. 134, 48 Eng. Ch. 134; Therman *v.* Abell, 2 Vern. 64; Newton *v.* Rowse, 1 Vern. 460. See also Derby *v.* Humber, L. R. 2 C. P. 247, 15 L. T. Rep. N. S. 538; Whincup *v.* Hughes, L. R. 6 C. P. 78, 40 L. J. C. P. 104, 24 L. T. Rep. N. S. 74, 19 Wkly. Rep. 439.

Upon death of master to whom a clerk has been apprenticed, the court of chancery has jurisdiction to entertain a claim for the return of an equitable part of the premium, and such claim constitutes a debt payable out of the assets of the estate. Hirst *v.* Tolson, 2 Macn. & G. 134, 48 Eng. Ch. 134; Newton *v.* Rowse, 1 Vern. 460.

1. Burrill L. Dict.

APPROACH. The right of a public armed vessel, of whatever nationality, to hail merchant vessels on the high seas for the purpose of ascertaining their nationality.[2] (See also BRIDGES.)

APPROBATION. Sanction; consent; concurrence.[3]

APPROPRIATE. To set apart for, or assign to, a particular use, in exclusion of all other uses;[4] to take to one's self in exclusion of others; to claim or use as by an exclusive right; to make peculiar, as to appropriate words to ideas;[5] to take from another to one's self, with or without violence;[6] to take as one's own by exclusive right;[7] necessary and proper.[8]

APPROPRIATION. The act of setting apart, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose;[9] an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state.[10] (Appropriation: Of Payments, see PAYMENT. Of Property, see EMINENT DOMAIN. Of Public Moneys, see MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS; STATES; STATUTES; TOWNS; UNITED STATES. Of Water-Rights, see WATERS.)

APPROVAL. Approbation; ratification; sanction.[11] (Approval: Of Bonds or Undertakings, see APPEAL AND ERROR; ARREST; ATTACHMENT; BAIL; INJUNCTIONS; RECEIVERS. Of Municipal Ordinances, see MUNICIPAL CORPORATIONS. Of Statutes, see STATUTES. Performance of Contracts Subject to, see CONTRACTS. Sales Subject to, see SALES.)

APPROVE. To accept as good or sufficient for the purpose intended;[12] to make or show to be worthy of approbation or acceptance;[13] to accuse an accomplice;[14] to improve.[15]

APPROVEMENT. A species of confession, and incident to the arraignment of a prisoner, indicted for treason or felony, who confesses the fact before plea pleaded, and appeals or accuses others, his accomplices, in the same crime, in order to obtain his own pardon.[16]

APPROVER. One who confesses himself guilty of felony, and accuses others of the same crime to save himself from punishment.[17]

APPURTENANCE or APPURTENANT. A thing belonging to another thing as principal, and which passes as incident to the principal thing;[18] a thing used

2. Davis Int. L. 488.

3. Welton *v.* Thomaston, 61 Conn. 397, 399, 24 Atl. 333.

4. Webster Dict. [*quoted* in Woodward *v.* Reynolds, 58 Conn. 486, 490, 19 Atl. 511; Pryor *v.* Kansas City, 153 Mo. 135, 145, 54 S. W. 499; State *v.* Sioux City, etc., R. Co., 7 Nebr. 357, 373; Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483, 500]; Henry *v.* Trustees, 48 Ohio St. 671, 677, 30 N. E. 1122. See also State *v.* Bordelon, 6 La. Ann. 68, 69, where the meaning of the word "appropriate" is said to be "to allot, assign, set apart or apply anything to the use of a particular person or thing, or for a particular purpose."

5. Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483, 500.

6. Waters *v.* U. S., 4 Ct. Cl. 389, 393 [*quoting* Worcester Dict.].

7. U. S. *v.* Nicholson, 8 Sawy. (U. S.) 162, 12 Fed. 522, 524.

8. People *v.* Washington, 36 Cal. 658, 669.

9. Webster Dict. [*quoted* in Clayton *v.* Berry, 27 Ark. 129, 131; Proll *v.* Dunn, 80 Cal. 220, 227, 22 Pac. 143; Shattuck *v.* Kincaid, 31 Oreg. 379, 387, 49 Pac. 758; McSorley *v.* Hill, 2 Wash. 638, 649, 27 Pac. 552]. See also Whitehead *v.* Gibbons, 10 N. J. Eq. 230, 235, wherein the court said: "The word 'appropriations' is significant. It evinces the intention of the testator to designate and set it apart from his other property for a specific object."

10. Ristine *v.* State, 20 Ind. 328, 338; State *v.* Lindsley, 3 Wash. 125, 127, 27 Pac. 1019.

Word "appropriate" or "appropriation" unnecessary.— To constitute an appropriation neither the word "appropriation" or "appropriate" is essential. State *v.* Bordelon, 6 La. Ann. 68, 69; State *v.* Moore, 50 Nebr. 88, 94, 69 N. W. 373, 61 Am. St. Rep. 538.

11. Century Dict.

12. Anderson L. Dict.

13. Sweeney *v.* Vaughn, 94 Tenn. 534, 536, 29 S. W. 903 [*quoting* Webster Dict.].

14. Black L. Dict.

15. Burrill L. Dict.

16. Gray *v.* People, 26 Ill. 344, 347.

17. Gray *v.* People, 26 Ill. 344, 347; Myers *v.* People, 26 Ill. 173, 176.

18. *Colorado.*— Bloom *v.* West, 3 Colo. App. 212, 32 Pac. 846 [*quoting* Bouvier L. Dict.].

Illinois.— Scheidt *v.* Belz, 4 Ill. App. 431, 437.

with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant;[19] that which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy.[20] Hence, as an adjective, the word "appurtenant" signifies "annexed to" or "belonging to;"[21] but it is sometimes used in the non-technical sense of "adjoining."[22] (Appurtenances: To Building Subject of — Arson, see ARSON; Burglary, see BURGLARY; Insurance, see FIRE INSURANCE; Mechanic's Lien, see MECHANICS' LIENS. To Railroad, see

Iowa.— Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 60, 24 Am. Rep. 719.

Kansas.— Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 182, 184, 29 Pac. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652 [*quoting* Bouvier L. Dict.].

Missouri.— Rutherford *v.* Wabash R. Co., 147 Mo. 441, 451, 48 S. W. 921 [*quoting* Webster Int. Dict.].

Nebraska.— Frey *v.* Drahos, 6 Nebr. 1, 5, 29 Am. Rep. 353.

New Hampshire.— Riddle *v.* Littlefield, 53 N. H. 503, 508, 16 Am. Rep. 388 [*quoting* Bouvier L. Dict.].

New York.— Gullman *v.* Sharp, 81 Hun (N. Y.) 462, 465, 30 N. Y. Suppl. 1036, 63 N. Y. St. 228; Ogden *v.* Jennings, 66 Barb. (N. Y.) 301, 307.

Ohio.— Meek *v.* Breckenridge, 29 Ohio St. 642, 648 [*quoting* Bouvier L. Dict.].

Rhode Island.— Cadwalader *v.* Bailey, 17 R. I. 495, 498, 23 Atl. 20, 14 L. R. A. 300.

Texas.— Ballew *v.* State, 26 Tex. App. 483, 485, 9 S. W. 765.

United States.— New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66; Harris *v.* Elliott, 10 Pet. (U. S.) 25, 54, 9 L. ed. 333; Philadelphia Invest. Co. *v.* Ohio, etc., R. Co., 41 Fed. 378, 380.

"Appurtenant" distinguished from "appendant."—An "appurtenant" is that which belongs to another thing, but which has not belonged to it immemorially, and which may be created by grant or claimed by prescription (Farmer *v.* Ukiah Water Co., 56 Cal. 11, 14; Empire Land, etc., Co. *v.* Rio Grande County, 1 Colo. App. 205, 28 Pac. 482; New-Ipswich W. L. Factory *v.* Batchelder, 3 N. H. 190, 192, 14 Am. Dec. 346; Leonard *v.* White, 7 Mass. 6, 8, 5 Am. Dec. 19; Watts *v.* Coffin, 11 Johns. (N. Y.) 495, 498; Jackson *v.* Stiker, 1 Johns. Cas. (N. Y.) 284, 291; Coke Litt. 121*b*, 122*a*; Moore 682; 1 Vent. 407); whereas an appendant is that which beyond memory has belonged to another thing more worthy and which can arise only from prescription (Leonard *v.* White, 7 Mass. 6, 8, 5 Am. Dec. 19; New-Ipswich W. L. Factory *v.* Batchelder, 3 N. H. 190, 192, 14 Am. Dec. 346; Watts *v.* Coffin, 11 Johns. (N. Y.) 495, 498; Jackson *v.* Stiker, 1 Johns. Cas. (N. Y.) 284, 291; Coke Litt. 121*b*).

"The word 'appurtenant' has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted." Missouri Pac. R. Co. *v.* Maffitt, 94 Mo. 56, 60, 6 S. W. 600.

Used as equivalent of "usually occupied."—"From as long ago as the fourth year of Philip and Mary (Hill *v.* Grange, Plowd. 170) the word 'appurtenances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.'" Thomas *v.* Owen, 20 Q. B. D. 225, 231, 57 L. J. Q. B. 198, 58 L. T. Rep. N. S. 162.

Used in sense of "fixtures."—"The term 'appurtenances,' though not synonymous, is frequently used in the same sense with 'fixtures,' and the law applicable to fixtures will no doubt apply with equal force to appurtenances." Frey *v.* Drahos, 6 Nebr. 1, 5, 29 Am. Rep. 353.

19. *Illinois.*— Jarvis *v.* Seele Milling Co., 173 Ill. 192, 195, 50 N. E. 1044, 64 Am. St. Rep. 107.

Massachusetts.— Leonard *v.* White, 7 Mass. 6, 8, 5 Am. Dec. 19.

Missouri.— Rutherford *v.* Wabash R. Co., 147 Mo. 441, 451, 48 S. W. 921; Brace, J., in Snoddy *v.* Bolen, 122 Mo. 479, 497, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507; Wilson *v.* Beckwith, 117 Mo. 61, 74, 22 S. W. 639; Witte *v.* Quinn, 38 Mo. App. 681, 692 [*quoting* 3 Kent Comm. 626].

New Hampshire.— Riddle *v.* Littlefield, 53 N. H. 503, 508, 16 Am. Rep. 388 [*citing* 3 Washburn Real Prop. 626, 627; Comyns Dig. tit. Appendant and Appurtenant, (A)].

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382, 390; Gullman *v.* Sharp, 81 Hun (N. Y.) 462, 465, 30 N. Y. Suppl. 1036, 63 N. Y. St. 228.

Tennessee.— Lucas *v.* Bishop, 15 Lea (Tenn.) 165, 167, 54 Am. Rep. 410.

United States.— Humphreys *v.* McKissock, 140 U. S. 304, 11 S. Ct. 779, 35 L. ed. 473.

In California "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Cal. Civ. Code, § 662 [*quoted* in Crooker *v.* Benton, 93 Cal. 365, 368, 28 Pac. 953; Ely *v.* Ferguson, 91 Cal. 187, 27 Pac. 587; McShane *v.* Carter, 80 Cal. 310, 315, 22 Pac. 178; Farmer *v.* Ukiah Water Co., 56 Cal. 11, 13].

20. Webster Dict. [*quoted* in Bloom *v.* West, 3 Colo. App. 212, 32 Pac. 846; Carpenter *v.* Leonard, 5 Minn. 155].

21. Abbott L. Dict. [*cited* in Farmer *v.* Ukiah Water Co., 56 Cal. 11, 14; Empire Land, etc., Co. *v.* Rio Grande County, 1 Colo. App. 205, 28 Pac. 482]. See also Farmers' L. & T. Co. *v.* Commercial Bank, 11 Wis. 207, 210.

22. Com. *v.* Curley, 101 Mass. 24.

RAILROADS. To Vessel, see SHIPPING. To Water-Rights, see WATERS. See also DEEDS; EASEMENTS; ESTATES; FIXTURES; LANDLORD AND TENANT; MINES AND MINERALS; MORTGAGES; VENDOR AND PURCHASER; WILLS.)

APUD ACTA. Among the acts or recorded proceedings.[23]

A QUA. See A QUO.

AQUA CEDIT SOLO. A maxim meaning "Water passes with the soil."[24]

AQUA CURRIT ET DEBET CURRERE, UT CURRERE SOLEBAT. A maxim meaning "Water runs and ought to run as it has used to run."[25]

AQUEDUCT. See EMINENT DOMAIN; WATERS.

A QUO or A QUA. Literally, "from whom" or "from which." A term applied to courts as expressive of their relation one to another.[26]

A. R. An abbreviation of the words *anno regni* — in the year of the reign.[27]

ARBITER. An ARBITRATOR,[28] *q. v.*

ARBITRAMENT. The award, determination, or decision of arbitrators upon the matter of dispute which has been submitted to them.[29] (See ARBITRATION AND AWARD.)

ARBITRAMENT AND AWARD. The technical name for the plea used in a common-law action for damages where the parties had submitted the question to an arbitrator, and he had made his award.[30] (See ARBITRATION AND AWARD.)

ARBITRAMENTUM ÆQUUM TRIBUIT CUIQUE SUUM. A maxim meaning "An award is the equal delivery to each one of his own."[31]

ARBITRARILY. Without fair, solid, and substantial cause and without reason given.[32]

ARBITRARY PUNISHMENT. Punishment left to the judge's decision in distinction from that defined by statute.[33]

23. Burrill L. Dict.

The use of the term is analogous, to some extent, to the modern phrase "in open court." Abbott L. Dict.

24. Abbott L. Dict.

25. Burrill L. Dict.

Applied in the following cases:

Connecticut.— Keeney, etc., Mfg. Co. *v.* Union Mfg. Co., 39 Conn. 576, 582.

Kansas.—Shamleffer *v.* Council Grove Peerless Mill Co., 18 Kan. 24, 31.

Maryland.— Baltimore *v.* Appold, 42 Md. 442, 456; Gladfelter *v.* Walker, 40 Md. 1, 13.

New Jersey.— Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 556, 3 Am. Rep. 269; Campbell *v.* Smith, 8 N. J. L. 140, 145, 14 Am. Dec. 400; Merritt *v.* Parker, 1 N. J. L. 460, 463; Acquackanonk Water Co. *v.* Watson, 29 N. J. Eq. 366, 370.

Ohio.— Crawford *v.* Rambo, 44 Ohio St. 279, 284, 7 N. E. 429.

Pennsylvania.— Kauffman *v.* Griesemer, 26 Pa. St. 407, 413, 67 Am. Dec. 437.

United States.—Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 199, 29 Fed. Cas. No. 17,322.

26. Thus a court or judge *a quo* is one from which or from whom an appeal is taken. Burrill L. Dict.

In connection with the word "court" *a qua* **is,** grammatically, more proper.

27. Anderson L. Dict.

28. Wharton L. Lex.

29. Burrill L. Dict.

30. Sweet L. Dict.

31. Morgan Leg. Max. [*citing* Noy Max. 248].

32. Treloar *v.* Bigge, L. R. 9 Exch. 151, 159, 43 L. J. Exch. 95, 22 Wkly. Rep. 843.

33. Bouvier L. Dict.

ARBITRATION AND AWARD

By Francis J. Kearful

CROSS-REFERENCES

For Compulsory Arbitration, see REFERENCES.
Effect of Bankruptcy on Arbitration Proceedings, see BANKRUPTCY.
Provisions in Contracts for Arbitration by Third Persons, see CONTRACTS.
Reference of Issues Under Statutes or Rules of Court, see REFERENCES.
Special Arbitration Courts, see COURTS.
Submission of Controversy on Agreed Facts, see SUBMISSION OF CONTROVERSY.
Treaty Provisions Relating to Arbitration, see TREATIES.

I. NATURE AND DEFINITIONS.

A. Nature of Arbitration as a Proceeding — 1. IN GENERAL. In its broad sense, arbitration is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law;[1] a domestic tribunal — as contradistinguished from a regularly organized court proceeding according to the course of the common law[2] — depending upon the voluntary act of the parties disputant in the selection of judges of their own choice.[3] Its object is the final

1. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200; Boyden *v.* Lamb, 152 Mass. 416, 25 N. E. 609; Gardner *v.* Masters, 56 N. C. 462.

At the civil law.— Mr. Justice Story has remarked the coincidences between the civil law and our law in regard to arbitrations and awards. Arbitration, called compromise, was the mode of terminating controversies favored by the civil law. It was entered into by reciprocal covenants or obligations, with a penalty or with some other certain or implied loss, and the award partook of the character of a judicial proceeding and had a conclusive effect similar to that of awards herein treated. 2 Story Eq. (13th ed.) § 1460 *et seq.* [*citing* Pothier Pand. Lib. 4, tit. 8, n, 13, 14 *et seq.*].

2. Reily *v.* Russell, 34 Mo. 524; Phillips *v.* Rouss, 7 N. Y. St. 378.

It is not a suit or judicial proceeding, in a technical sense, under general statutes relating to proceedings of contest, between parties, begun by judicial process. Crook *v.* Chambers, 40 Ala. 239.

Though a judge of a court be selected by the parties to determine matters in controversy between them, the parties cannot, by such an agreement, confer upon the judge jurisdiction to hear, as a court, matters outside of his statutory jurisdiction. If the determination of the judge has any validity, it is as an ordinary award of an arbitrator. Banigan *v.* Nelms, 106 Ga. 441, 32 S. E. 337; Strite *v.* Reiff, 55 Md. 92; Lansing's Appeal, 10 Wis. 120; and APPEAL AND ERROR [2 Cyc. 539 note]. So, where an appeal is taken to a judge, personally, by agreement, as an arbitrator, his award, though rendered in the form of a judicial order, will be valid, and a failure to perform it will be a breach of the bond given to secure performance. State *v.* McCarty, 64 Md. 253, 1 Atl. 116. So, in Hays *v.* Hays, 23 Wend. (N. Y.) 363, the form which plaintiff sought to give to the proceeding was a submission to a justice of the peace of certain matters in controversy between the parties, without pleadings on issue presented in any form, and it was held that, in that view, the proceedings would be an arbitration, and not an action; but it was also held that, in view of the fact that the hearing was held before the justice in the formal method of a trial, the defendant might, notwithstanding the agreement, prove, in support of his contention, that it was an action, and that there were pleadings and issues presented before the justice.

3. Burroughs *v.* David, 7 Iowa 155; Jenifer *v.* Hamilton County, 2 Disn. (Ohio) 189; Bachelder *v.* Hanson, 2 Aik. (Vt.) 319; Benjamin *v.* U. S., 29 Ct. Cl. 417. It is a delegation of power for a mere private purpose. Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

Court cannot impose arbitration as condition.— A court cannot impose, upon parties litigant before it, arbitration as a condition of justice, though it may suggest such a course. Sobey *v.* Thomas, 37 Wis. 568. See also REFERENCES.

Combination of consent and compulsion.— Disputes may be terminated and the right transferred from one of the contending parties to the other, by consent, by compulsion, or by a combination of both. It is by consent when one agrees to give, and the other to accept, something else in lieu of the property in dispute. It is by compulsion when one obtains process and sentence of a competent court of justice against the other. And it seems to be the combination of both when, unable to settle the dispute themselves, they refer it to others to whose opinion they bind themselves to submit. Dixon *v.* Morehead, Add. (Pa.) 216.

Reference by statute.— When the legislature compels a party, without his assent, to arbitrate upon a claim which, properly, should be the subject of an action, this is an attempt to deprive him of the right, which is secured by the constitution, of a trial according to the course of the common law. People *v.* Haws, 15 Abb. Pr. (N. Y.) 115, as to the right of the legislature to refer to arbitrators an action of damages against a city, without the consent of the city.

Adjustment of claim against government. — An award cannot be made by public officers unless such officers are authorized, by statute, to act for the government. Benjamin *v.* U. S., 29 Ct. Cl. 417. So, under an act providing that the quartermaster-general may examine and adjust the claims of a designated person and shall "report the facts to Congress, to be considered with other claims reported by the Quartermaster-General," the only power which the quartermaster-general has, after examining and adjusting the claims, is to report the facts for the consideration of congress, and this report has no element of a final award. Nutt *v.* U. S., 23 Ct. Cl. 68. But where, by an act of legislature, the state divests itself of its sovereignty and authorizes a submission to arbitrators,

disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties.[4]

2. Classes or Kinds of Arbitration — a. In General. Arbitration may be classified under three heads: (1) where, in the absence or regardless of any statutory provision, the parties to any controversy submit the decision thereof to mutually-chosen arbitrators;[5] (2) where, by statute, authority is given to parties to a controversy not in court to submit the same to arbitrators, and, by agreement, have the submission entered as a rule of court, and the award enforced, or, on motion, entered as the judgment of a designated court;[6] (3) where a court in which a controversy is pending sends it for determination, by consent of the parties, to arbitrators chosen by the parties or selected by the court. These are, usually, designated as references,[7] and, while the right to thus submit is inherent

to be appointed by both parties, and both parties act pursuant to such statute, the authorities as to the finality or conclusiveness of a merely governmental commission have no applicability, as the proceeding then becomes an ordinary arbitration. State *v.* Ward, 9 Heisk. (Tenn.) 100.

Under by-law or society regulations.— Upon the principle that courts will not have persons coerced into waiving their strict rights if they choose to insist upon them, it is held that courts will not sustain a by-law of an exchange which assumed, under penalty of suspension or expulsion, to compel members to submit their business controversies to arbitration. State *v.* Union Merchants' Exchange, 2 Mo. App. 96. But, if parties voluntarily submit under such by-laws or regulations, they may, nevertheless, be bound as upon a common-law award. See *infra*, IV, B.

A testator cannot provide in his will that, if any differences arise respecting the will, they shall be determined by a specified arbitrator whose decision is to be final. Russell Arb. & Award (8th ed.) 38 [*citing* Philips *v.* Bury, Skin. 469].

4. Waite *v.* Barry, 12 Wend. (N. Y.) 377. See *infra*, IX.

Where final determination not intended.— If an award, so called, is not intended as a final disposition of the matters submitted, it cannot have the binding force of an award, properly so called. Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Sartwell *v.* Horton, 28 Vt. 370, wherein, upon holding that an award published on express condition that the parties were not to be bound, did not conclude the parties, the court distinguished Ennos *v.* Pratt, 26 Vt. 630, in that there the arbitrators intended to make a final determination, and their opinion that, as their award was not in writing, it was not obligatory, had no effect upon its conclusiveness.

5. First method.— In these cases the successful party must resort to the courts in an action on the award to enforce it, and is benefited by the arbitration only in that he may base his action on the award instead of on the original cause of action, and such award, unless impeached, is conclusive evidence in his favor. See *infra*, IX, A, 2; XI, A, B.

6. Second method.— Here the successful party has not only the advantage of a determination of the disputed questions, but an easy and expeditious method of placing that determination in a position where the law will enforce it. This was the aim and scope of the statute 9 & 10 Wm. III — to put controversies out of court on the same footing as those in court. Lucas *v.* Wilson, 2 Burr. 701. The statutes in the United States differ, but, as a general rule, they are bottomed upon the statute of 9 & 10 Wm. III, and look to the same end. See *infra*, XI, E.

7. Third method.— Miller *v.* Brumbaugh, 7 Kan. 343.

Award entirely upon agreement distinguished.— The difference between an award solely by agreement of the parties and one under statute, or when made a rule of court, lies in the somewhat more extensive control by the court of awards in the latter instances, and in the difference between the remedies by which the award may be enforced. See Grayson *v.* Meredith, 17 Ind. 357; Moore *v.* Barnett, 17 Ind. 349; Burroughs *v.* David, 7 Iowa 155; Miller *v.* Brumbaugh, 7 Kan. 343; Eyre *v.* Fenimore, 3 N. J. L. 489; Den *v.* Allen, 2 N. J. L. 32; Gardner *v.* Masters, 56 N. C. 462. And where referees, though designated by the act of the parties, derive their authority from the court, and their doings are of no avail until sanctioned by the court, the proceeding is said not to be an arbitration. Bachelder *v.* Hanson, 2 Aik. (Vt.) 319. See also Strong *v.* Barbour, 1 Mackey (D. C.) 209; Chatfield *v.* Hewlett, 2 Dem. Surr. (N. Y.) 191. The referee derives his authority from the court, while the arbitrator derives his from the parties; the latter pronounces judgment, while the former reports his opinion to the court. Merieult *v.* Austin, 3 Mart. (La.) 319. A reference under a rule of court is considered as a judicial proceeding, as distinguished from a mere arbitration. Lazell *v.* Houghton, 32 Vt. 579. But in *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200, it was said that the duty imposed on the court in accepting an award was very much like the duty in accepting a report of a committee, auditor, or referee, the words used in statutes being similar, and the purpose of the acceptance in either case being the same — that is, to establish the award in the one case, or the report in the other, as the judgment of the court. It did not matter that arbitrators were not officers of the court, as were committees.

at common law,[8] the proceeding is often regulated by statute.[9] Statutes relating to references do not supersede this common-law method of arbitration;[10] but, if the case is not brought within the provisions of the statute as to references, it must be controlled by the rules which govern arbitration.[11]

b. Ministerial or Quasi-Judicial Acts. Technically, to constitute a valid common-law award, it is necessary that there should be a submission, by the parties, of an existing matter of difference, for the purpose of terminating or concluding the parties as to the entire subject-matter in issue between them,[12] as distinguished from a submission for the ascertainment of a single fact, or the settlement of a particular question in the chain of evidence constituting a mere appraisement, valuation, or reference not designed to terminate the whole controversy between the parties, which proceeding is said not to be an arbitration.[13]

8. See *infra*, II, B, E.

9. See *supra*, note 6.

10. Lusk *v.* Clayton, 70 N. C. 184; Leach *v.* Harris, 69 N. C. 532; Bollmann *v.* Bollmann, 6 S. C. 29. See also *infra*, I, A, 2, c; XI, E, 2, c.

11. "Reference" and "arbitration" compared.— Thus, on a motion to set aside a report of a referee, it was held that, as it appeared by the rule of reference that the cause was referred to a single person, it could not be regarded as a reference under the statute, and was, therefore, merely an arbitration, the result being that the court could not interfere with the report, or, more properly speaking, the award. Rathbone *v.* Lownsbury, 2 Wend. (N. Y.) 595. So, in actions not referable, if the parties refer the cause without providing that judgment shall be entered, the reference is an arbitration and will operate as a discontinuance, although, if there is a provision that judgment shall be entered, the parties are held concluded by the agreement, though the cause is not referable. Merritt *v.* Thompson, 27 N. Y. 225; Green *v.* Patchen, 13 Wend. (N. Y.) 293; Farrington *v.* Hamblin, 12 Wend. (N. Y.) 212; Messenger *v.* Broom, 1 Pinn. (Wis.) 630. See also Diedrick *v.* Richley, 2 Hill (N. Y.) 271; Camp *v.* Root, 18 Johns. (N. Y.) 22; Johnson *v.* Parmely, 17 Johns. (N. Y.) 129. But, where a part of claims were referable and a part not, and the referee was authorized, by agreement of the parties, to pass upon the latter, it was held that the complaint in an action on the report was properly dismissed, because the reference was not converted into an arbitration, and that the plaintiff's remedy was by application for confirmation of the referee's report. Hovey *v.* Hovey, 46 Hun (N. Y.) 71 [*distinguishing* former cases cited *supra*, in this note, in that the actions in those cases were, in fact, discontinued by the voluntary submission of the controversies to referees; while, in this case, the proceeding was pending and the subject-matter, or a considerable portion of it which the parties sought to and did bring to the attention of the referee, was legitimately in the special proceeding in progress before him. The court also distinguished Akely *v.* Akely, 17 How. Pr. (N. Y.) 21, in that the decision there was put upon the ground that the proceeding was not in form or substance a reference under the statute; and Godding *v.* Porter, 17 Abb. Pr. (N. Y.) 374, in that the motion to confirm in that case was denied, because the claim in question was not referable under the statute, and the objection went to the entire claim involved and allowed].

For proceedings referring issues in pending actions see REFERENCES.

12. Ehrman *v.* Stanfield, 80 Ala. 118; Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650; Green, etc., Streets Pass. R. Co. *v.* Moore, 64 Pa. St. 79; Nutt *v.* U. S., 23 Ct. Cl. 68. Where it appears from the terms of the agreement that the intention of the parties is that there should be an inquiry in the nature of a judicial inquiry, and that the matters should be decided upon the evidence, there is a reference to arbitration. Russell Arb. & Award (8th ed.) 37 [*citing* Matter of Hopper, L. R. 2 Q. B. 367, 8 B. & S. 100, 36 L. J. Q. B. 97, 15 L. T. Rep. N. S. 566, 15 Wkly. Rep. 443; Carus-Wilson *v.* Greene, 18 Q. B. D. 7, 56 L. J. Q. B. 530, 55 L. T. Rep. N. S. 864, 35 Wkly. Rep. 43].

13. *Illinois.*— Brown *v.* Galesburg Pressed-Brick, etc., Co., 132 Ill. 648, 24 N. E. 522; Stage *v.* Gorich, 107 Ill. 361. See also McAvoy *v.* Long, 13 Ill. 147; Board Trustees Illinois, etc., Canal *v.* Lynch, 10 Ill. 521.

Indiana.— Gilmore *v.* Putnam County, 35 Ind. 344; Grimes *v.* Blake, 16 Ind. 160.

Kentucky.—Whitehead *v.* Darling, 9 Ky. L. Rep. 340, 5 S. W. 356.

Maine.— Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650; Patterson *v.* Triumph Ins. Co., 64 Me. 500 (holding that, in order to maintain, in bar of an action on an insurance policy, an award of the amount of plaintiff's loss, it must be shown that the parties agreed to be bound and abide by the arbitration); McKinney *v.* Page, 32 Me. 513 (holding that where, upon completion of a building, the owner and builder selected parties to examine the building to ascertain if it was finished according to the contract and whether the contract had been complied with, the persons so selected were not vested with the powers of referees, and their doings were not conclusive).

Michigan.— Noble *v.* Grandin, 125 Mich. 383, 84 N. W. 465.

Missouri.— Zallee *v.* Laclede Mut. F. & M.

This distinction is also the subject of consideration in applying the rules governing arbitrations to various proceedings. In some cases the same rules are applied whether the proceeding is an appraisement or technical arbitration,[14] while in others the same rules are not applied.[15] The decisions are not harmonious, how-

Ins. Co., 44 Mo. 530; Curry *v.* Lackey, 35 Mo. 389.

New Hampshire.—Hale *v.* Handy, 26 N. H. 206, holding that, where logs which were the subject of a contract between the parties were to be measured by a third person, his duty was not judicial, and evidence was admissible to show a mistake in the measurement. This, however, does not distinguish between an award of arbitrators as such and a mere valuer or appraiser, but seems to go upon the principle that a mistake of an arbitrator as such in a mere mathematical computation may be set up in an action at law.

New Jersey.— Broadway Ins. Co. *v.* Doying, 55 N. J. L. 569, 27 Atl. 927; Phœnix Iron Co. *v.* New York Wrought Iron Chair Co., 27 N. J. L. 484; Jersey City, etc., R. Co. *v.* Jersey City, etc., Horse R. Co., 20 N. J. Eq. 61.

New York.— Birdsall Co. *v.* Ayres, 21 N. Y. Suppl. 898, 50 N. Y. St. 242; Garr *v.* Gomez, 9 Wend. (N. Y.) 649 [*modifying* 6 Wend. (N. Y.) 583].

Pennsylvania.—Green, etc., Streets Pass. R. Co. *v.* Moore, 64 Pa. St. 79.

Virginia.— Bierly *v.* Williams, 5 Leigh (Va.) 700.

England.— Carus-Wilson *v.* Greene, 18 Q. B. D. 7, 56 L. J. Q. B. 530, 55 L. T. Rep. N. S. 864, 35 Wkly. Rep. 43; *In re* Dawdy, 15 Q. B. D. 426, 54 L. J. Q. B. 574, 53 L. T. Rep. N. S. 800; Collins *v.* Collins, 26 Beav. 306, 5 Jur. N. S. 30, 28 L. J. Ch. 184, 7 Wkly. Rep. 115; Scott *v.* Liverpool Corp., 3 De G. & J. 334, 5 Jur. N. S. 491, 28 L. J. Ch. 236, 7 Wkly. Rep. 441, 60 Eng. Ch. 334; Leeds *v.* Burrows, 12 East 1; Turner *v.* Goulden, L. R. 9 C. P. 57, 43 L. J. C. P. 60; Bos *v.* Helsham, L. R. 2 Exch. 72, 4 H. & C. 642, 36 L. J. Exch. 20, 15 L. T. Rep. N. S. 481, 15 Wkly. Rep. 259; Hammond *v.* Waterton, 62 L. T. Rep. N. S. 808; Lee *v.* Hemingway, 3 N. & M. 860, 3 L. J. K. B. 124, 28 E. C. L. 628.

A decision which precludes differences from arising, instead of settling them after they have arisen, is, for many purposes, frequently not an award. Russell Arb. & Award (8th ed.) 37 [*citing* Carus-Wilson *v.* Greene, 18 Q. B. D. 7, 56 L. J. Q. B. 530, 55 L. T. Rep. N. S. 864, 35 Wkly. Rep. 43]. But see *infra*, note 14.

Judges of contest of skill.— Though the award of judges, appointed to determine a contest of skill upon reports made to them by specially appointed heralds, is not an award at common law, it is in the nature of such award. Alabama Agricultural, etc., Assoc. *v.* Trimble, 49 Ala. 212.

Reference to accountant.— Where the only duty of a third person is to examine books as an accountant and state what they exhibit, the agreement under which such party acts is not a submission to arbitration. Kelly *v.* Crawford, 5 Wall. (U. S.) 785, 18 L. ed. 562. See also Randall *v.* Glenn, 2 Gill (Md.) 430.

Reference to mere witness.— A reference, as to a disputed fact, to a party who was to state the fact of his own recollection, is not analogous to a submission to arbitration, and the statement of such referee is not conclusive. Williams *v.* Wood, 12 N. C. 82.

Stewards of a horse-race, appointed to settle disputes respecting it, are not arbitrators, in the strict sense. Russell Arb. & Award (8th ed.) 38 [*citing* Parr *v.* Winteringham, 1 E. & E. 394, 5 Jur. N. S. 787, 28 L. J. Q. B. 123, 7 Wkly. Rep. 288, 102 E. C. L. 394; Ellis *v.* Hooper, 3 H. & N. 766, 4 Jur. N. S. 1025, 28 L. J. Exch. 1, 7 Wkly. Rep. 15].

Survey.— A written instrument by the proprietors of adjoining lands, reciting that they were desirous of having their respective lines run so that each might know his true boundary, and agreeing to employ a surveyor to run the line, was held not to be a submission to arbitration. It did not appear that there was any controversy between the parties, and, so far as the agreement showed, the service of the surveyor was simply ministerial and there was no submission to adopt and abide by the line which he might determine. Thayer *v.* Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59. But, for a different holding where there was a dispute between the parties, see Turner *v.* Burt, 24 N. Brunsw. 547.

14. Earle *v.* Johnson, 81 Minn. 472, 84 N. W. 332 (as to liability of a person, chosen as an appraiser for the purpose of determining the value of leased property, as a "chosen arbitrator," to conviction for a misdemeanor, under a statute making a juror or person chosen arbitrator, who makes any promises or agreement to give a report, award, or decision, for or against a party, guilty of a misdemeanor); Janney *v.* Goehringer, 52 Minn. 428, 54 N. W. 481; Schreiber *v.* German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708 (holding that an appraisal, under an appointment pursuant to a stipulation in an insurance policy, without notice to the insured of the time when the appraisers would make their investigation, is void); Brown *v.* Lyddy, 11 Hun (N. Y.) 451.

15. James *v.* Schroeder, 61 Mich. 28, 27 N. W. 850, holding that a simple reference to appraise the value of property on inspection was not such an arbitration as required the presence of the parties. See also Gernsheim *v.* Central Trust Co., 16 N. Y. Suppl. 127, 40 N. Y. St. 967. So, of the failure of appraisers to be sworn. Zallee *v.* Laclede Mut. F. & M. Ins. Co., 44 Mo. 530. See also Broadwell *v.* Denman, 7 N. J. L. 278. So, an appraisement stamp upon a written valuation is sufficient, and an award stamp is not necessary. Leeds *v.* Burrows, 12 East 1. See also

ever, and it is impossible to trace, for all cases, a more definite distinction between a technical arbitration and the class of proceedings mentioned. Reference may be made to the cases in which parties bind themselves, by contract, to abide by a mere ministerial determination, without regard to the distinction above drawn.[16] Where the whole matter of dispute is referred to quasi-judicial determination, the original cause of action is merged by the judgment;[17] but a mere appraisement, valuation, or other like act does not destroy the original cause of action. At most it affects the evidence rather than the remedy.[18] In this connection, if the parties, by their contract, are bound by the mere ascertainment of the evidentiary fact, or other ministerial act, the distinction between the technical award and such ministerial act would seem to be one in the use of terms merely, and has been so regarded.[19]

Perkins *v.* Potts, 2 Chit. 399, 18 E. C. L. 704. But where a bond, conditioned for the discharge by a person of the duties of a clerk, provided that the discharge should be ascertained by inspection of his accounts by another, and that the amount so ascertained should be liquidated damages, it was held that the paper, by the person designated to inspect the accounts, by which he had ascertained such amount, should be stamped as an award. Jebb *v.* McKiernan, 1 M. & M. 340, 22 E. C. L. 541.

16. Appraisement of loss.— Thus, an independent agreement, under a policy of insurance submitting the amount of loss to appraisement, is considered as a common-law arbitration. Georgia Home Ins. Co. *v.* Kline, 114 Ala. 366, 21 So. 958. See also Bradshaw *v.* Agricultural Ins. Co., 16 N. Y. Suppl. 639, 42 N. Y. St. 79.

Valuers.—So, a contract by which one party agrees to cut and haul timber at a stipulated price per thousand feet, to be estimated by a designated person, is held to bind the parties to the estimate of such person, in the absence of corruption or mistake. Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; Stubbings *v.* McGregor, 86 Wis. 248, 56 N. W. 641, holding that an estimate so made stood upon the same ground as an award of arbitrators. And, in an action on a written instrument signed by the parties, whereby they agreed that certain persons should appraise work on a building lately erected by plaintiff for defendant, the contract was treated as a submission to arbitration. Efner *v.* Shaw, 2 Wend. (N. Y.) 567. So, of the appraisement of persons chosen, pursuant to an agreement in a lease, to appraise the value of buildings erected on the demised premises during the term. Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405.

Contract to prevent differences from arising.— The difference between an arbitration and award and an estimate, made by third persons, under a contract between the parties, as to the performance of the contract, is that, in the former case, the cause of action is supposed to really exist, and is referred to the decision of arbitrators instead of a court, the award of whom is like the judgment of a court; whereas, in the latter case, the final estimate is, of itself, a part of the cause of action and a condition precedent, the performance, or a sufficient excuse for the non-performance of which, must be shown in order to maintain the action. Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447. As to the effect of such contracts see CONTRACTS.

17. See *infra*, IX, A, 2.

18. *Missouri.*— Davenport *v.* Fulkerson, 70 Mo. 417; Pearce *v.* McIntyre, 29 Mo. 423; Garred *v.* Macey, 10 Mo. 161.

New Jersey.—Broadway Ins. Co. *v.* Doying, 55 N. J. L. 569, 27 Atl. 927.

New York.— Garr *v.* Gomez, 9 Wend. (N. Y.) 649.

Virginia.— Bierly *v.* Williams, 5 Leigh (Va.) 700.

England.— Allen *v.* Milner, 2 Cr. & J. 47, 1 L. J. Exch. 7, 2 Tyrw. 113.

Appraisement adopted by court.— In an action against the owner of a building to recover on a building contract, it appeared that, while the owner was conducting his business on the first floor of the building being altered, his stock was damaged by water coming through the roof by reason of the negligence of the contractors, and that arbitrators had decided on the amount of damages so suffered by the owner. It was held that the decision of the arbitrators, whether binding on the owner or not, would be followed by the court in determining the amount of counter-claim to which the owner was entitled. Kenny *v.* Monahan, 66 N. Y. Suppl. 249.

19. Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650 (wherein, under a contract of insurance providing that the estimate of loss in case of fire should be made by the insured and the company, or, if they should differ, by appraisers, etc., it was said that it was not necessary to decide whether such appraisers were, technically, arbitrators; that the result might be that such appraisers were properly considered arbitrators for some purpose, but not in all respects; that all were vested with quasi-judicial functions which must be discharged with absolute impartiality, and that appraisers might be said to act in the twofold capacity of arbitrators and experts); Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405 (wherein Spencer, C. J., said that, notwithstanding the ingenious distinctions made between appraisement and an ordinary submission to arbitration, he could not feel the force of such distinctions, and that appraisers, appointed, pursuant to an agree-

c. Statutory and Common-Law Proceedings Cumulative. Usually, the statutory provisions regulating the subject of arbitration in the various states refer to the remedy for the enforcement of the award, and unless, by express terms or necessary implication, they abrogate the common law on the subject, parties are still at liberty to enter into a submission as at common law.[20] The provisions of the statute, however, may be general and apply to all arbitrators, whether at common law or statutory.[21] Where the parties seek to avail themselves of whatever advantage there may be in a statutory award, the proceedings must conform to the statute. While a strict pursuance of the statute, in order to constitute a statutory award, has been held to be necessary,[22] it seems that the general rule is that all of the essential requirements of the statute must be pursued, though a substantial compliance will be sufficient.[23] If the proceedings are entirely contrary to the rules which govern statutory arbitrations, all questions as to the effect of the award, the sufficiency thereof, and the like, must be determined according to the rules of the common law.[24]

3. Approved Method of Settlement — Favored by Construction. Though arbitration was recognized at the common law as a mode of adjusting matters in dispute, especially such as concerned personal chattels and personal wrongs,[25] yet, from efforts perceptible in the earlier cases to construe arbitration proceedings and awards so as to defeat them, it would seem that they were not originally favored by the courts.[26] This hostility, however, has long since disappeared, and, by reason of the fact that the proceeding represents a method of the parties' own choice and furnishes a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor arbitration. Therefore, every reasonable intendment will be indulged to give effect to such proceedings, and in favor of the regularity and integrity of the arbitrators' acts.[27]

ment in a lease, to appraise the value of buildings erected on demised premises, were substantially arbitrators, by whatever name they might be called).

20. See *infra*, XI, E, 2, c.

21. Wolfe *v.* Hyatt, 76 Mo. 156. Thus, the oath required by statute to be administered to arbitrators was held to apply to all submissions in writing, whether containing a clause for the entry of judgment upon the award or not, though a failure to take the oath is a mere irregularity which might be waived. Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522. See also New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Bulson *v.* Lohnes, 29 N. Y. 291.

22. Monosiet *v.* Post, 4 Mass. 532.

23. *Alabama.*— Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476, holding that a failure to comply with the provisions of the statute, which provisions are merely directory, will not defeat an award under the statute if the award is, in other respects, conformable to the statute.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

California.— Kreiss *v.* Hotaling, 96 Cal. 617, 31 Pac. 740.

Kentucky.— Sims *v.* Banta, 9 Ky. L. Rep. 286.

Massachusetts.— Abbott *v.* Dexter, 6 Cush. (Mass.) 108.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Washington.— Bachelder *v.* Wallace, 1 Wash. Terr. 107.

24. Shaw *v.* State, 125 Ala. 80, 28 So. 390; Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Dudley *v.* Farris, 79 Ala. 187; Willingham *v.* Harrell, 36 Ala. 583; Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502; Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126; Stephenson *v.* Price, 30 Tex. 715.

Resort to common-law remedy upon failure to comply with statute see *infra*, XI, E, 2, c.

25. Byrd *v.* Odem, 9 Ala. 755 [*citing* 3 Bl. Comm. 16]; Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370. See also *infra*, II, C.

26. Speer *v.* McChesney, 2 Watts & S. (Pa.) 233.

In the earlier history of equity jurisprudence prejudice existed against the system of adjudicating disputes of voluntary arbitration *in pais*. The established tribunals manifested jealousy of so irregular a substitute as was presented by a board of arbitration liable, often, to be composed either in whole or in part of laymen. Fluharty *v.* Beatty, 22 W. Va. 698.

27. *Alabama.*— Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367; Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Burns *v.* Hendrix, 54 Ala. 78; Wolff *v.* Shelton, 51 Ala. 425; Mobile Bay Road Co. *v.* Yeind, 29 Ala. 325; Strong *v.* Beroujon, 18 Ala. 168.

Colorado.— Wilson *v.* Wilson, 18 Colo. 615, 34 Pac. 175.

B. "Submission" Defined. A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others, and to be bound by the award of the latter.[28]

C. "Arbitrator" Defined. The arbitrator is the person to whose determination the matters in dispute are submitted — a judge of the parties' own choosing,[29]

Illinois.— McMillan *v.* James, 105 Ill. 194; Hadaway *v.* Kelly, 78 Ill. 286; Henrickson *v.* Reinback, 33 Ill. 299; Hubbard *v.* Firman, 29 Ill. 90; Haywood *v.* Harmon, 17 Ill. 477; Root *v.* Renwick, 15 Ill. 461; McDonald *v.* Arnout, 14 Ill. 58; Merritt *v.* Merritt, 11 Ill. 565; Shear *v.* Mosher, 8 Ill. App. 119.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Allen *v.* Hiller, 8 Ind. 310; Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098.

Iowa.— Skrahle *v.* Pryne, 93 Iowa 691, 62 N. W. 21; Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806; Tomlinson *v.* Tomlinson, 3 Iowa 575.

Kansas.— Arbitration proceedings ought to be encouraged, and, so far as is consistent with the preservation of the rights of the parties, full force and effect should be given to them. Brewer, J., in Groat *v.* Pracht, 31 Kan. 656, 3 Pac. 274.

Kentucky.—Snyder *v.* Rouse, 1 Metc. (Ky.) 625.

Maryland.— Sisson *v.* Baltimore, 51 Md. 83; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458; Roloson *v.* Carson, 8 Md. 208.

Massachusetts.— Mickles *v.* Thayer, 14 Allen (Mass.) 114; Strong *v.* Strong, 9 Cush. (Mass.) 560; Bigelow *v.* Newell, 10 Pick. (Mass.) 348; Peters *v.* Peirce, 8 Mass. 398.

Michigan.— Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Alpena Lumber Co. *v.* Fletcher, 48 Mich. 555, 12 N. W. 849; Cooper *v.* Andrews, 44 Mich. 94, 6 N. W. 92.

Missouri.— Tucker *v.* Allen, 47 Mo. 488; Shroyer *v.* Barkley, 24 Mo. 346; Reeves *v.* McGlochlin, 65 Mo. App. 537.

New Hampshire.— Burleigh *v.* Ford, 59 N. H. 536; Sanborn *v.* Murphy, 50 N. H. 65; Tracy *v.* Herrick, 25 N. H. 381; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485.

New Jersey.— Rogers *v.* Tatum, 25 N. J. L. 281; Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319; Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567; Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297.

New York.— Hiscock *v.* Harris, 74 N. Y. 108; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; Perkins *v.* Giles, 50 N. Y. 228; Locke *v.* Filley, 14 Hun (N. Y.) 139; Bergh *v.* Pfeiffer, Lalor (N. Y.) 110; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.

Pennsylvania.— Finch *v.* Lamberton, 62 Pa. St. 370; Robinson *v.* Bickley, 30 Pa. St. 384; Bemus *v.* Clark, 29 Pa. St. 251; Plank *v.* Mizell, 11 Pa. Co. Ct. 670, 1 Pa. Dist. 757.

South Carolina.— Mulder *v.* Cravat, 2 Bay (S. C.) 370.

Tennessee.—Cooley *v.* Dill, 1 Swan (Tenn.) 313.

Texas.— Elder *v.* McLane, 60 Tex. 383; Green *v.* Franklin, 1 Tex. 497.

Vermont.— Young *v.* Kinney, 48 Vt. 22; Soper *v.* Frank, 47 Vt. 368.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698; Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

Wisconsin.—Wood *v.* Treleven, 74 Wis. 577, 43 N. W. 488; Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195; Dolph *v.* Clemens, 4 Wis. 181; Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

United States.—Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96; Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121.

England.— Lingood *v.* Eade, 2 Atk. 501; Cargey *v.* Aitcheson, 2 B. & C. 170, 3 D. & R. 433, 9 E. C. L. 81; Hawkins *v.* Colclough, 1 Burr. 274; Bowes *v.* Fernie, 4 Myl. & C. 150, 18 Eng. Ch. 150; Wood *v.* Griffith, 1 Swanst. 43, 1 Wils. C. P. 34, 18 Rev. Rep. 18.

Canada.— Hodder *v.* Turvey, 20 Grant Ch. (U. C.) 63; Campbell *v.* Brown, 2 Ont. Pr. 291.

28. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Garr *v.* Gomez, 9 Wend. (N. Y.) 649. See also Driggs *v.* Morgan, 2 La. Ann. 151; Class' Appeal, 6 Pa. Super. Ct. 130; District of Columbia *v.* Bailey, 171 U. S. 161, 18 S. Ct. 868, 43 L. ed. 118; Chorpenning *v.* U. S., 11 Ct. Cl. 625. It is a covenant by which persons who have a controversy select others as arbitrators to decide the matter. Meyer *v.* Ludeling, 40 La. Ann. 640, 4 So. 583; McClendon *v.* Kemp, 18 La. Ann. 162. An agreement, parol — oral or written — or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference. Howard *v.* Sexton, 4 N. Y. 157; McManus *v.* McCulloch, 6 Watts (Pa.) 357; Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534; Bouvier L. Dict.; Kyd Awards 11.

See also, generally, *infra*, II, C.

29. Garr *v.* Gomez, 9 Wend. (N. Y.) 649; Haigh *v.* Haigh, 8 Jur. N. S. 983, 31 L. J. Ch. 420, 5 L. T. Rep. N. S. 507.

Agents or judges.— Arbitrators are sometimes considered as substitutes, and sometimes as judges for the parties. Dixon *v.* Morehead, Add. (Pa.) 216. Thus, upon the principle that arbitrators are the agents of both parties, their acts have been considered as the acts of the parties themselves, and a balance found by such arbitrators has been considered as a balance struck by the parties on an account stated by themselves. Hays *v.* Hays, 23 Wend. (N. Y.) 363. But, on the other hand, upon the principle that an arbitrator is not an agent, it was held that a justice of the peace did not have jurisdiction in an action on an award for more than the pecuniary limitation of his jurisdiction, over the insistence that the award was in the

whose functions are judicial and whose duties are not those of a mere partisan agent, but of an impartial judge, to dispense equal justice to all the parties,[30] and to decide the law and facts involved in the matters submitted, with a view to determining and finally ending the controversy.[31]

D. "Umpire" Defined. An umpire, in the common signification of the word, denotes one who is to decide the controversy in case the original arbitrators cannot agree.[32]

E. "Award" Defined. An award is the judgment pronounced by the arbitrators,[33] and to make an award is to announce and publish the judgment.[34] It is a judicial act,[35] and, while sometimes said to partake of the attributes of a contract,[36] it is more nearly akin to a judgment of a regular judicial tribunal, and is no more a contract than such judgment, being at the same time of a higher nature than a mere specialty.[37]

II. SUBMISSION TO ARBITRATION.

A. Necessity of Submission. Without a submission in some form there can be no valid award.[38]

B. Who May Submit — 1. In General. Where there is a capacity to contract, with a liability to pay, there is, generally, a power to submit to arbitration.[39]

nature of a settled account signed by the parties, through the arbitrators as their agents, in order to bring the case within the provision of the statute extending the jurisdiction where the claim was on a settled account signed by the parties. Collins *v.* Oliver, 4 Humphr. (Tenn.) 438. See also Babb *v.* Stromberg, 14 Pa. St. 397, wherein Gibson, C. J., said that an award was an act of the parties, performed through their agents, and assented to in advance.

30. Jones *v.* Brown, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; Story *v.* Elliot, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; Collins *v.* Oliver, 4 Humphr. (Tenn.) 438.

31. See *infra*, III, E, 2.

32. Keans *v.* Rankin, 2 Bibb (Ky.) 88 [*citing* 1 Bacon Abr. tit. Arbitrament and Award, (D), 211].

Distinction between umpire and other arbitrator see *infra*, V, A.

33. *New Jersey.*—Hoff *v.* Taylor, 5 N. J. L. 976.

New York.— Garr *v.* Gomez, 9 Wend. (N. Y.) 649.

Pennsylvania.—Green, etc., Streets Pass. R. Co. *v.* Moore, 64 Pa. St. 79, per Sharswood, J.

United States.— Benjamin *v.* U. S., 29 Ct. Cl. 417.

England.—Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221.

34. Hoff *v.* Taylor, 5 N. J. L. 976.

35. Story *v.* Elliot, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423, in determining that an award made and published on Sunday was void.

36. Dixon *v.* Morehead, Add. (Pa.) 216, wherein it is said that an award is a contract, and is considered as similar to an accord and satisfaction and equal to the judgment of a court.

37. Smith *v.* Lockwood, 7 Wend. (N. Y.) 241 (upon considering whether the statute of limitations applied to debt on an award); Celley *v.* Gray, 37 Vt. 136; Woodrow *v.* O'Conner, 28 Vt. 776. Thus, an award for the payment of money is, like a judgment, in a very limited and restricted sense, a contract. Johnson *v.* Maxey, 43 Ala. 521. So, matters submitted orally are merged in the award in writing, which partakes of the nature of a judgment, and, as a contract, would be regarded as a specialty. Searles *v.* Lum, 81 Mo. App. 607.

Statutory and common-law arbitration.— If an arbitration is under the statute, with an agreement to make the submission a rule of court, it partakes much of the nature of judicial proceedings. If the arbitration is under an ordinary submission, the award partakes of the nature of a judgment, as it is a voluntary agreement for the adjusting of differences, and may be regarded as simply the contract of settlement between the parties. Groat *v.* Pracht, 31 Kan. 656, 3 Pac. 274, per Brewer, J.

Conclusiveness.— See *infra*, IX, A, 1.

38. Burghardt *v.* Turner, 12 Pick. (Mass.) 534; Williams *v.* Williams, 11 Sm. & M. (Miss.) 393; Stokely *v.* Robinson, 34 Pa. St. 315; Perit *v.* Cohen, 4 Whart. (Pa.) 81.

Proof of submission.— A certificate of a county clerk that a controversy relative to the ownership of a chattel was submitted to him by the parties, and that he decided it in favor of one of them, is not evidence of such submission. Howard *v.* Sherwood, 1 Colo. 117.

39. *Arkansas.*— Wilkes *v.* Cotter, 28 Ark. 519.

Indiana.— Webb *v.* Zeller, 70 Ind. 408.

Massachusetts.— Bean *v.* Farnam, 6 Pick. (Mass.) 269; Paine *v.* Ball, 3 Mass. 235; Thomas *v.* Leach, 2 Mass. 152.

New York.— Brady *v.* Brooklyn, 1 Barb. (N. Y.) 584.

Virginia.— Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504, wherein

2. PERSONS ACTING IN DIFFERENT CAPACITIES. A person, acting both individually and in a representative capacity, may submit a matter in controversy to arbitration, the question as to the capacity in which he acts being one of construction, to be determined from the terms of the submission.[40]

3. PERSONS NOT PARTIES TO SUIT. Where persons, not parties to a suit, but interested in the subject-matter thereof, agree to a submission of such subject-matter to arbitration, they thereby become parties to the suit, and are bound by the award.[41]

C. Matters Which May Be Submitted — 1. MATTERS OF A CIVIL NATURE — a. In General. Unless forbidden by statute or public policy, all matters of controversy or litigation, whether of law or of equity jurisdiction; whether claims for specific articles of property, real, personal, or mixed, or sums of money;

it was held that overseers of poor, being a corporation with power to sue and contract, can submit.

England.— Comyns Dig. 537.

See 4 Cent. Dig. tit. "Arbitration and Award," § 26.

As to the power of agent to submit matters to arbitration see PRINCIPAL AND AGENT. Of attorney see ATTORNEY AND CLIENT. Of bankrupt see BANKRUPTCY. Of corporation see CORPORATIONS. Of county court see COUNTIES. Of executor and administrator see EXECUTORS AND ADMINISTRATORS. Of guardian of infant see GUARDIAN AND WARD; INFANTS. Of guardian or committee of incompetent person see INSANE PERSONS. Of married woman see HUSBAND AND WIFE. Of municipal corporation see MUNICIPAL CORPORATIONS. Of officer of United States see UNITED STATES. Of overseer of the poor see POOR PERSONS. Of parent to submit claim of child see PARENT AND CHILD. Of partner see PARTNERSHIP. Of selectmen of town see TOWNS. Of trustee see TRUSTS.

Adult heirs, who are *sui juris,* may enter into a submission of an equitable claim to land, of which their ancestor died seized, notwithstanding there are other heirs interested in the subject who are not parties, and the award in such case will be binding on the parties to the submission according to its terms. Boyd *v.* Magruder, 2 Rob. (Va.) 761. *Compare* Stahl *v.* Brown, 72 Iowa 720, 32 N. W. 105; Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157; Haynes *v.* Harris, 33 Iowa 516.

Incapacity of some of the parties.— An objection that a submission was not binding, because some of the parties to it had no capacity to contract, cannot prevail as to parties having capacity. Fort *v.* Battle, 13 Sm. & M. (Miss.) 133; Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118. But see Britton *v.* Williams, 6 Munf. (Va.) 453, wherein it was held that a submission to arbitration by infants and adults is not obligatory on either party.

Public officer.— Where the law imposes a personal duty on an officer in relation to a matter of public interest, he cannot delegate it to another, and, therefore, such officer cannot submit such a matter to arbitration. Mann *v.* Richardson, 66 Ill. 481.

Presumption of authority to submit.— After an award and submission have been permitted to come to the jury in an action on the award, after verdict, it will be presumed that there was sufficient evidence of the authority of the president of one party, which was a railroad corporation, to enter into the submission in the absence of specific objection at the proper time. Maryland, etc., R. Co. *v.* Porter, 19 Md. 458.

40. King *v.* Jemison, 33 Ala. 499; Munn *v.* Reed, 4 Allen (Mass.) 431; Tallman *v.* Tallman, 5 Cush. (Mass.) 325. See also Bennett *v.* Pierce, 28 Conn. 315, 316, wherein it was held that, where the language of the submission was "all matters of controversy between us subsisting, now in suit, we agree to submit," etc., and the submission was signed by the parties, it might be proved by parol the capacity in which defendant, who submitted the case in her own name and not as administratrix, had entered into the submission.

Submission in both capacities.— A written agreement between A, individually and as president of a company, and B, signed by both parties, and submitting "the difficulties existing between the above mentioned parties in relation to the said Columbus bridge," is a good submission. King *v.* Jemison, 33 Ala. 499.

Recovery in personal capacity.— In an action on a covenant in a submission running to plaintiff personally, he may sue in his own name, though the submission provided for the arbitration of matters in which plaintiff was acting as executor. Macon *v.* Crump, 1 Call (Va.) 575.

41. Shultz *v.* Lempert, 55 Tex. 273; Gunton *v.* Nurse, 5 Moore C. P. 259, 2 Ball & B. 447. See also Hawkins *v.* Benton, 8 Q. B. 479, 10 Jur. 95, 15 L. J. Q. B. 139, 55 E. C. L. 477; Morgan *v.* Miller, 6 Bing. N. Cas. 168, 37 E. C. L. 565; Williams *v.* Lewis, 7 E. & B. 929, 3 Jur. N. S. 1324, 90 E. C. L. 929; Stockley *v.* Shopland, 26 L. T. Rep. N. S. 586; Rogers *v.* Stanton, 7 Taunt. 575 note, 2 E. C. L. 499.

Addition of party after submission.—Where a submission has, in the first instance, been made between two, a third party may be added afterward, and the reference may proceed as if all three had been parties to the original order of reference. Winter *v.* Munton, 2 Moore C. P. 723, 4 E. C. L. 537.

whether such claims be by the party, who, in the pending suit or in the case to be made a rule of court, may be plaintiff or defendant, can be submitted to arbitration.[42]

b. Necessity of Controversy — (I) *In General.* It is not essential to the

42. *Alabama.*—Brown *v.* Mize, (Ala. 1898) 24 So. 253, stale claims.

Arkansas.— Green *v.* Ford, 17 Ark. 586.

California.— Ryan *v.* Dougherty, 30 Cal. 218.

District of Columbia.—Bailey *v.* District of Columbia, 9 App. Cas. (D. C.) 360.

Georgia.— Barksdale *v.* Greene, 29 Ga. 418.

Illinois.— Gerrish *v.* Ayres, 4 Ill. 245.

Indiana.— Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253.

Iowa.— Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806; Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40; Richards *v.* Holt, 61 Iowa 529, 16 N. W. 595; Fink *v.* Fink, 8 Iowa 312; Tomlinson *v.* Hammond, 8 Iowa 40.

Kansas.— State *v.* Nemaha County, 7 Kan. 542.

Kentucky.—Remington *v.* Harrison County Ct., 12 Bush (Ky.) 148; Thomasson *v.* Risk, 11 Bush (Ky.) 619.

Maine.— Gerry *v.* Eppes, 62 Me. 49; Stanwood *v.* Mitchell, 59 Me. 121; Cushing *v.* Babcock, 38 Me. 452; Pierce *v.* Pierce, 30 Me. 113; Proprietors Fryeburg Canal *v.* Frye, 5 Me. 38.

Maryland.— Caton *v.* MacTavish, 10 Gill & J. (Md.) 192; Shriver *v.* State, 9 Gill & J. (Md.) 1.

Massachusetts.— Giles *v.* Royal Ins. Co., (Mass. 1901) 60 N. E. 786; Bean *v.* Farnam, 6 Pick. (Mass.) 269.

New York.—Wood *v.* Tunnicliff, 74 N. Y. 38; McBride *v.* Hagan, 1 Wend. (N. Y.) 325; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522. See also Waite *v.* Barry, 12 Wend. (N. Y.) 377.

Pennsylvania.— Seagrave's Appeal, 125 Pa. St. 362, 17 Atl. 412; Naglee's Estate, 52 Pa. St. 154; Strawbridge *v.* Funstone, 1 Watts & S. (Pa.) 517; Steinbrook *v.* Steinbrook, 2 Penr. & W. (Pa.) 165.

Vermont.— Hall *v.* Mott, Brayt. (Vt.) 81.

United States.—Knoche *v.* Chicago, etc., R. Co., 34 Fed. 471.

England.— Hewitt *v.* Hewitt, 1 Q. B. 110, 4 P. & D. 598, 41 E. C. L. 460; Soilleux *v.* Herbst, 2 B. & P. 444; Allen *v.* Milner, 2 Cr. & J. 47, 1 L. J. Exch. 7, 2 Tyrw. 113; Bateman *v.* Ross, 1 Dowl. 235; Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 23 Eng. Ch. 276; Steff *v.* Andrews, 2 Madd. 6; Prosser *v.* Gorringe, 3 Taunt. 426; Waters *v.* Taylor, 15 Ves. Jr. 10, 13 Rev. Rep. 91; Barry *v.* Grogan, 16 Wkly. Rep. 727.

See 4 Cent. Dig. tit. "Arbitration and Award," § 11 *et seq.*

Illustrations.— A suit on an administration bond (Stout *v.* Com., 2 Rawle (Pa.) 341); debt on a recognizance of bail in error (Stevenson *v.* Docherty, 3 Watts (Pa.) 176); a scire facias on a judgment on a report of arbitrators (Hill *v.* Crawford, 8 Serg. & R. (Pa.) 477); whether or not certain judgments are erroneous, void, or have been fraudulently obtained (Dolph *v.* Clemens, 4 Wis. 181 [and see also Campbell *v.* Howland, 19 U. C. Q. B. 18]); claims barred by the statute of limitations (Boynton *v.* Butterfield, 6 Allen (Mass.) 67; Pierce *v.* Pierce, 60 N. H. 355); questions respecting the future use and enjoyment of property (Boodle *v.* Davies, 3 A. & E. 200, 1 Hurl. & W. 420, 4 N. & M. 788, 30 E. C. L. 109; Ross *v.* Clifton, 9 Dowl. P. C. 356, 7 Jur. 601, 12 L. J. Q. B. 265; Wrightson *v.* Bywater, 6 Dowl. P. C. 359, 1 H. & N. 50, 7 L. J. Exch. 83, 3 M. & W. 199; Allenby *v.* Proudlock, 4 Dowl. P. C. 54, 1 Hurl. & W. 357), and pure questions of law (Mathew *v.* Davis, 1 Dowl. N. S. 679; Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 23 Eng. Ch. 276; Steff *v.* Andrews, 2 Madd. 6; Young *v.* Walter, 9 Ves. Jr. 364, 7 Rev. Rep. 224; Ching *v.* Ching, 6 Ves. Jr. 282), may be submitted to arbitration. But an action of covenant (Thomas *v.* Reab, 6 Wend. (N. Y.) 503); debt on a recognizance in a criminal suit (Roop *v.* Meek, 6 Serg. & R. (Pa.) 542); a claim of a son against the estate of his father for services (Crum *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262); the question whether there has been a breach of an agreement to arbitrate (Jones *v.* Brown, 171 Mass. 318, 50 N. E. 648; Miles *v.* Schmidt, 168 Mass. 339, 47 N. E. 115), or matters in controversy arising out of illegal contracts (Levy *v.* Ross, T. U. P. Charlt. (Ga.) 292; Hall *v.* Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575; Fain *v.* Headerick, 4 Coldw. (Tenn.) 327; Hale *v.* Sharp, 4 Coldw. (Tenn.) 275; Haley *v.* Long, Peck (Tenn.) 93; Beverley *v.* Rennolds, Wythe (Va.) 121; Steers *v.* Lashley, 6 T. R. 61; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163 [but see Byrd *v.* Odem, 9 Ala. 755; Davis *v.* Wentworth, 17 N. H. 567; Wohlenberg *v.* Lageman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600]) cannot be submitted to arbitration. And arbitration is not a proper mode to establish a rejected claim against an estate. Yarborough *v.* Leggett, 14 Tex. 677. The consent of the parties cannot give validity to a submission of matters which are not subject to be submitted to arbitration. Hubbell *v.* Bissell, 13 Gray (Mass.) 298.

Land in another state.— Where a part of the subject-matter of a submission is land situated in another state, this does not render the arbitrators incompetent to pass upon the respective rights of the parties therein, nor prevent the court in the state of submission from enforcing specific performance of the award. Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367.

nature or validity of a submission that there should have been a previous controversy between the parties regarding the subject-matter.[43]

(II) *Controversy Capable of Sustaining Action.* At common law, in order to make an award binding, it is not necessary that there should be a legal cause of action submitted. It is sufficient if there is a *bona fide* difference of opinion as to the rights of the parties.[44] Statutes, however, generally confine submissions under them to controversies which are capable of sustaining a civil action.[45]

c. Ownership of Property — (I) *Title to, or Interest in, Property* — (A) *General Rule.* The nature of an arbitration proceeding is such that arbitrators cannot be invested with the power to transfer the title to, or interest in, property; and, therefore, it may be said, in a limited sense, that a final determination of the title to, or an interest in, property cannot be submitted to arbitration.[46] This proposition applies with special reference to the ownership of real estate, in relation to which it has often been announced;[47] but it also applies equally to the ownership of personal property.[48]

43. Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550. But see Cothran *v.* Knox, 13 S. C. 496, wherein it was held that an award will be set aside where there is no evidence whatever tending to show that the parties to it had any previous dispute.

44. Parrish *v.* Strickland, 52 N. C. 504; Findly *v.* Ray, 50 N. C. 125; Mayo *v.* Gardner, 49 N. C. 359.

45. See the statutes of the several states and the following cases:

California.— Ryan *v.* Dougherty, 30 Cal. 218.

Iowa.— Richards *v.* Holt, 61 Iowa 529, 16 N. W. 595; Fink *v.* Fink, 8 Iowa 312; Tomlinson *v.* Hammond, 8 Iowa 40.

Kansas.—Anderson *v.* Beebe, 22 Kan. 768; Miller *v.* Brumbaugh, 7 Kan. 343.

Kentucky.— Remington *v.* Harrison County Ct., 12 Bush (Ky.) 148.

Maine.— Quinn *v.* Besse, 64 Me. 366; Stanwood *v.* Mitchell, 59 Me. 121; Proprietors Fryeburg Canal *v.* Frye, 5 Me. 38.

Massachusetts.— Osborn *v.* Fall River, 140 Mass. 508, 5 N. E. 483; Torrey *v.* Munroe, 119 Mass. 490; Hubbell *v.* Bissell, 13 Gray (Mass.) 298; Carpenter *v.* Spencer, 2 Gray (Mass.) 407; Henderson *v.* Adams, 5 Cush. (Mass.) 610.

New Hampshire.— Dorr *v.* Hill, 62 N. H. 506.

See 4 Cent. Dig. tit. "Arbitration and Award," § 13.

A proceeding to condemn land for a street extension is a "suit" within Iowa Code (1873), § 3419, providing that a "suit" may be submitted to arbitrators. Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40.

46. Arbitrators not agents.—"There is a difference between property awarded to be transferred by the owner to another, and property which is actually transferred by the contract of the owner through the medium of his agent." Per Lord Ellenborough, in Hunter *v.* Rice, 15 East 100, 102, 13 Rev. Rep. 394. Referring to this language, the court, in Speer *v.* McChesney, 2 Watts & S. (Pa.) 233, observed: "It seems difficult to understand why an agreement of transfer, which the parties were competent to make in their own persons, may not be made by arbitrators, as their agents, clothed with their powers. The reason may be that an award is executory."

47. *Maryland.*— Drane *v.* Hodges, 1 Harr. & M. (Md.) 262.

Massachusetts.—Whitney *v.* Holmes, 15 Mass. 152.

New York.— Jackson *v.* Gager, 5 Cow. (N. Y.) 383; Shepard *v.* Ryers, 15 Johns. (N. Y.) 497; Sellick *v.* Addams, 15 Johns. (N. Y.) 197.

Pennsylvania.— Speer *v.* McChesney, 2 Watts & S. (Pa.) 233; Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537; Dixon *v.* Morehead, Add. (Pa.) 216.

Vermont.—Akely *v.* Akely, 16 Vt. 450.

England.— Thorpe *v.* Eyre, 1 A. & E. 926, 3 N. & M. 214, 28 E. C. L. 426; Doe *v.* Rosser, 3 East 15; Henry *v.* Kirwan, 9 Ir. C. L. 459; Marks *v.* Marriot, 1 Ld. Raym. 114; Johnson *v.* Wilson, Willes 248.

Mutual deeds may be delivered to arbitrators for their disposal as they shall award the title; and, although the arbitrators cannot, merely as such, transfer title by force of their award, in case of mutual deeds the transfer is effected by act of the parties themselves, to take effect on publication of the award, when the deed to the party in whose favor the award is made becomes absolute. Peck *v.* Goodwin, Kirby (Conn.) 64.

The creation of a lien upon real estate stands upon the same ground as the transfer of title thereto, so as to prevent the exercise of such power by arbitrators or of submission of a matter involving the exercise of such a power. Littlefield *v.* Smith, 74 Me. 387.

48. Shelton *v.* Alcox, 11 Conn. 240, 244, where it is said: "Awards respecting real estate, stand upon the same ground as those respecting personal property."

Trover cannot be maintained for personalty awarded, because it is not within the power of the parties to authorize, by a submission, the arbitrators to transfer the title; but, for non-performance, the remedy is upon

(B) *Statutory Arbitrations.* Under a statutory provision for entry of judgment upon an award when the statute embraces controversies relating to real estate, the judgment of the court has been held as effectual to divest title as a deed of conveyance, and, therefore, in such case, the final determination of the title to real estate may be submitted;[49] but, if the statutory provision contemplates only such a judgment as might have been entered in an action of ejectment, and since a judgment in ejectment does not finally settle the title to real estate, such power cannot be conferred by submission.[50] By statute in special cases awards of specially constituted boards of arbitrators have been given effect as conveyances, upon submission to them of the final determination of the title to, or an interest in, real estate.[51]

(II) *Right of Property*—(A) *Personalty.* There have never been any legal restrictions upon the power of parties to submit to arbitration any and all questions involving the right of property in personalty.[52]

(B) *Real Estate*—(1) Old Common-Law Disability. The restrictions upon alienation of real estate arising out of the peculiarities of feudal tenure prevented the submission of the right of property in real estate to arbitration so long as such restrictions upon the power of alienation were permitted to exist,[53] to which fact seems to be traceable the reason for the rule that the title to real estate cannot be submitted to, or determined finally by, arbitrators.[54]

(2) Submissions Under Bond. Aside from a consideration of the statutes and contrivances for the removal of disabilities to alienate property, the first departure from the early feudal doctrine preventing submissions of controversies involving title to real estate seems to have been effected by means of mutual bonds, given by the parties, and conditioned to perform the award.[55]

(3) Equitable Principles. The growth of equitable principles gradually replaced feudal restrictions upon the power to submit to arbitration the right of property in real estate, and it finally became established that equity would enforce specific performance of an agreement to abide an award,[56] or, by force of the

the award. Hunter *v.* Rice, 15 East 100, 13 Rev. Rep. 394. *Aliter* in case of an agreement of the parties settling the title in the submission of accounts arising out of transactions with reference to it. Clement *v.* Hadlock, 13 N. H. 185.

Where the successful party is in possession, no question of power to authorize the transfer of title is involved in the determination of whether or not, after the award, the party in possession is the owner, without any act by the other party. Girdler *v.* Carter, 47 N. H. 305.

49. Crabtree *v.* Green, 8 Ga. 8; Hersey *v.* Packard, 56 Me. 395; Goodridge *v.* Dustin, 5 Metc. (Mass.) 363.

A judgment on award of title to land has been held to be void, because arbitrators cannot be authorized to award the title, but only to determine the right, and that one party shall execute conveyances to the other. Den *v.* Allen, 2 N. J. L. 32.

50. Hardin *v.* Beaty, 20 N. C. 426; Pullen *v.* Rianhard, 1 Whart. (Pa.) 514; Duer *v.* Boyd, 1 Serg. & R. (Pa.) 203.

51. Jacomb *v.* Turner, [1892] 1 Q. B. 47; Doe *v.* Saunder, 5 A. & E. 664, 2 Hurl. & W. 350, 6 L. J. K. B. 53, 1 N. & P. 119, 31 E. C. L. 774; Ellis *v.* Arnison, 5 B. & Ald. 47, 7 E. C. L. 37, 1 B. & C. 70, 8 E. C. L. 31, 2 D. & R. 161, 1 L. J. K. B. O. S. 24, 25 Rev. Rep. 314; Farrer *v.* Billing, 2 B. & Ald. 171; Johnson *v.* Hodgson, 8 East 38; Doe *v.* Neeld, 5 Jur. 751, 10 L. J. C. P. 266, 3 M. & G. 271, 3 Scott N. R. 618, 42 E. C. L. 148; Greathead *v.* Morley, 10 L. J. C. P. 246, 3 M. & G. 139, 3 Scott N. R. 538, 42 E. C. L. 80; Cator *v.* Croydon Canal Co., 4 Y. & C. Ch. 405, 13 L. J. Ch. 89.

52. Miller *v.* Brumbaugh, 7 Kan. 343 [*distinguishing* Stigers *v.* Stigers, 5 Kan. 652]; Drane *v.* Hodges, 1 Harr. & M. (Md.) 262; Smith *v.* Smith, 4 Rand. (Va.) 95.

53. Coxal *v.* Sharp, 1 Keb. 937; 1 Rolle Abr. 1, 10, 16, 20, 242.

54. Shelton *v.* Alcox, 11 Conn. 240; Akely *v.* Akely, 16 Vt. 450; 3 Bl. Comm. 16.

55. Den *v.* Allen, 2 N. J. L. 32; 3 Bl. Comm. 16; Marks *v.* Marriot, 1 Ld. Raym. 114; Knight *v.* Burton, 6 Mod. 231.

See also *infra*, II, K, 1.

56. *Massachusetts.*— Jones *v.* Boston Mill Corp., 6 Pick. (Mass.) 148.

New York.— Shepard *v.* Ryers, 15 Johns. (N. Y.) 497.

North Carolina.— Crawford *v.* Orr, 84 N. C. 246.

Pennsylvania.— Speer *v.* McChesney, 2 Watts & S. (Pa.) 233.

Vermont.—Akely *v.* Akely, 16 Vt. 450.

United States.— McNeil *v.* Magee, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915.

In Pennsylvania, where no court of chancery existed, it was held that a decree for

doctrine of equitable estoppel, would preclude a party from drawing the award in question;[57] and the power to submit such questions to the final determination of arbitrators at length became universally recognized as substantially coequal with the power of alienation.[58]

(4) Estoppel in Actions at Law. Estoppel to question an award of the right of property in real estate has been adopted as a rule of the common law, applicable in an action at law on the award, or where the award is pleaded in bar or drawn in question collaterally.[59]

(5) Statutory Restrictions. Statutes relating to arbitration usually prohibit, either by express language or by necessary implication, the submission under them of controversies involving the right or title to real estate.[60] But the existence of a statute, precluding or prohibiting the submission of controversies involving real estate from enforcement in the manner provided by the statute for matters as to which it applies, does not, by implication, destroy the power to submit such questions under the common law.[61] The exercise of such power may, however, be expressly prohibited.[62]

(c) *Matters Relating to, But Not Involving, Realty.* There are many matters in controversy relating to, or arising out of, the ownership of real estate in which the right of property is not involved and which are not, therefore, subject to any restrictive rules about the submission of the right or title to real estate, either as

specific performance of an award upon the right to real estate would be considered as having been made in a subsequent action involving the title, upon the consideration that this was one of the cases in which a chancellor would make such decree. Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537.

57. *Connecticut.*— Shelton *v.* Alcox, 11 Conn. 240.

Georgia.— Crabtree *v.* Green, 8 Ga. 8.

Massachusetts.— Goodridge *v.* Dustin, 5 Metc. (Mass.) 363.

New York.— Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

South Carolina.—Garvin *v.* Garvin, 55 S. C. 360, 33 S. E. 458.

England.— Doe *v.* Rosser, 3 East 15.

See also cases cited *infra*, note 59.

58. Shelton *v.* Alcox, 11 Conn. 240; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 169, 16 Am. Dec. 537 (where the court said: "The fluctuation of sentiment on this subject seems at length to have settled down into an opinion conformable to common sense — that the owners of property, either real or personal, may submit the title to the decision of arbitrators, whose award shall be conclusive"); Downs *v.* Cooper, 2 Q. B. 256, 1 G. & D. 573, 6 Jur. 622, 11 L. J. Q. B. 2, 42 E. C. L. 663; Prosser *v.* Gorringe, 3 Taunt. 426.

In Kansas, the doubt about submitting real-estate controversies to arbitration, which was created by the erroneous decision of an early case, was removed by Kan. Stat. (1876), c. 102, § 1. Finley *v.* Funk, 35 Kan. 668, 12 Pac. 15.

59. *Alabama.*— Moore *v.* Helms, 74 Ala. 368.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.—Weeks *v.* Trask, 81 Me. 127, 16 Atl. 412, 2 L. R. A. 532.

Maryland.— But see Drane *v.* Hodges, 1 Harr. & M. (Md.) 262.

Massachusetts.— Goodridge *v.* Dustin, 5 Metc. (Mass.) 363 [*overruling* Whitney *v.* Holmes, 15 Mass. 152].

New Hampshire.— Page *v.* Foster, 7 N. H. 392.

New York.— Jackson *v.* Gager, 5 Cow. (N. Y.) 383; Sellick *v.* Addams, 15 Johns. (N. Y.) 197.

Tennessee.— Darby *v.* Russel, 5 Hayw. (Tenn.) 138, 9 Am. Dec. 767.

England.— Doe *v.* Rosser, 3 East 15.

Canada.— Doe *v.* Long, 4 U. C. Q. B. 146.

60. *California.*— Spencer *v.* Winselman, 42 Cal. 479.

Indiana.— Snodgrass *v.* Smith, 13 Ind. 393.

Maine.— Proprietors Fryeburg Canal *v.* Frye, 5 Me. 38.

Massachusetts.— Fowler *v.* Bigelow, 8 Mass. 1.

Michigan.— Lang *v.* Salliotte, 79 Mich. 505, 44 N. W. 938, 7 L. R. A. 720.

New York.—Wiles *v.* Peck, 26 N. Y. 42; German *v.* Machin, 6 Paige (N. Y.) 288.

Utah.— Thygerson *v.* Whitbeck, 5 Utah 406, 16 Pac. 403.

Wisconsin.— Russell *v.* Clark, 60 Wis. 284, 18 N. W. 844.

61. *Kentucky.*— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.— McNear *v.* Bailey, 18 Me. 251.

New Hampshire.— Dorr *v.* Hill, 62 N. H. 506; Carey *v.* Wilcox, 6 N. H. 177.

Texas.— Myers *v.* Easterwood, 60 Tex. 107.

Virginia.— Miller *v.* Miller, (Va. 1901) 37 S. E. 792.

62. Thygerson *v.* Whitbeck, 5 Utah 406, 16 Pac. 403.

to the power to submit in general, or as to the mode of submission[63]— such as disputed boundary lines between claimants of adjoining tracts of land,[64] claims for damages on account of injuries to land[65] or on account of real-estate transac-

63. Spencer *v.* Winselman, 42 Cal. 479.

A submission of the equitable title has been held not to be prohibited by 2 N. Y. Rev. Stat. p. 541, § 2, which forbids the submission of claims involving the legal title to real estate. Olcott *v.* Wood, 15 Barb. (N. Y.) 644 [*affirmed* in 14 N. Y. 32].

A submission of real estate will not be presumed, so as to avoid a submission for non-compliance with the statute relating to submissions of real estate, where the submission is merely in general of all matters, of every kind and description, in controversy between the parties; and, where the award does not show that a right or title to real estate was determined, it will be presumed that only such matters in controversy as have been legally submitted were, in fact, submitted and tried under submission. White *v.* Fox, 29 Conn. 570.

As to whether an absolute deed is a mortgage is a question which has been held to involve the adjudication of real estate within the prohibition of a statute excluding submissions of any claim to any estate "in fee or for life to real estate." Russell *v.* Clark, 60 Wis. 284, 285, 18 N. W. 844.

64. **The location of a boundary line where the respective titles do not conflict** has, generally, been held not to involve any determination of a right or title to real estate with respect to the submission thereof to arbitration.

Maine.— Sweeny *v.* Miller, 34 Me. 388.

Massachusetts.— Byam *v.* Robbins, 6 Allen (Mass.) 63; Thayer *v.* Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59; Searle *v.* Abbe, 13 Gray (Mass.) 409; Clark *v.* Burt, 4 Cush. (Mass.) 396; Goodridge *v.* Dustin, 5 Metc. (Mass.) 363, 366 (where it is said: "The effect of such a judgment is not to change the titles to a portion of the respective estates, but to confirm each in its own state"); Rogers *v.* Kenwrick, Quincy (Mass.) 62.

New Hampshire.— Jones *v.* Dewey, 17 N. H. 596; Gray *v.* Berry, 9 N. H. 473.

New York.—Wood *v.* Lafayette, 46 N. Y. 484; Vosburgh *v.* Teator, 32 N. Y. 561; Kennedy *v.* Farley, 82 Hun (N. Y.) 227, 31 N. Y. Suppl. 274, 63 N. Y. St. 592; Stout *v.* Woodward, 5 Hun (N. Y.) 340 [*affirmed* in 71 N. Y. 590]; Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578; Jackson *v.* Gager, 5 Cow. (N. Y.) 383.

North Carolina.— Gaylord *v.* Gaylord, 48 N. C. 367.

Pennsylvania.— Evars *v.* Kamphaus, 59 Pa. St. 379; Armstrong *v.* Hall, 15 Pa. St. 23; Bowen *v.* Cooper, 7 Watts (Pa.) 311; Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537.

Utah.—Thygerson *v.* Whitbeck, 5 Utah 406, 16 Pac. 403.

Vermont.— Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

Virginia.— Miller *v.* Miller, (Va. 1901), 37 S. E. 792.

See 4 Cent. Dig. tit. "Arbitration and Award," § 41.

Title involved in boundary disputes.— The submission to arbitration of a disputed boundary may, necessarily, involve the determination of a right or title to realty. This occurs beyond question when the location of the boundary is dependent upon the settlement of conflicting titles.

Connecticut.— Parmelee *v.* Allen, 32 Conn. 115.

Maine.— Buker *v.* Bowden, 83 Me. 67, 21 Atl. 748; Philbrick *v.* Preble, 18 Me. 255, 36 Am. Dec. 718.

Massachusetts.— Torrey *v.* Munroe, 119 Mass. 490.

Michigan.— Lang *v.* Salliotte, 79 Mich. 505, 44 N. W. 938, 7 L. R. A. 720.

North Carolina.— Crawford *v.* Orr, 84 N. C. 246.

Vermont.— Smith *v.* Bullock, 16 Vt. 592.

65. Parmelee *v.* Allen, 32 Conn. 115; Carson *v.* Earlywine, 14 Ind. 256; Proprietors Fryeburg Canal *v.* Frye, 5 Me. 38.

Although the question of damages depends upon a disputed title, it does not involve an adjudication of the title, and may, therefore, be submitted as a personal controversy. Dorr *v.* Hill, 62 N. H. 506. *Aliter* where the determination of a disputed title is the principal question. Wiles *v.* Peck, 26 N. Y. 42.

An alternative claim for damages, in case an agreement to convey land cannot be specifically performed, prevents the submission of the whole controversy from coming within a statute forbidding the submission to arbitration of claims to real estate. Olcott *v.* Wood, 15 Barb. (N. Y.) 644 [*affirmed* in 14 N. Y. 32].

Damages for flooding land by mill-owner is a mere pecuniary claim, capable of being waived, satisfied, or extinguished by parol, and may, therefore, be submitted to arbitration like any other personal claim for damages. Quinn *v.* Besse, 64 Me. 366; Snow *v.* Moses, 53 Me. 546; Fitch *v.* Constantine Hydraulic Co., 44 Mich. 74, 6 N. W. 91.

The question of the existence of a right to flood land has been held to stand upon a different ground from that of the question of damages for flooding, and that a submission thereof constitutes a submission of an interest in real estate. Carpenter *v.* Spencer, 2 Gray (Mass.) 407; Henderson *v.* Adams, 5 Cush. (Mass.) 610. *Contra,* Hersey *v.* Packard, 56 Me. 395.

Future damages constituting a lien upon mill property for overflowing adjoining lands cannot be authorized by a submission as a

tions,[66] questions of amount of purchase-price to be paid on account of conveyances of real estate[67] or by way of compensation for the taking of real estate under the power of eminent domain,[68] compensation for the use of personal and temporary right of way,[69] a claim for a trust fund which has been invested in real estate,[70] or a controversy as to the seizin and possession of land.[71]

2. Matters of a Criminal Nature. On grounds of public policy, offenses affecting the public at large are not subject to submission to arbitration;[72] but, where a party injured has a remedy by action as well as by indictment, he may refer the adjustment of the reparation he is to receive to arbitration, although a criminal prosecution may have been commenced.[73]

D. Agreements to Submit — 1. In General. Agreements to arbitrate, whether made with regard to pending controversies, or embodied in contracts with relation to controversies that may arise in the future, are regarded with favor by the courts, and will be upheld where the jurisdiction of the courts is not ousted by the terms of the contract.[74]

2. Condition Precedent to Action. Though the parties cannot, by an agreement to submit, oust the jurisdiction of the courts,[75] they may agree to impose, as a condition precedent to any right of action, that, with respect of the liability to pay, the mode of settling the amount to be paid, or the time for paying the same, an arbitration shall first be held.[76] In respect to such agreements the rule is that,

claim not affecting real estate. Littlefield *v.* Smith, 74 Me. 387.

66. Damages for breach of warranty, on account of an admitted encumbrance upon property sold as being free from encumbrance, may be submitted as a question of mere personal liability. Snodgrass *v.* Smith, 13 Ind. 393.

The question of the amount due under a real-estate mortgage may be submitted without reference to rules or statutes respecting real estate. Page *v.* Foster, 7 N. H. 392.

A question about performance of a contract to convey has been held not to be within the prohibition of the statute relating to arbitrations of the title to real estate. Blair *v.* Wallace, 21 Cal. 318; Butler *v.* Mace, 47 Me. 423. *Aliter* where the claim submitted was founded upon an alleged agreement by parol. German *v.* Machin, 6 Paige (N. Y.) 288.

67. White *v.* Fox, 29 Conn. 570; Weston *v.* Stuart, 11 Me. 326; Davy *v.* Faw, 7 Cranch (U. S.) 171, 3 L. ed. 305.

68. Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

69. Mitchell *v.* Bush, 7 Cow. (N. Y.) 185.

70. French *v.* Richardson, 5 Cush. (Mass.) 450.

71. Blanchard *v.* Murray, 15 Vt. 548.

72. Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Harrington *v.* Brown, 9 Allen (Mass.) 579; Reg. *v.* Blakemore, 14 Q. B. 544, 68 E. C. L. 544; Reg. *v.* Hardey, 14 Q. B. 529, 14 Jur. 649, 19 L. J. Q. B. 196, 68 E. C. L. 529; Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 51 E. C. L. 308, 9 Q. B. 371, 10 Jur. 742, 15 L. J. Q. B. 359, 58 E. C. L. 371; Bacon Abr. tit. Arbitrament and Award, (A).

73. Noble *v.* Peebles, 13 Serg. & R. (Pa.) 319; Reg. *v.* Hardey, 14 Q. B. 529, 14 Jur. 649, 19 L. J. Q. B. 196, 68 E. C. L. 529; Elworthy *v.* Bird, 2 Bing. 258, 3 L. J. C. P. O. S. 260, 9 Moore C. P. 430, 13 Price 222, 2 Sim. & St. 372, 9 E. C. L. 569; Baker *v.* Townsend, 1 Moore C. P. 120, 7 Taunt. 422, 18 Rev. Rep. 521, 2 E. C. L. 428; Blake's Case, 6 Rep. 43*b*. See also Smith *v.* Holcomb, 99 Mass. 552; McCreary *v.* Taggart, 2 S. C. 418.

74. *Colorado.*—Union Pac. R. Co. *v.* Anderson, 11 Colo. 293, 18 Pac. 24.

District of Columbia.— Bailey *v.* District of Columbia, 9 App. Cas. (D. C.) 360.

Kansas.— Berry *v.* Carter, 19 Kan. 135.

Kentucky.— Masterson *v.* Masterson, 22 Ky. L. Rep. 1193, 60 S. W. 301.

Massachusetts.— Hood *v.* Hartshorn, 100 Mass. 117, 1 Am. Rep. 89.

New York.— Anderson *v.* Meislahn, 12 Daly (N. Y.) 149.

Pennsylvania.— Singerly *v.* Johnson, 3 Wkly. Notes Cas. (Pa.) 541.

United States.—Knoche *v.* Chicago, etc., R. Co., 34 Fed. 471.

See 4 Cent. Dig. tit. "Arbitration and Award," § 27; and Contracts.

As to arbitration bonds and notes see *infra*, II, K.

75. See *infra*, II, G, 3.

76. Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457 [*reversing* 44 L. J. Q. B. 67, 23 Wkly. Rep. 304]; Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 8 Jur. N. S. 506, 31 L. J. Q. B. 17, 5 L. T. Rep. N. S. 550, 101 E. C. L. 782; Russell *v.* Pellegrini, 6 E. & B. 1020, 3 Jur. N. S. 184, 26 L. J. Q. B. 75, 5 Wkly. Rep. 71, 88 E. C. L. 1020; Tredwen *v.* Holman, 1 H. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. 389, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652; Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746; Sharpe *v.* San Paulo R. Co., L. R. 8 Ch. 597, 29 L. T. Rep. N. S. 9; Elliott *v.* Royal Exch. Assur. Co., L. R. 2 Exch. 237, 36 L. J. Exch. 129, 16 L. T. Rep. N. S. 399, 15

if the agreement is in such terms that a reference is a condition precedent to the right of the party to maintain an action, he is not entitled to maintain it until that condition is complied with; but, if the agreement is to pay, with a subsequent agreement to refer the question to arbitration, contained in a distinct clause collateral to the other, the agreement for reference does not oust the jurisdiction of the courts.[77]

Wkly. Rep. 907; Scott *v.* Mercantile Acc., etc., Ins. Co., 66 L. T. Rep. N. S. 811; Trainor *v.* Phœnix F. Ins. Co., 65 L. T. Rep. N. S. 825.

In order that an award shall be a condition precedent to the right to bring suit, it must be so expressed in the agreement or be necessarily implied from its terms. New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 21 U. S. App. 228, 9 C. C. A. 623.

77. *Alabama.*— State Bank *v.* Martin, 4 Ala. 615; Bozeman *v.* Gilbert, 1 Ala. 90.

Arizona.— U. S. *v.* Ellis, (Ariz. 1887) 14 Pac. 300.

California.— Old Saucelito Land, etc., Co. *v.* Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232; Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356; Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244.

District of Columbia.— Campbell *v.* American Popular L. Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591.

Florida.— Finegan *v.* L'Engle, 8 Fla. 413.

Georgia.—Liverpool, etc., Ins. Co. *v.* Creighton, 51 Ga. 95.

Illinois.— Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; German-American Ins. Co. *v.* Steiger, 109 Ill. 254.

Iowa.— Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

Kansas.— Berry *v.* Carter, 19 Kan. 135.

Kentucky.— Insurance Co. of North America *v.* Forwood, 13 Ky. L. Rep. 261.

Maine.— Robinson *v.* Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239.

Maryland.— Allegre *v.* Maryland Ins. Co., 6 Harr. & J. (Md.) 408, 14 Am. Dec. 289.

Massachusetts.— Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847; Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572; White *v.* Middlesex R. Co., 135 Mass. 216; Pearl *v.* Harris, 121 Mass. 390; Hood *v.* Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596; Hall *v.* People's Mut. F. Ins. Co., 6 Gray (Mass.) 185; Nute *v.* Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174.

Michigan.— Weggner *v.* Greenstine, 114 Mich. 310, 72 N. W. 170; Boots *v.* Steinberg, 100 Mich. 134, 58 N. W. 657; Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055; Abeel *v.* Hubbell, 52 Mich. 37, 17 N. W. 231; McGunn *v.* Hanlin, 29 Mich. 476.

Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Mosness *v.* German American Ins. Co., 50 Minn. 341, 52 N. W. 932; Gasser *v.* Sun Fire Office, 42 Minn. 315, 44 N. W. 252. *Compare* Powers Dry Goods Co. *v.* Imperial F. Ins. Co., 48 Minn. 380, 51 N. W. 123.

Missouri.— St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Bales *v.* Gilbert, 84 Mo. App. 675; McNees *v.* Southern Ins. Co., 61 Mo. App. 335; Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Lasar *v.* Baldridge, 32 Mo. App. 362.

Nebraska.— German American Ins. Co. *v.* Etherton, 25 Nebr. 505, 41 N. W. 406.

New Hampshire.— March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New Jersey.— Wolff *v.* Liverpool, etc., Ins. Co., 50 N. J. L. 453, 14 Atl. 561; Boyd *v.* Meighan, 48 N. J. L. 404, 4 Atl. 778.

New York.—Seward *v.* Rochester, 109 N. Y. 164, 16 N. E. 348, 15 N. Y. St. 193; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Gibbs *v.* Continental Ins. Co., 13 Hun (N. Y.) 611; Williams *v.* Shields, 16 Daly (N. Y.) 178, 9 N. Y. Suppl. 502, 30 N. Y. St. 556; Davenport *v.* Long Island Ins. Co., 10 Daly (N. Y.) 535; New York, etc., Automatic Sprinkler Co. *v.* Andrews, 4 Misc. (N. Y.) 124, 23 N. Y. Suppl. 998, 53 N. Y. St. 212.

North Carolina.—Swaim *v.* Swaim, 14 N. C. 31.

Oregon.— Ball *v.* Doud, 26 Oreg. 14, 37 Pac. 70.

Pennsylvania.— Hostetter *v.* Pittsburgh, 107 Pa. St. 419; Hartupee *v.* Pittsburgh, 97 Pa. St. 107; Quigley *v.* De Haas, 82 Pa. St. 267; Howard *v.* Allegheny Valley R. Co., 69 Pa. St. 489; Irwin *v.* Shultz, 46 Pa. St. 74; Thompson *v.* Adams, 4 Wkly. Notes Cas. (Pa.) 445; Phœnix Pottery Co. *v.* Griffin, 16 Phila. (Pa.) 569, 39 Leg. Int. (Pa.) 119; Abbot *v.* Shepherd, 4 Phila. (Pa.) 90, 17 Leg. Int. (Pa.) 222.

Rhode Island.— Woonsocket Mach., etc., Co. *v.* Miller, 18 R. I. 657, 29 Atl. 838.

Tennessee.— Cole Mfg. Co. *v.* Collier, 91 Tenn. 525, 19 S. W. 672, 30 Am. St. Rep. 898.

Utah.—Daniher *v.* Grand Lodge, A. O. U. W., 10 Utah 110, 37 Pac. 245.

Virginia.— Rison *v.* Moon, 91 Va. 384, 22 S. E. 165; Corbin *v.* Adams, 76 Va. 58; Condon *v.* South Side R. Co., 14 Gratt. (Va.) 302.

West Virginia.— Kinney *v.* Baltimore, etc., Employes Relief Assoc., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142.

Wisconsin.— Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405; Oakwood Retreat Assoc. *v.* Rathborne, 65 Wis. 177, 26 N. W. 742; Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

United States.— Hamilton *v.* New York

3. Operation as Submission. A mere agreement to submit to arbitration will not be construed as a submission.[78]

E. Modes of Submission — 1. At Common Law — a. Controversies Out of Court. At common law any persons, though no suit was pending between them, might agree to submit their matters of difference to arbitrators.[79]

b. Causes Depending in Court. Where a cause was depending in court, the parties might, at common law, agree to an arbitration and obtain an order referring the cause to arbitrators or referees, designated either by themselves or by the court.[80]

2. By Statute.[81] Both in England[82] and in the United States, statutes have been enacted providing for the submission of controversies, whether depending in court or not, under rule of court.[83]

Home Ins. Co., 137 U. S. 370, 11 S. Ct. 133, 34 L. ed. 708; Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. ed. 419; New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 21 U. S. App. 228, 9 C. C. A. 623; Wallace *v.* German-American Ins. Co., 4 McCrary (U. S.) 123, 41 Fed. 742; Laflin *v.* Chicago, etc., R. Co., 34 Fed. 859; Low *v.* Fisher, 27 Fed. 542; Crossley *v.* Connecticut F. Ins. Co., 27 Fed. 30; Perkins *v.* U. S. Electric Light Co., 21 Blatchf. (U. S.) 308, 16 Fed. 513; Gauche *v.* London, etc., Ins. Co., 4 Woods (U. S.) 102, 10 Fed. 347; Fox *v.* Hempfield R. Co., 3 Wall. Jr. (U. S.) 243, 9 Fed. Cas. No. 5,010.

England.— Viney *v.* Bignold, 20 Q. B. D. 172, 57 L. J. Q. B. 82, 58 L. T. Rep. N. S. 26, 36 Wkly. Rep. 479; Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457; Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 8 Jur. N. S. 506, 31 L. J. Q. B. 17, 5 L. T. Rep. N. S. 550, 101 E. C. L. 782; Dawson *v.* Fitzgerald, 1 Ex. D. 257, 45 L. J. Exch. 893, 35 L. T. Rep. N. S. 220, 24 Wkly. Rep. 773; Russell *v.* Pellegrini, 6 E. & B. 1020, 3 Jur. N. S. 184, 26 L. J. Q. B. 75, 5 Wkly. Rep. 71, 88 E. C. L. 1020; Roper *v.* Lendon, 1 E. & E. 825, 5 Jur. N. S. 491, 28 L. J. Q. B. 290, 7 Wkly. Rep. 441, 102 E. C. L. 825; Tredwen *v.* Holman, 1 H. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. 389, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652; Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746, 10 Eng. Reprint 1121; Horton *v.* Sayer, 4 H. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. 28, 7 Wkly. Rep. 735; Elliott *v.* Royal Exch. Assur. Co., L. R. 2 Exch. 237, 36 L. J. Exch. 129, 16 L. T. Rep. N. S. 399, 15 Wkly. Rep. 907.

See 4 Cent. Dig. tit. "Arbitration and Award," § 30.

Manner of pleading.— A party cannot, under a general denial, in an action for work and labor performed and materials furnished, avail himself of an express contract for arbitration as to the price to be paid, but such contract must be specially pleaded. Lautenschlager *v.* Hunter, 22 Minn. 267. See also Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937.

78. Smith *v.* Edmunds, 16 Vt. 687. *Compare supra*, I, B.

79. Byrd *v.* Odem, 9 Ala. 755, 766 (wherein it was said: "Arbitration and award was recognized at the common law, as a mode of adjusting matters in dispute, especially such as concerned personal chattels, or personal wrongs"); Titus *v.* Scantling, 4 Blackf. (Ind.) 89; Miller *v.* Brumbaugh, 7 Kan. 343, 350 (wherein it was said: "The settlement of disputes by arbitration is a matter of ancient practice at the common law"); 3 Bl. Comm. 16.

80. *Georgia.*— Hardin *v.* Almand, 64 Ga. 582; Boog *v.* Bayley, R. M. Charlt. (Ga.) 190.

Iowa.— Higgins *v.* Kinneady, 20 Iowa 474.

Maine.— Cushing *v.* Babcock, 38 Me. 452.

Maryland.— Phillips *v.* Shipley, 1 Bland (Md.) 516.

New Hampshire.— French *v.* Shackford, 5 N. H. 143.

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29.

Virginia.—Shermer *v.* Beale, 1 Wash. (Va.) 11.

England.—Dick *v.* Milligan, 4 Bro. Ch. 117, 2 Ves. Jr. 23; Lucas *v.* Wilson, 2 Burr. 701; Owen *v.* Hurd, 2 T. R. 643.

81. As to cumulative character of statutory submission see *infra*, XI, E, 2, c.

82. 9 & 10 Wm. III, c. 15.

Declaratory of common law.— The statute of 9 & 10 Wm. III, c. 15, was made to put submissions, where no cause was depending, upon the same footing as where there was, and is declaratory only of what the law was. Ford *v.* Potts, 6 N. J. L. 388; Lucas *v.* Wilson, 2 Burr. 701.

83. See the statutes of the several states and the following cases:

Georgia.— Walker *v.* Walker, 25 Ga. 65.

Illinois.— Smith *v.* Douglass, 16 Ill. 34.

Indiana.— Hollingsworth *v.* Stone, 90 Ind. 244; Richardson *v.* Reed, 39 Ind. 330; Hawes *v.* Coombs, 34 Ind. 455; Estep *v.* Larsh, 16 Ind. 82.

Iowa.— Older *v.* Quinn, 89 Iowa 445, 56 N. W. 660; Fink *v.* Fink, 8 Iowa 312.

Kansas.— Morgan *v.* Smith, 33 Kan. 438, 6 Pac. 569.

Kentucky.— Carson *v.* Carson, 1 Metc. (Ky.) 434; Galloway *v.* Hill, 4 Bibb (Ky.) 475; Johnston *v.* Dulin, 10 Ky. L. Rep. 403.

Maryland.— Shriver *v.* State, 9 Gill & J.

F. Requisites and Validity of Submission — 1. In General. The form of a submission is immaterial. It is sufficient if it appears from the acts of the parties that they intended to arbitrate, and that the decision of the arbitrators should have the effect of an award.[84]

(Md.) 1; Phillips *v.* Shipley, 1 Bland (Md.) 516.

Minnesota.— Minneapolis, etc., R. Co. *v.* Cooper, 59 Minn. 290, 61 N. W. 143.

Nevada.— Steel *v.* Steel, 1 Nev. 27.

New Hampshire.— Free *v.* Buckingham, 59 N. H. 219; Weare *v.* Putnam, 56 N. H. 49; Hayes *v.* Bennett, 2 N. H. 422.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333; Ford *v.* Potts, 6 N. J. L. 388.

New York.— Bulson *v.* Lohnes, 29 N. Y. 291; Wells *v.* Lain, 15 Wend. (N. Y.) 99; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575 [*affirming* 2 Edw. (N. Y.) 452].

North Carolina.— Moore *v.* Austin, 85 N. C. 179; Simpson *v.* McBee, 14 N. C. 454.

Pennsylvania.—White's Appeal, 108 Pa. St. 473; Shisler *v.* Keavy, 75 Pa. St. 79; Brendlinger *v.* Yeagley, 53 Pa. St. 464; Wall *v.* Fife, 37 Pa. St. 394; Ford *v.* Keen, 13 Pa. St. 179; Preston *v.* Mogridge, 1 Phila. (Pa.) 132, 8 Leg. Int. (Pa.) 3.

Texas.— Hooper *v.* Brinson, 2 Tex. 185.

Virginia.—Graham *v.* Pence, 6 Rand. (Va.) 529.

See 4 Cent. Dig. tit. "Arbitration and Award," § 7.

Cases pending on appeal may be submitted to arbitration by the parties, and the award entered as a judgment of the appellate court. Carpentier *v.* Delaware Ins. Co., 2 Binn. (Pa.) 264; Rogers *v.* Nall, 6 Humphr. (Tenn.) 28; McGinnis *v.* Curry, 13 W. Va. 29.

See 4 Cent. Dig. tit. "Arbitration and Award," § 15.

As to effect on appeal of submission pending it see *infra*, II, G, 2, c.

Matters not included in suit.— Where a pending suit is submitted to arbitration under a statute, matters in controversy between the parties, but not embraced in the suit submitted, may be included in the submission. Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126; Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227; Shriver *v.* State, 9 Gill & J. (Md.) 1; Berkshire Woollen Co. *v.* Day, 12 Cush. (Mass.) 128; Remington *v.* Morris, 2 Grant (Pa.) 457; Henderson *v.* Walker, 2 Grant (Pa.) 36. See also Galloway *v.* Hill, 4 Bibb (Ky.) 475.

Status of arbitrators.— Where a submission to arbitration is made a rule of court, under a statute, the arbitrators do not thereby become officers of the court, but are the appointees of the parties, as in cases where there is no rule of court. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

84. *Alabama.*— Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725.

Georgia.— Brand *v.* Sorrells, 61 Ga. 162.

Illinois.— Kimball *v.* Walker, 30 Ill. 482.

Indiana.— Madison Ins. Co. *v.* Griffin, 3 Ind. 277.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

New Hampshire.— French *v.* Shackford, 5 N. H. 143.

New York.— Brady *v.* Brooklyn, 1 Barb. (N. Y.) 584; Hays *v.* Hays, 23 Wend. (N. Y.) 363.

Pennsylvania.—Wilson *v.* Getty, 57 Pa. St. 266; McManus *v.* McCulloch, 6 Watts (Pa.) 357.

United States.— Salinas *v.* Stillman, 66 Fed. 677, 30 U. S. App. 40, 14 C. C. A. 50.

See 4 Cent. Dig. tit. "Arbitration and Award," § 32.

Certainty to common intent.— The law favors and encourages the settlement of disputes by arbitration, and neither exacts nor expects technical precision either in the submission or in the award. It is enough if certainty to a common intent be observed. Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725.

Usury.—A stipulation in a submission that the arbitrator, in calculating the amount due on a certain note, shall compute interest at the rate of ten per cent. is not usurious. Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.

Form of agreement for submission or submission bond is set out in:

Alabama.— Georgia Home Ins. Co. *v.* Kline, 114 Ala. 366, 21 So. 958; Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222.

Colorado.— Perrigo *v.* Grimes Gold Min., etc., Co., 2 Colo. 651.

Connecticut.— Bridgeport *v.* Eisenman, 47 Conn. 34; Waller *v.* Shannon, 44 Conn. 480; Averill *v.* Buckingham, 36 Conn. 359; Ranney *v.* Edwards, 17 Conn. 309; Brown *v.* Green, 7 Conn. 536; Dutton *v.* Gillet, 5 Conn. 172.

Georgia.— Southern Live Stock Ins. Co. *v.* Benjamin, 113 Ga. 1088, 39 S. E. 489.

Illinois.— Seaton *v.* Kendall, 61 Ill. App. 289.

Indiana.—Carson *v.* Earlywine, 14 Ind. 256.

Kansas.— Weir *v.* West, 27 Kan. 650.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.— Porter *v.* Buckfield Branch R. Co., 32 Me. 539.

Maryland.— Bullock *v.* Bergman, 46 Md. 270; Bushey *v.* Culler, 26 Md. 534; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458.

Massachusetts.— Campbell *v.* Upton, 113 Mass. 67; Benson *v.* White, 101 Mass. 48; Mickles *v.* Thayer, 14 Allen (Mass.) 114; Wilson *v.* Concord R. Co., 3 Allen (Mass.) 194; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Penniman *v.* Rodman, 13 Metc. (Mass.) 382.

Nebraska.— O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256.

2. Agreement to Abide by Award. Where a matter is submitted to arbitrators it is not necessary that there should be an express agreement to abide by an award when made; the law implies such an agreement from the very fact of the submission.[85]

3. Consideration. Mutual promises, by persons competent to contract, to submit to arbitration claims which are the subject of arbitration, are a good and sufficient consideration each for the other.[86]

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

New York.— Cobb *v.* Dolphin Mfg. Co., 108 N. Y. 463, 15 N. E. 438; Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Merritt *v.* Thompson, 27 N. Y. 225; Backus *v.* Fobes, 20 N. Y. 204; Locke *v.* Filley, 14 Hun (N. Y.) 139; Owen *v.* Boerum, 23 Barb. (N. Y.) 187; Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Akely *v.* Akely, 17 How. Pr. (N. Y.) 21; Purdy *v.* Delavan, 1 Cai. (N. Y.) 304; Shepard *v.* Merrill, 2 Johns. Ch. (N. Y.) 276.

North Carolina.— Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679; Osborne *v.* Colvert, 86 N. C. 170; Bryant *v.* Fisher, 85 N. C. 69; Crawford *v.* Orr, 84 N. C. 246; Thompson *v.* Deans, 59 N. C. 22; Mackey *v.* Neill, 53 N. C. 214.

Ohio.— Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.

Pennsylvania.— Johnston *v.* Brackbill, 1 Penr. & W. (Pa.) 364; Gratz *v.* Gratz, 4 Rawle (Pa.) 411.

South Carolina.— Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; Betsill *v.* Betsill, 30 S. C. 505, 9 S. E. 652; Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31.

Tennessee.— Gooch *v.* McKnight, 10 Humphr. (Tenn.) 229; McDaniel *v.* Bell, 3 Hayw. (Tenn.) 257.

Texas.— Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976; Elder *v.* McLane, 60 Tex. 383; Smith *v.* Clark, 22 Tex. Civ. App. 485, 54 S. W. 1052; Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612; Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764.

Vermont.— Hartland *v.* Henry, 44 Vt. 593; Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140; Bowman *v.* Downer, 28 Vt. 532; Giddings *v.* Hadaway, 28 Vt. 342; Briggs *v.* Brewster, 23 Vt. 100; Preston *v.* Whitcomb, 11 Vt. 47; Blin *v.* Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738.

Virginia.— Armstrong *v.* Armstrong, 1 Leigh (Va.) 491; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238; Tennant *v.* Divine, 24 W. Va. 387.

Wisconsin.— Pettibone *v.* Perkins, 6 Wis. 616; Dolph *v.* Clemens, 4 Wis. 181.

United States.—Swann *v.* Alexandria Canal Co., 1 Hayw. & H. (U. S.) 163, 23 Fed. Cas. No. 13,671.

England.— Emery *v.* Wase, 8 Ves. Jr. 505.

Canada.— Willson *v.* York, 46 U. C. Q. B. 289; Hodder *v.* Turvey, 20 Grant Ch. (U. C.) 63.

85. *Arkansas.*— Couch *v.* Harrison, 68 Ark. 580, 60 S. W. 957.

California.— Robinson *v.* Templar Lodge No. 17, I. O. O. F., 97 Cal. 62, 31 Pac. 609.

Connecticut.— Bundy *v.* Sabin, 1 Root (Conn.) 411.

Kentucky.— Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262.

Massachusetts.— Kingsley *v.* Bill, 9 Mass. 198.

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

New York.—Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

Pennsylvania.— McManus *v.* McCulloch, 6 Watts (Pa.) 357.

Vermont.— Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

Wisconsin.— Pierce *v.* Kirby, 21 Wis. 124.

United States.— Smith *v.* Morse, 9 Wall. (U. S.) 76, 19 L. ed. 597.

England.— Knox *v.* Simmonds, 3 Bro. Ch. 358, 1 Ves. Jr. 369; Boisloe *v.* Baily, 6 Mod. 221.

See 4 Cent. Dig. tit. "Arbitration and Award," § 49.

If the submission was by parol it is material to prove not only that both parties promised to abide by the award, but that the promises were concurrent and mutual, for otherwise each promise is but *nudum pactum.* Ingraham *v.* Whitmore, 75 Ill. 24; Houghton *v.* Houghton, 37 Me. 72; Keep *v.* Goodrich, 12 Johns. (N. Y.) 397; Kingston *v.* Phelps, Peake 227.

Nature of agreement.— An agreement to abide by an award of arbitrators is an agreement to await the award without revoking the submission — not to acquiesce in any award that may be made, whether it be legal or not. Atlanta, etc., R. Co. *v.* Mangham, 49 Ga. 266; Bach *v.* Slidell, 2 La. Ann. 626; Marshall *v.* Reed, 48 N. H. 36; Shaw *v.* Hatch, 6 N. H. 162. See also Abide [1 Cyc. 164]. But see Pass. *v.* Critcher, 112 N. C. 405, 17 S. E. 9, in which last case it was held that an agreement to abide by the award made by the arbitrators renders the surety on the bond of agreement liable for the payment of the award, and is not merely a guaranty not to withdraw from the arbitration. See also Robinson *v.* Bickley, 30 Pa. St. 384.

86. *Arkansas.*— Wilkes *v.* Cotter, 28 Ark. 519.

Massachusetts.— Woods *v.* Rice, 4 Metc. (Mass.) 481.

New Hampshire.— Page *v.* Pendergast, 2 N. H. 233.

New York.— Wood *v.* Tunnicliff, 74 N. Y. 38; Curtis *v.* Gokey, 68 N. Y. 300.

4. Parol Submission. A verbal submission is valid at common law in all cases where the subject-matter is such that a verbal agreement directly between the parties, in the terms of the award, would prevail.[87] A submission under the statute must, however, be in writing if the statute so requires.[88] Upon the same

North Carolina.— Mayo *v.* Gardner, 49 N. C. 359.

Ohio.—Wilcox *v.* Singletary, Wright (Ohio) 420.

Pennsylvania.— McManus *v.* McCulloch, 6 Watts (Pa.) 357; Offerman *v.* Packer, 26 Leg. Int. (Pa.) 205.

See 4 Cent. Dig. tit. "Arbitration and Award," § 36; and, generally, Contracts.

Unlawful consideration for agreement to submit.— In an action upon an award it is not a sufficient objection to its validity that defendant agreed to withdraw a civil action for assault and battery then pending, and also, "as far as he might be able to do," withdraw his prosecution of an indictment for assault and battery relating to the same subject-matter, as this does not constitute a submission to arbitration of the criminal proceedings, the continuance of which is made no ground of complaint by plaintiff, who sues on the award. McCreary *v.* Taggart, 2 S. C. 418.

Want of mutuality.— Where a submission to arbitration is not binding for want of mutuality, no action will lie for a breach of the agreement to abide by the award. Ingraham *v.* Whitmore, 75 Ill. 24. See also Yeamans *v.* Yeamans, 99 Mass. 585, holding that a submission that is not binding on both parties is binding on neither. To same effect is Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Onion *v.* Robinson, 15 Vt. 610.

87. *Alabama.*—Ehrman *v.* Stanfield, 80 Ala. 118; Byrd *v.* Odem, 9 Ala. 755; Martin *v.* Chapman, 1 Ala. 278.

Arkansas.— Green *v.* Ford, 17 Ark. 586.

Connecticut.— Alling *v.* Munson, 2 Conn. 691.

Delaware.—Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Illinois.— Koon *v.* Hollingsworth, 97 Ill. 52; Phelps *v.* Dolan, 75 Ill. 90; Ingraham *v.* Whitmore, 75 Ill. 24; Smith *v.* Douglass, 16 Ill. 34.

Indiana.— Kelley *v.* Adams, 120 Ind. 340, 22 N. E. 317; Boots *v.* Canine, 94 Ind. 408; Dilks *v.* Hammond, 86 Ind. 563; Webb *v.* Zeller, 70 Ind. 408; Shroyer *v.* Bash. 57 Ind. 349; Miller *v.* Goodwine, 29 Ind. 46; Carson *v.* Earlywine, 14 Ind. 256; Griggs *v.* Seeley, 8 Ind. 264; Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Kansas.— Bulsom *v.* Lampman, 1 Kan. 324.

Kentucky.— Thomasson *v.* Risk, 11 Bush (Ky.) 619; Brown *v.* Burkemeyer, 9 Dana (Ky.) 159, 33 Am. Dec. 541; Shockey *v.* Glasford, 6 Dana (Ky.) 9; Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262; Massie *v.* Spencer, 1 Litt. (Ky.) 320.

Massachusetts.—Peabody *v.* Rice, 113 Mass. 31.

Michigan.— Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Mississippi.— McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298.

Missouri.— Carter *v.* Scaggs, 38 Mo. 302; Searles *v.* Lum, 81 Mo. App. 607; Donnell *v.* Lee, 58 Mo. App. 288.

Nebraska.—Greer *v.* Canfield, 38 Nebr. 169, 56 N. W. 883.

New Hampshire.— Furber *v.* Chamberlain, 29 N. H. 405; Page *v.* Pendergast, 2 N. H. 233; Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68.

New York.— French *v.* New, 28 N. Y. 147, 2 Abb. Dec. (N. Y.) 209, 58 How. Pr. (N. Y.) 389; Giles Lithographic, etc., Printing Co. *v.* Recamier Mfg. Co., 14 Daly (N. Y.) 475; Diedrick *v.* Richley, 2 Hill (N. Y.) 271; Hays *v.* Hays, 23 Wend. (N. Y.) 363; Wells *v.* Lain, 15 Wend. (N. Y.) 99; Mitchell *v.* Bush, 7 Cow. (N. Y.) 185.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.—Gay *v.* Waltman, 89 Pa. St. 453; Lobb *v.* Lobb, 26 Pa. St. 327; Millar *v.* Criswell, 3 Pa. St. 449; McManus *v.* McCulloch, 6 Watts (Pa.) 357; Wentz *v.* Bealor, 14 Pa. Co. Ct. 337.

Tennessee.— Halliburton *v.* Flowers, 12 Heisk. (Tenn.) 25.

Texas.—Faggard *v.* Williamson, 4 Tex. Civ. App. 337, 23 S. W. 557.

Vermont.— Barnett *v.* Peck, 6 Vt. 456.

Wisconsin.— Winne *v.* Elderkin, 2 Pinn. (Wis.) 248, 52 Am. Dec. 159.

England.— Harrison *v.* Wright, 13 M. & W. 816; Cooth *v.* Jackson, 6 Ves. Jr. 12.

See 4 Cent. Dig. tit. "Arbitration and Award," § 39.

As to parol amendment of submission see *infra*, II, H, 1, b.

Where the subject of arbitration is a specialty, submission by parol is not valid. Logsdon *v.* Roberts, 3 T. B. Mon. (Ky.) 255.

88. *Alabama.*— Dudley *v.* Farris, 79 Ala. 187.

Florida.— O'Bryan *v.* Reed, 2 Fla. 448.

Georgia.— Jones *v.* Payne, 41 Ga. 23.

Indiana.— Boots *v.* Canine, 94 Ind. 408.

Kentucky.— Carson *v.* Carson, 1 Metc. (Ky.) 434; Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124.

Louisiana.— McClendon *v.* Kemp, 18 La. Ann. 162; Harrod *v.* Lewis, 3 Mart. (La.) 311.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

Missouri.—Williams *v.* Perkins, 83 Mo. 379.

Wisconsin.— Pierce *v.* Kirby, 21 Wis. 124.

As to submission under statute see *infra*, II, E, 8.

Substitutes.— A bond to secure the performance of an award, referring to, but not

principle, the English statute of frauds, and the embodiment thereof in the laws of the various states, requiring that all contracts relating to real estate shall be in writing, prohibit and render void any submission by parol agreement concerning the right of property to real estate.[89]

5. Setting Out Subject-Matter. The subject-matter of controversy should be so specifically set out as to leave no reasonable doubt as to what has been submitted. It is not, however, necessary to set it out with the same degree of certainty required in pleadings.[90]

6. Time of Making Award. It is not necessary, in a common-law submission to arbitration, to state the time within which the award shall be made.[91]

containing, an agreement to submit, will not take the place of the required written submission. Boots *v.* Canine, 94 Ind. 408. See also Pierce *v.* Kirby, 21 Wis. 124; Hill *v.* Taylor, 15 Wis. 190.

89. Submission as affected by statute of frauds.— *Kentucky.*— Thomasson *v.* Risk, 11 Bush (Ky.) 619; Royse *v.* McCall, 5 Bush (Ky.) 695; Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262; Stark *v.* Cannady, 3 Litt. (Ky.) 399, 14 Am. Dec. 76.

Maine.— Philbrick *v.* Preble, 18 Me. 255, 36 Am. Dec. 718.

Massachusetts.— Copeland *v.* Wading River Reservoir Co., 105 Mass. 397.

Mississippi.— McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298.

New York.— French *v.* New, 28 N. Y. 147, 2 Abb. Dec. (N. Y.) 209, 58 How. Pr. (N. Y.) 389.

North Carolina.— Fort *v.* Allen, 110 N. C. 183, 14 S. E. 685; Crissman *v.* Crissman, 27 N. C. 498.

Pennsylvania.— Gratz *v.* Gratz, 4 Rawle (Pa.) 411.

South Carolina.— Miller *v.* Graham, 1 Brev. (S. C.) 448.

Vermont.— Smith *v.* Bullock, 16 Vt. 592.

See 4 Cent. Dig. tit. "Arbitration and Award," § 40; and, generally, Frauds, Statute of.

90. *Alabama.*— Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; King *v.* Jemison, 33 Ala. 499; Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476.

Georgia.—Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173.

Iowa.— McKinnis *v.* Freeman, 38 Iowa 364; Zook *v.* Spray, 38 Iowa 273; Woodward *v.* Atwater, 3 Iowa 61.

Kansas.— See Anderson *v.* Beebe, 22 Kan. 768.

Kentucky.— Emerson *v.* Hutcheson, 2 Bibb (Ky.) 455; Galloway *v.* Webb, Hard. (Ky.) 318.

Maine.— Bodge *v.* Hull, 59 Me. 225; Kendall *v.* Bates, 35 Me. 357.

Massachusetts.— Caldwell *v.* Dickinson, 13 Gray (Mass.) 365.

Michigan.— See Rawlinson *v.* Shaw, 124 Mich. 340, 82 N. W. 1054.

Minnesota.— Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57.

New Hampshire.— Eastman *v.* Burleigh, 2 N. H. 484. *Compare* Hayes *v.* Bennett, 2 N. H. 422.

Ohio.—Windisch *v.* Hildebrandt, 5 Cinc. L. Bul. 415.

Pennsylvania.—Weichardt *v.* Hook, 83 Pa. St. 434; Summerville *v.* Painter, 44 Pa. St. 110.

South Carolina.— Cothran *v.* Knox, 13 S. C. 496.

Vermont.— Rixford *v.* Nye, 20 Vt. 132.

See 4 Cent. Dig. tit. "Arbitration and Award," § 45.

Matters not embraced in pending suit.— If an order of reference, made in a suit depending in court, extends to matters not embraced in the suit, there should be a statement entered of record showing what such matters are. Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227. See also Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126; Berkshire Woollen Co. *v.* Day, 12 Cush. (Mass.) 128.

Statutory submissions.—Statutory requirements that submissions under the statute should set forth a statement of the demand must be observed. Wood *v.* Holden, 45 Me. 374; Harmon *v.* Jennings, 22 Me. 240; Inman *v.* Wheeler, 1 Pick. (Mass.) 504; Humphry *v.* Strong, 14 Mass. 262; Mansfield *v.* Doughty, 3 Mass. 398; Eastman *v.* Burleigh, 2 N. H. 484; Hill *v.* Page, 1 N. H. 190; Smith *v.* Kimball, 1 N. H. 72. But, in Alabama, if, in a pending suit, the case is referred to arbitrators, no statement in writing, signed by the parties, of the matter in dispute, as required by Ala. Civ. Code, § 3223, is necessary, as that section only applies to disputes submitted when no suit is pending. Snodgrass *v.* Armbrester, 90 Ala. 493, 7 So. 840.

As to submission under statute see *infra*, II, E, 8.

91. Reasonable time.— Either party may, in such case, request the arbitrators to proceed within a reasonable time. Rogers *v.* Tatum, 25 N. J. L. 281; Curtis *v.* Potts, 3 M. & S. 145. See also French *v.* Shackford, 5 N. H. 143, wherein it was held that, if the submission make the report returnable "at or before" a specified day, it is sufficient.

In Massachusetts the parties to an agreement for submission to arbitration may agree upon a different time from the time named in Mass. Pub. Stat. c. 188; but, in such case, the time within which the award shall be returned is a material part of the submission,

7. What Law Governs. The validity, in the courts of one state, of an agreement to arbitrate, such agreement having been made in another state, is governed by the laws of the latter state.[92]

8. Submission Under Statute — a. In General. A submission, professedly under the statute, must substantially follow the statute, except in so far as its requirements are expressly waived.[93]

b. Acknowledgment. To authorize the court to adopt an award and render judgment thereon, statutory requirements as to the acknowledgment of the agreement of submission must be observed.[94] The same degree of particularity is not

and must be fixed by an agreement, signed and acknowledged by the parties. Bent *v.* Erie Tel., etc., Co., 144 Mass. 165, 10 N. E. 778.

Question for jury.— Whether the award was invalid because not made within a reasonable time after the submission within the intent of the parties is a question for the jury. Haywood *v.* Harmon, 17 Ill. 477.

92. Green *v.* East Tennessee, etc., R. Co., 37 Ga. 456; Titus *v.* Scantling, 4 Blackf. (Ind.) 89. See also, generally, Contracts.

93. *Alabama.*— Ehrman *v.* Stanfield, 80 Ala. 118; Dudley *v.* Farris, 79 Ala. 187.

California.— Heslep *v.* San Francisco, 4 Cal. 1.

Florida.— O'Bryan *v.* Reed, 2 Fla. 448.

Georgia.— Osborn, etc., Mfg. Co. *v.* Blanton, 109 Ga. 196, 34 S. E. 306; Crane *v.* Barry, 47 Ga. 476; Halloran *v.* Bray, 29 Ga. 422.

Illinois.— Low *v.* Nolte, 15 Ill. 368; Martine *v.* Harvey, 12 Ill. App. 587; Forman Lumber Co. *v.* Ragsdale, 12 Ill. App. 441.

Indiana.— Francis *v.* Ames, 14 Ind. 251.

Iowa.— Foust *v.* Hastings, 66 Iowa 522, 24 N. W. 22; Love *v.* Burns, 35 Iowa 150; Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93.

Kansas.— Morgan *v.* Smith, 33 Kan. 438, 6 Pac. 569.

Kentucky.—Carson *v.* Carson, 1 Metc. (Ky.) 434; Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Sims *v.* Banta, 9 Ky. L. Rep. 286.

Massachusetts.—Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Burghardt *v.* Owen, 13 Gray (Mass.) 300; Heath *v.* Tenney, 3 Gray (Mass.) 380; Wesson *v.* Newton, 10 Cush. (Mass.) 114; Abbott *v.* Dexter, 6 Cush. (Mass.) 108; Monosiet *v.* Post, 4 Mass. 532.

Michigan.— Gibson *v.* Burrows, 41 Mich. 713, 3 N. W. 200.

Minnesota.— Northwestern Guaranty Loan Co. *v.* Channell, 53 Minn. 269, 55 N. W. 121; Barney *v.* Flower, 27 Minn. 403, 7 N. W. 823.

Missouri.— See Reeves *v.* McGlochlin, 65 Mo. App. 537.

Nevada.— Steel *v.* Steel, 1 Nev. 27.

New York.— Bulson *v.* Lohnes, 29 N. Y. 291; Ocean House Corp. *v.* Chippu, 5 Hun (N. Y.) 419; Hollenback *v.* Fleming, 6 Hill (N. Y.) 303.

Ohio.— Strum *v.* Cunningham, 3 Ohio 286; Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.—Wilson *v.* Brown, 82 Pa. St. 437; Richardson *v.* Cassily, 3 Watts (Pa.) 320.

Texas.— Owens *v.* Withee, 3 Tex. 161; Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895.

Vermont.— Barnett *v.* Peck, 6 Vt. 456.

See 4 Cent. Dig. tit. "Arbitration and Award," § 38; and *supra*, II, E, 4; also *supra*, note 90.

94. *Massachusetts.*— Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Abbott *v.* Dexter, 6 Cush. (Mass.) 108.

Michigan.— Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629; Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

Minnesota.— Northwestern Guaranty Loan Co. *v.* Channell, 53 Minn. 269, 55 N. W. 121; Barney *v.* Flower, 27 Minn. 403, 7 N. W. 823.

Nebraska.— Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388.

New Hampshire.—Atwood *v.* York, 4 N. H. 50.

See 4 Cent. Dig. tit. "Arbitration and Award," § 43.

As to acknowledgments, generally, see Acknowledgments.

In Iowa, if the parties submit a controversy to arbitration that might be, but as yet is not, the subject of a suit, or where they submit, by agreement and without an order of court, any or all matters involved in any suit then pending between them, the agreement of submission must be acknowledged; but, where the subject-matter of a suit is submitted by order of court, an acknowledgment is not necessary. In the latter case the order of the court stands in the place of the acknowledgment. Fink *v.* Fink, 8 Iowa 312. See also Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40.

Acknowledgment by attorney.— In Wright *v.* Raddin, 100 Mass. 319, it was held that it is not, under Mass. Gen. Stat. c. 147, § 2, a defect in a submission, apparent as matter of law on the record, that one of the parties acknowledged the instrument by attorney, though there is no averment that it was signed before the magistrate.

An acknowledgment of a submission to arbitration is irregular if not made until after the arbitrators have begun their work; but a statutory judgment on the award is not invalid if the acknowledgment is made before the award. Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629.

Extension of time.— An agreement for extending the time for making the award need

demanded, however, in the acknowledgment of the execution of a submission as is required in the acknowledgment of deeds.[95]

e. Attestation and Sealing. Statutory provisions that submissions to arbitration shall be under seal and attested by a subscribing witness must be carried out.[96]

d. Consent of Parties. A submission to arbitration of a pending suit, without the consent of all the parties thereto whose interests may be affected by the award, is irregular and void.[97]

e. Designation of Arbitrators. The agreement of submission must state the names of the arbitrators, if the statute so requires.[98]

not be acknowledged. Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57.

Submission executed by agent.—Where, under Mich. Rev. Stat. p. 531, the execution, by one of the parties of an agreement to submit matters in difference to arbitration, appeared to be by an agent, the certificate of the officer taking the acknowledgment of the agreement that such party appeared before him by such agent, for that purpose duly appointed, and acknowledged the same, is sufficient evidence of the execution of the agreement to authorize the arbitrators to hear and determine the matters submitted to them, and the circuit court to render judgment on their award. Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

95. McKnight *v.* McCullough, 21 Iowa 111.

96. *Connecticut.*— Parmelee *v.* Allen, 32 Conn. 115; White *v.* Fox, 29 Conn. 570.

Illinois.— Moody *v.* Nelson, 60 Ill. 229; Cook *v.* Schroeder, 55 Ill. 530; Hamilton *v.* Hamilton, 27 Ill. 158.

Indiana.— Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 473.

Michigan.—An agreement of submission need not be under seal. Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

New Jersey.— See Hazen *v.* Addis, 14 N. J. L. 333.

New York.— Ocean House Corp. *v.* Chippu, 5 Hun (N. Y.) 419; Goodsell *v.* Phillips, 49 Barb. (N. Y.) 353, 3 Abb. Pr. N. S. (N. Y.) 147; Hollenback *v.* Fleming, 6 Hill (N. Y.) 303.

Pennsylvania.—An agreement to refer all matters in variance to certain persons is sufficient to authorize the entry of a rule without it being attested by subscribing witnesses or accompanied by an affidavit that it was duly executed. Herman *v.* Freeman, 8 Serg. & R. (Pa.) 9.

See 4 Cent. Dig. tit. "Arbitration and Award," § 42.

A submission, not required by statute to be under seal, was signed by an agent under seal, and it was held that it was not necessary that the authority of the agent should be under seal. White *v.* Cox, 29 Conn. 570.

A submission to arbitration by a corporation need not be under the corporate seal. Brady *v.* Brooklyn, 1 Barb. (N. Y.) 584.

Since a submission of the right to real estate cannot authorize a conveyance of the title by award of arbitrators, it is not necessary that the submission should be under seal, even where conveyances are required to be under seal (Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534), unless a seal is specifically required by statute as a condition to a valid submission (Parmelee *v.* Allen, 32 Conn. 115; White *v.* Fox, 29 Conn. 570).

97. *Maryland.*— Shriver *v.* State, 9 Gill & J. (Md.) 1, holding that the consent must be in writing.

New Jersey.—Paulison *v.* Halsey, 38 N. J. L. 488.

North Carolina.— Jackson *v.* McLean, 96 N. C. 474, 1 S. E. 785, holding that the consent must appear of record.

South Carolina.— See Alwyn *v.* Perkins, 3 Desauss. (S. C.) 297.

Wisconsin.— Sobey *v.* Thomas, 37 Wis. 568, holding that a court cannot impose upon parties litigant before it, as a condition upon which certain relief will be granted, a submission of their cause to arbitration.

United States.— Mobile *v.* Wood, 95 Fed. 537; Gregory *v.* Boston Safe-Deposit, etc., Co., 36 Fed. 408.

See 4 Cent. Dig. tit. "Arbitration and Award," § 34.

Submission by mistake.— A submission to arbitration entered into by mistake is not obligatory. Bright *v.* Ford, 11 Heisk. (Tenn.) 252; Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643. But see Offerman *v.* Packer, 26 Leg. Int. (Pa.) 205, holding that an allegation that a submission was entered into "on erroneous impression" is not sufficient to avoid it in equity, in the absence of fraud or concealment.

98. McKnight *v.* McCullough, 21 Iowa 111; Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Holdridge *v.* Stowell, 39 Minn. 360, 40 N. W. 259; Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370. But see Reeves *v.* McGlochlin, 65 Mo. App. 537, wherein it was held that an award will not be set aside because the written agreement to arbitrate did not contain the names of the arbitrators. *Compare* Hill *v.* Taylor, 15 Wis. 190, wherein it appeared that the parties to an action executed mutual bonds for arbitration. The names of two of the arbitrators were inserted, but that of the third was inserted only in defendant's bond. Underneath defendant's bond a stipulation was written, and signed by the parties, extending the time for "delivering the award referred to in the foregoing undertaking." It was held that this was a sufficient submission to the three arbitrators by an instrument in writing, as required by Wis. Rev. Stat. c. 131, § 1.

f. Designation of Court of Entry of Award. The submission must designate the court to which the award is to be returned, if the statute so requires.[99]

g. Naming Parties. As the submission presupposes the assent and presence of both parties, either in person or by attorney, as essential to its due execution and validity, it must not be doubtful who constitute the parties thereto. More especially is this so, inasmuch as the submission furnishes the only basis which the court can have upon which to render judgment after an award is returned and accepted.[1]

G. Construction and Effect of Submission — 1. In General. It is an established principle that submissions are to be liberally construed, so as to give effect to the intentions of the parties.[2] Every reasonable intendment is to be

See 4 Cent. Dig. tit. "Arbitration and Award," § 47.

Insertion before acknowledgment.— An agreement for a statutory arbitration is of no effect where the names of the arbitrators are not in it when acknowledged. Northwestern Guaranty Loan Co. *v.* Channell, 53 Minn. 269, 55 N. W. 121.

A misnomer in a submission, consisting of using a wrong middle initial of the referee, will not vitiate the award, especially where it appeared that the referee acted as such and signed the award. Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173.

Number and mode of selection.— A stipulation for a submission to arbitration which does not provide for the number of arbitrators nor the mode of their selection is too indefinite to be enforced. Greiss *v.* State Invest., etc., Co., 98 Cal. 241, 33 Pac. 195; Case *v.* Manufacturers' F. & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; Williams *v.* Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77.

99. Foust *v.* Hastings, 66 Iowa 522, 24 N. W. 22; Kendall *v.* Bates, 35 Me. 357. But see Woelfel *v.* Hammer, 159 Pa. St. 448, 28 Atl. 147, wherein it was held that, where parties have agreed to submit disputes to arbitrators and agree that the submission shall be an award of court, without designating the court, and also give bonds, with warrant of attorney, to each other to secure the payment of the award, and the amount of the award is recovered by means of a judgment entered upon the bond, the fact that the award is entered in the court of common pleas is a mere irregularity which does defendant no harm, and which does not entitle him to have the award set aside. See also McKnight *v.* McCullough, 21 Iowa 111.

In Illinois it has been held that, in an agreement to submit matters to arbitration under the statute, it is not necessary to name the court which is to render judgment on the award. Seaton *v.* Kendall, 61 Ill. App. 289 [*affirmed* in 171 Ill. 410, 49 N. E. 561].

In Texas, in an arbitration under Sayles' Civ. Stat. arts. 42–56, requiring submissions involving two hundred dollars or less to be filed with a justice, and over that amount with the clerk of the district court, it is not essential that the amount in controversy, showing the jurisdiction of the court, should appear from the agreement to arbitrate, but it is sufficient if the record, when the court is called upon to enter judgment, shows the requisite amount to give jurisdiction. Gautier *v.* McHenry, 15 Tex. Civ. App. 332, 39 S. W. 603.

Sufficiency of designation.— A submission naming the "supreme judicial" as the court to which the award should be returned is sufficiently definite as designating the "supreme judicial court." Kendall *v.* Bates, 35 Me. 357.

1. Wesson *v.* Newton, 10 Cush. (Mass.) 114. See also Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

A misrecital of the name of one of the parties in a submission will not vitiate an award. Hale *v.* Mattheson, Draper (U. C.) 63.

2. *Alabama.*— Byrd *v.* Odem, 9 Ala. 755.

Connecticut.— *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200; Hopson *v.* Doolittle, 13 Conn. 236; Shelton *v.* Alcox, 11 Conn. 240.

Georgia.— Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811; South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778.

Illinois.— Tucker *v.* Page, 69 Ill. 179; Williams *v.* Warren, 21 Ill. 541; Ross *v.* Watt, 16 Ill. 99; Garrish *v.* Ayers, 4 Ill. 245.

Indiana.— Estep *v.* Larsh, 21 Ind. 190.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Maine.— Orcutt *v.* Butler, 42 Me. 83; Thompson *v.* Michell, 35 Me. 281; Walker *v.* Merrill, 13 Me. 173; Gordan *v.* Tucker, 6 Me. 247.

Massachusetts.— Richards *v.* Todd, 127 Mass. 167; Bigelow *v.* Maynard, 4 Cush. (Mass.) 317; Dickey *v.* Sleeper, 13 Mass. 244.

Missouri.— Tucker *v.* Allen, 47 Mo. 488.

New Hampshire.— Ford *v.* Burleigh, 60 N. H. 278; Burleigh *v.* Ford, 59 N. H. 536.

New Jersey.—Williams *v.* Winans, 22 N. J. Eq. 573.

New York.— Jones *v.* Welwood, 71 N. Y. 208; Curtis *v.* Gokey, 68 N. Y. 300; Munro *v.* Alaire, 2 Cai. (N. Y.) 320; Efner *v.* Shaw, 2 Wend. (N. Y.) 567. See also Enright *v.* Montauk F. Ins. Co., 15 N. Y. Suppl. 893, 40 N. Y. St. 642.

North Carolina.— Pass *v.* Critcher, 112 N. C. 405, 17 S. E. 9; Robbins *v.* Killebrew,

made in their favor.[3] The words used are interpreted in accordance with their signification in common parlance, and not according to their strictly technical meaning.[4]

2. Effect on Pending Action — a. In General. The submission of a cause of action to arbitration, pending a suit thereon, works a discontinuance of the suit.[5] But a submission will not operate as a discontinuance if it is stipulated

95 N. C. 19; Hunter *v.* Anthony, 53 N. C. 385, 80 Am. Dec. 333.

Pennsylvania.— Kennedy *v.* Poor, 151 Pa. St. 472, 25 Atl. 119; Rogers *v.* Playford, 12 Pa. St. 181; Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557; Noble *v.* Peebles, 13 Serg. & R. (Pa.) 319.

Tennessee.— Cooley *v.* Dill, 1 Swan (Tenn.) 313.

Vermont.— Edwards *v.* Harrington, 45 Vt. 63.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

Wisconsin.— McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668; Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

United States.—Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96.

England.— 1 Stephens N. P. 36.

Canada.— Crouse *v.* Parke, 6 U. C. Q. B. 362.

See 4 Cent. Dig. tit. "Arbitration and Award," § 77.

As to interpretation of contracts, generally, see Contracts.

The ancient strictness in construing submissions has passed away. They are now to be construed according to the true intent of the parties. Hopson *v.* Doolittle, 13 Conn. 236; Shelton *v.* Alcox, 11 Conn. 240.

Submission by state.— By a voluntary proposition to submit matters in dispute between the state and a citizen, the state necessarily agrees to waive its exemption from suit so far as to give the citizen all the benefit of the award, or to protect him from the consequences of an illegal award, and the state thus divests itself of its sovereignty, the arbitrators being governed by the rules applicable to ordinary cases of arbitration. State *v.* Ward, 9 Heisk. (Tenn.) 100.

3. Byrd *v.* Odem, 9 Ala. 755; Joy *v.* Simpson, 2 N. H. 179; Gonsales *v.* Deavens, 2 Yeates (Pa.) 539.

4. Munro *v.* Alaire, 2 Cai. (N. Y.) 320; Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

5. *California.*— Draghicevich *v.* Vulicevich, 76 Cal. 378, 18 Pac. 406; Heslep *v.* San Francisco, 4 Cal. 1; Gunter *v.* Sanchez, 1 Cal. 45.

Colorado.— Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651.

Connecticut.— *Contra,* Nettleton *v.* Gridley, 21 Conn. 531, 56 Am. Dec. 378.

District of Columbia.— Strong *v.* Barbour, 1 Mackey (D. C.) 209.

Illinois.—Cunningham *v.* Craig, 53 Ill. 252; Reeve *v.* Mitchell, 15 Ill. 297.

Kentucky.— Gilkerson *v.* Flower, 1 Bibb (Ky.) 524.

Louisiana.—See Fielding *v.* Westermeier, 20 La. Ann. 51.

Maine.— Hearne *v.* Brown, 67 Me. 156; Crooker *v.* Buck, 41 Me. 355; Mooers *v.* Allen, 35 Me. 276, 58 Am. Dec. 700.

Massachusetts.— Hill *v.* Hunnewell, 1 Pick. (Mass.) 192. *Compare* Emerson *v.* Wadman, 122 Mass. 384.

Michigan.— *Contra,* Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718 [*limiting* Vanderhoof *v.* Dean, 1 Mich. 463; Dunn *v.* Sutliff, 1 Mich. 24].

Missouri.— Bowen *v.* Lazalere, 44 Mo. 383.

New Hampshire.— *Contra,* Dinsmore *v.* Hanson, 48 N. H. 413. See also Lary *v.* Goodnow, 48 N. H. 170.

New Jersey.— *Compare* Paulison *v.* Halsey, 38 N. J. L. 488.

New York.— McNulty *v.* Solley, 95 N. Y. 242; Keep *v.* Keep, 17 Hun (N. Y.) 152; Jacoby *v.* Johnston, 1 Hun (N. Y.) 242; Resequie *v.* Brownson, 4 Barb. (N. Y.) 541; Jordan *v.* Hyatt, 3 Barb. (N. Y.) 275; Blunt *v.* Whitney, 3 Sandf. (N. Y.) 4; Birdsall Co. *v.* Ayres, 21 N. Y. Suppl. 898, 50 N. Y. St. 242; Buel *v.* Dewey, 22 How. Pr. (N. Y.) 342; Grosvenor *v.* Hunt, 11 How. Pr. (N. Y.) 355; Smith *v.* Barse, 2 Hill (N. Y.) 387; West *v.* Stanley, 1 Hill (N. Y.) 69; Wells *v.* Lain, 15 Wend. (N. Y.) 99; Green *v.* Patchen, 13 Wend. (N. Y.) 293; Towns *v.* Wilcox, 12 Wend. (N. Y.) 503; Larkin *v.* Robbins, 2 Wend. (N. Y.) 505; People *v.* Onondaga Common Pleas, 1 Wend. (N. Y.) 314; Monroe Bank *v.* Widner, 11 Paige (N. Y.) 529, 43 Am. Dec. 768.

Pennsylvania.— See Douglas *v.* Kenton, 1 Miles (Pa.) 21.

South Carolina.— *Compare* Lynch *v.* Goodwin, 6 S. C. 144.

Tennessee.— Eddings *v.* Gillespie, 12 Heisk. (Tenn.) 548; Susong *v.* Jack, 1 Heisk. (Tenn.) 415; Norwood *v.* Stephens, 7 Coldw. (Tenn.) 1; Snodderly *v.* Weaver, 1 Coldw. (Tenn.) 255; Saffle *v.* Cox, 9 Humphr. (Tenn.) 141; Rogers *v.* Nall, 6 Humphr. (Tenn.) 28; Jewell *v.* Blankenship, 10 Yerg. (Tenn.) 438.

Texas.— See Cox *v.* Giddings, 9 Tex. 44.

Vermont.— Babcock *v.* School Dist. No. 9, 35 Vt. 250; Rixford *v.* Nye, 20 Vt. 132.

Virginia.—See Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

Wisconsin.— Sohns *v.* Sloteman, 85 Wis. 113, 55 N. W. 158; Walworth County Bank *v.* Farmers L. & T. Co., 22 Wis. 231; Hills *v.* Passage, 21 Wis. 294; State *v.* Chamber of Commerce, 20 Wis. 63; Bigelow *v.* Goss, 5 Wis. 421; Dolph *v.* Clemens, 4 Wis. 181.

See 4 Cent. Dig. tit. "Arbitration and Award," § 98.

The reason is that the parties have chosen another forum for the determination of the matters in controversy between them, and the

therein that the award shall be entered as a judgment of the court.[6] It has also been held that a mere agreement between the parties to a suit to submit it to arbitration, which agreement has not been acted upon by either of the parties or by the arbitrator, will not operate as a discontinuance.[7]

b. As Waiver of Objections. The submission of a pending cause to arbitration is, generally, a waiver of objections to previous proceedings in the cause.[8]

c. On Pending Appeal. Where parties, pending an appeal from a judgment

court in which the suit may be pending at the time of the submission will not proceed further with the case, but will leave the parties to the tribunal they have created for themselves. Muckey *v.* Pierce, 3 Wis. 307.

At common law, the effect of an agreement to arbitrate the matter in litigation is no more than to entitle the parties to a stay of proceedings in the suit. 2 Tidd Pr. 822; 1 Stephens N. P. 39, 40.

6. *Alabama.*— When a pending suit is submitted to arbitration by agreement, entered of record, and nothing is done under the submission by the next term, the court may, at a subsequent term, proceed and try the same, unless good cause is shown for a further continuance. Davis *v.* Badders, 95 Ala. 348, 10 So. 422.

Colorado.— Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651.

Maine.— Hearne *v.* Brown, 67 Me. 156.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

New Hampshire.— Lary *v.* Goodnow, 48 N. H. 170.

New York.— Jacoby *v.* Johnston, 1 Hun (N. Y.) 242; Wilson *v.* Williams, 66 Barb. (N. Y.) 209; *Ex p.* Wright, 6 Cow. (N. Y.) 399. See also Ensign *v.* St. Louis, etc., R. Co., 62 How. Pr. (N. Y.) 123; Buel *v.* Dewey, 22 How. Pr. (N. Y.) 342.

Pennsylvania.— See Summy *v.* Hiestand, 65 Pa. St. 300.

Tennessee.— McMinnville, etc., R. Co. *v.* Huggins, 3 Baxt. (Tenn.) 177; Norwood *v.* Stephens, 7 Coldw. (Tenn.) 1; Crockett *v.* Beaty, 7 Humphr. (Tenn.) 66; Rogers *v.* Nall, 6 Humphr. (Tenn.) 28; Bridges *v.* Vick, 2 Humphr. (Tenn.) 515.

Discharge of bail.— A reference of a cause to arbitration, under which reference the award is to be a rule of court, will discharge the bail. Bean *v.* Parker, 17 Mass. 591. But see, *contra*, Cunningham *v.* Howell, 23 N. C. 9.

7. *Alabama.*—Wright *v.* Evans, 53 Ala. 103.

Kansas.— See Snively *v.* Hill, 46 Kan. 494, 26 Pac. 1024.

Maine.— Chapman *v.* Seccomb, 36 Me. 102.

New Hampshire.— Elliott *v.* Quimby, 13 N. H. 181.

Tennessee.— Norwood *v.* Stephens, 7 Coldw. (Tenn.) 1.

United States.—Burke *v.* Pierce, 83 Fed. 95, 55 U. S. App. 59, 27 C. C. A. 462; Laflin *v.* Chicago, etc., R. Co., 34 Fed. 859.

8. *Maine.*— Hix *v.* Sumner, 50 Me. 290.

Massachusetts.—Ames *v.* Stevens, 120 Mass. 218; Page *v.* Monks, 5 Gray (Mass.) 492; Merrill *v.* Gold, 1 Cush. (Mass.) 457; Coffin *v.* Cottle, 4 Pick. (Mass.) 454; Forseth *v.* Shaw, 10 Mass. 253.

Michigan.—Vanderhoof *v.* Dean, 1 Mich. 463.

New Jersey.—Bozorth *v.* Prickett, 2 N. J. L. 251.

Vermont.— Waterman *v.* Connecticut, etc., Rivers R. Co., 30 Vt. 610, 73 Am. Dec. 326.

Virginia.— Ligon *v.* Ford, 5 Munf. (Va.) 10.

See 4 Cent. Dig. tit. "Arbitration and Award," § 102.

A misjoinder of parties is not waived by reference of the case to arbitrators, under rule of court. Porter *v.* Dickerman, 11 Gray (Mass.) 482.

Objections to jurisdiction.— If a court has not original jurisdiction of a cause commenced in it, yet, if the parties mutually agree to a reference of the action under an order of court, and it is referred, the objection on account of want of jurisdiction is thereby waived. Maxfield *v.* Scott, 17 Vt. 634. See also Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528, wherein it was held that, although consent of parties cannot give jurisdiction to a court of equity, yet if, after the improper granting of an injunction, the parties refer all matters in difference between them in that suit to arbitrators, consenting that their award may be made the decree of the court, such consent is binding. But see Clements *v.* Painter, 46 Ga. 486, wherein it was held that consenting to refer a case to an arbitrator does not preclude a party, upon the return of the award, from asking a dismissal for want of jurisdiction.

Right of review.— A party, by consenting to a reference of his cause, with an agreement that the report of the referees be final and that judgment shall be entered thereon, waives his right of review. Carroll *v.* Locke, 58 N. H. 163. See also Bone *v.* Rice, 1 Head (Tenn.) 149, wherein it was held that, where the parties to a litigation agree to submit the matters in controversy to the decision of arbitrators, whose award is produced in court and simply adopted as the judgment thereof without anything more, neither party has a right of appeal, and the fact that the parties in the articles of submission expressly reserved the right of appeal does not alter the rule.

Trial by jury.— A party, by submitting to an arbitration, waives his right to a trial by jury as to the matters in controversy. Boyden *v.* Lamb, 152 Mass. 416, 25 N. E. 609. See also Carroll *v.* Locke, 58 N. H. 163.

in an action, enter into an agreement to arbitrate the matter in dispute in the action in which the judgment has been recovered, such agreement implies a mutual abandonment of all previous proceedings, including the judgment.[9]

3. Effect on Subsequent Action. Being revocable in its nature,[10] an agreement to submit to arbitration, not consummated by an award, is no bar to a suit at law or in equity concerning the subject-matter submitted.[11]

9. Harrison *v.* Glover, 4 Hun (N. Y.) 121; Grosvenor *v.* Hunt, 11 How. Pr. (N. Y.) 355; Van Slyke *v.* Lettice, 6 Hill (N. Y.) 610 [*distinguishing* Miller *v.* Van Anken, 1 Wend. (N. Y.) 516]. See also Muckey *v.* Pierce, 3 Wis. 307, wherein it was held that the submission of a cause to arbitrators after an appeal from the judgment therein works a discontinuance of the suit and not merely a dismissal of the appeal. To same effect is Bigelow *v.* Goss, 5 Wis. 421. But see Hayes *v.* Blanchard, 4 Vt. 210, wherein it was held that a submission of an action to arbitrators after an appeal therein does not necessarily deprive plaintiff of his right to enter his complaint for affirmance, unless there is an award made before court, or unless the terms of the submission allow a time in which to make an award, which time extends beyond the term of the court to which the appeal is taken.

See 4 Cent. Dig. tit. "Arbitration and Award," § 104.

10. See *infra*, II, I.

11. *Alabama.*— Wright *v.* Evans, 53 Ala. 103; Bozeman *v.* Gilbert, 1 Ala. 90; Stone *v.* Dennis, 3 Port. (Ala.) 231.

California.—Loup *v.* California Southern R. Co., 63 Cal. 97; Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356; Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233; Crumlish *v.* Wilmington, etc., R. Co., 5 Del. Ch. 270.

District of Columbia.— Campbell *v.* American Popular L. Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Georgia.— Leonard *v.* House, 15 Ga. 473.

Illinois.— Ross *v.* Nesbit, 7 Ill. 252; Frink *v.* Ryan, 4 Ill. 322; Waugh *v.* Schlenk, 23 Ill. App. 433.

Indiana.— Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460.

Kansas.— Richardson *v.* Emmert, 44 Kan. 262, 24 Pac. 478.

Kentucky.— Gore *v.* Chadwick, 6 Dana (Ky.) 477; McClanahan *v.* Kennedy, 1 J. J. Marsh. (Ky.) 332; Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

Maine.— Dugan *v.* Thomas, 79 Me. 221, 9 Atl. 354; Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Hill *v.* More, 40 Me. 515.

Maryland.—Allegre *v.* Maryland Ins. Co., 6 Harr. & J. (Md.) 408, 14 Am. Dec. 289; Contee *v.* Dawson, 2 Bland (Md.) 264.

Massachusetts.— Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572; White *v.* Middlesex R. Co., 135 Mass. 216; Vass *v.* Wales, 129 Mass. 38; Noyes *v.* Marsh, 123 Mass. 286; Pearl *v.* Harris, 121 Mass. 390; Wood *v.* Humphrey, 114 Mass. 185; Rowe *v.* Williams, 97 Mass. 163.

Michigan.— Nurney *v.* Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 339; McGunn *v.* Hanlin, 29 Mich. 476.

Minnesota.—Whitney *v.* National Masonic Acc. Assoc., 52 Minn. 378, 54 N. W. 184.

Missouri.— Bowen *v.* Lazalere, 44 Mo. 383; Bales *v.* Gilbert, 84 Mo. App. 675.

Nebraska.— Home F. Ins. Co. *v.* Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521; National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466; German-American Ins. Co. *v.* Etherton, 25 Nebr. 505, 41 N. W. 406.

New Hampshire.— Pitman *v.* Thompson, 63 N. H. 73; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New Jersey.— Knaus *v.* Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237.

New York.— Seward *v.* Rochester, 109 N. Y. 164, 16 N. E. 348, 15 N. Y. St. 193; Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 50 N. Y. 250; Hurst *v.* Litchfield, 39 N. Y. 377; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350 [*affirming* 4 Sandf. (N. Y.) 198]; Smith *v.* Compton, 20 Barb. (N. Y.) 262; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Reynolds *v.* Plumbers' Material Protective Assoc., 30 Misc. (N. Y.) 709, 63 N. Y. Suppl. 303; Smith *v.* Barse, 2 Hill (N. Y.) 387.

Pennsylvania.— Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 529, 2 Am. St. Rep. 562; Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80; McCahan *v.* Reamey, 33 Pa. St. 535; Lauman *v.* Young, 31 Pa. St. 306; Patterson *v.* Peironnet, 7 Watts (Pa.) 337; Gray *v.* Wilson, 4 Watts (Pa.) 39; McQuaide *v.* Pennsylvania R. Co., 6 Pa. Dist. 391; McMahon *v.* Watermen's Beneficial Assoc., 17 Phila. (Pa.) 216, 42 Leg. Int. (Pa.) 151; Carr *v.* Raleigh, 2 Phila. (Pa.) 242, 14 Leg. Int. (Pa.) 86; Gavitt *v.* Snodgrass, 2 Phila. (Pa.) 162, 13 Leg. Int. (Pa.) 309.

South Carolina.— Smith *v.* Thomson, 1 Strobh. (S. C.) 344; Percival *v.* Herbemont, 1 McMull. (S. C.) 59.

Utah.—Daniher *v.* Grand Lodge, A. O. U. W., 10 Utah 110, 37 Pac. 245.

Vermont.— Welch *v.* Miller, 70 Vt. 108, 39 Atl. 749.

Virginia.— Rison *v.* Moon, 91 Va. 384, 22 S. E. 165; Corbin *v.* Adams, 76 Va. 58.

West Virginia.— Kinney *v.* Baltimore, etc., Employes Relief Assoc., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142.

4. Effect on Statute of Limitations. A mere submission to arbitrators of matters upon which the arbitrators have never acted will not prevent the running of the statute of limitations during the continuance of the submission.[12] It has also been held that this rule is not affected by the fact that, pending the submission, the right to sue was suspended.[13]

H. Amendment or Modification of Submission — 1. By Parties — a. Right to Amend or Modify. It is competent for the parties to a submission to arbitration, at any time previous to the making of the award, to amend or modify the submission.[14]

Wisconsin.— Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504; Muckey *v.* Pierce, 3 Wis. 307.

United States.— Potomac Steamboat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75; New York Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365; Straits of Dover Steamship Co. *v.* Munson, 41 C. C. A. 156 [*affirming* 99 Fed. 787]; Laflin *v.* Chicago, etc., R. Co., 34 Fed. 859; Perkins *v.* U. S. Electric Light Co., 21 Blatchf. (U. S.) 308, 16 Fed. 513; Trott *v.* City Ins. Co., 1 Cliff. (U. S.) 439, 24 Fed. Cas. No. 14,189; Tobey *v.* Bristol County, 3 Story (U. S.) 800, 23 Fed. Cas. No. 14,065.

England.—Wellington *v.* Macintosh, 2 Atk. 569; Clapman *v.* Higham, 1 Bing. 87, 7 Moore C. P. 703, 8 E. C. L. 415; Tattersoll *v.* Groote, 2 B. & P. 131, 14 Rev. Rep. viii; Michell *v.* Harris, 4 Bro. Ch. 312, 2 Ves. Jr. 129; Thompson *v.* Charnock, 8 T. R. 139; Milne *v.* Gratrix, 7 East 608; Livingston *v.* Ralli, 5 E. & B. 132, 1 Jur. N. S. 594, 24 L. J. Q. B. 269, 3 Wkly. Rep. 488, 85 E. C. L. 132, 30 Eng. L. & Eq. 279; King *v.* Joseph, 5 Taunt. 452, 1 E. C. L. 236; Gourlay *v.* Somerset, 19 Ves. Jr. 429, 13 Rev. Rep. 234; Street *v.* Rigby, 6 Ves. Jr. 815; Kill *v.* Hollister, 1 Wils. C. P. 129.

See 4 Cent. Dig. tit. "Arbitration and Award," § 29.

As to institution of suit as revocation see *infra*, II, I, b, (III).

An offer to arbitrate will not defeat an action if the offer was not accepted and no award made. Funsten *v.* Funsten Commission Co., 67 Mo. App. 559. See also Van Beueren *v.* Wotherspoon, 12 N. Y. App. Div. 421, 42 N. Y. Suppl. 404.

12. Cowart *v.* Perrine, 18 N. J. Eq. 454.

In Louisiana a submission to arbitration of the matters in dispute, and a suit, in affirmance of the award, praying that it be made executory, constitute a legal interruption of prescription. Meyer *v.* Ludeling, 40 La. Ann. 640, 4 So. 583.

Occupancy by permission.— But it is held that where there is an agreement to arbitrate matters in dispute in a contest for the possession of land, with a provision that the defendant in possession should continue in possession pending the arbitration, the running of the statute of limitations is interrupted during the continuance of such possession. Perkins *v.* Blood, 36 Vt. 273.

An agreement to submit a question of boundary to arbitration defeats the operation of the statute of limitations. Hunt *v.* Guilford, 4 Ohio 310.

13. Cowart *v.* Perrine, 21 N. J. Eq. 101.

14. *Kentucky.*— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 157 Mass. 268, 31 N. E. 1060; Loring *v.* Alden, 3 Metc. (Mass.) 576; Symonds *v.* Mayo, 10 Cush. (Mass.) 39; Eveleth *v.* Chase, 17 Mass. 458.

Nebraska.— Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

New Hampshire.— George *v.* Farr, 46 N. H. 171; Varney *v.* Brewster, 14 N. H. 49; Gray *v.* Berry, 9 N. H. 473; Brown *v.* Copp, 5 N. H. 346.

New Jersey.—McClure *v.* Gulick, 17 N. J. L. 340.

New York.— French *v.* New, 28 N. Y. 147, 2 Abb. Dec. (N. Y.) 209, 58 How. Pr. (N. Y.) 389; Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

North Carolina.— Bryant *v.* Stewart, 3 N. C. 259.

Pennsylvania.—Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 27 Atl. 756; Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

South Carolina.— Penman *v.* Gardner, 1 Brev. (S. C.) 498.

Tennessee.— Cooley *v.* Dill, 1 Swan (Tenn.) 313 [*citing* 1 Stephens N. P. 36].

Vermont.—Woods *v.* Page, 37 Vt. 252.

Virginia.— Price *v.* Kyle, 9 Gratt. (Va.) 247; Manlove *v.* Thrift, 5 Munf. (Va.) 493; Shermer *v.* Beale, 1 Wash. (Va.) 11.

Wisconsin.—Brookins *v.* Shumway, 18 Wis. 98.

England.— Evans *v.* Thomson, 5 East 189, 1 Smith K. B. 380.

See 4 Cent. Dig. tit. "Arbitration and Award," § 61; and *infra*, II, H, 2.

As to extension of time for making award see *infra*, III, G, 1, c, (III).

"Previously to making the award it is optional with the parties to make any alteration they may deem requisite in the original submission, and even the terms of an agreement of reference under seal may be changed by a subsequent agreement not under seal, because the agreement subsequent to the original submission is a new agreement incorporating the original submission and the parties are bound by it." 1 Stephens N. P. 36 [*citing* Evans *v.* Thomson, 5 East 189, 1 Smith K. B. 380].

Introduction of new matter.— Where, after a submission had been entered into by

b. Parol Amendment or Modification. A submission may be amended or modified by parol, even though it is under seal,[15] except where the submission itself could not have been so made.[16] In case of amendment or modification, the amended or modified submission stands in the place of the original submission.[17] It has been held, however, that a contemporaneous parol agreement cannot enlarge a written submission to arbitrators.[18]

2. By Court. A submission made a rule of court cannot be amended or modified by the court without the consent of the parties;[19] but, where it is made manifest to the court that there has been some omission upon the part of its officer, or that, by some accident or mistake, the order is not in accordance with the intention of the parties, it may make such amendment as will give effect to that which the parties have agreed to.[20]

bond, a further agreement was made under seal, bringing new matters before the arbitrators, subjecting to their power another person who was not a party to the original submission, but who was to the later agreement, and enlarging the power which the arbitrators already had over the subject-matter of the original submission, it was held that the later writing was not an alteration of the original submission, but an entirely new undertaking, superseding the original. Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

Withdrawal of part of claim.— After making a submission, the parties thereto may withdraw from the consideration of the arbitrators a part of the claim submitted. Varney *v.* Brewster, 14 N. H. 49.

15. *Kentucky.*— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 157 Mass. 268, 31 N. E. 1060; Loring *v.* Alden, 3 Metc. (Mass.) 576; Eveleth *v.* Chase, 17 Mass. 458.

Nebraska.— Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

New Hampshire.— George *v.* Farr, 46 N. H. 171.

New York.— Freeman *v.* Adams, 9 Johns. (N. Y.) 115; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575. But see Howard *v.* Cooper, 1 Hill (N. Y.) 44.

Pennsylvania.— Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557, parol alteration of submission by specialty.

Vermont.— Woods *v.* Page, 37 Vt. 252; Blanchard *v.* Murray, 15 Vt. 548.

Virginia.—Manlove *v.* Thrift, 5 Munf. (Va.) 493; Shermer *v.* Beale, 1 Wash. (Va.) 11.

England.— Thames Ironworks, etc., Co. *v.* Reg., 10 B. & S. 33, 20 L. T. Rep. N. S. 318; Heard *v.* Wadham, 1 East 618; Cook *v.* Jennings, 7 T. R. 381, 4 Rev. Rep. 468; Littler *v.* Holland, 3 T. R. 590; ——— *v.* Mills, 17 Ves. Jr. 419.

See 4 Cent. Dig. tit. "Arbitration and Award," § 62.

As to submission by parol see *supra*, II, E, 4.

In Massachusetts it has been held that, where an agreement for arbitration, made under the statute, is executed, the parties can extend the time or alter the submission only by a supplemental agreement, executed in the manner required by the statute. Bent *v.* Erie Tel., etc., Co., 144 Mass. 165, 10 N. E. 778; Woodbury *v.* Proctor, 9 Gray (Mass.) 18.

In Virginia it has been held that a substituted submission may be made without any order of the court confirming the substitution, even though the original submission had been made a rule of court. Manlove *v.* Thrift, 5 Munf. (Va.) 493.

To justify an inference that a written agreement for arbitration has been subsequently modified by parol, the evidence must be clear and the implication must be strong and free from all doubt. Loring *v.* Alden, 3 Metc. (Mass.) 576.

16. French *v.* New, 28 N. Y. 147, 2 Abb. Dec. (N. Y.) 209, 58 How. Pr. (N. Y.) 389 [*reversing* 20 Barb. (N. Y.) 481]. In this case A and B, having executed bonds of submission to arbitration of a controversy concerning a lease, and required the award to be in writing and subscribed by the arbitrators, waived that requirement by parol, and agreed to receive a verbal award. It was held that such waiver and verbal award were not binding, on the ground stated in the text.

17. Symonds *v.* Mayo, 10 Cush. (Mass.) 39; Loring *v.* Alden, 3 Metc. (Mass.) 576; George *v.* Farr, 46 N. H. 171.

18. Palmer *v.* Green, 6 Conn. 14.

19. Lazell *v.* Houghton, 32 Vt. 579; Baxter *v.* Thompson, 25 Vt. 505; Rice *v.* Clark, 8 Vt. 104; Smurthwaite *v.* Richardson, 15 C. B. N. S. 463, 109 E. C. L. 463; Morgan *v.* Tarte, 3 C. L. Rep. 970, 11 Exch. 82; Houghton *v.* Bankart, 3 De G. F. & J. 16, 64 Eng. Ch. 16. And see Hickernell *v.* Carlisle First Nat. Bank, 62 Pa. St. 146, in which it was held that a court cannot impose additional terms to those prescribed by statute.

See 4 Cent. Dig. tit. "Arbitration and Award," § 63.

Presumption of consent.— Where it appears, by the record of the court below, that a case was referred to three persons, and that, on a subsequent day, one of them having declined to serve, another person was appointed in his place, it will be presumed, in the absence of contradiction by the record, that the substitution was made with the consent of both parties. Browning *v.* McManus, 1 Whart. (Pa.) 177. See also Lattimore *v.* Martin, Add. (Pa.) 11.

20. Vanderbyl *v.* McKenna, L. R. 3 C. P. 252. See also Bell *v.* Postlethwaite, 5 E. & B.

I. Revocation or Setting Aside Submission — 1. By Act of Parties — a. Right to Revoke — (i) *In General.* Though there are cases which hold that a submission under a contract or agreement, founded upon a valuable consideration, or a submission which is part of an agreement containing other terms to be performed by the parties, is irrevocable by one party without the consent of the other,[21] the general rule is that a submission may be revoked by either party thereto at any time before award, if the submission is not made a rule of court or is not otherwise regulated by statute. The remedy of the adverse party, in case of a revocation, is by an action on the agreement to submit, or on the submission bond.[22] But after an award is made and pub-

695, 1 Jur. N. S. 1167, 25 L. J. Q. B. 63, 4 Wkly. Rep. 89, 85 E. C. L. 695. And see Evans *v.* Senor, 5 Taunt. 662, 1 E. C. L. 340, in which it was held that the court can insert into the submission that which the parties, in the legal effect of their contract, assented to at the time of reference.

21. McCune *v.* Lytle, 197 Pa. St. 404, 47 Atl. 190; Zehner *v.* Lehigh Coal, etc., Co., 187 Pa. St. 487, 43 Wkly. Notes Cas. (Pa.) 147, 41 Atl. 464, 67 Am. St. Rep. 586; McKenna *v.* Lyle, 155 Pa. St. 599, 26 Atl. 777, 35 Am. St. Rep. 910; White's Appeal, 108 Pa. St. 473; Williams *v.* Tracey, 95 Pa. St. 308; Lewis' Appeal, 91 Pa. St. 359; Paist *v.* Caldwell, 75 Pa. St. 161; McGheehen *v.* Duffield, 5 Pa. St. 497; Mitchell *v.* Newman, 4 Pennyp. (Pa.) 443; White *v.* Davis, 14 Wkly. Notes Cas. (Pa.) 59; Everhart *v.* Flynn, 6 Pa. Dist. 131; Farel *v.* Roberts, 11 Pa. Co. Ct. 58; Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484; Abbot *v.* Shepherd, 4 Phila. (Pa.) 90, 17 Leg. Int. (Pa.) 222. But see *infra*, note 22.

22. *California.*— California Academy of Sciences *v.* Fletcher, 99 Cal. 207, 33 Pac. 855; Sidlinger *v.* Kerkow, 82 Cal. 42, 22 Pac. 932.

Connecticut.— Rowley *v.* Young, 3 Day (Conn.) 118; Wetmore *v.* Lyman, 2 Root (Conn.) 484.

Delaware.—Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

Georgia.— Cherry *v.* Smith, 51 Ga. 558; Davis *v.* Maxwell, 27 Ga. 368; Leonard *v.* House, 15 Ga. 473.

Illinois.— Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95]; Ingraham *v.* Whitmore, 75 Ill. 24.

Indiana.— See Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395.

Iowa.— Harrison *v.* Hartford F. Ins. Co., 112 Iowa 77, 83 N. W. 820.

Kentucky.— Peters *v.* Craig, 6 Dana (Ky.) 307.

Maine.— Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Call *v.* Hagar, 69 Me. 521; Brown *v.* Leavitt, 26 Me. 251. *Compare* Weeks *v.* Trask, 81 Me. 127, 16 Atl. 412, 2 L. R. A. 532.

Massachusetts.— Coon *v.* Allen, 156 Mass. 113, 30 N. E. 83; Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 139 Mass. 463, 31 N. E. 751; Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572; Pond *v.* Harris, 113 Mass. 114.

Michigan.— Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

Minnesota.— Minneapolis, etc., R. Co. *v.* Cooper, 59 Minn. 290, 61 N. W. 143.

Mississippi.—Jones *v.* Harris, 59 Miss. 214.

Missouri.— King *v.* Howard, 27 Mo. 21; Donnell *v.* Lee, 58 Mo. App. 288.

Nebraska.—Connecticut F. Ins. Co. *v.* O'Fallon, 49 Nebr. 740, 69 N. W. 118; Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496; Home F. Ins. Co. *v.* Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521.

New Hampshire.— Dinsmore *v.* Hanson, 48 N. H. 413; Dexter *v.* Young, 40 N. H. 130; Wright *v.* Cobleigh, 21 N. H. 339; Rochester *v.* Whitehouse, 15 N. H. 468; Blaisdell *v.* Blaisdell, 14 N. H. 78; Clement *v.* Hadlock, 13 N. H. 185; Gray *v.* Berry, 9 N. H. 473; Hunt *v.* Wilson, 6 N. H. 36.

New Jersey.—Paulison *v.* Halsey, 38 N. J. L. 488; Freehorn *v.* Denman, 8 N. J. L. 116.

New York.— Wood *v.* Lafayette, 46 N. Y. 484; Merritt *v.* Thompson, 27 N. Y. 225; Smith *v.* Compton, 20 Barb. (N. Y.) 262; Heath *v.* President Gold Exchange, 7 Abb. Pr. N. S. (N. Y.) 251, 38 How. Pr. (N. Y.) 168; Frets *v.* Frets, 1 Cow. (N. Y.) 335; Allen *v.* Watson, 16 Johns. (N. Y.) 205.

North Carolina.— Tyson *v.* Robinson, 25 N. C. 333; Norfleet *v.* Southall, 7 N. C. 189.

Pennsylvania.— Buckwalter *v.* Russell, 119 Pa. St. 495, 13 Atl. 310; Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80; Shisler *v.* Keavy, 75 Pa. St. 79; Coleman *v.* Grubb, 23 Pa. St. 393; Erie *v.* Tracy, 2 Grant (Pa.) 20. See also Dixon *v.* Morehead, Add. (Pa.) 216; Greenawalt *v.* Hamilton, 4 Pennyp. (Pa.) 495. But see *supra*, note 21.

Rhode Island.— Sherman *v.* Cobb, 15 R. I. 570, 10 Atl. 591.

Tennessee.— Rogers *v.* Nall, 6 Humphr. (Tenn.) 28.

Texas.— Houston, etc., R. Co. *v.* Newman, 2 Tex. App. Civ. Cas. § 349.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11; Craftsbury *v.* Hill, 28 Vt. 763; Marsh *v.* Packer, 20 Vt. 198; Hawley *v.* Hodge, 7 Vt. 237; Aspinwall *v.* Tousey, 2 Tyler (Vt.) 328.

Virginia.— Rison *v.* Moon, 91 Va. 384, 22 S. E. 165. See also Corbin *v.* Adams, 76 Va. 58.

United States.— Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 13 Sawy. (U. S.) 260, 35 Fed. 22; Tobey *v.* Bristol County, 3 Story (U. S.) 800, 23 Fed. Cas. No. 14,065.

lished, neither party can revoke the submission without the consent of the other.[23]

(II) *Submission Made Rule of Court.* Numerous decisions, however, support the doctrine that a submission made a rule of court is irrevocable without leave of court.[24]

England.— Fraser *v.* Ehrensperger, 12 Q. B. D. 310, 53 L. J. Q. B. 73, 49 L. T. Rep. N. S. 646, 32 Wkly. Rep. 240; Bacon Abr. tit. Arbitration, B; Aston *v.* George, 2 B. & Ald. 395, 1 Chit. 204, 22 Rev. Rep. 803, 18 E. C. L. 120; Green *v.* Pole, 6 Bing. 443, 8 L. J. C. P. O. S. 149, 4 M. & P. 198, 31 Rev. Rep. 463, 19 E. C. L. 203; Clapman *v.* Higham, 1 Bing. 87, 7 Moore C. P. 403, 8 E. C. L. 415; Warburton *v.* Storr, 4 B. & C. 103, 6 D. & R. 213, 3 L. J. K. B. O. S. 156, 10 E. C. L. 500; Vynior's Case, 8 Coke 81*b*; Comyns Dig. tit. Arbitration, D, 5; Milne *v.* Gratrix, 7 East 608; Mills *v.* Bayley, 2 H. & C. 36, 32 L. J. Exch. 179, 9 Jur. N. S. 499, 8 L. T. Rep. N. S. 392, 11 Wkly. Rep. 598; Newgate *v.* Degelder, 2 Keb. 10, 1 Sid. 281; Rouse *v.* Meier, L. R. 6 C. P. 212, 40 L. J. C. P. 145, 23 L. T. Rep. N. S. 865, 19 Wkly. Rep. 438; Greenwood *v.* Misdale, 1 M'Clel. & Y. 276; King *v.* Joseph, 5 Taunt. 452, 1 E. C. L. 236.

Canada.— Ruthven *v.* Rossin, 8 Grant Ch. (U. C.) 370.

See 4 Cent. Dig. tit. "Arbitration and Award," § 64 *et seq.*

See also, generally, Bonds; Contracts.

As to damages on revocation see *infra*, VI, B, 11, a.

Power of agent.—The authority of an agent to submit to arbitration does not carry with it the authority to revoke the submission unless such authority be expressly conferred. Madison Ins. Co. *v.* Griffin, 3 Ind. 277.

Power of joint parties.— In Robertson *v.* McNiel, 12 Wend. (N. Y.) 578, it was held that if a submission be by one on the one side and two on the other, one of the two could not revoke without the other's assent. See also Lewis' Appeal, 91 Pa. St. 359; Wilde *v.* Vinor, 1 Brownl. 62. *Compare* Brown *v.* Leavitt, 26 Me. 251.

Submission by attorney — Revocation by client.— Though counsel has a right to submit a client's cause to a reference, the client has a right to revoke the submission before it is acted on. Coleman *v.* Grubb, 23 Pa. St. 393.

23. *Massachusetts.*— Coon *v.* Allen, 156 Mass. 113, 30 N. E. 83.

New Hampshire.— Clement *v.* Hadlock, 13 N. H. 185; Hunt *v.* Wilson, 6 N. H. 36.

New York.— Merritt *v.* Thompson, 27 N. Y. 225.

Pennsylvania.— Shisler *v.* Keavy, 75 Pa. St. 79; Robinson *v.* Bickley, 30 Pa. St. 384; Gardner *v.* Lincoln, 5 Phila. (Pa.) 24, 19 Leg. Int. (Pa.) 132.

Tennessee.—See Brown *v.* Welcker, 1 Coldw. (Tenn.) 197.

England.— Milner *v.* Brydges, 2 P. & B. 87.

Estoppel to deny revocation.— In Hawley *v.* Hodge, 7 Vt. 237, it was held that, where an arbitrator refused to proceed in consequence of a parol revocation of his power by one of the parties, that party cannot deny that a revocation was made.

Waiver of revocation.— Though a party who has agreed to submit matters of dispute to arbitration afterward gives notice that he will not stand to any award that may be made, he will be bound by the award if he appears before the arbitrators and enters into the trial. Seely *v.* Pelton, 63 Ill. 101. *Compare* McKenna *v.* Lyle, 155 Pa. St. 599, 26 Atl. 777, 35 Am. St. Rep. 910.

24. *California.*— California Academy of Sciences *v.* Fletcher, 99 Cal. 207, 33 Pac. 855.

Connecticut.— Bray *v.* English, 1 Conn. 498.

Illinois.— Poppers *v.* Knight, 69 Ill. App. 578.

Indiana.— Bash *v.* Christian, 77 Ind. 290, 84 Ind. 180; Shroyer *v.* Bash, 57 Ind. 349.

Iowa.— Harrison *v.* Hartford F. Ins. Co., 112 Iowa 77, 83 N. W. 820, in which it was held that Iowa Code, § 4390, declaring that neither party can revoke a submission to arbitration, does not forbid the revocation of an agreement to arbitration not made under the provisions of the act.

Maine.— Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Cumberland *v.* North Yarmouth, 4 Me. 459.

Massachusetts.— Haskell *v.* Whitney, 12 Mass. 47.

New Hampshire.— Dexter *v.* Young, 40 N. H. 130.

New Jersey.— Ferris *v.* Munn, 22 N. J. L. 161; Freeborn *v.* Denman, 8 N. J. L. 116.

New York.— Under N. Y. Code Civ. Proc. § 2383, providing that a submission to arbitration cannot be revoked after final submission, a submission is revocable at any time before the cause is finally submitted for decision. New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; People *v.* Nash, 111 N. Y. 310, 18 N. E. 630, 19 N. Y. St. 75, 7 Am. St. Rep. 747, 2 L. R. A. 180; Heath *v.* President Gold Exchange, 7 Abb. Pr. N. S. (N. Y.) 251, 38 How. Pr. (N. Y.) 168; Frets *v.* Frets, 1 Cow. (N. Y.) 335; Monroe Bank *v.* Widner, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575 [*affirming* 2 Edw. (N. Y.) 452].

North Carolina.— Tyson *v.* Robinson, 25 N. C. 333.

Ohio.— Montgomery County *v.* Carey, 1 Ohio St. 463; Carey *v.* Montgomery County, 19 Ohio 245; Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.— Zehner *v.* Lehigh Coal, etc., Co., 187 Pa. St. 487, 43 Wkly. Notes Cas. (Pa.) 147, 41 Atl. 464, 67 Am. St. Rep. 586; Withers *v.* Haines, 2 Pa. St. 435; Ruston *v.*

(III) *Stipulation of Irrevocability.* An agreement, in a submission to arbitrate, that it shall be irrevocable does not destroy its revocability.[25] The remedy of a party in case of a revocation is an action for the breach of the agreement.[26]

b. What Constitutes Revocation — (I) *Death of Arbitrator.* Where a submission to arbitration makes no provision for filling vacancies, the occurrence of a vacancy, by reason of the death of an arbitrator, revokes the submission.[27]

(II) *Death of Party* — (A) *Common-Law Submission.* As the submission to arbitration confers no more than a naked power, the death, before award, of a party to a common-law submission has the effect of a revocation of the submission,[28]

Dunwoody, 1 Binn. (Pa.) 42; Lance *v.* Lumber Co., 3 Pa. Co. Ct. 142; Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484; Keavy *v.* Shisler, 8 Phila. (Pa.) 54.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366; Stiringer *v.* Toy, 33 W. Va. 86, 10 S. E. 26.

United States.— Masterson *v.* Kidwell, 2 Cranch C. C. (U. S.) 669, 16 Fed. Cas. No. 9,269.

England.— East, etc., India Dock Co. *v.* Kirk, 12 App. Cas. 738, 57 L. J. Q. B. 295, 58 L. T. Rep. N. S. 158; Green *v.* Pole, 6 Bing. 443, 8 L. J. C. P. O. S. 149, 4 M. & P. 198, 31 Rev. Rep. 463, 19 E. C. L. 203.

See 4 Cent. Dig. tit. "Arbitration and Award," § 66; and *infra*, II, I, 2.

At common law the power to revoke remained even where the submission had been made a rule of court. Rouse *v.* Meier, L. R. 6 C. P. 212, 40 L. J. C. P. 145, 23 L. T. Rep. N. S. 865, 19 Wkly. Rep. 438.

25. *New York.*— People *v.* Nash, 111 N. Y. 310, 18 N. E. 630, 19 N. Y. St. 75, 7 Am. St. Rep. 747, 2 L. R. A. 180.

Pennsylvania.— Power *v.* Power, 7 Watts (Pa.) 205.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11.

United States.— Tobey *v.* Bristol County, 3 Story (U. S.) 800, 23 Fed. Cas. No. 14,065.

England.— Marsh *v.* Bulteel, 5 B. & Ald. 507, 1 D. & R. 106, 7 E. C. L. 278; Vynior's Case, 8 Coke 81*b*; Hide *v.* Petit, 1 Ch. Cas. 185, 2 Freem. Ch. 133.

The reason is, that a man cannot, by his own act, make such authority, power, or warrant not countermandable which is, by law and its own nature, countermandable. Vynior's Case, 8 Coke 81*b*.

26. People *v.* Nash, 111 N. Y. 310, 18 N. E. 630, 19 N. Y. St. 75, 7 Am. St. Rep. 747, 2 L. R. A. 180. See, generally, Contracts.

27. Dinsmore *v.* Hanson, 48 N. H. 413; Wolf *v.* Augustine, 181 Pa. St. 576, 37 Atl. 574; Shreiner *v.* Cummins, 63 Pa. St. 374; Potter *v.* Sterrett, 24 Pa. St. 411; Huggins *v.* Neill, 2 Pa. Super. Ct. 103, 38 Wkly. Notes Cas. (Pa.) 467; Sutton *v.* Tyrrell, 10 Vt. 91; Harper *v.* Ahrahams, 4 Moore C. P. 3, 21 Rev. Rep. 732, 16 E. C. L. 353; Crawshay *v.* Collins, 3 Swanst. 90; Cheslyn *v.* Dalby, 2 Y. & C. Ch. 170.

Effect of death on subject-matter of controversy.— In Shreiner *v.* Cummins, 63 Pa. St. 374, it was held that the death of an arbitrator, to whom had been referred, by the parties, a claim barred by the statute of limitations, did not extinguish the debt, but that it was left to the judicial tribunals, if no other mode could be agreed upon.

28. *Indiana.*— Bash *v.* Christian, 77 Ind. 290; Citizens' Ins. Co. *v.* Coit, 12 Ind. App. 161, 39 N. E. 766.

Maine.— Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Mooers *v.* Allen, 35 Me. 276, 58 Am. Dec. 700.

New York.— McIntire *v.* Morris, 14 Wend. (N. Y.) 90.

North Carolina.— Tyson *v.* Robinson, 25 N. C. 333.

Pennsylvania.— Marseilles *v.* Kenton, 17 Pa. St. 238; Bailey *v.* Stewart, 3 Watts & S. (Pa.) 560, 39 Am. Dec. 50; Power *v.* Power, 7 Watts (Pa.) 205.

Tennessee.—Moore *v.* Webb, 6 Heisk. (Tenn.) 301.

Vermont.— Sutton *v.* Tyrrell, 10 Vt. 91.

United States.— Gregory *v.* Boston Safe-Deposit, etc., Co., 36 Fed. 408.

England.— Cooper *v.* Johnson, 2 B. & Ald. 394, 20 Rev. Rep. 483; Rhodes *v.* Haigh, 2 B. & C. 345, 3 D. & R. 608, 2 L. J. K. B. O. S. 40, 26 Rev. Rep. 376, 9 E. C. L. 156; Edmunds *v.* Cox, 3 Dougl. 406, 26 E. C. L. 267; Toussaint *v.* Hartop, Holt 335, 3 E. C. L. 137, 1 Moore C. P. 287, 7 Taunt. 571, 2 E. C. L. 497; President, etc., Orphan's Board *v.* Van Reenen, 1 Knapp 83, 12 Eng. Reprint 252; Caledonian R. Co. *v.* Lockhart, 3 Macq. 808, 6 Jur. N. S. 1311, 3 L. T. Rep. N. S. 65, 8 Wkly. Rep. 373; Blundell *v.* Brettargh, 17 Ves. Jr. 232.

See 4 Cent. Dig. tit. "Arbitration and Award," § 71.

Death of infant.—Where the guardians and trustees of an infant join in a reference affecting lands of which the infant was tenant for life, and the latter died pending the reference, an award made against them after his death was, on application to the court, set aside so far as it related to them. Bristow *v.* Binns, 3 D. & R. 184, 26 Rev. Rep. 607.

Death of trustee.— In Citizens' Ins. Co. *v.* Coit, 12 Ind. App. 161, 39 N. E. 766, it was held that, where a trustee of an express trust for the management of real estate takes out a policy of insurance and agrees to submit the amount of loss to arbitration, his death before an award is made does not revoke the submission.

in the absence of a stipulation that the submission shall survive, and to this end the agreement must be explicit.[29]

(B) *Statutory Submission.* The death of a party to a statutory submission will not, however, revoke the submission, if the cause of action survives.[30]

(III) *Institution of Suit.* The institution of a suit, before award, by one of the parties, the cause of action being the same subject-matter as that submitted to arbitration, revokes, by implication, the agreement to arbitrate.[31]

(IV) *Marriage of Female Party.* The marriage of a *feme sole*, a party to a submission, would formerly have the effect of revoking the submission. It is believed, however, that this would not now be the case under the married-women's acts so generally in force at the present time.[32]

(V) *Refusal of Arbitrator to Act.* The refusal of an arbitrator to proceed with the arbitration operates as a revocation of the submission.[33]

29. Mooers *v.* Allen, 35 Me. 276, 58 Am. Dec. 700; Bailey *v.* Stewart, 3 Watts & S. (Pa.) 560, 39 Am. Dec. 50; Tyler *v.* Jones, 3 B. & C. 144, 4 D. & R. 740, 10 E. C. L. 74; Rhodes *v.* Haigh, 2 B. & C. 345, 3 D. & R. 610, 2 L. J. K. B. O. S. 40, 26 Rev. Rep. 376, 9 E. C. L. 156; McDougal *v.* Robertson, 4 Bing. 435, 1 M. & P. 147, 2 Y. & J. 11, 31 Rev. Rep. 552, 13 E. C. L. 576; Clarke *v.* Crofts, 4 Bing. 143, 5 L. J. C. P. O. S. 127, 12 Moore C. P. 349, 29 Rev. Rep. 527, 13 E. C. L. 439; Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 574, 11 E. C. L. 20; Lewin *v.* Helbrook, 2 Dowl. N. S. 991, 12 L. J. Exch. 267, 11 M. & W. 110; Blundell *v.* Brettargh, 17 Ves. Jr. 232.

Effect in action of tort.— In an action of tort referred to arbitration before verdict, where plaintiff died and the award was afterward made, it was held that the clause providing against revocation in the event of the death of a party had no effect, and that the award was a nullity, as a right of action for tort was determined by the death. Bowker *v.* Evans, 15 C. B. D. 565, 54 L. J. Q. B. 421, 53 L. T. Rep. N. S. 801, 33 Wkly. Rep. 695. See ABATEMENT AND REVIVAL, III, A, 4 [1 Cyc. 60].

30. *Indiana.*— Bash *v.* Christian, 77 Ind. 290.

Maryland.—Turner *v.* Maddox, 3 Gill (Md.) 190.

Massachusetts.—Bacon *v.* Crandon, 15 Pick. (Mass.) 79.

New Jersey.— Freeborn *v.* Denman, 8 N. J. L. 116.

New York.— N. Y. Code Civ. Proc. § 2382, provides that "the death of a party to a submission, made either as prescribed in this title or otherwise, . . . operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterwards." See also Manning *v.* Pratt, 18 Abb. Pr. (N. Y.) 344, in which it was held that, on the death of a party to a statutory proceeding by arbitration, the court cannot revive it or substitute another person in place of the deceased.

Pennsylvania.— See Ruston *v.* Dunwoody, 1 Binn. (Pa.) 42.

South Carolina.— *Compare* Farmer *v.* Frey, 4 McCord (S. C.) 160.

Tennessee.—Moore *v.* Webb, 6 Heisk. (Tenn.) 301.

Virginia.— Wheatley *v.* Martin, 6 Leigh (Va.) 62.

See ABATEMENT AND REVIVAL, III [1 Cyc. 47].

The death of one of several plaintiffs in a cause referred, by rule of court, to referees is not a revocation of the authority of the referees. A suggestion of such death may be entered upon the record. Freeborn *v.* Denman, 8 N. J. L. 116. *Compare* ABATEMENT AND REVIVAL, III, B, 7, f [1 Cyc. 91].

31. *Illinois.*— Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

Kentucky.— Peters *v.* Craig, 6 Dana (Ky.) 307.

New Hampshire.— Kimball *v.* Gilman, 60 N. H. 54.

New Jersey.— Knaus *v.* Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237.

Pennsylvania.— Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 529, 2 Am. St. Rep. 562.

Vermont.— *Contra,* Sutton *v.* Tyrrell, 10 Vt. 91.

See 4 Cent. Dig. tit. "Arbitration and Award," § 69.

As to right to institute suit pending submission see *supra,* II, C, 2.

Proceedings to enforce mechanic's lien.— In Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95], it was held that, where a mechanic's lien had been submitted to arbitration, proceedings to enforce the lien, instituted before the award, were a revocation of the agreement to arbitrate.

32. Marseilles *v.* Kenton, 17 Pa. St. 238; Bailey *v.* Stewart, 3 Watts & S. (Pa.) 560, 39 Am. Dec. 50; Abbott *v.* Keith, 11 Vt. 525; Sutton *v.* Tyrrell, 10 Vt. 91; Bacon Abr. tit. Baron and Feme, E; Andrews *v.* Palmer, 4 B. & Ald. 250, 23 Rev. Rep. 267, 6 E. C. L. 471; McCan *v.* O'Ferrall, 3 Cl. & F. 30; Comyns Dig. tit. Arbitration, D, 5; Charnley *v.* Winstanley, 5 East 266; Samin *v.* Norton, 3 Keb. 9. See also, generally, HUSBAND AND WIFE.

33. *Illinois.*— Michigan Ave. M. E. Church *v.* Hearson, 41 Ill. App. 89.

c. Manner of Revocation. Revocations are express or in fact, or they are implied or in law.[34]

d. Requisites of Revocation. The express revocation of a submission must be of equal dignity with the submission. Thus, a submission by deed can be revoked only by deed;[35] a submission in writing by a revocation in writing.[36] An oral submission may be orally revoked.[37]

2. By Court. Where a submission to arbitration is made by rule of court, the court may rescind such rule either for good cause appearing to itself, though neither party request it, or on motion of either party, on good cause shown.[38]

Maine.— Chapman *v.* Seccomb, 36 Me. 102.
Massachusetts.— See Cavanagh *v.* Dooley, 6 Allen (Mass.) 66.
Missouri.— Donnell *v.* Lee, 58 Mo. App. 288.
New Hampshire.— Kimball *v.* Gilman, 60 N. H. 54; Dinsmore *v.* Hanson, 48 N. H. 413.
Tennessee.— Brown *v.* Welcker, 1 Coldw. (Tenn.) 197.
Texas.— Johnson *v.* Cheney, 17 Tex. 336.
See 4 Cent. Dig. tit. "Arbitration and Award," § 110.

34. Express revocations are made by the party. Sutton *v.* Tyrrell, 10 Vt. 91. And the question is one for the jury. Hunt *v.* Guilford, 4 Ohio 310. See *supra*, II, I, 1, a, b.
Implied revocations arise from the legal effect and necessary consequence of some intervening event, either providential or caused by the party, necessarily putting an end to the business. Sutton *v.* Tyrrell, 10 Vt. 91. See *supra*, II, I, 1, b.

35. *Maine.*— Brown *v.* Leavitt, 26 Me. 251.
Massachusetts.— Wallis *v.* Carpenter, 13 Allen (Mass.) 19.
New Hampshire.— Dexter *v.* Young, 40 N. H. 130.
New York.— Jacoby *v.* Johnston, 1 Hun (N. Y.) 242; Howard *v.* Cooper, 1 Hill (N. Y.) 44; Van Antwerp *v.* Stewart, 8 Johns. (N. Y.) 125.
Tennessee.— Mullins *v.* Arnold, 4 Sneed (Tenn.) 261; Evans *v.* Cheek, 3 Hayw. (Tenn.) 42.
Vermont.— Sutton *v.* Tyrrell, 10 Vt. 91.
Wisconsin.—McFarlane *v.* Cushman, 21 Wis. 401.
England.— King *v.* Joseph, 5 Taunt. 452, 1 E. C. L. 236. *Compare* Vynior's Case, 8 Coke 81*b*.
See 4 Cent. Dig. tit. "Arbitration and Award," § 72.
Form of revocation is set out in Frets *v.* Frets, 1 Cow. (N. Y.) 335.
It is sufficient if enough appear in the instrument of revocation to show an intention to revoke, although it is not declared in terms that the party revokes the submission. Frets *v.* Frets, 1 Cow. (N. Y.) 335. But a mere expression of a determination not to stand to the agreement will not put an end to a submission. Brown *v.* Welcker, 1 Coldw. (Tenn.) 197. The revocation, too, must not be coupled with any conditions. Goodwine *v.* Miller, 32 Ind. 419.
Notice to arbitrators.— A revocation is not effective until the arbitrators have been duly notified thereof. Brown *v.* Leavitt, 26 Me. 251; Allen *v.* Watson, 16 Johns. (N. Y.) 205.
Request for delay of decision.— In Keyes *v.* Fulton, 42 Vt. 159, it was held that an agreement between the attorneys of the parties to exchange briefs before the award should be made, and the failure of one of the attorneys to comply with the agreement, together with a letter from the attorney of the other party requesting a delay of the decision on this ground, did not constitute a revocation of the submission.

36. *Indiana.*—Shroyer *v.* Bash, 57 Ind. 349; Maud *v.* Patterson, 19 Ind. App. 619, 49 N. E. 974.
Maine.— Brown *v.* Leavitt, 26 Me. 251.
Massachusetts.— Wallis *v.* Carpenter, 13 Allen (Mass.) 19.
New York.—Under N. Y. Code Civ. Proc. § 2383, a revocation of any arbitration must be by an instrument in writing, signed by the revoking party. New York Lumber, etc., Co. *v.* Schneider, 15 Daly (N. Y.) 15, 1 N. Y. Suppl. 441, 16 N. Y. St. 698, 15 N. Y. Civ. Proc. 30. See also Relyea *v.* Ramsay, 2 Wend. (N. Y.) 602.
Pennsylvania.—Shisler *v.* Keavy, 75 Pa. St. 79; Dickerson *v.* Rorke, 30 Pa. St. 390.
Tennessee.— Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.
Vermont.— Keyes *v.* Fulton, 42 Vt. 159; Sutton *v.* Tyrrell, 10 Vt. 91.
Wisconsin.— McFarlane *v.* Cushman, 21 Wis. 401.

37. Dexter *v.* Young, 40 N. H. 130; Sutton *v.* Tyrrell, 10 Vt. 91.

38. *Alabama.*— Shelby Iron Co. *v.* Cobb, 55 Ala. 636.
Massachusetts.— Cowley *v.* Dobbins, 131 Mass. 327.
New Hampshire.— Dexter *v.* Young, 40 N. H. 130.
New York.— Ensign *v.* St. Louis, etc., R. Co., 62 How. Pr. (N. Y.) 123.
North Carolina.— Tyson *v.* Robinson, 25 N. C. 333.
Pennsylvania.— Zehner *v.* Lehigh Coal, etc., Co., 187 Pa. St. 487, 43 Wkly. Notes Cas. (Pa.) 147, 41 Atl. 464, 67 Am. St. Rep. 586; Millar *v.* Criswell, 3 Pa. St. 449; Swope *v.* McComsey, 8 Pa. Dist. 373.
West Virginia.— Pendleton *v.* Barton, 4 W. Va. 496.
England.— East, etc., India Dock Co. *v.* Kirk, 12 App. Cas. 738, 57 L. J. Q. B. 295, 58

3. Effect of Revocation. The general effect of a revocation is to place the parties in the position they occupied prior to the submission, and to vitiate any subsequent proceedings by the arbitrators.[39]

J. Making Submission Rule of Court[40] **— 1. Consent of Parties.** A submission to arbitration cannot be made a rule of court without the consent of the parties thereto.[41]

2. Necessity of Entry of Rule. A submission to arbitration, whether in a controversy out of court or in a controversy pending in court, must be made a rule of court in order to have judgment entered on the award.[42] It has been held,

L. T. Rep. N. S. 158; *In re* Woodcroft, 9 Dowl. P. C. 538, 5 Jur. 771.

See 4 Cent. Dig. tit. "Arbitration and Award," § 76; and *supra*, II, I, 1, a, (II).

39. *Alabama.*—Wolff *v.* Shelton, 51 Ala. 425.

Connecticut.— Rowley *v.* Young, 3 Day (Conn.) 118; Castle *v.* Peirce, 2 Root (Conn.) 294; Belton *v.* Halsey, 1 Root (Conn.) 221.

Illinois.— Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95]; Burnside *v.* Potts, 23 Ill. 411.

Maine.— Chapman *v.* Seccomb, 36 Me. 102.

New York.— Schepp *v.* Manley, 59 Hun (N. Y.) 440, 13 N. Y. Suppl. 728, 36 N. Y. St. 991; Graham *v.* James, 7 Rob. (N. Y.) 468; Grosvenor *v.* Hunt, 11 How. Pr. (N. Y.) 355; Allen *v.* Watson, 16 Johns. (N. Y.) 205.

Pennsylvania.—Wood *v.* Finn, 1 Pa. L. J. Rep. 396.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11; Aspinwall *v.* Tousey, 2 Tyler (Vt.) 328.

United States.— Sangster *v.* Quantrill, 1 Hayw. & H. (U. S.) 18, 21 Fed. Cas. No. 12,321.

See 4 Cent. Dig. tit. "Arbitration and Award," § 73.

If the parties to a submission agree that judgment may be entered on the report, the court may proceed to trial, though the submission be revoked. *Ex p.* Wright, 6 Cow. (N. Y.) 399.

Resubmission after award — Effect of revocation.— Where a pending action was submitted to arbitration, and an award made unsatisfactory to both parties, upon which they agreed to resubmit the matters in dispute, it was held that the second submission implied and contained in it an agreement to set aside the first award and a mutual release of either party absolutely from any obligation to abide such award, though one of the parties revoked the power of the arbitrators before a second award was made. Castle *v.* Peirce, 2 Root (Conn.) 294. To like effect see Burnside *v.* Potts, 23 Ill. 411.

40. At common law a rule of court to stand to a submission and award was a rule entered in some one of the courts at Westminster, where the record and pleadings in the cause were made up. Simpson *v.* McBee, 14 N. C. 454.

Justices' courts.— In Indiana the statutes regulating arbitrations and defining the powers of justices of the peace do not authorize a submission to arbitration to be made a rule of court in the court of a justice of the peace, nor empower a justice to render judgment on an award. Hollingsworth *v.* Stone, 90 Ind. 244; Richardson *v.* Reed, 39 Ind. 330.

41. *California.*—Pieratt *v.* Kennedy, 43 Cal. 393.

Florida.— Coxetter *v.* Huertas, 14 Fla. 270.

Illinois.— A verbal submission to arbitrators cannot be made a rule of court, nor can judgment be entered on the award. Smith *v.* Douglass, 16 Ill. 34.

Indiana.— Hawes *v.* Coombs, 34 Ind. 455; Estep *v.* Larsh, 16 Ind. 82; Coffin *v.* Woody, 5 Blackf. (Ind.) 423.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

Minnesota.— Minneapolis, etc., R. Co. *v.* Cooper, 59 Minn. 290, 61 N. W. 143.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333.

Pennsylvania.—Where an action pending in court is referred to arbitration, the consent of the parties that the submission shall be made a rule of court will be implied if there be no contradictory provision. Brendlinger *v.* Yeagley, 53 Pa. St. 464; Buckman *v.* Davis, 28 Pa. St. 211; Ford *v.* Keen, 13 Pa. St. 179; McAdams *v.* Stilwell, 13 Pa. St. 90.

Canada.—A consent to make a submission a rule of court must be contained in the submission itself. *In re* Thirkell, 2 U. C. Q. B. 173.

See 4 Cent. Dig. tit. "Arbitration and Award," § 52.

An application to make the agreement a rule of court is granted on the production and proving the execution of the bond by which the consent of the party appears. *Ex p.* Wallis, 6 Cow. (N. Y.) 581; Knight *v.* Carey, 1 Cow. (N. Y.) 39; Rudd *v.* Coe, Barnes 55.

42. *Alabama.*— Bell *v.* Sampey, 80 Ala. 372; Dudley *v.* Farris, 79 Ala. 187; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Halsill *v.* Massey, 2 Ala. 300; Lamar *v.* Nicholson, 7 Port. (Ala.) 158; Davis *v.* McConnell, 3 Stew. (Ala.) 492.

California.— Kettleman *v.* Treadway, 65 Cal. 505, 4 Pac. 506; Pieratt *v.* Kennedy, 43 Cal. 393; Ryan *v.* Dougherty, 30 Cal. 218; Heslep *v.* San Francisco, 4 Cal. 1.

Florida.— O'Bryan *v.* Reed, 2 Fla. 448.

Georgia.— To entitle an award to be made the judgment of the court it must appear that the submission was made under the statute. Crane *v.* Barry, 47 Ga. 476.

Kansas.—Weir *v.* West, 27 Kan. 650; An-

however, in the case of a submission in a pending action not made a rule of court, that allowing the award to be entered as the judgment of the court, without objection, amounts to a confession of judgment for the sum found due by the award.[43]

3. TIME OF ENTRY OF RULE. A submission to arbitration may be made a rule of court after an award is made.[44]

K. Arbitration Bonds and Notes — 1. ARBITRATION BONDS. Common-law awards, made out of court, being non-enforceable save by action, it became customary for parties entering upon an arbitration to execute bonds, conditioned for the submission to arbitration and for the performance of the award. They are also authorized by the various arbitration statutes, and both at common law and under such statutes receive a liberal construction.[45]

derson *v.* Beebe, 22 Kan. 768; Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Kentucky.— Carson *v.* Carson, 1 Metc. (Ky.) 434; Hay *v.* Cole, 11 B. Mon. (Ky.) 70.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

Massachusetts.— Eaton *v.* Arnold, 9 Mass. 519.

Minnesota.— Minneapolis, etc., R. Co. *v.* Cooper, 59 Minn. 290, 61 N. W. 143.

Mississippi.— *Compare* Wear *v.* Ragan, 30 Miss. 83.

New Jersey.—Sherron *v.* Wood, 10 N. J. L. 7.

New York.— See Camp *v.* Root, 18 Johns. (N. Y.) 22.

North Carolina.— Knight *v.* Holden, 104 N. C. 107, 10 S. E. 90; Moore *v.* Austin, 85 N. C. 179; Simpson *v.* McBee, 14 N. C. 454.

Pennsylvania.— Stokely *v.* Robinson, 34 Pa. St. 315; Marshall *v.* Bozorth, 17 Pa. St. 409; Benjamin *v.* Benjamin, 5 Watts & S. (Pa.) 562; Okison *v.* Flickinger, 1 Watts & S. (Pa.) 257.

South Carolina.— Parnell *v.* King, 1 Rice (S. C.) 376. *Compare* McCall *v.* McCall, 36 S. C. 80, 15 S. E. 348.

West Virginia.— See Tennant *v.* Divine, 24 W. Va. 387.

England.— Clarke *v.* Baker, 1 Hurl. & W. 215.

See 4 Cent. Dig. tit. "Arbitration and Award," § 53.

Enlargement of time for making award.— When the time for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by judge's order, should be made a rule of court as well as the original submission. Masecar *v.* Chambers, 4 U. C. Q. B. 171.

43. Thompson *v.* Greene, 85 Ala. 240, 4 So. 735; Townsend *v.* Moore, 13 Tex. 36. See also Wilson *v.* Williams, 66 Barb. (N. Y.) 209; Green *v.* Patchen, 13 Wend. (N. Y.) 293; Yates *v.* Russell, 17 Johns. (N. Y.) 461; Buckman *v.* Davis, 28 Pa. St. 211; and *infra*, XI, E, 2, a.

44. McClure *v.* Gulick, 17 N. J. L. 340; Hazen *v.* Addis, 14 N. J. L. 333; *Ex p.* Vasques, 5 Cow. (N. Y.) 29; Shermer *v.* Beale, 1 Wash. (Va.) 11; Pownall *v.* King, 6 Ves. Jr. 10; Chicot *v.* Lequesne, 2 Ves. 315. See also California Academy of Sciences *v.* Fletcher, 99 Cal. 207, 33 Pac. 855, wherein it was held that, where there is a full entry of everything required by the statute at the time of the entry of judgment upon the award, there is jurisdiction to enter the judgment. But see Steel *v.* Steel, 1 Nev. 27, wherein it was held that a judgment on an award under the statute is invalid where a submission, signed by all the parties, is not filed and a note of all that the statute requires is not made before the filing of the award.

45. *Connecticut.*— Bundy *v.* Sabin, 1 Root (Conn.) 411.

Indiana.— Madison Ins. Co. *v.* Griffin, 3 Ind. 277; Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Louisiana.— Hunt *v.* Zuntz, 28 La. Ann. 500; Thompson *v.* Moulton, 20 La. Ann. 535.

Maine.— Tyler *v.* Dyer, 13 Me. 41.

Maryland.—Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412.

Massachusetts.— Cutter *v.* Whittemore, 10 Mass. 442.

Michigan.— James *v.* Schroeder, 61 Mich. 28, 27 N. W. 850; Clement *v.* Comstock, 2 Mich. 359.

Minnesota.—Washburne *v.* Lufkin, 4 Minn. 466.

New Hampshire.— Shaw *v.* Hatch, 6 N. H. 162.

New York.— Hughes *v.* Bywater, 4 Hill (N. Y.) 551.

North Carolina.— Pass *v.* Critcher, 112 N. C. 405, 17 S. E. 9; Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167; Kesler *v.* Kerns, 50 N. C. 191.

Ohio.—Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

South Carolina.— Greenwood Assoc. *v.* Sullivan, 1 Strobh. (S. C.) 450.

See 4 Cent. Dig. tit. "Arbitration and Award," § 57 *et seq.*

As to action on bond see *infra*, XI, B.

Amount beyond court's jurisdiction.— A bond, given as security for performance of an award in an action which involved an amount beyond the court's jurisdiction, may be enforced even though judgment entered on the award has been reversed. Slocum *v.* Taylor, 8 Serg. & R. (Pa.) 399 [*distinguishing* McKillip *v.* McKillip, 2 Serg. & R. (Pa.) 489].

2. ARBITRATION NOTES. A submission to arbitration is a good consideration for an arbitration note, and such a note is valid.[46]

III. THE ARBITRATORS.

A. Competency — 1. STATUTORY RESTRICTIONS. Any person may be selected to act as an arbitrator who is not prohibited from so acting by an express provision of a statute[47] or by reasons of public policy.[48]

2. FACTS AFFECTING IMPARTIALITY. The existence of any facts which may operate to affect the impartiality of arbitrators will render such arbitrators incompetent to make a valid award, provided such facts were unknown to the complaining party[49] — such as an interest of an arbitrator in the subject-matter of the contro-

Escrow of arbitration bond.— A mutual bond to abide the result of a common-law arbitration, placed in the hands of a third party, to be delivered up only on request of both parties, has been held enforceable although never delivered by such party, and although the losing party never requested it, but objected to its delivery, the bond appearing to have been "executed and delivered as the deed of each, to be an available security to whichever of them should have occasion to try its legal efficacy." Tyler *v.* Dyer, 13 Me. 41, 46.

46. Towne *v.* Jaquith, 6 Mass. 46, 4 Am. Dec. 84; Page *v.* Pendergast, 2 N. H. 233; Battey *v.* Button, 13 Johns. (N. Y.) 187; Woodrow *v.* O'Conner, 28 Vt. 776; Bagley *v.* Wiswall, Brayt. (Vt.) 23.

A note given by an executor, on the submission to arbitration of a claim against his testator, does not bind him personally. He is only liable on it to the extent of the assets in his hands. Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301.

47. A woman, either married or single, is not incapacitated to act as arbitrator by reason of any common-law disability. Evans *v.* Ives, 15 Phila. (Pa.) 635, 38 Leg. Int. (Pa.) 393.

A statutory prohibition against judicial officers acting in any cause or proceeding in which they may be interested or related to either party does not apply to arbitrators if the parties, with knowledge of the interest or relationship, see fit to select them, since the reason of the statute rests upon the principle that the parties are drawn against their consent before judges, while arbitrators are voluntarily selected by the parties. Davis *v.* Forshee, 34 Ala. 107.

In Michigan a statute which prohibited any judge from practising, or having a partner who practises in the court for which he is a judge, has been held to be peremptory and applicable to arbitration proceedings. Gallagher *v.* Kern, 31 Mich. 138.

See 4 Cent. Dig. tit. "Arbitration and Award," § 137 *et seq.*

48. Judge self-appointed as arbitrator.— Under a statute permitting a submission to be filed with a court who is authorized to appoint arbitrators and enter judgment on the award, it has been held that the judge may not, in his judicial capacity, confer jurisdiction upon himself to act as an arbitrator. Drew *v.* Canady, 1 Mass. 158; Drew *v.* Mulikin, 5 N. H. 153. The contrary has been held where the statute authorizes the parties to nominate their own arbitrators, and the judges of the court are nominated. Hopkins *v.* Sodouskie, 1 Bibb (Ky.) 148; Galloway *v.* Webb, Hard. (Ky.) 318.

Failure to object on the ground of the incompetency of one of the arbitrators, because he was a judge of the court in which the award was entered, until after the cause was brought to the supreme court and final judgment rendered, has been held a sufficient waiver of the alleged incompetency to act as arbitrator. Sharp *v.* Loyless, 39 Ga. 678.

49. Arbitrators analogous to jurors.— The "arbitrators are said to be not only the judges, but the jurors, of the parties' own selection, chosen, it is supposed, for their disinterestedness. their intelligence, and moral fitness. Whatever, then, may be regarded as a good ground of objection to a juror, ought to obtain when urged against an arbitrator." Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370, 379. But see Shear *v.* Mosher, 8 Ill. App. 119, 124, wherein the court said: "It is the duty of an arbitrator, as of a juror or judge, to keep himself, as far as possible, free from any influence that would lead to impair his impartiality or expose him to the suspicion of prejudice. . . . The effect, however, of misconduct of an arbitrator upon an award may not be the same as that of a juror upon a verdict, for several reasons. He is voluntarily selected by the parties to the controversy, who are therefore estopped to complain of prejudice previously and honestly imbibed without fraud of the adverse party. A longer interval of time usually occurs between his selection and his service, subjecting him to greater exposure. And he is not specially advised of his duty and restrained in his conduct by the direction and authority of a court. Hence a greater latitude is to be expected and tolerated in his case than in that of a juror."

Lack of knowledge or information concerning the qualifications of arbitrators is not sufficient evidence of unfitness. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

An arbitrator can be restrained by injunction from acting in any case in which he is, in the opinion of the court, unfit or incompetent to act. Beddow *v.* Beddow, 9 Ch. D.

versy,[50] relationship of an arbitrator to one of the contending parties,[51] prejudgment, by an arbitrator, of the controversy before the hearing,[52] or business con-

89, 47 L. J. Ch. 588, 26 Wkly. Rep. 570; Malmesbury R. Co. *v.* Budd, 2 Ch. D. 113, 45 L. J. Ch. 271. See, generally, INJUNCTIONS.

50. Interest in controversy.— *Massachusetts.*— Strong *v.* Strong, 12 Cush. (Mass.) 135.

North Carolina.—Pearson *v.* Barringer, 109 N. C. 398, 13 S. E. 942.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.— Connor *v.* Simpson, (Pa. 1886) 7 Atl. 161.

England.—Kemp *v.* Rose, 1 Giff. 258; Earle *v.* Stocker, 2 Vern. 251.

Canada.— Vineberg *v.* Guardian F., etc., Assur. Co., 19 Ont. App. 293.

An engineer who is a stock-holder in a railroad company is, if the fact of his being a stock-holder was unknown, incompetent to act as arbitrator upon disputes arising between the company and contractors, although the fact that he was employed as engineer by the company was known to the contractors. Milnor *v.* Georgia R., etc., Co., 4 Ga. 385. But see *In re* Elliott, etc., R. Co., 2 De G. & Sm. 17, 12 Jur. 445.

Bet of arbitrator on horse-race submitted. — It has been held that an award of stewards (who, by the rules of the association, were to be the arbitrators of all such disputes), upon a dispute as to the result of a horse-race, against a horse against which one of them had placed a bet, was not invalid on the ground that one of them was an interested arbitrator. Ellis *v.* Hooper, 3 H. & N. 766, 4 Jur. N. S. 1025, 28 L. J. Exch. 1, 7 Wkly. Rep. 15.

Indebtedness of an arbitrator to one of the parties is not, of itself, a sufficient objection to the award upon the ground of interest in the controversy (Wallis *v.* Carpenter, 13 Allen (Mass.) 19; Morgan *v.* Morgan, 1 Dowl. P. C. 611, 2 L. J. Exch. 56; Hall *v.* Wilson, 7 U. C. C. P. 272), especially if it appear that the indebtedness was small, not insecure, and not dependent, to any extent, on the result of the controversy (Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315).

Mortgage, upon the furniture of an arbitrator, held by one of the parties does not, of itself, show such an interest in the controversy as to affect the competency of the arbitrator or the validity of the award. Mather *v.* Day, 106 Mich. 371, 64 N. W. 198.

Termination of interest.— Where, without the knowledge of the complaining party, one of two arbitrators was interested in the subject-matter of the controversy, and they failed to agree, gave notice to the parties thereof, and thereupon, after the interest of the arbitrator had ceased, a new agreement was made adding another arbitrator, with authority to make a majority award, it was held that the arbitrator was not disqualified to act under the subsequent agreement by reason of his interest, although the losing party did not obtain knowledge of such interest until after the award was made. Wilson *v.* Concord R. Co., 3 Allen (Mass.) 194.

51. Kinship of arbitrator.— Stinson *v.* Davis, 20 Ky. L. Rep. 1942, 50 S. W. 550; Brown *v.* Leavitt, 26 Me. 251.

Equal relationship to both parties does not affect the competency of an arbitrator selected to settle a dispute between them. Matter of McGregor, 13 N. Y. Suppl. 191, 35 N. Y. St. 907.

Relationship interest of third party.— The fact that one of the arbitrators is related to the mortgagee of land, compensation for the taking of which by a railroad company was the subject of the arbitration, disqualifies such arbitrator to act if it appears that the railroad company had no knowledge of the existence of the mortgage or of the effect of such relationship. Stephenson *v.* Oatman, 3 Lea (Tenn.) 462.

Remote relationship.— The fact that an arbitrator was related to an officer of a company which was one of the contending parties has been held no sufficient objection to the validity of the award. Benning *v.* Atlantic, etc., R. Co., 34 L. C. Jur. 301, 6 Montreal Q. B. 385, 5 Montreal Super. Ct. 136 [*affirmed* in 20 Can. Supreme Ct. 177].

Transfer to an arbitrator's son, pending proceedings, of the interest of one of the parties in the subject-matter of the controversy, disqualifies such arbitrator to make an award unless the parties, with knowledge of the transaction, consent to the further action of the arbitrator; and the award cannot be upheld by showing that the fact did not change or affect his judgment. Spearman *v.* Wilson, 44 Ga. 473.

52. Prejudgment of arbitrator.— *Massachusetts.*— Conrad *v.* Massasoit Ins. Co., 4 Allen (Mass.) 20.

New Hampshire.— Beattie *v.* Hilliard, 55 N. H. 428.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Rhode Island.— Bowen *v.* Steere, 6 R. I. 251.

United States.— Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720.

An opinion expressed five years before the arbitration has, in the absence of a showing that the same opinion was entertained by the arbitrator at the hearing, been held not sufficient to impeach the award upon the ground of partiality. Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510.

An opinion which has been changed by the evidence cannot be taken as an imputation of unfairness or partiality of an arbitrator. Tyler *v.* Dyer, 13 Me. 41.

An opinion unknown to the successful party, expressed by an arbitrator prior to the hearing as to the merits of the controversy, is not sufficient evidence of partiality upon which to avoid the award. Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

Opinion upon true knowledge of the facts.

nections between an arbitrator and a party which are calculated to influence the judgment of the arbitrator upon the matter submitted.[53]

3. WAIVER OF INCOMPETENCY. Notwithstanding the existence of facts which may influence the judgment of an arbitrator, if a party, with knowledge of such facts, submits his case to the decision of such person, the objection is waived,[54]

— Where it was objected that an arbitrator had expressed an opinion before hearing the controversy, and it appeared that, before the arbitrator was appointed, the successful party had honestly stated to him the principal facts in the case upon which the arbitrator had expressed an opinion, and the proposition was one with reference to which few men, upon the facts, would differ, and it did not appear that, by reason of such previous opinion, any injury had been done or could have been done, and there was nothing to show that the arbitrator had acted partially, the court on appeal refused to disturb the judgment of the lower court upholding the award. Morville *v.* The American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

Previous opinion which the facts could not change.— Where it appeared that the facts before the arbitrators were undisputed and that the award thereon could not have been different without violating the law applicable to the facts, it was held that the forming of an opinion by one of the arbitrators before the hearing as to the merits of the controversy, from his knowledge thereof, would not invalidate the award. Graves *v.* Fisher, 5 Me. 69, 17 Am. Dec. 203.

53. Employment of an arbitrator by one of the parties in a capacity not in any way related to the subject-matter of the arbitration has been held not to affect the competency of the arbitrator unless it could also be shown that such fact resulted in bias or partiality favorable to the employer. Eckersley *v.* Mersey Docks, etc., Board, [1894] 2 Q. B. 667, 9 Reports 827, 71 L. T. Rep. N. S. 308; Ives *v.* Williams, [1894] 2 Ch. 478, 63 L. J. Ch. 521, 70 L. T. Rep. N. S. 674, 7 Reports 243, 42 Wkly. Rep. 483; Jackson *v.* Barry R. Co., [1893] 1 Ch. 238, 2 Reports 207, 68 L. T. Rep. N. S. 472; North Shore R. Co. *v.* Ursuline Ladies of Quebec, (Can. Supreme Ct. 1885) Cassels Dig. 37 [*confirming* (Q. B. 1884) 19 R. L. 614]; Rowand *v.* Martin, 7 Manitoba 160; Rowand *v.* Railway Commissioner, 6 Manitoba 401.

Regular employment as solicitor of the estate of which one of the parties was executor was held sufficient to disqualify an arbitrator, although he was not engaged as attorney or counsel in the matter in controversy and did not concur in the award. Sumner *v.* Barnhill, 12 Nova Scotia 501.

Former employment, as counsel in another matter, of an arbitrator by one of the parties in whose favor he made the award, although the fact was not known to the other party, has been held not sufficient, of itself, to establish incompetency. Goodrich *v.* Hulbert, 123 Mass. 190, 25 Am. Rep. 60.

Acting as counsel in a similar matter between other parties does not, as a matter of law, disqualify a person to act as arbitrator, in the absence of a showing as a matter of fact that he was biased or partial. Cheney *v.* Martin, 127 Mass. 304.

Prior services as arbitrator in similar matters for the same party in whose favor he makes an award does not, necessarily, render an arbitrator incompetent. Stemmer *v.* Scottish Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

Subsequent selection as arbitrator in other similar proceedings by the successful party is not legal ground of objection to the validity of an award. Benning *v.* Atlantic, etc., R. Co., 34 L. C. Jur. 301, 6 Montreal Q. B. 385, 5 Montreal Super. Ct. 136 [*affirmed* in 20 Can. Supreme Ct. 177].

Being a witness in a similar matter for one of the parties does not establish the incompetency of the person to act as arbitrator. Haigh *v.* London, etc., R. Co., [1896] 1 Q. B. 649, 65 L. J. Q. B. 511, 74 L. T. Rep. N. S. 655, 44 Wkly. Rep. 618.

An agent of one of the parties is incompetent to act as arbitrator where the submission to arbitration was procured by a representation that the person named was a disinterested person. Bradshaw *v.* Agricultural Ins. Co., 16 N. Y. Suppl. 639, 42 N. Y. St. 79.

54. Knowledge of facts before submission. — *Illinois.*— Hubbard *v.* Hubbard, 61 Ill. 228.

Indiana.— Indiana Ins. Co. *v.* Brehm, 88 Ind. 578; Cones *v.* Vanosdol, 4 Ind. 248; Hough *v.* Beard, 8 Blackf. (Ind.) 158.

Kentucky.— Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935.

Massachusetts.— Fox *v.* Hazelton, 10 Pick. (Mass.) 275.

Mississippi.— Estice *v.* Cockerell, 26 Miss. 127.

North Carolina.—Pearson *v.* Barringer, 109 N. C. 398, 13 S. E. 942.

Ohio.—Robb *v.* Brachman, 38 Ohio St. 423; Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Oregon.— Stemmer *v.* Scottish Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

Pennsylvania.— Monongahela Nav. Co. *v.* Fenlon, 4 Watts & S. (Pa.) 205.

Tennessee.— Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

England.— Matthew *v.* Ollerton, Comb. 218, 4 Mod. 226; *In re* Clout, etc., R. Co., 46 L. T. Rep. N. S. 141.

Evidence of knowledge of incompetency — Constructive notice from records not applica-

and the same rule obtains where a party has agreed to submit to arbitration without knowledge of such facts, and afterward, during the progress of the hearing, obtains knowledge thereof and proceeds, without objection, to the making of an award.[55]

B. Appointment. Unless the appointment of arbitrators is made in the agreement of submission[56] it is essential to their authority that further action appointing persons to act as arbitrators should be taken either in accordance with the agreement to arbitrate[57] or in accordance with the provisions of a statutory requirement.[58] But, independent of the agreement to submit and of a subsequent appointment, if the parties attend proceedings before persons acting as arbitrators without objecting to their authority, this, in itself, operates as a sufficient appointment or waiver of an irregularity therein;[59] and, by subsequent agreement of

ble.— Where the sufficiency of an award was questioned on the ground of interest of an arbitrator by reason of the fact that he was related to a mortgagee of the land, damages for the taking of which by a railroad company was the subject of arbitration, and of which mortgage the company did not have actual notice at the time of the submission to arbitration, it was held that the company could not be charged, constructively, with notice of such mortgage, because it had been duly recorded, so as to hold that the company, with notice of the facts, had waived the objection to the incompetency of the arbitrator. Stephenson *v.* Oatman, 3 Lea (Tenn.) 462.

Notice to directors of a corporation.—Where an award is questioned on the ground of interest of an arbitrator because he was a stockholder of the other party, and the other party seeks to establish a waiver of the disqualification by showing that the first party had notice of the fact objected to, the fact of notice is not established by evidence that such arbitrator, a year prior to the submission, in the presence of a director of the party sought to be charged with notice, mentioned the fact of his being such stock-holder while discussing an entirely different transaction. Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, 17 Atl. 394.

Knowledge of incompetency may be presumed, in the absence of a distinct averment to the contrary, in order to uphold an award. Ledlie *v.* Gamble, 35 Mo. App. 355.

55. Knowledge of facts after submission. — Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315; Brown *v.* Leavitt, 26 Me. 251; Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, 17 Atl. 394; Leitch *v.* Miller, 40 Mo. App. 180.

Limits and extent of rule.— However, although a waiver of incompetency may be established as before stated, such arbitrator is not thereby invested with authority to act partially; and the courts, by reason of the existence of facts which would naturally influence the judgment, will closely scrutinize an award made by such arbitrator. Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 26 N. Y. St. 445, 15 Am. St. Rep. 376.

56. For sufficiency of appointment by agreement to submit to arbitration see *supra*, II, F, 8, e.

As to appointment of umpire or special arbitrator see *infra*, V, B.

57. Appointment by third party — Action of majority.— The committee of an association who are authorized, by an agreement of parties, to select and appoint arbitrators to settle matters in dispute between them may, unless otherwise provided in the agreement, make such an appointment by action of their majority. Burleigh *v.* Ford, 61 N. H. 360.

Refusal by one of the parties to appoint arbitrators prevents an arbitration under the agreement. The remedy for such refusal is for breach of the contract. Williams *v.* Schmidt, 54 Ill. 205; Copper *v.* Wells, 1 N. J. Eq. 10.

Refusal to appoint after void award.— After the return of an award which is void, or after the arbitrators have become incompetent to act and one of the parties refuses to agree to a new selection of arbitrators, the other party may sue at law for the amount of his demand. New York *v.* Butler, 1 Barb. (N. Y.) 325.

Indorsement of acceptance on the agreement for arbitration, by an arbitrator upon his appointment as provided by such agreement, has been held not to be an essential prerequisite to the exercise of his authority. Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

58. Statutory requirements.— Jones *v.* Bond, 76 Ga. 517; Eyre *v.* Leicester, [1892] 1 Q. B. 136, 56 J. P. 228, 61 L. J. Q. B. 438, 65 L. T. Rep. N. S. 733, 40 Wkly. Rep. 203; Brazilian Submarine Tel. Co. *v.* Western, etc., Tel. Co., 42 L. T. Rep. N. S. 234.

A greater or less number of arbitrators than that provided by statute, appointed by the parties to a submission, will prevent the award from being enforced in the special manner provided by statute, although it may be valid at common law. Price *v.* Byne, 57 Ga. 176; Martine *v.* Harvey, 12 Ill. App. 587; Bowes *v.* French, 11 Me. 182; Myers *v.* Easterwood, 60 Tex. 107.

As to the enforcement at common law of an award which does not follow the provisions of a statute providing a summary remedy see *infra*, XI, E, 2, c.

59. Failure to object as waiver.— Brewer *v.* Bain, 60 Ala. 153; Hays *v.* Hays, 23 Wend. (N. Y.) 363; Harcourt *v.* Ramsbottom, 1 Jac. & W. 505.

the parties, the controversy may be submitted to a different number of arbitrators from that originally agreed upon.[60]

C. Substitution. Persons other than those originally appointed, in the submission, as arbitrators may be substituted, under the same submission, by subsequent agreement of the parties;[61] but not by one of the parties without the consent of the other,[62] nor by the arbitrators originally appointed unless in accordance with an express authority to them in the submission,[63] or in accordance with the provisions of a statute under which the proceedings are taken;[64] nor by

60. **Subsequent agreement of parties.**— Blanchard *v.* Murray, 15 Vt. 548.

61. **Indorsement on submission.**—An agreement of the parties to substitute arbitrators, which is indorsed on the original submission with express reference to the contents thereof, is obligatory upon the parties and constitutes sufficient authority in the substituted arbitrators to act under the original submission. McClure *v.* Gulick, 17 N. J. L. 340.

Indorsement, on submission under seal, of an agreement to substitute arbitrators with reference to the contents of the submission does not admit of the objection to an award by the substituted arbitrators that the indorsement was not under seal. Tunno *v.* Bird, 5 B. & Ad. 488, 3 L. J. K. B. 5, 2 N. & M. 328, 27 E. C. L. 209. See also Rone *v.* Hines, 7 Ky. L. Rep. 94.

Evidence of agreement to substitute.— In an arbitration under rule of court, if an entry is made of record of the substitution of an arbitrator, and the parties proceed before such substituted arbitrator without objection, this is sufficient evidence upon which to base a finding of an agreement to substitute. Chapman *v.* Ewing, 78 Ala. 403; Brigham *v.* Packard, 116 Mass. 195. But see Hicks *v.* McDonnell, 99 Mass. 459.

Presumption of authorized substitution.— A substitution of arbitrators which might have been authorized will, in the absence of a contrary showing, be presumed to have been made upon sufficient authority. Goldman *v.* Goldman, 50 La. Ann. 29, 22 So. 967; Bemus *v.* Clark, 29 Pa. St. 251.

62. **Consent of both parties.**— McCawley *v.* Brown, 12 B. Mon. (Ky.) 132.

63. **By original arbitrators.**— Hills *v.* Home Ins. Co., 129 Mass. 345; Crowell *v.* Davis, 12 Metc. (Mass.) 293; Mitchell *v.* Wilhelm, 6 Watts (Pa.) 259; Steeley *v.* Irvine, 6 Serg. & R. (Pa.) 128.

Absence of an arbitrator in Europe is sufficient evidence of his inability to act to justify the appointment of another under an authority given to arbitrators to make the appointment in case of refusal or inability of any of them to perform the duties imposed. Binsse *v.* Wood, 47 Barb. (N. Y.) 624.

Where an arbitrator dies before an award is made his place cannot be filled unless done pursuant to a provision in the agreement to submit. Huggins *v.* Neill, 2 Pa. Super. Ct. 103, 38 Wkly. Notes Cas. (Pa.) 467.

Such power is not to be inferred from a clause in the submission that if "either of the referees aforesaid do not attend at the time and place appointed, another or others are to be chosen in their room," as this constitutes merely a contract to secure additional arbitrators if necessary. Potter *v.* Sterrett, 24 Pa. St. 411.

Presumption of proper substitution.— In the absence of special objection, to an award made by persons other than the original arbitrators in a case where substitution was proper under the terms of the submission, that the substitution was not regularly made, it will be presumed that the award was regular, or that the irregularity, if any existed, was waived. Henneigh *v.* Kramer, 50 Pa. St. 530.

Waiver of unauthorized substitution by participation.— Where a vacancy was filled by arbitrators without express authority therefor, and one of the parties objected upon this ground, but proceeded to trial upon a written agreement of the other party that objections upon this ground would not thereby be waived, it was held, nevertheless, that the participation in the proceedings waived the irregularity, because, had the complaining party been successful, he could have enforced the award, and, for the sake of the mutuality, it must also be enforceable against him. Christman *v.* Moran, 9 Pa. St. 487.

64. **Compliance with statutory requirement.**— Under a statute providing for substituting arbitrators in place of those who may fail to attend at the designated time and place, by the parties in writing signed as the original submission, or by attending arbitrators by memorandum on the submission, it was held that a failure to comply with these provisions would prevent an entry of judgment upon the award. Dudley *v.* Farris, 79 Ala. 187.

Necessity for substitution.— The substitution of a third arbitrator, by the other two who attend the first meeting, is authorized by a statute permitting substitution in case of failure to attend such meeting where it appears that the third arbitrator was, in fact, present, but refused to act because of an interest in the controversy, it being held that he was not present as an arbitrator. Stiles *v.* Carlisle, etc., Turnpike Road Co., 10 Serg. & R. (Pa.) 286.

Time of substitution by arbitrators.— Under a statute authorizing attending arbitrators to substitute, in place of arbitrators who failed to attend the first meeting, other persons by them to be selected, two arbitrators have no authority to appoint a third, who attended the first meeting but who failed to attend the second. Sickel *v.* Keach, 2 Walk. (Pa.) 535.

the court, without the consent of the parties, where an award is set aside in equity.[65]

D. Oath — 1. Necessity For Oath — a. At Common Law. The authority to act as arbitrator under a submission at common law does not require that the arbitrators should be sworn,[66] unless it is stipulated in the agreement to arbitrate that such oath shall be administered.[67]

b. Statutory Requirements. In arbitration proceedings under a statute requiring that arbitrators shall be sworn as a condition of their authority to act, the award is invalid unless the statute has been substantially complied with.[68] But

After the arbitrators have assembled and been sworn, and thereafter one of their number fails to attend, the others have no power, under a statute permitting a substitution upon failure to attend, to supply the vacancy. Wilson *v.* Cross, 7 Watts (Pa.) 495.

Proof of notice to absent arbitrators, sometimes required to be made to attending arbitrators in order to authorize the choice of a substitute, may be effected in any manner satisfactory to the arbitrators, even without testimony. Reesman *v.* Kittanning Ins. Co., 3 Pa. Co. Ct. 1.

65. By the court.— Ross *v.* Pleasants, Wythe (Va.) 10.

66. *Alabama.*— Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Willingham *v.* Harrell, 36 Ala. 583.

Georgia.— Southern Live Stock Ins. Co. *v.* Benjamin, 113 Ga. 1088, 39 S. E. 489.

Illinois.— Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

Indiana.— Dickerson *v.* Hays, 4 Blackf. (Ind.) 44.

Nebraska — Greer *v.* Canfield, 38 Nebr. 169, 56 N. W. 883.

New York.— Howard *v.* Sexton, 4 N. Y. 157; Britton *v.* Hooper, 25 Misc. (N. Y.) 388, 55 N. Y. Suppl. 493.

Ohio.— State *v.* Jackson, 36 Ohio St. 281; Hassenpflug *v.* Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200.

Pennsylvania.— Otis *v.* Northrop, 2 Miles (Pa.) 350.

Statutory and common-law arbitration.— The fact that, in proceedings under a statute relating to arbitration, it is required that the arbitrators shall be sworn does not require the swearing of arbitrators as a prerequisite to their authority to act under a submission at common law or under any proceeding other than a statutory arbitration. Willingham *v.* Harrell, 36 Ala. 583; Broadwell *v.* Denman, 7 N. J. L. 278; Howard *v.* Sexton, 4 N. Y. 157; Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470; Otis *v.* Northrop, 2 Miles (Pa.) 350.

67. Stipulation in submission.— State *v.* Jackson, 36 Ohio St. 281; Crosby *v.* Moses, 48 N. Y. Super. Ct. 146, holding that a false oath, under a stipulation in the submission for an oath, cannot constitute a public offense.

Where parties to submission evidently sought, by the language used, to invest their arbitrator with such power as the code conferred upon arbitrators under a statutory submission, but the arbitration was not under a statute because the submission was to one instead of three arbitrators and a statutory oath was not directed to be taken, it was held that these facts did not indicate that the parties intended to impose upon their arbitrator, as a condition precedent to the exercise of his authority, that he should take the statutory oath. Southern Live Stock Ins. Co. *v.* Benjamin, 113 Ga. 1088, 39 S. E. 489.

Presumption of waiver.— It will be presumed that an oath was dispensed with in the submission to arbitration if the parties proceeded without demanding it. Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Greer *v.* Canfield, 38 Nebr. 169, 56 N. W. 883.

68. Compliance with statute necessary to good statutory award.— *Alabama.*— Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

Colorado.— Hepburn *v.* Jones, 4 Colo. 98.

Delaware.— Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Kentucky.— Sims *v.* Banta, 9 Ky. L. Rep. 286.

Louisiana.— Overton *v.* Alpha, 13 La. Ann. 558; Donovan *v.* Owen, 10 La. Ann. 463; Penny *v.* Carl, 10 La. Ann. 202; Sharkey *v.* Wood, 5 Rob. (La.) 326; Harrod *v.* Lewis, 3 Mart. (La.) 311.

Missouri.— Fassett *v.* Fassett, 41 Mo. 516; Walt *v.* Huse, 38 Mo. 210; Frissell *v.* Fickes, 27 Mo. 557; Toler *v.* Hayden, 18 Mo. 399.

New Jersey.— Inslee *v.* Flagg, 26 N. J. L. 368, 69 Am. Dec. 580; Barr *v.* Chandler, 47 N. J. Eq. 532, 20 Atl. 733; Combs *v.* Little, 4 N. J. Eq. 310, 40 Am. Dec. 207.

New York.— Flannery *v.* Sahagian, 134 N. Y. 85, 31 N. E. 319, 45 N. Y. St. 598; Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196.

Pennsylvania.— Otis *v.* Northrop, 2 Miles (Pa.) 350.

Texas.— Dockery *v.* Randolph, (Tex. Civ. App. 1895) 30 S. W. 270.

All submissions in writing within statute. — In Missouri and New York it has been held that the statute requiring that, in cases of all submissions in writing, the arbitrators must be sworn applies where the submission is in writing, although there be no clause for entering judgment upon the award under the statute, and that an award made by arbitrators in disregard of this requirement is void. Fassett *v.* Fassett, 41 Mo. 516; Walt *v.* Huse, 38 Mo. 210; Valle *v.* North Missouri R. Co., 37 Mo. 445; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Cope *v.* Gilbert, 4 Den. (N. Y.) 347; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575.

in those cases which hold the oath to be not jurisdictional, the requirement is material only when the oath is not waived.[69]

2. Evidence of Oath. Where it appears by recital or otherwise that an oath was administered, it will be presumed, until the contrary is shown, that the oath was duly administered in compliance with the requirement.[70] Unless the fact that the arbitrators were sworn is required to be shown by recital in the award it may be shown by extrinsic evidence.[71]

3. Waiver of Oath — a. Power of Parties to Waive — (1) *Oath Held Jurisdictional.* It has been held in some cases that the oath required by

But see Williams *v.* Perkins, 83 Mo. 379 (a bond given to secure the performance of an award, the bond being signed by one party only); Zalle *v.* Laclede Mut. F. & M. Ins. Co., 44 Mo. 530 (an appraisement under an insurance policy).

A different oath, not substantially equivalent to that prescribed by statute to be administered to arbitrators, will invalidate the award unless it appears that the parties waived the irregularity. Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761, per Bleckley, J. [*cited* with approval in Sisson *v.* Pittman, 113 Ga. 166, 38 S. E. 315]. The contrary has been held in Kentucky in a substantially similar situation and with reference to a similar statute. Snyder *v.* Rouse, 1 Metc. (Ky.) 625. See also Vaughn *v.* Graham, 11 Mo. 575, where an oath different in form from that prescribed in the statute was held to be a substantial compliance.

The oath need not be in writing, in the absence of a specific requirement to that effect (Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629); and, where required to be in writing and signed by the arbitrators, their failure to reduce the oath to writing and sign it until after the hearing will not vitiate the award, in the absence of objections to their proceeding without it, the arbitrators having, in fact, been sworn (Ogden *v.* Forney, 33 Iowa 205).

The oath may be administered by one of the arbitrators to the others if the person administering the oath is one of the officers designated by the statute. *In re* Kenny, 3 Nova Scotia 14.

Time of oath.— The oath need not be administered to an arbitrator before fixing the time and place of hearing. Ruckman *v.* Ransom, 35 N. J. L. 565.

Reswearing.— It has been held that, where arbitrators were sworn under a written submission which did not provide for statutory judgment on the award, and thereafter the submission was amended to cure the defect, it was not necessary, in compliance with the statute, to reswear the arbitrators. Bridgman *v.* Bridgman, 23 Mo. 272.

Where the arbitrators disagree and appoint an umpire, upon which umpire is devolved the whole burden of the award, it has been held that, the persons first appointed not having acted as arbitrators in making an award, it was not necessary that they should have been sworn. Scudder *v.* Johnson, 5 Mo. 551.

As to appointment of umpire see *infra*, V.

69. See cases cited *supra*, note 68.

As to waiver of oath see *infra*, III, D, 3.

70. Presumption as to proper oath.— Callahan *v.* McAlexander, 1 Ala. 366; Price *v.* Kirby, 1 Ala. 184; Aills *v.* Voirs, 1 A. K. Marsh. (Ky.) 190; Keans *v.* Rankin, 2 Bibb (Ky.) 88; Offeciers *v.* Dirks, 2 Tex. 468; Mills *v.* Atlantic, etc., R. Co., 4 Montreal Super. Ct. 302.

A mere jurat annexed to an arbitrator's report is not a sufficient showing of record that the oath was taken. Penny *v.* Carl, 10 La. Ann. 202.

An incomplete certificate of the oath by a justice of the peace may be amended after the award by adding to the signature the words "Justice of the Peace." Dorr *v.* Hill, 62 N. H. 506, 508.

Evidence of a statement by an arbitrator that the arbitrators were not sworn is not sufficient evidence upon which to impeach an award for non-compliance with the statute. Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

The oath required by a submission will not be regarded technically, because "under no circumstances, could a falsehood in such a proceeding be a public offense, and the oath was only meant to bind strongly the conscience;" and it was, therefore, held that a showing that the oath was administered within the jurisdiction of the officer, although as drawn up and signed the venue was informal and no *scilicet* appeared, evinced a sufficient compliance with the requirement of the submission. Crosby *v.* Moses, 48 N. Y. Super. Ct. 146, 149.

71. Extrinsic evidence.— Crook *v.* Chambers, 40 Ala. 239; Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511; Cones *v.* Vanosdol, 4 Ind. 248.

A recital of the oath has been held essential to validity of the award where the arbitration proceeds under a statute requiring such oath as a condition precedent to jurisdiction. Deputy *v.* Betts, 4 Harr. (Del.) 352; Shult *v.* Travis, Ky. Dec. 140; Bethea *v.* Hood, 9 La. Ann. 88; Ford *v.* Potts, 6 N. J. L. 388; Little *v.* Silverthorne, 3 N. J. L. 255; Swayze *v.* Riddle, 3 N. J. L. 238; Cramer *v.* Mathis, 3 N. J. L. 138.

Where the fact does not appear by recital and is not thus required to appear, it may, in the absence of any showing to the contrary, be presumed that the oath was duly taken. Duncan *v.* Fletcher, 1 Ill. 323; Tomlinson *v.* Hammond, 8 Iowa 40; Negley *v.* Stewart, 10 Serg. & R. (Pa.) 207.

statute to be taken by arbitrators is a prerequisite to the exercise of jurisdiction, that their authority to act is derived from the statute requiring the oath, and that, therefore, the requirement cannot be dispensed with or waived by the parties.[72]

(II) *Oath Held Not Jurisdictional.* However, the general rule established in most of the states is that the authority of arbitrators to act under a statute requiring an oath to be taken is derived, not from the statute, but from the agreement to submit to arbitration; that the oath is prescribed for the benefit of the parties to secure to them, if they desire it, a greater obligation upon the arbitrators to faithfully discharge their duties, and that, therefore, the requirement may be waived.[73] In case of a provision for an oath in the agreement to submit, it is evident that the requirement is not jurisdictional, and may, therefore, be waived.[74]

(III) *Rights of Arbitration Surety.* The rights of sureties upon a bond given to secure the performance of an award are not such as to affect the power of the party to waive a provision that the arbitrators shall be sworn.[75]

72. View that oath cannot be waived.— French *v.* Moseley, 1 Litt. (Ky.) 247; Lile *v.* Barnett, 2 Bibb (Ky.) 166; Overton *v.* Alpha, 13 La. Ann. 558; Bethea *v.* Hood, 9 La. Ann. 88; Fassett *v.* Fassett, 41 Mo. 516; Walt *v.* Huse, 38 Mo. 210, 213 (where it is said: "Arbitrators act in a judicial capacity, and the same reasons exist for their complying with the requisitions of the statute that exist in the case of other judicial officers"); Frissell *v.* Fickes, 27 Mo. 557; Toler *v.* Hayden, 18 Mo. 399 [see also *infra*, this note, for present Missouri rule]; Inslee *v.* Flagg, 26 N. J. L. 368, 69 Am. Dec. 580 [*disapproving* Ford *v.* Potts, 6 N. J. L. 388]; Combs *v.* Little, 4 N. J. Eq. 310, 40 Am. Dec. 207.

In Missouri it has been held that the oath required by statute might be waived by an express agreement, and the earlier cases which established the rule that the oath could not be waived because it was jurisdictional and the character of the arbitrators judicial were distinguished upon the ground that this rule did not relate to an express waiver. Tucker *v.* Allen, 47 Mo. 488. See also Valle *v.* North Missouri R. Co., 37 Mo. 445, 450, holding that the objection for failure to take the oath could not be raised for the first time on appeal, because it was said that, had the question been raised in the court below, proof might have been produced "that it was expressly waived by the parties." Finally, in Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854, the doctrine of the earlier cases — that the oath required by statute could not be waived — appears to have been expressly overruled, and the contrary doctrine that such provision may be waived, either expressly or by implication, from the circumstances attending the proceedings, is established.

73. View that oath may be waived.— *Illinois.*— Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

Kansas.— Russell *v.* Seery, 52 Kan. 736, 35 Pac. 812. Objection that oath was not administered by the officer prescribed cannot be raised collaterally. Weir *v.* West, 27 Kan. 650.

Missouri.— Tucker *v.* Allen, 47 Mo. 488; Grafton Quarry Co. *v.* McCully, 7 Mo. App. 580. See also *supra*, note 72.

New York.— Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Kelsey *v.* Darrow, 22 Hun (N. Y.) 125; Box *v.* Costello, 6 Misc. (N. Y.) 415, 27 N. Y. Suppl. 293; Howard *v.* Sexton, 1 Den. (N. Y.) 440; Browning *v.* Wheeler, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173.

Ohio.— Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.

Pennsylvania.— Otis *v.* Northrop, 2 Miles (Pa.) 350.

Texas.— Anderson *v.* Ft. Worth, 83 Tex. 107, 18 S. W. 483.

Vermont.— Woodrow *v.* O'Connor, 28 Vt. 776.

Wisconsin.— Hill *v.* Taylor, 15 Wis. 190.

See also cases cited *infra*, note 76 *et seq.*

Knowledge of requirement.— It is immaterial that the party waiving the oath of arbitrators did not know that the statute required an oath. Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854.

Failure to take the oath is a technical defense; hence, after a case has been regularly closed, it should not be reopened for the purpose of permitting a party to show invalidity of the award on account of failure to take the oath (Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173), and the objection should not be entertained for the first time on appeal (Valle *v.* North Missouri R. Co., 37 Mo. 445).

74. Southern Live Stock Ins. Co. *v.* Benjamin, 113 Ga. 1088, 39 S. E. 489, where the court said: "The parties undertook originally to create a court for themselves outside of the statutory provisions. Their consent alone gave to it jurisdiction, their agreement alone vested it with power, and the matter as to when they agreed just so they did agree, must be immaterial; and if, after prescribing that the arbitrator should be sworn, they subsequently expressly agreed to waive this requirement, it was, after all, but a change they made in the submission."

75. Southern Live Stock Ins. Co. *v.* Benjamin, 113 Ga. 1088, 1095, 39 S. E. 489, 492,

b. Method of Waiver. If the statute prescribing the oath to be taken provides also a particular method of waiving it — as that it may be waived by agreement in writing — the provision for waiver is exclusive, and unless the provision is substantially complied with the waiver cannot be sustained, and no waiver in such case will be implied.[76] In the absence of a statutory provision on the subject, a waiver may be established by any competent evidence of the fact,[77] or it may be implied from the fact that the parties appear before the arbitrators and proceed with the hearing without objection,[78] provided such proceeding is had with knowledge of the omission to take the oath.[79]

E. Nature and Extent of Authority — 1. Necessity For Impartiality — a. Judicial Character of Arbitrators. When persons have accepted an appointment to act as arbitrators they assume a quasi-judicial character and become amenable to the same principles of justice which require judicial officers, in the exercise of their functions, to be impartial between the parties.[80]

b. Agency of Arbitrators. For the purpose of illustrating the nature of the functions devolving upon arbitrators, they have been regarded as the agents of both parties alike, so as to require equal justice between them, without favor to either.[81] But, however honest may be an arbitrator's intentions, it is highly improper that he should regard himself as the agent or partisan of the party appointing him; and, because of the rule requiring impartiality of arbitrators, an award which appears to have been made as the result of partisanship should not, irrespective of the honesty of the arbitrator's motive, be allowed to stand.[82]

the court saying: "But it is contended that such waiver could not be made so as to bind Benjamin, the surety on the bond. Why not? Benjamin had nothing to do with the submission. He was not a party to it; he had no differences to be settled by the arbitration. His obligation bound him to pay the award rendered against his principal, and his only right to attack the award rested on its illegality."

See also, generally, PRINCIPAL AND SURETY.

76. Statutory method prescribed.— Flannery *v.* Sahagian, 134 N. Y. 85, 31 N. E. 319, 45 N. Y. St. 598 [*reversing* 12 N. Y. Suppl. 56, 34 N. Y. St. 887].

A common-law submission is not governed by provisions of N. Y. Code Civ. Proc. § 2269, requiring that arbitrators be sworn unless the oath be waived by an agreement in writing. Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470; Britton *v.* Hooper, 25 Misc. (N. Y.) 388, 55 N. Y. Suppl. 493.

77. Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854.

78. Implied waiver.— *Illinois.*—Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

New York.— Kelsey *v.* Darrow, 22 Hun (N. Y.) 125; Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173.

Ohio.—Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.

United States.— Newcomb *v.* Wood, 97 U. S. 581, 24 L. ed. 1085.

Canada.— Mitchell *v.* Butters, 2 Rev. Crit. 480.

Gross mistake as to form of oath.— Where, in an action to enforce an award, it was sought to establish a waiver of the requirement to swear arbitrators by showing the circumstance that the parties proceeded with the arbitration without objecting to the omission, and it appeared that an oath had been taken, though not in the form prescribed by statute and so as not to be a substantial compliance with the statute, it was held that a waiver ought not to be implied because, as the court said: "They set out in their first act with the commission of such a gross mistake, that it is very likely their opinion about law was wrong all through." Wilkins *v.* Van Winkle, 78 Ga. 557, 567, 3 S. E. 761.

79. Knowledge of the omission to take the oath is necessary to be shown in order to establish a waiver of the oath. Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761.

80. Hoosac Tunnel Dock, etc., Co. *v.* O'Brien, 137 Mass. 424, 50 Am. Rep. 323; Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304; Wood *v.* Helme, 14 R. I. 325; Widder *v.* Buffalo, etc., R. Co., 24 U. C. Q. B. 520; *In re* Lawson, 19 Grant Ch. (U. C.) 84.

81. Agent of both parties alike.— Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304; Benjamin *v.* U. S., 29 Ct. Cl. 417; Malo *v.* Land, etc., Co., 5 Quebec Super. Ct. 483.

82. Partisanship.—*Georgia.*—Sisson *v.* Pittman, 113 Ga. 166, 38 S. E. 315; Orme *v.* Burney, 95 Ga. 418, 22 S. E. 633.

Indiana.— Bash *v.* Christian, 77 Ind. 290.

Iowa.— Sullivan *v.* Frink, 3 Iowa 66.

Kansas.— Downey *v.* Atchison, etc., R. Co., 60 Kan. 499, 57 Pac. 101.

Massachusetts.—Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40; Strong *v.* Strong, 9 Cush. (Mass.) 560.

New York.—Smith *v.* Cooley, 5 Daly (N. Y.) 401.

Rhode Island.— Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304.

Washington.— Glover *v.* Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

2. AUTHORITY TO DETERMINE THE LAW — a. Under General Submission. Unless restricted by a reservation in the agreement of submission of a controversy to the final decision of arbitrators, they are, necessarily, given the power to decide upon all questions of law as well as of fact which either directly or incidentally arise in the consideration or decision of the matters embraced in the submission.[83]

b. To Disregard the Law. Arbitrators, who are given authority, under a general submission, to decide all questions of law and fact, are not bound by any strict rules of law or equity, but are free to do substantial justice between the parties according to such principles as may seem to them best adapted to establish the right of the particular matter before them.[84]

England.— Watson *v.* Northumberland, 11 Ves. Jr. 153; Fetherstone *v.* Cooper, 9 Ves. Jr. 67; Calcraft *v.* Roebuck, 1 Ves. Jr. 221, 1 Rev. Rep. 126.

Canada.— *In re* Lawson, 19 Grant Ch. (U. C.) 84; Malo *v.* Land, etc., Co., 5 Quebec Super. Ct. 483.

Partisanship on both sides.— Partisanship of one arbitrator is not to be condoned by evidence of similar partisanship in behalf of the other party on the part of his co-arbitrator. *In re* Lawson, 19 Grant Ch. (U. C.) 84. But it has been held that, where it appeared that an honest result had been reached, the fact that one arbitrator unconsciously permitted his jealousy of the other to slightly warp his judgment, and that the other adjusted his judgment to balance the supposed leaning of the other arbitrator, would not be sufficient to vitiate the award. Silver *v.* Connecticut River Lumber Co., 40 Fed. 192. And, again, it has been held that the mere fact that each party selected as an arbitrator a partisan of his own would not alone be sufficient to impeach an award which did not otherwise appear to be unfair. Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

83. May decide both questions of law and of fact.— *Indiana.*— Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

Maine.— Whitmore *v.* Le Ballistier, 35 Me. 488; Tyler *v.* Dyer, 13 Me. 41; Walker *v.* Sanborn, 8 Me. 288; Smith *v.* Thorndike, 8 Me. 119.

Massachusetts.—Bigelow *v.* Newell, 10 Pick. (Mass.) 348.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

New Hampshire.— Dodge *v.* Brennan, 59 N. H. 138; Truesdale *v.* Straw, 58 N. H. 207; Sanborn *v.* Murphy, 50 N. H. 65; Pike *v.* Gage, 29 N. H. 461; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485.

New York.— Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392.

Ohio.— Ormsby *v.* Bakewell, 7 Ohio 98.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869.

England.— Dick *v.* Milligan, 2 Ves. Jr. 23.

Canada.— Foulis *v.* Kinnear, 2 N. Brunsw. 26.

See 4 Cent. Dig. tit. "Arbitration and Award," § 150.

Statutory review of award by court to which it is necessary that the award shall be returned does not deprive arbitrators of their judicial functions nor of the power to decide questions of law. Jones *v.* Brown, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185.

There is no distinction between lawyers and laymen, as to authority to decide questions of law, when the final decision of a controversy is submitted to arbitration. Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Swasey *v.* Laycock, 1 Handy (Ohio) 334; Fuller *v.* Fenwick, 3 C. B. 705, 10 Jur. 1057, 16 L. J. C. P. 79, 54 E. C. L. 705; Hodgkinson *v.* Fernie, 3 C. B. N. S. 189, 3 Jur. N. S. 818, 27 L. J. C. P. 66, 6 Wkly. Rep. 181, 91 E. C. L. 189; Huntig *v.* Ralling, 8 Dowl. P. C. 879, 2 H. & W. 2, 4 Jur. 1091; Ashton *v.* Pointer, 2 Dowl. P. C. 651, 3 Dowl. P. C. 201, 4 L. J. Exch. 71; Haydock *v.* Beard, 2 Jur. 1069; Green *v.* Citizens Ins. Co., 18 Can. Supreme Ct. 338.

84. Not bound by strict rules of law or equity.—*Arkansas.*—Kirten *v.* Spears, 44 Ark. 166, 173, wherein the court said: "If the parties wanted exact justice administered according to the forms of law, they should have allowed their case to take the usual course. But for reasons satisfactory to themselves, they have chosen to substitute for the courts of law a private forum, and there is no injustice in holding them bound by the result."

California.— Connor *v.* Pratt, 128 Cal. 279, 60 Pac. 862; Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 195, 17 Atl. 356; Parker *v.* Avery, Kirby (Conn.) 353.

Indiana.— Hays *v.* Miller, 12 Ind. 187.

Louisiana.— Under the statute, arbitrators are required to decide according to law, but "amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity." Bird *v.* Laycock, 7 La. Ann. 171, 172; St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202; Davis *v.* Leeds, 7 La. 471.

Maine.— Portland Mfg. Co. *v.* Fox, 18 Me. 117; Tyler *v.* Dyer, 13 Me. 41, 48, in which latter case the court said: "Having submitted to a judge chosen by themselves, the parties give to his acts an authority which the courts would not allow to their own."

Massachusetts.— Smith *v.* Boston, etc., R. Co., 16 Gray (Mass.) 521.

F. Delegation of Authority — 1. In General. As a general rule, arbitrators have no power to delegate to others the whole or any material portion of the authority confided to them or the judicial functions devolving upon them under a submission;[85] and, since their authority and duties are joint, the delegation thereof cannot be made by one or any number of them to the others.[86]

Michigan.— Chicago, etc., R. Co. *v.* Hughes, 28 Mich. 186.

Missouri.— Mitchell *v.* Curran, 1 Mo. App. 453.

New Hampshire.— Cushman *v.* Wooster, 45 N. H. 410; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485.

New Jersey.— Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319 (wherein the court said: "So long as the arbitrator acts uprightly and impartially and keeps within his authority as designated by the submission, his judgments are unimpeachable and irreversible; he may do what no other judge has a right to do — he may intentionally decide contrary to law and still have his judgment stand"); Ruckman *v.* Ransom, 23 N. J. Eq. 118; West Jersey R. Co. *v.* Thomas, 21 N. J. Eq. 205.

New York.— Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392 [*affirming* 37 N. Y. Super. Ct. 358]; Smith *v.* Cooley, 5 Daly (N. Y.) 401; McGregor *v.* Sprott, 13 N. Y. Suppl. 191, 35 N. Y. St. 907; Halstead *v.* Seaman, 52 How. Pr. (N. Y.) 415; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.

North Carolina.— Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130; Robbins *v.* Killebrew, 95 N. C. 19; Lusk *v.* Clayton, 70 N. C. 184.

Pennsylvania.— Dixon *v.* Morehead, Add. (Pa.) 216, where the court said: "Arbitrators can do whatever the parties themselves can do, and more than the court can do."

Tennessee.—Jocelyn *v.* Donnel, Peck (Tenn.) 274, 14 Am. Dec. 453. *Compare* Pearce *v.* Roller, 5 Lea (Tenn.) 485, which holds that arbitrators cannot disregard a plea of the statute of limitations by an administrator, because the latter was bound to make this defense "under peril of being himself held responsible to the distributees for his failure," which would be inequitable and unjust.

Vermont.— Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140; Downer *v.* Downer, 11 Vt. 395; Hazeltine *v.* Smith, 3 Vt. 535.

Virginia.—Willoughby *v.* Thomas, 24 Gratt. (Va.) 521; Moore *v.* Luchess, 23 Gratt. (Va.) 160.

Washington.— School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341.

Wisconsin.— McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668.

United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869.

England.— Wade *v.* Malpas, 2 Dowl. P. C. 638; Steff *v.* Andrews, 2 Madd. 6; Wood *v.* Griffith, 1 Swanst. 43, 1 Wils. C. P. 34, 18 Rev. Rep. 18. But see Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163, where the making of an award contrary to law was held to be an excess of power.

Canada.—Townsend *v.* Morton, 2 U. C. Q. B. 100; Jekyll *v.* Wade, 8 Grant Ch. (U. C.) 363.

As to effect of mistake of law where arbitrators are required to follow the law, or where, in the absence of such requirement, they attempt to follow the law and mistake it, see *infra*, IX, B, 1, a, (II), (C), (2), (a), (b).

85. *Kentucky.*— Lell *v.* Hardesty, 13 Ky. L. Rep. 831.

Maryland.— Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58; Archer *v.* Williamson, 2 Harr. & G. (Md.) 62.

Rhode Island.— David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544.

Vermont.— Weeks *v.* Boynton, 37 Vt. 297.

England.— Eastern Counties R. Co. *v.* Eastern Union R. Co., 3 De G. J. & S. 610, 68 Eng. Ch. 463.

See 4 Cent. Dig. tit. "Arbitration and Award," § 155; and *infra*, VI, J, 6, b, (VI).

Resident ministers of foreign governments, to which governments parties have submitted a dispute for arbitration, have been held to be authorized by such submission to conclude the matter by a decision in the names of their respective governments. Gernon *v.* Cochran, Bee (U. S.) 209, 10 Fed. Cas. No. 5,368.

A party who has not been prejudiced by a delegation, to some extent, of the authority which has been committed to the arbitrators has been held to have no ground of objection to the award. Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470 [*affirmed* in 98 N. Y. 628].

86. **Agreement of original arbitrators to adopt opinion of special arbitrator,** who is authorized only to act with them in making a majority award, amounts to an improper delegation of authority which would avoid the award; but, where such an agreement was afterward abandoned and the three arbitrators participated in an examination of the facts which resulted in a majority award, it was held that the improper agreement would have no effect. Haff *v.* Blossom, 5 Bosw. (N. Y.) 559.

Delegation of authority to execute award. — Where one of the arbitrators was called away by his private business and authorized the other two to sign his name to the award provided the subsequent testimony did not change the case materially, and the two arbitrators, assuming that such testimony did not change the rights of the parties as shown before all the arbitrators, made an award, signing their own and the absent arbitrator's name, it was held that the award was void as a unanimous award and not a proper exercise of autority given to make a majority award. Dunphy *v.* Ford, 2 Mont. 300.

Delegation to one arbitrator under authority to make majority award. — Two of three arbitrators who are invested with the power to make a majority award cannot delegate to

2. **Seeking Advice.** There is no substantial reason why the arbitrators may not honestly seek the advice of outsiders for the purpose of enabling them to better understand the matters before them and to perform the duties confided to them.[87] It is, however, essential to the proper exercise of the arbitrators' duty that, in acting upon the advice so received, they should exercise their individual judgment and not accept as final the advice received unless it be in accordance with their own views.[88]

3. **Ministerial Assistance.** It is not an improper delegation of the authority confided to them for the arbitrators to employ other persons to perform ministerial duties connected with the arbitration — such as the assistance of a clerk or accountant,[89] the measurement of a tract of land involved in the arbitration,[90] the

the third authority to decide a point of law, and then draw the award in accordance with his decision. The parties have a right to require the joint judgment of at least two of the arbitrators upon the matters submitted to them. Little *v.* Newton, 9 Dowl. P. C. 437, 5 Jur. 246, 10 L. J. C. P. 88, 2 M. & G. 351, 2 Scott N. R. 159, 40 E. C. L. 637.

Filling blank after signing award.— Two arbitrators and an umpire, with authority to make a majority award, may, upon disagreement, as to one item, about which the umpire is not ready to decide, agree that the award shall be signed in blank, and that one of the arbitrators shall fill in the amount agreed upon, deducting or adding the item which is the subject of disagreement, according to the subsequent decision of the umpire. Filling the blank in such case is an exercise of ministerial and not judicial authority by the single arbitrator, and a subsequent decision of the umpire, agreeing with one of the arbitrators, constitutes a good majority award. Tennant *v.* Divine, 24 W. Va. 387.

Recital that the matter was decided by a special arbitrator, having authority only to act with the original arbitrators, renders an award *prima facie* invalid as an unauthorized delegation of authority. Horton *v.* Pool, 40 Ala. 629.

87. **Rule stated.**— Simons *v.* Mills, 80 Cal. 118, 22 Pac. 25; Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96; Anderson *v.* Wallace, 3 Cl. & F. 26, 6 Eng. Reprint 1347; Eads *v.* Williams, 4 De G. M. & G. 674, 24 L. J. Ch. 531, 1 Jur. N. S. 193, 53 Eng. Ch. 528; Caledonian R. Co. *v.* Lockhart, 6 Jur. N. S. 1311, 3 L. T. Rep. N. S. 65, 3 Macq. 808, 8 Wkly. Rep. 373; Hopcraft *v.* Hickman, 3 L. J. Ch. 43, 2 Sim. & St. 130; Rogers *v.* Commercial Union Assur. Co., 10 Manitoba 667.

Prudence and discretion would seem to require that arbitrators should ask the parties to be present when they communicate with any person for advice as to the law, although a failure to do so is not ground for avoiding the award, unless it can be shown that they were misled as to the law. Therefore, it has been held that the communication, by one of the parties to the arbitrators, of a legal opinion correct in itself, which is acted upon by them, does not vitiate the award. Rolland *v.* Cassidy, 13 App. Cas. 770, 57 L. J. P. C. 97, 59 L. T. Rep. N. S. 873.

88. **Acting upon advice contrary to their own judgment** is unauthorized, and amounts to an unauthorized delegation of authority. Simons *v.* Mills, 80 Cal. 118, 22 Pac. 25; David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544.

As to delegation of authority see *supra*, III, F, 1.

Previous agreement, made by arbitrators, to be bound by advice of an outsider, is altogether unwarranted and, if complied with, vitiates the award. Hopcraft *v.* Hickman, 3 L. J. Ch. 43, 2 Sim. & St. 130.

The adoption of another's opinion as the opinion of the arbitrators themselves, upon the investigation of a matter in which the person whose opinion is adopted possesses special skill, is not improper provided the opinion is not contrary to the views of the arbitrators. Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650; Emery *v.* Wase, 5 Ves. Jr. 846, 8 Ves. Jr. 505, 7 Rev. Rep. 109; Rogers *v.* Commercial Union Assur. Co., 10 Manitoba 667.

The adoption of opinion of an intended umpire by arbitrators, such opinion being contrary to the opinion of one of them, and without making such third person an umpire, is irregular and unauthorized by a submission permitting them to make such person an umpire in case of disagreement. Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 53 Eng. Ch. 528, 24 L. J. Ch. 531.

89. **An accountant must not be permitted to interfere with the award.**— His duties are ministerial and subject to the supervision of the arbitrators, who should exercise their own judgment as to the result — otherwise the award may be avoided. Haigh *v.* Haigh, 8 Jur. N. S. 983, 31 L. J. Ch. 420, 6 L. T. Rep. N. S. 507.

Employing the agent of one of the parties as a clerk in figuring amounts has been held not an unwarranted or irregular delegation of authority, where the other party was present and made no objection, and it appeared that no harm had been done. Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714.

The result arrived at by experts appointed by arbitrators to examine books and vouchers submitted to them should not, if there is any objection to the correctness of the results, be accepted by the arbitrators without a personal examination. Shipman *v.* Fletcher, 82 Va. 601.

90. Thorp *v.* Cole, 2 C. M. & R. 367, 4 Dowl. 437, 5 L. J. Exch. 24.

sale of property authorized by the submission,[91] or the drawing of the award by an outsider,[92] by one of the parties,[93] or by the attorney of one of the parties.[94]

G. Termination of Authority — 1. When and How Authority Terminates — a. By Completion of Award — (I) *Rule Stated.* The authority of arbitrators to act as such terminates with the completion of the award,[95] notwithstanding the award, as completed, is not valid.[96]

(II) *What Constitutes Completion.* The question of what constitutes a completion of the award may depend upon the terms of the submission. If delivery is required the award is not completed, and, hence, the arbitrators' authority does not terminate until the award is delivered according to the submission.[97] When delivery is not required a question of what constitutes a complete and final award is to be determined by looking to the intention of the arbitrators.[98] The final intention of the arbitrators is sufficiently evidenced by

91. *In re* Fraser, 12 Nova Scotia 10.

92. Baker *v.* Cotterill, 7 Dowl. & L. 20, 14 Jur. 1120, 18 L. J. Q. B. 345.

93. Deception by party drawing award.— The mere fact that one of the parties draws an award for the arbitrators in the absence of the other party is not of itself sufficient to invalidate the award; but where it was shown that the award as drawn and signed was erroneous and deceptive and in favor of the party drawing it — as where it recited that the arbitrators examined the premises in controversy after the submission, and that the valuation thereof was a money value, both statements being contrary to the facts — the award was held invalid in equity. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

94. Award drawn by attorney of successful party.— After an award has been agreed upon, there is no evident impropriety in employing the attorney of the prevailing party to draw it up according to the agreement, provided the award is afterward submitted to the arbitrators, and adopted and signed by them. Steere *v.* Brownell, 113 Ill. 415; Kane *v.* Fond du Lac, 40 Wis. 495. It has, however, been held that although there is no necessary impropriety in employing the attorney of one of the parties to draft the award, yet that this practice is not to be commended. Underwood *v.* Bedford, etc., R. Co., 11 C. B. N. S. 442, 31 L. J. C. P. 10, 5 L. T. Rep. N. S. 581, 10 Wkly. Rep. 106, 103 E. C. L. 442; Behren *v.* Bremer, 3 C. L. R. 40; Fetherstone *v.* Cooper, 9 Ves. Jr. 67; *Ex p.* Milner, 16 N. Brunsw. 96; *In re* Manley, 2 Ont. Pr. 354.

95. Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227; Benson *v.* Love, 1 U. C. Q. B. 398.

See 4 Cent. Dig. tit. "Arbitration and Award," § 154.

96. Notwithstanding invalidity of award. — Porter *v.* Scott, 7 Cal. 312; Martin *v.* Oneal, 2 Litt. (Ky.) 54; Flannery *v.* Sahagian, 134 N. Y. 85, 31 N. E. 319, 45 N. Y. St. 598; Fallon *v.* Kelehar, 16 Hun (N. Y.) 266.

An award embracing matters not submitted cannot be treated by the arbitrator as a void award, so that he may thereupon make another which he deems to be within the matters submitted. *In re* Stringer, [1901] 1 Q. B. 105, 70 L. J. Q. B. 19, 49 Wkly. Rep. 111.

97. Depends upon terms of submission.— Williams *v.* Rumbough, 5 Lea (Tenn.) 606.

Where delivery is required the arbitrators may, even after the award has been drawn up, reopen the case and hear other evidence and make a new award at any time within the time limited for delivery. Anderson *v.* Miller, 108 Ala. 171, 19 So. 302.

98. Completion when delivery not required. — Fargo *v.* Reighard, 13 Ind. App. 39, 41 N. E. 74; Baby *v.* Davenport, 2 U. C. Q. B. 65.

Under an authority to make more than one award, the question of whether or not the award which has been made was intended to be a last and final award is one of fact, to be determined by all the circumstances of the case. Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 565, 11 E. C. L. 20.

Reading an award to the parties, after it had been signed and sealed, for the purpose of entertaining any objections which might be made thereto, shows that the arbitrators intended that the award as read should not operate as a final award in case a valid objection thereto could be made; and, therefore, where, in such a case, upon objection, the award was altered, again signed, and delivered, it was held that the latter was the only final award. Byars *v.* Thompson, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

Tentative award.— It is not a final exercise of authority for arbitrators to submit to the parties a tentative award, which is not finally signed and sealed when presented, for the purpose of allowing them to make objections, so as to prevent the arbitrators from acting upon objections thereupon made and correcting the award accordingly. Betsill *v.* Betsill, 30 S. C. 505, 9 S. E. 652.

The delivery of an informal decision as to one item submitted to arbitration has been held to terminate the arbitrators' authority, so as to preclude the subsequent delivery, on the same day, of the former decision of all the matters submitted. Flannery *v.* Sahagian, 134 N. Y. 85, 31 N. E. 319, 45 N. Y. St. 598 [*reversing* 12 N. Y. Suppl. 56, 34 N. Y. St. 887].

The mere opinion of the arbitrators, in the form of an award and signed by them, does not terminate the arbitrators' authority, the

the announcement of their decision even when not in writing,[99] the execution and publication or notice of their decision when in writing,[1] or, in any case, by delivery of the award.[2]

b. By Inability to Make an Award. The authority of arbitrators terminates upon notice by them to the parties of their inability to make an award under the terms of the submission, and they cannot afterward, without the consent of the parties, assume to act under the original authority.[3] Upon a disagreement, requiring the appointment of an umpire and submission of the matters in controversy to him, and with whom the arbitrators have no power to concur, the authority of such arbitrators to act is at an end.[4]

intention and understanding of the parties as to the effect of the document being shown from extraneous facts. Beach *v.* Sterne, 67 Hun (N. Y.) 341, 22 N. Y. Suppl. 330, 51 N. Y. St. 873 [*affirmed* in 143 N. Y. 634, 37 N. E. 825, 60 N. Y. St. 873].

99. Pleading an oral award is sufficient, in an action to enforce it, although the arbitrators thereafter made a written award containing the same decision, a written award not being required. Maud *v.* Patterson, 19 Ind. App. 619, 49 N. E. 974.

1. A written award which is not required to be delivered is completed when signed by the arbitrators and notice of its contents given to the parties.

Indiana.— Maud *v.* Patterson, 19 Ind. App. 619, 49 N. E. 974.

Maine.— Thompson *v.* Mitchell, 35 Me. 281.

Virginia.— Pollard *v.* Lumpkin, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238.

England.—Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473; Henfree *v.* Bromley, 6 East 309, 2 Smith K. B. 400, 8 Rev. Rep. 491; Mordue *v.* Palmer, L. R. 6 Ch. 22, 40 L. J. Ch. 8, 23 L. T. Rep. N. S. 752, 19 Wkly. Rep. 36.

Canada.— Sanford *v.* Sanford, 3 Nova Scotia 266; Helps *v.* Roblin, 6 U. C. C. P. 52.

2. Delivery as evidence of intention.— Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367; Doke *v.* James, 4 N. Y. 568; Eddy *v.* London Assur. Corp., 65 Hun (N. Y.) 307, 20 N. Y. Suppl. 216, 48 N. Y. St. 10; Butler *v.* Boyles, 10 Humphr. (Tenn.) 154, 51 Am. Dec. 697; McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668.

Possession of an award by one of the parties is sufficient *prima-facie* evidence that the arbitrators delivered it to him as a final award. Lansdale *v.* Kendall, 4 Dana (Ky.) 613.

Presumption as to time of delivery of annexed explanation.— Under a submission to arbitrate all differences, including the costs of a former action, an award was made and signed for a certain sum, generally, and, on the same day the arbitrators — to prevent misapprehension, as was presumed — affixed a statement of a specified portion for costs of the arbitration and the balance for costs of the former suit. In an action upon the award for the latter portion alone it was presumed, in the absence of a showing that the original award was delivered prior to the supplemental statement, that they were both delivered at the same time. Walker *v.* Merrill, 13 Me. 173.

3. A subsequent meeting, on the same day of a disagreement and notice to the parties of inability to make an award, the subsequent meeting being upon the suggestion of one of the parties, should be submitted to the jury in an action upon the award with an instruction that the verdict should be for defendant unless it appears that the parties afterward agreed to abide by any award which the arbitrators might make. Couch *v.* Harrison, 68 Ark. 580, 60 S. W. 957.

Separation of three arbitrators after disagreement does not necessarily imply a termination of authority of two of the arbitrators thereafter to make a majority award, as it may be presumed, in the absence of any showing to the contrary, that the separation was temporary only, and because the third arbitrator did not assent to the finding of the other two. Baltes *v.* Bass Foundry, etc., Works, 129 Ind. 185, 28 N. E. 319.

Where, by statute, the concurrence of all is necessary, a report, to the court to which the award is made returnable, that the arbitrators are unable to agree terminates their authority, and they cannot thereafter proceed to make an award. Jeffersonville R. Co. *v.* Mounts, 7 Ind. 669.

4. Disagreement requiring appointment of umpire.— Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Mitchell *v.* Harris, 1 Ld. Raym. 671, 12 Mod. 512; Westminster, etc., Coal, etc., Co. *v.* Clayton, 11 L. T. Rep. N. S. 366, 13 Wkly. Rep. 134; Watson *v.* Clement, Rolle 5. But see Gibson *v.* Broadfoot, 3 Desauss. (S. C.) 584, which holds that, where an umpire was called in upon a disagreement, and the arbitrators thereupon reached an agreement without the intervention of the umpire, an award by the original arbitrators should be upheld.

Award of arbitrators upon opinion of umpire.— Where, upon disagreement, an umpire had been called in and an award was afterward made by the original arbitrators, such award being based merely upon the opinion of the umpire, who did not execute the award, it was held that such determination could have no validity. Daniel *v.* Daniel, 6 Dana (Ky.) 93. But it has been held that a recital in an award, which did not show that there had been any disagreement, that the arbitrators had "considered the decision of the umpire," would not invalidate the award, be-

c. By Expiration of Time-Limit — (i) *Time Fixed by Submission.* Whenever, by the terms of the submission, either at common law or under rule of court, the award is required to be made within a specified time, the authority of the arbitrators terminates upon the expiration of the time specified.[5]

(ii) *Time Fixed by Statute.* In arbitrations under a statute which fixes the time within which the award must be made and returned to the designated court, as a general rule the designation of the time-limit is held to be jurisdictional and the authority of the arbitrators to end with the expiration of the time;[6] but, in some instances, statutory designations of a time-limit have been held directory merely, for failure to observe which the consequence is not to terminate the arbitrator's authority.[7]

cause the recital could be rejected as surplusage. Harlow *v.* Read, 1 C. B. 733, 3 Dowl. & L. 203, 9 Jur. 642, 14 L. J. C. P. 239, 50 E. C. L. 733. See also Matter of Cayley, 3 U. C. Q. B. 124, which upholds an award by arbitrators who, upon disagreement as to some of the items referred to them, called in an umpire for his opinion on such items, and subsequently adopted that opinion as their own.

5. *California.*— Ryan *v.* Dougherty, 30 Cal. 218.

Indiana.— Conrad *v.* Johnson, 20 Ind. 421.

Kentucky.— Burnam *v.* Burnam, 6 Bush (Ky.) 389.

Louisiana.— St. Martin *v.* Mestaye, 18 La. Ann. 320; Donovan *v.* Owen, 10 La. Ann. 463.

Massachusetts.— Bent *v.* Erie Tel., etc., Co., 144 Mass. 165, 10 N. E. 778.

New Jersey.— White *v.* Kemble, 3 N. J. L. 53.

Tennessee.— White *v.* Puryear, 10 Yerg. (Tenn.) 440.

Canada.—Ruthven *v.* Ruthven, 8 U. C. Q. B. 12; Heathers *v.* Wardman, 4 U. C. Q. B. 173; Gilley *v.* Miller, 1 Rev. de Lég. 510.

Actual delivery within the time is not necessary unless required specifically. It is sufficient if the award is ready to be delivered within the time. Clement *v.* Comstock, 2 Mich. 359; Houghton *v.* Burroughs, 18 N. H. 499; Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473; Brown *v.* Vawser, 4 East 584.

A failure to deliver upon demand, on the day on which the award was required to be ready for delivery, has been held to terminate the authority of the arbitrators, so that a delivery after the day could not be made. Wilson *v.* Wilson, 1 Saund. 327*c*, note 3.

In the absence of a demand for delivery and in the absence of facts showing that it was not ready for delivery on the day named, it has been held no objection to an award that it was delivered a day after the day named in the submission upon which it should be ready for delivery, the presumption being that it was ready. Owen *v.* Boerum, 23 Barb. (N. Y.) 187.

The designation of a certain hour of a certain date, on or before which an award shall be made, does not authorize an award on that day after the hour named. Elliot *v.* Hanson, 39 Mich. 157.

Withholding award beyond time-limit for correction.—Where an award was agreed upon by three arbitrators having authority to make a majority award, and it was drawn up and signed by two of them within the time-limit and delivered to the third to be signed by him and handed to the parties, and the third arbitrator discovered a mistake, which was afterward corrected with the consent of the two who had signed it, and finally signed and delivered after the time-limit, it was held that no effect could be given to the award, either as a majority award as first signed or as a unanimous award as subsequently corrected. Wilson *v.* Kerr, 2 N. Brunsw. 280.

Construction of agreement fixing time.— Where the submission contained a provision requiring the arbitrators "to meet and determine said matters on the first of August, 1858, and to adjourn from day to day until concluded, and within five days thereafter file the same in the District Court," it was held a sufficient compliance with the requirements for the arbitrators to meet on the day named, adjourn to the following day, on that day agree upon their award, and file it in court on August 23d. Fink *v.* Fink, 8 Iowa 312, 313.

Presumption from date of award.— Where an award bears date within the time limited by the submission it will be presumed, until the contrary is shown, that the award was made and published within that time. Doe *v.* Stillwell, 8 A. & E. 645, 2 Jur. 591, 3 M. & P. 701, 1 W. W. & H. 532, 35 E. C. L. 773.

Computation of time.— Under a requirement that an award should be made within six months, it was held that an award within six calendar months, but not within six lunar months, was unauthorized. *In re* Swinford, 6 M. & S. 226.

6. **General rule stated.**—Field *v.* Bissell, 36 Me. 593; Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Atwood *v.* York, 4 N. H. 50.

7. **Departure from general rule.**— Evans *v.* Hitchcock, 26 Ill. 295; Patrick *v.* Batten, 123 Mich. 203, 207, 81 N. W. 1081, the court saying: "The failure to file the award within the time fixed is not one of the reasons provided by the statute for vacating it."

Agreement to waive statutory limit.— In Indiana, although the time within which an award shall be made is prescribed by statute, it has been held that the parties may waive this provision, and in their submission agree

(III) *Extension of Time-Limit.* The time within which an award is required to be made may be extended by subsequent agreement of the parties, without other limitation than that which affects their powers to enter into the original submission.[8] So an extension may be made by arbitrators, if by so doing they act in conformity to the terms of a submission or statute which authorizes it,[9]

upon the time for its completion. Conrad *v.* Johnson, 20 Ind. 421.

Forfeiture of compensation.— In Pennsylvania, under the statutory provision requiring arbitrators to file their award in the prothonotary's office within seven days, it has been held that an omission to comply with this provision does not terminate the authority of the arbitrators to make an award, but only forfeits their right to compensation. Boone *v.* Reynolds, 1 Serg. & R. (Pa.) 231.

8. **By subsequent agreement.**— *Illinois.*— Buntain *v.* Curtis, 27 Ill. 374.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

New Hampshire.— Brown *v.* Copp, 5 N. H. 346.

New York.— Bloomer *v.* Sherman, 2 Edw. (N. Y.) 452.

North Carolina.— Bryer *v.* Stewart, 3 N. C. 269.

South Carolina.— Penman *v.* Gardner, 1 Brev. (S. C.) 498.

Washington.—Bachelder *v.* Wallace, 1 Wash. Terr. 107.

Wisconsin.— Brookins *v.* Shumway, 18 Wis. 98.

England.— Greig *v.* Talbot, 2 B. & C. 179, 3 D. & R. 446, 9 E. C. L. 85; Knox *v.* Simmonds, 3 Bro. Ch. 358, 1 Ves. Jr. 369; Evans *v.* Thomson, 5 East 189, 1 Smith K. B. 380.

Canada.— Cie du Chemin de Fer de Quebec, etc., *v.* Curé, etc., de Ste. Anne, 3 Montreal Super. Ct. 154.

Acknowledgment of extension.— An agreement for extending the time within which an award may be made need not be acknowledged before a justice of the peace as in the case of an original submission under Minn. Gen. Stat. (1878), c. 89, which permits an extension and requires acknowledgment only of the original submission. Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57.

An agreement after expiration of time for extension of the time for making an award has been held to be defective. Jones *v.* Powell, 1 W. W. & H. 60.

Necessity to seal extension agreement.— The time limited in a sealed submission for making an award may be extended by agreement of the parties, not under seal, in any case where there was no necessity to seal the original submission. Wood *v.* Tunnicliff, 74 N. Y. 38; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575. *Contra*, Goldsborough *v.* McWilliams, 2 Cranch C. C. (U. S.) 401, 10 Fed. Cas. No. 5,518, which holds that parol evidence of an agreement to extend the time designated in an arbitration bond for making the award is inadmissible.

Extension by indorsement on arbitration bond is sufficient to authorize an award within the time so extended, and in accordance with the condition of the bond, if the indorsement is under the seals of the parties and the bond is redelivered. Penman *v.* Gardner, 1 Brev. (S. C.) 498; Greig *v.* Talbot, 2 B. & C. 169, 3 D. & R. 446, 9 E. C. L. 85.

An indorsement for extension, signed by one party only, is not sufficient to authorize an award after the time originally fixed in the condition of the bond. Peters *v.* Johnson, 3 Harr. & J. (Md.) 291.

Rule of court not provided for by indorsement.— Where parties, by indorsement, in general terms, on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference — among others, that the submission for such enlarged time shall be made a rule of court — and, consequently, the party is liable to an attachment for non-performance of an award made within such enlarged time, under 9 & 10 Wm. III, c. 15. Evans *v.* Thomson, 5 East 189, 1 Smith K. B. 380.

An extension of time for award under rule of court has been held not sufficient to authorize an attachment for enforcement where the agreement for extension failed to provide that the award should be made a rule of court. Jenkins *v.* Law, 8 T. R. 87.

Extension regulated by statute.— Where the manner of extending the time within which an award may be made and returned to court is regulated by statute, mere consent of the parties, not evidenced as required by the statute, is not sufficient. Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Lazell *v.* Houghton. 32 Vt. 579. Under Me. Rev. Stat. (1857), c. 108, permitting an agreement for extension of the time for returning an award to a term of court subsequent to the term designated, it has been held that the parties could not, if the court should adjourn before the actual return, agree that an award returned after the designated term might be entered as of the term originally designated so as to warrant an entry of the award at a subsequent term. Berry *v.* Sands, 60 Me. 99.

Upon a rule for attachment for non-performance of an award, where the time for making the award had been enlarged, notice of such enlargement, and that the award had been made within the enlarged time, was required. Hilton *v.* Hapwood, 1 Marsh. 66. A verbal notice of the enlargement was sufficient (Doddington *v.* Bailward, 7 Dowl. 640, 8 L. J. C. P. 331); but it seems that a mere recital in the award of the fact of enlargement was not of itself sufficient notice (Davis *v.* Vass, 15 East 96).

9. *In re* Killett, etc., Local Board, 34 L. J. Q. B. 87, 11 L. T. Rep. N. S. 457, 13 Wkly. Rep. 207.

or an extension may be ordered by the court under the provisions of a statute giving the court authority to exercise such power.[10]

(IV) *Failure to Fix Time-Limit.* If no time is fixed within which the award must be made it is fair to presume that the parties intended to leave the time of making the award to the discretion of the arbitrators,[11] unless the circumstances of the case are such as evince an intention to require an award within a reasonable time,[12] in which event the question of what constitutes a reasonable

Extension of time by arbitrators.— Where the arbitrators are given authority to extend the time within which an award may be made, and the award is made beyond the time originally fixed, it should properly appear that the extension was made in accordance with the terms of the submission to a time at or beyond the actual completion of the award. Dickins *v.* Jarvis, 5 B. & C. 528, 8 D. & R. 285, 11 E. C. L. 569; Moule *v.* Stawell [*cited* in Davis *v.* Vass, 15 East 97]; George *v.* Lousley, 8 East 13, 9 Rev. Rep. 366; Kirk *v.* Unwin, 6 Exch. 908, 20 L. J. Exch. 345, 2 L. M. & P. 519; Reade *v.* Dutton, 2 Gale 228, 6 L. J. Exch. 16, 2 M. & W. 62; Wohlenberg *v.* Lageman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600; Matter of Hick, 8 Taunt. 694, 21 Rev. Rep. 511, 4 E. C. L. 340.

Interpretation of provision authorizing extension of time by arbitrators.— In an action on an arbitration bond in which the validity of the award was drawn in question by defendant, it appeared that the award was made after a day fixed in the submission, and also that the submission provided that the award might be made thereafter in case of prevention by either of the parties, and also that the arbitrators were ready in season to have made their award by the day limited, but that, at the request and for the accommodation of defendant, they adjourned beyond the time, and thereafter proceeded to a hearing and determination; and it was held that the award was conclusive and valid because the arbitrators were prevented by defendant from making it at the specified time, and that the provision of the submission related, not merely to the making up of the award after agreement, but to the whole proceeding. Bixby *v.* Whitney, 11 Me. 62.

10. Statutory extension by court.— Under 3 & 4 Wm. IV, c. 42, § 39 [repealed] if the arbitrator, having power to enlarge the time for making his award, failed to do so, but made his award after the time originally fixed, the court had power to extend the time so as to embrace the actual time of making the award. Parberry *v.* Newman, 9 Dowl. P. C. 288, 5 Jur. 175, 10 L. J. Exch. 169, 7 M. & W. 378, 2 Wkly. Rep. 464; *In re* Ward, 32 L. J. Q. B. 53, 11 Wkly. Rep. 88; Brown *v.* Collyer, 15 Jur. 881, 20 L. J. Q. B. 426, 2 L. M. & P. 470. The power of the court under this statute was not confined to cases where there had been a revocation, or an attempted revocation, of the submission. Burley *v.* Stephens, 4 Dowl. P. C. 255, 770, 1 Gale 374, 5 L. J. Exch. 92, 1 M. & W. 156.

Under the English Common-Law Procedure Act of 1854 [17 & 18 Vict. c. 125, § 15], the judge, in his discretion, has power to enlarge the time for making an award so as to validate an award made beyond the time originally fixed, although the submission contained no provision authorizing an enlargement by the arbitrator. May *v.* Harcourt, 13 Q. B. D. 688; Denton *v.* Strong, L. R. 9 Q. B. 117, 43 L. J. Q. B. 41, 30 L. T. Rep. N. S. 52, 22 Wkly. Rep. 316.

11. Within discretion of arbitrators.— *Alabama.*— Alabama Agricultural, etc., Assoc. *v.* Trimble, 49 Ala. 212.

Maine.— Small *v.* Thurlow, 37 Me. 504.

New Jersey.— Ruckman *v.* Ransom, 35 N. J. L. 565.

New York.— Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125.

Tennessee.— White *v.* Puryear, 10 Yerg. (Tenn.) 440.

England.— Curtis *v.* Potts, 3 M. & S. 145.

Canada.— Adams *v.* Ham, 5 U. C. Q. B. 292.

A delay of twelve years in the making of an award has been held, in the absence of good reasons for the delay, to be so unreasonable as to invalidate the award. Hook *v.* Philbrick, 23 N. H. 288.

Limitation of time by arbitrators.— Where no limit of time has been fixed in the submission within which an award shall be made, the arbitrators have no authority, unless it be contained in the submission, to fix a time beyond which the award may not be made. *In re* Morphett, 2 Dowl. & L. 967, 10 Jur. 546, 14 L. J. Q. B. 259.

12. Circumstances requiring award within a reasonable time.—Although no time is fixed in an agreement to submit to arbitrators the price to be paid for land purchased by one of the parties from the other, the fact that the land at the time was rapidly rising in value requires the making of an award within a reasonable time, and in such a case a delay of six months was held, under all the circumstances, to be an unreasonable time. Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5.

Requirement for an immediate valuation by designated arbitrators has been held not sufficiently complied with by an award made twelve months afterward. Rutherford *v.* Pillow, 5 Yerg. (Tenn.) 133.

A bond payable in certain time, conditioned to perform an award which is not required by the submission or specified by the bond to be made within a certain time, does not, by implication, engraft a limitation upon the power of the arbitrators which prevents them from making an award after the date named in the bond upon which the obligation is payable. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412.

time is one of fact, to be submitted to the jury.[13] It is, however, open to either of the parties to push the arbitration, where no time has been fixed, by requesting the arbitrators to proceed within a reasonable time, and to revoke the submission upon the failure of the latter to do so.[14]

(v) *Waiver of Time-Limit.* The time fixed for making the award may be waived by proceeding, without objection, before the arbitrators after expiration of the time[15] or by failure to make the expiration of the time-limit a ground of objection in the lower court when the award is there drawn in question.[16]

(vi) *Power of Court to Recommit Award.* The statutory power of the court to recommit an award implies the power to make a new award or a correction after the expiration of the original time-limit.[17]

d. Death of Arbitrator. The death of one of the arbitrators previous to the execution of an award terminates the authority of the board of arbitrators to make an award thereafter.[18] But it has been held that the death of one of the arbitrators after the execution of the award, and before the same has been returned to court for enforcement, would not invalidate the award, and that it might be returned thereafter.[19]

2. Effect of Termination of Authority. After the termination of the authority of arbitrators in the manner before stated they are *functi officio* and without further power to make any award, either as a new award[20] or by way of addition

13. Question for jury.— Haywood *v.* Harmon, 17 Ill. 477.

14. Requesting proceedings within reasonable time.— Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395; Small *v.* Thurlow, 37 Me. 504; Ruckman *v.* Ransom, 35 N. J. L. 565; Curtis *v.* Potts, 3 M. & S. 145.

15. Proceedings after expiration of time.— *Louisiana.*— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191.

Maine.— Adams *v.* Macfarlane. 65 Me. 143.

New York.— Wood *v.* Tunnicliff, 74 N. Y. 38.

West Virginia.— Mathews *v.* Miller, 25 W. Va. 817.

England.— Leggett *v.* Finlay, 6 Bing. 255, 8 L. J. C. P. O. S. 52, 3 M. & P. 629, 19 E. C. L. 122; Hallett *v.* Hallett, 7 Dowl. P. C. 389, 2 H. & N. 3, 3 Jur. 727, 8 L. J. Exch. 174, 5 M. & W. 25; Hawkesworth *v.* Brammall, 5 Myl. & C. 281, 46 Eng. Ch. 254; Rex *v.* Hill, 7 Price 638; Lawrence *v.* Hodson, 1 Y. & J. 16, 30 Rev. Rep. 754.

Canada.— Ontario, etc., R. Co. *v.* Le Curé, etc., de Ste. Anne, 7 Montreal Q. B. 110, 5 Montreal Super. Ct. 51, 21 Rev. Leg. 180.

Attending a hearing under protest, and after objections to the proceeding on the ground that the authority of the arbitrator has terminated because of expiration of the time-limit, has been held not a waiver of the objections nor sufficient to give the arbitrator authority to make an award. Davies *v.* Price, 34 L. J. Q. B. 8, 11 L. T. Rep. N. S. 203, 12 Wkly. Rep. 1009.

Attending one of several meetings after the expiration of the time-limit has been held to be merely a waiver *pro tanto*, and not to justify the proceeding thereafter when the party was absent, nor to constitute a parol submission to a new arbitration, the latter meetings having taken place under the terms of the original submission. Dunstan *v.* Norton, 13 L. T. Rep. N. S. 722.

Waiver of unauthorized extension by arbitrator.— By the terms of a reference to arbitration, the two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time, and afterward held a meeting, at which the parties attended, and it was held that the parties, being aware of these facts, and having afterward attended, could not make any objection on the ground of the enlargement of the time having been made before the appointment of the umpire. Matter of Hick, 8 Taunt. 694, 21 Rev. Rep. 511, 4 E. C. L. 340.

16. Failure to object.—Ellison *v.* Chapman, 7 Blackf. (Ind.) 224; Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395.

17. Hickey *v.* Veazie, 59 Me. 282; Sperry *v.* Ricker, 4 Allen (Mass.) 17; Eastman *v.* Burleigh, 2 N. H. 484; Henley *v.* Menefee, 10 W. Va. 771.

18. Before execution of award.— Blundell *v.* Brettargh, 17 Ves. Jr. 232.

19. After execution of award.— Cartledge *v.* Cutliff, 21 Ga. 1.

20. A second award made without special authority therefor is void, although the first award may be upheld if it is not otherwise objectionable.

Indiana.— Maud *v.* Patterson, 19 Ind. App. 619, 49 N. E. 974.

Kentucky.— Lansdale *v.* Kendall, 4 Dana (Ky.) 613; Martin *v.* Oneal, 2 Litt. (Ky.) 54; Eddy *v.* Northup, 15 Ky. L. Rep. 434, 23 S. W. 353; Martin *v.* White, 1 Ky. L. Rep. 347.

Maine.— Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214.

Massachusetts.— Clark *v.* Burt, 4 Cush. (Mass.) 396.

to the first award,[21] or correction thereof which requires a reconsideration of the merits of any matter submitted.[22] In some of the cases it has been held that, even after the completion of an award, the arbitrators have the power to correct clerical errors appearing on the face of the award,[23] while quite a number of other

New Hampshire.— Aldrich *v.* Jessiman, 8 N. H. 516.

New York.— Doke *v.* James, 4 N. Y. 568.

North Carolina.— Patton *v.* Baird, 42 N. C. 255.

United States.— Bayne *v.* Morris, 1 Wall. (U. S.) 97, 17 L. ed. 495; Alexander *v.* McNear, 28 Fed. 403.

England.— French *v.* Patton, 1 Campb. 180, 9 East 351, 9 Rev. Rep. 571; Phillips *v.* Evans, 1 Dowl. & L. 463, 13 L. J. Exch. 80, 12 M. & W. 309; Irvine *v.* Elnon, 8 East 54; Henfree *v.* Bromley, 6 East 309, 2 Smith K. B. 400, 8 Rev. Rep. 491.

Canada.— Sanford *v.* Sanford, 3 Nova Scotia 266.

Bond avoided by expiration of time.— A bond conditioned upon the performance of an award to be made at or before a designated time is avoided by the expiration of the time irrespective of whether or not the award made thereafter may be enforced because of an agreement for extension or waiver of time which is not made a part of the bond.

Maine.— Berry *v.* Sands, 60 Me. 99.

Massachusetts.—Franklin Min. Co. *v.* Pratt, 101 Mass. 359.

Michigan.— Elliot *v.* Hanson, 39 Mich. 157.

Vermont.— Lazell *v.* Houghton, 32 Vt. 579.

England.—Wilson *v.* Wilson, 1 Saund. 327*c*, note 3; Jenkins *v.* Law, 8 T. R. 87.

An award made after the time limited in the submission is unauthorized and void unless the time has been extended by agreement of the parties or by the arbitrators pursuant to the submission, or unless the requirement has been waived. Ruthven *v.* Ruthven, 8 U. C. Q. B. 12.

Statutory award made after the time-limit, without a proper enlargement of the time, cannot be enforced in the manner prescribed by statute. Bent *v.* Erie Tel., etc., Co., 144 Mass. 165, 10 N. E. 778; Wilson *v.* Kerr, 2 N. Brunsw. 280. The successful party is relegated to an action on the award. Matter of Schafer, 3 Abb. Pr. N. S. (N. Y.) 234.

21. Additional or supplemental award.— Shurtleff *v.* Parker, 138 Mass. 86; Green *v.* Lundy, 1 N. J. L. 497; Herbst *v.* Hagenaers, 137 N. Y. 290, 33 N. E. 315, 50 N. Y. St. 687; Flannery *v.* Sahagian, 134 N. Y. 85, 31 N. E. 319, 45 N. Y. St. 598; Talbott *v.* Hartley, 1 Cranch C. C. (U. S.) 31, 23 Fed. Cas. No. 13,732.

The original award may be enforced, though an unauthorized additional or supplemental award is void. Eddy *v.* Northup, 15 Ky. L. Rep. 434, 23 S. W. 353.

22. Correction of award.— *Kentucky.*— Martin *v.* White, 1 Ky. L. Rep. 347.

Maine.— Thompson *v.* Mitchell, 35 Me. 281.

Pennsylvania.— Robinson-Rea Mfg. Co. *v.* Mellon, 139 Pa. St. 257, 27 Wkly. Notes Cas. (Pa.) 571, 21 Atl. 91, 23 Am. St. Rep. 186; Buckwalter *v.* Russell, 119 Pa. St. 495, 13 Atl. 310.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238.

Wisconsin.— McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668.

England.—Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473.

Canada.— Vanburen *v.* Bull, 19 U. C. Q. B. 633; Benson *v.* Love, 1 U. C. Q. B. 398; Helps *v.* Roblin, 6 U. C. C. P. 52.

The evidence should not be reconsidered, after the completion of an award, for the purpose of changing the amount thereof without the assent of all the parties. Hartley *v.* Henderson, 189 Pa. St. 277, 282, 42 Atl. 198, the court saying: "If he could do it for the reason that he had overlooked items of the evidence, why could he not for the reason that he had given undue weight to testimony, or been deceived by witnesses, or had pursued a wrong plan in seeking facts, or had erred in the inferences drawn from them?"

By agreement for reconsideration the parties may procure the reopening of the arbitration after an award has been delivered. Eveleth *v.* Chase, 17 Mass. 458.

Estoppel to claim termination of authority. — Where an award had been made and delivered to the parties, and one of them thereafter procured the arbitrators to change the award so as to make it more beneficial to him, and the award, as changed, was returned to court, and judgment entered thereon after hearing of objections by the party procuring the amended award, it was held, on appeal, that the judgment was proper upon the ground that the party was estopped to claim a lack of authority in the arbitrators to do what he had procured them to do in a manner favorable to him and unfavorable to his adversary. Rogers *v.* Corrothers, 26 W. Va. 238.

23. View that clerical errors may be corrected.— Hartley *v.* Henderson, 189 Pa. St. 277, 42 Atl. 198; Robinson-Rea Mfg. Co. *v.* Mellon, 139 Pa. St. 257, 27 Wkly. Notes Cas. (Pa.) 571, 21 Atl. 91, 23 Am. St. Rep. 186; Goodell *v.* Raymond, 27 Vt. 241.

Formal amendment of an award, in compliance with a statutory requirement, to be made after its delivery, has been held to be within the authority of arbitrators. Goodell *v.* Raymond, 27 Vt. 241; Dorr *v.* Hill, 62 N. H. 506.

In case of a parol submission, it has been held that the arbitrators might, if the alteration is made before the award is delivered to the parties, make any alterations in their award before the expiration of the term limited in the submission for its publication. Eveleth *v.* Chase, 17 Mass. 458.

Material alterations.— A plea to an action on an award, setting up an alteration in the

cases, including decisions of both English and Canadian courts, hold that even such power to correct clerical errors appearing on the face of the award does not exist.[24]

IV. PROCEEDINGS BY AND BEFORE ARBITRATORS.

A. Mode of Conducting in General. The mode of conducting the proceedings in arbitration is, as a general proposition, for the arbitrators to determine, and, when not restricted by the submission, they are not bound to proceed according to technical rules.[25]

B. Under Corporate By-Laws or Society Regulations. An arbitration, held pursuant to corporate by-laws or regulations of a society, under a voluntary submission of the parties, is governed by the ordinary rules of arbitration and award, and the award is equally as binding as if made without reference to such regulations.[26]

award, has been held bad because it did not allege that the award was altered in a material part. Brown *v.* Warnock, 5 Dana (Ky.) 492.

The award may be signed or sealed after delivery, provided it is done within the time fixed for delivery (Forrer *v.* Coffman, 23 Gratt. (Va.) 871), or provided no time has been specified for the making or delivery of the award (Saunders *v.* Heaton, 12 Ind. 20).

24. View that even clerical errors cannot be corrected.—Dudley *v.* Thomas, 23 Cal. 365; Mordeu *v.* Palmer, L. R. 6 Ch. 22, 40 L. J. Ch. 8, 22 L. T. Rep. N. S. 752, 19 Wkly. Rep. 36; Baby *v.* Davenport, 2 U. C. Q. B. 65.

An alteration of the amount, leaving the original amount legible, is unauthorized and void, as to the alteration, when made after the completion of the award, but the award showing the original amount is valid for that amount. Henfree *v.* Bromley, 6 East 309, 2 Smith K. B. 400, 8 Rev. Rep. 491.

Correction of a mistake in the calculation of figures after making an award has been held unwarranted, the court remarking at the same time that such mistake might include the essential merits of the case. Irvine *v.* Elnon, 8 East 54.

Powers analogous to those of a jury.— It has been held that, after the making of a final award, the arbitrators have no more power to alter it than a jury has to change their verdict after it is rendered and they are discharged. Patton *v.* Baird, 42 N. C. 255.

25. Not bound by technical rules.— *Connecticut.*— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Iowa.— Skrable *v.* Pryne, 93 Iowa 691, 62 N. W. 21.

Maine.— Sanborn *v.* Paul, 60 Me. 325.

Massachusetts.— Blodgett *v.* Prince, 109 Mass. 44.

New York.— Turnbull *v.* Martin, 2 Daly (N. Y.) 428. Often the controlling reason for resorting to this method of settling controversies is to avoid the customary expense and delay consequent upon a trial in court. Locke *r.* Filley, 14 Hun (N. Y.) 139.

Pennsylvania.— Robinson *v.* Bickley, 30 Pa. St. 384.

South Carolina.— Askew *v.* Kennedy, 1 Bailey (S. C.) 46.

England.— Tillam *v.* Copp, 5 C. B. 211, 57 E. C. L. 211; Hewlett *v.* Laycock, 2 C. & P. 574, 12 E. C. L. 740. The courts have no power to order an arbitrator to proceed according to a particular principle. Houghton *v.* Bankart, 3 De G. F. & J. 16, 64 Eng. Ch. 12.

Canada.—Townsend *v.* Morton, 2 U. C. Q. B. 100.

By a voluntary submission to judges of their own choosing the parties will always be understood to mean to dispense with the technical rules of proceeding by which the regular judicial tribunals are usually governed. Askew *v.* Kennedy, 1 Bailey (S. C.) 46. Irregularity which is not prejudicial will not vitiate an award. Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

Course prescribed by agreement.— Where a course of proceedings is prescribed to an arbitrator by the consent of the parties, or he engages to pursue a particular course which the parties think material to their interests, he is not at liberty to afterward depart from it. Hewitt *v.* Reed City, 124 Mich. 6, 82 N. W. 616, 50 L. R. A. 128; Walker *v.* Charleston, Bailey Eq. (S. C.) 443.

The manner of proceeding is sometimes regulated by the statute, as that the hearing shall be conducted as before referees. O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256.

Proceeding without submission.—While the authority of the arbitrator rests in the submission, it is no objection to the validity of an award that the arbitrators do not have the articles of submission before them when they enter upon the performance of their duty. Boor *v.* Wilson, 48 Md. 305.

Where articles of submission are in a foreign language and contain technical terms, the arbitrators may receive expert testimony as to the meaning, when translated, of such terms. Republic of Colombia *v.* Cauca Co., 106 Fed. 337.

26. *Alabama.*— Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725, holding that an arbitration, held pursuant to a church regulation, was as binding as if held without reference to such regulation. *Contra,* Tubbs *v.* Lynch, 4 Harr. (Del.) 521.

California.— Robinson *v.* Templar Lodge No. 17, I. O. O. F., 97 Cal. 62, 31 Pac. 609. But in Grimbley *v.* Harrold, 125 Cal. 24, 57

C. Objections in General. Where it does not otherwise appear, every presumption will be indulged in favor of the integrity and regularity of the proceedings of arbitrators.[27] Irregularities in the proceedings of arbitrators may be made good by agreement of the parties.[28] Objections to the proceedings should, as a general rule, be taken at the hearing and when they come to the knowledge of the party, for, by proceeding thereafter, the objection will be waived. A person cannot thus take the chance of a favorable issue.[29] But, in order to operate as a waiver, the party must have had notice of the defects.[30]

Pac. 558, 73 Am. St. Rep. 19, where a beneficiary of a certificate in a mutual benefit assurance association, the by-laws of which provided for the appointment, when conflicting claims should be set up, of a board of arbitration to hear and determine who were its beneficiaries under its certificates, filed her claim with the association and subsequently adduced evidence of the claim before the board of arbitration, it was held that she was not bound by the decision of such board, the court distinguishing Robinson *v.* Templar Lodge No. 17, I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193, in that the dispute in that case was between a member of the organization concerning rights founded immediately upon the contract of membership, and which the member had, by assenting to its rules, agreed to submit to its tribunals.

New York.— Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201.

Pennsylvania.—Green *v.* Carpenter, 12 Wkly. Notes Cas. (Pa.) 201, holding that if a dispute is submitted to arbitration, according to the rules of a society of which the parties are members, it may be presumed that they intended the award to be subject to the rules of the society.

Tennessee.— Vaughn *v.* Herndon, 91 Tenn. 64, 17 S. W. 793.

27. Presumption in favor of regularity.— See *supra*, I, A, 3. But see Gear *v.* Bracken, 1 Pinn. (Wis.) 249, wherein it was held that, under a submission to a committee of a chamber of commerce, the award must show that the arbitrators proceeded according to by-laws, rules, and regulations of the chamber of commerce.

28. Agreement of parties.— Tracy *v.* Herrick, 25 N. H. 381.

29. Time for making objections.—*Alabama.* — By proceeding without objection on the ground that the arbitrators did not comply with a condition upon which the party's consent to arbitrate had been obtained, the objection is waived. Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725.

Florida.— Blood *v.* Shine, 2 Fla. 127.

Georgia.— Harper *v.* Pike County Road Com'rs, 52 Ga. 659.

Louisiana.— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191.

Maine.— Small *v.* Trickey, 41 Me. 507, 66 Am. Dec. 255; Stewart *v.* Waldron, 41 Me. 486.

Massachusetts.— Everett *v.* Charlestown, 12 Allen (Mass.) 93; Maynard *v.* Frederick, 7 Cush. (Mass.) 247.

Nebraska.— O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256.

New York.— Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201; Britton *v.* Hooper, 25 Misc. (N. Y.) 388, 55 N. Y. Suppl. 493.

Pennsylvania.— Thomas *v.* Heger, 174 Pa. St. 345, 34 Atl. 568 [*affirming* 11 Montg. Co. Rep. (Pa.) 106].

England.— Moseley *v.* Simpson, L. R. 16 Eq. 226, 42 L. J. Ch. 739, 28 L. T. Rep. N. S. 727, 21 Wkly. Rep. 694.

Canada.—Slack *v.* McEathron, 3 U. C. Q. B. 184; Hickman *v.* Lawson, 8 Grant Ch. (U. C.) 386.

Proceeding after objection.— In Ringland *v.* Lowndes, 17 C. B. N. S. 514, 10 Jur. N. S. 850, 33 L. J. C. P. 337, 12 Wkly. Rep. 1010, 112 E. C. L. 514 [*reversing* 15 C. B. N. S. 173, 109 E. C. L. 173], it was held that a party who attended before an arbitrator under protest, cross-examined his adversary's witnesses, and called witnesses on his own behalf, did not thereby preclude himself from afterward objecting that the arbitrator was proceeding without authority.

Effect of appointment of umpire.— On a motion to set aside an award of an umpire in a case where the arbitrators had disagreed, it was held that the court would not regard irregular and improper acts on the part of the arbitrators. Crabtree *v.* Green, 8 Ga. 8.

A court of equity may restrain an arbitration proceeding upon equitable grounds, as fraud or misconduct, or where it is satisfied that injury will result to the party complaining if the arbitration is allowed to go on (Pickering *v.* Cape Town R. Co., L. R. 1 Eq. 84, 13 L. T. Rep. N. S. 570; Farrar *v.* Cooper, 44 Ch. D. 323, 59 L. J. Ch. 506, 62 L. T. Rep. N. S. 528, 38 Wkly. Rep. 410; Beddow *v.* Beddow, 9 Ch. D. 89, 47 L. J. Ch. 588, 26 Wkly. Rep. 570), or where the arbitrator has been improperly appointed, and before the submission has been made a rule of court (Direct Cable Co. *v.* Dominion Tel. Co., 28 Grant Ch. (U. C.) 648). But the fact that a demand for arbitration, under a contract providing for a settlement of the differences between parties in that manner, sought the determination of a claim which was not within the contract of submission was held not a ground for an injunction, because an award as to matters not within the agreement would be void. Cincinnati *v.* Cincinnati Southern R. Co., 6 Ohio Cir. Ct. 247.

30. Notice of defects.— Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Darnley *v.* London, etc., R. Co., L. R. 2 H. L. 43, 36 L. J. Ch.

D. Hearing — 1. Right to — a. In General. It may be stated, as a general proposition, that parties are always entitled to a hearing before the arbitrators, and, although arbitrators are not bound by strict rules of evidence, they cannot transgress that fundamental principle of justice which declares that no man shall be condemned without an opportunity of being heard.[31] The parties are entitled to a hearing upon all the matters submitted.[32] But, on the other hand, it is held that arbitrators are not bound to hear arguments of counsel or of parties, and, in the absence of a request, are certainly not under such a duty.[33]

b. By All the Arbitrators. All the arbitrators must have notice of the meeting,[34] and the matters must be heard by all the arbitrators together. A less number have no right to proceed, for the parties are entitled to have the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges,[35] unless a different

404, 16 L. T. Rep. N. S. 217, 15 Wkly. Rep. 817.

31. **Entitled to hearing.**— *Massachusetts.*— Billings *v.* Billings, 110 Mass. 225.

New York.— Brown *v.* Lyddy, 11 Hun (N. Y.) 451; Moran *v.* Bogert, 16 Abb. Pr. N. S. (N. Y.) 303.

South Carolina.— Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478 [*citing* Morris *v.* Reynolds, 2 Ld. Raym. 857].

Virginia.—Shipman *v.* Fletcher, 82 Va. 601.

England.— Ives *v.* Medcalfe, 1 Atk. 63; Brook *v.* Badart, 16 C. B. N. S. 403, 10 Jur. N. S. 704, 33 L. J. C. P. 246, 10 L. T. Rep. N. S. 378, 111 E. C. L. 403; Thorburn *v.* Barnes, L. R. 2 C. P. 384, 36 L. J. C. P. 184, 16 L. T. Rep. N. S. 10, 15 Wkly. Rep. 623.

Canada.—Doe *v.* Murray, 4 N. Brunsw. 359; Perlet *v.* Perlet, 15 U. C. Q. B. 165; *In re* Potter, 5 Ont. Pr. 197.

See 4 Cent. Dig. tit. "Arbitration and Award," § 158.

Presumptions.— It need not appear on the face of the award that the parties were heard, or had an opportunity to be heard, by the arbitrator. Warner *v.* Collins, 135 Mass. 26; Houghton *v.* Burroughs, 18 N. H. 499. And, if an award states that, after due notice, the arbitrators met the several parties and their counsel, and heard their several pleas and allegations, the legal presumption is that they also heard all the legal proofs offered by either party, unless the contrary appears, although it is not so explicitly stated in the award. Leominster *v.* Fitchburg, etc., R. Co., 7 Allen (Mass.) 38.

32. **Hearing on all matters submitted.**— Fairfield *v.* Butchard, 3 Rev. de Lég. 357.

See *infra*, VI, J, 6, c.

Person named by a party as his arbitrator does not represent him in the sense that the presence of such arbitrator will justify a statement by the arbitrators, in their award, that the party was heard. Richelieu, etc., Nav. Co. *v.* Commercial Union Assur. Co., 3 Quebec Q. B. 410.

33. **Arbitrators not bound to hear arguments.**— Zell *v.* Johnston, 76 N. C. 302. See also Collier *v.* Hicks, 2 B. & Ad. 663, 9 L. J. M. C. 138, 22 E. C. L. 278; *In re* Mequeen, 9 C. B. N. S. 793, 99 E. C. L. 793. But it is no objection that, contrary to the agreement of the parties, one party's counsel assisted him at the hearing, where such counsel desisted upon objection. Blodgett *v.* Prince, 109 Mass. 44.

Presence of stranger.— In Tillam *v.* Copp, 5 C. B. 211, 57 E. C. L. 211, the court refused to set aside an award on the ground that the arbitrator declined to permit a stranger to be present for the purpose of assisting defendant's attorney with practical hints. But see *In re* Haigh, 3 De G. F. & J. 157, 31 L. J. Ch. 420, 64 Eng. Ch. 124, where an award was set aside because an arbitrator excluded from some of the meetings a son of one of the parties, who was conversant with the partnership in dispute, and also a shorthand writer, the attendance of both of whom the parties wished to have.

34. **All arbitrators must have notice.**— Blanton *v.* Gale, 6 B. Mon. (Ky.) 260; Doherty *v.* Doherty, 148 Mass. 367, 19 N. E. 352.

35. *Illinois.*— Vessel Owners' Towing Co. *v.* Taylor, 126 Ill. 250, 18 N. E. 663; Smith *v.* Smith, 28 Ill. 56 (holding, upon the principle that each arbitrator must be present at every meeting and the witnesses and parties must be examined in the presence of them all, that if one so drunk as to be *non compos mentis* acts as an arbitrator, the award will be set aside); Citizens Ins. Co. *v.* Hamilton, 48 Ill. App. 593.

Kentucky.— Henderson *v.* Buckley, 14 B. Mon. (Ky.) 236.

Maine.— Thompson *v.* Mitchell, 35 Me. 281.

Massachusetts.— Carpenter *v.* Wood, 1 Metc. (Mass.) 409; Short *v.* Pratt, 6 Mass. 496.

Missouri.— Hinkle *v.* Harris, 34 Mo. App. 223. Under Mo. Gen. Stat. (1865), c. 198, § 5, any number of arbitrators less than the whole were incompetent to sit. Bowen *v.* Lazalere, 44 Mo. 383.

New Jersey.— Hoff *v.* Taylor, 5 N. J. L. 976; Barr *v.* Chandler, 47 N. J. Eq. 532, 20 Atl. 733, holding that proceedings and award by persons who do not consult together and arrive at their conclusion as a result of conference are of no effect.

New York.—McInroy *v.* Benedict, 11 Johns. (N. Y.) 402.

Vermont.— Howard *v.* Conro, 2 Vt. 492.

course is authorized by the submission,[36] or the parties assent to proceedings by a less number than the whole,[37] or unless, under the original authority, the arbitrators might have made a majority award.[38] But it is not necessary that the award should show on its face that all the arbitrators were present at the hearing, because this fact, while an essential one, is one which may be shown if it is denied.[39]

2. Appointment of Time and Place — a. In General. Parties must have a reasonable time within which to be heard,[40] and, in the absence of other provision, it is for the arbitrators to appoint a time and place of hearing, and they should not make an award without appointing such time.[41] If the submission provides

England.— Beck *v.* Jackson, 1 C. B. N. S. 695, 87 E. C. L. 695; Lord *v.* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404. In Plews *v.* Middleton, 6 Q. B. 845, 852, 51 E. C. L. 845, Patterson, J., said: "It is true that the erroneous proceeding related to a very small matter; but, if it were sanctioned in any instance, the referees in every case of joint arbitration might agree to carry on their inquiries apart." In that case it appears that several arbitrators each, separately, examined a witness in relation to a small matter of difference. And Coleridge, J., said: "To uphold this award would be to authorize a proceeding contrary to the first principles of justice."

Canada.— Toronto *v.* Leak, 23 U. C. Q. B. 223; Hickman *v.* Lawson, 8 Grant Ch. (U. C.) 386.

Misconstruction of character of arbitrator. — An award by two, under a submission to three, has been held to be had, though the two supposed that they had authority, under a parol agreement made prior to the written submission, and that the third arbitrator provided for by the submission was to be called in only in case of their disagreement. Loring *v.* Alden, 3 Metc. (Mass.) 576. But, conversely, it was held in Overby *v.* Thrasher, 47 Ga. 10, that where three arbitrators were selected and one of them conceived himself to have been selected as umpire and expressed no opinion on the points submitted, except where the others disagreed, but signed the award with the others, it was doubtful if the award could be set aside on this ground, and certainly the arbitrator, himself, could not be introduced to show his own misconduct in this respect.

36. As governed by terms of submission.— Devereux *v.* Burgwin, 33 N. C. 490, holding that where a submission for the partition of land provides that the arbitrators should make such examination as they think proper, an award made upon a survey of one of the arbitrators, without the others having gone upon the land, is sufficient.

37. Controlled by stipulation of parties.— Hinkle *v.* Harris, 34 Mo. App. 223; Howard *v.* Conro, 2 Vt. 492; Wier *v.* Cumminger, 11 Nova Scotia 173.

Proceeding without objection is sufficient evidence of assent. Glass-Pendery Consol. Min. Co. *v.* Meyer Min. Co., 7 Colo. 51, 1 Pac. 443; Akridge *v.* Patillo, 44 Ga. 585; Howard *v.* Conro, 2 Vt. 492.

Proceeding after filing protest.— Where a party appears before the arbitrators and files a protest against their jurisdiction, on the ground of the absence of one of their number, he does not waive his objection by subsequently participating in the hearing. Kent *v.* French, 76 Iowa 187, 40 N. W. 713.

Reception of documentary evidence.—Where the parties appeared at the place of hearing before two arbitrators, where documentary evidence only was introduced, it was held that this was not sufficient to sustain an inference that one of the parties had consented that the award should be made without the participation of a third arbitrator named in the submission. Loring *v.* Alden, 3 Metc. (Mass.) 576.

Mere inspection of the subject-matter, without taking testimony or deciding the points to be arbitrated, is held not to constitute a hearing in the sense that an award will be bad unless all the arbitrators were present. Glass-Pendery Consol. Min. Co. *v.* Meyer Min. Co., 7 Colo. 51, 1 Pac. 443.

38. Under authority for majority award.— See *infra*, IV, E, 2.

39. That all arbitrators were present need not appear in award.— Hoffman *v.* Hoffman, 26 N. J. L. 175; Rixford *v.* Nye, 20 Vt. 132. A statement that they met at a certain time and place, heard the particulars, and the majority found the facts and made the report, means that all the referees heard the parties. Dorr *v.* Hill, 62 N. H. 506. But, where it did not appear by a report of referees that all the referees named in the submission were present at the hearing, the report not being signed by all the referees, under a reference made under a rule entered before a justice of the peace, pursuant to statute, it was held that a judgment entered on such a report would, on error, be reversed. Short *v.* Pratt, 6 Mass. 496.

40. Reasonable time.— Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82; Green *v.* Franklin, 1 Tex. 497.

41. Arbitrators should appoint time and place.— *Louisiana.*— Penny *v.* Carl, 10 La. Ann. 202.

Massachusetts.— Blodgett *v.* Prince, 109 Mass. 44.

New York.— Moran *v.* Bogert, 16 Abb. Pr. N. S. (N. Y.) 303. The arbitrator is the judge of the reasonableness of the notice. Elmendorf *v.* Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

Pennsylvania.— Weir *v.* Johnston, 2 Serg. & R. (Pa.) 459.

for a time and place of meeting the arbitrators must meet at that time and place.[42] The power of the arbitrators to act is not confined, however, by any such consideration as that of territorial jurisdiction.[43]

b. Notice — (i) *Right to.* Though formerly it was otherwise,[44] and a distinction is made in some of the cases between a voluntary submission and a submission by rule of court,[45] it may be laid down as a general rule that, unless the parties have dispensed with or waived notice, and even in the absence of any provision therefor in the submission, an award cannot properly be made without notice to them where, in the nature of the submission, the judgment of the arbitrators may be influenced or enlightened by the adduction of evidence.[46] But the

England.— Fetherstone *v.* Cooper, 9 Ves. Jr. 67. Arbitrators may, if they think best, examine a witness at his own house. Tillam *v.* Copp, 5 C. B. 211, 57 E. C. L. 211; Hewlett *v.* Laycock, 2 C. & P. 574, 12 E. C. L. 740.

As governed by statute.— An appointment, in the absence of a party, of a day of meeting sooner than the time prescribed by the statute makes subsequent proceedings erroneous. Kirk *v.* Eaton, 10 Serg. & R. (Pa.) 103.

After declining to act, if the arbitrators, at the instance of one of the parties, are prevailed upon to act, and authorize such party to give notice to his adversary of the time and place of proceeding, and at such time and place they, against the protest of the other party, hear the matters on *ex parte* evidence, it is misbehavior which will vitiate the award. Graham *v.* Pence, 6 Rand. (Va.) 529.

42. Designated in submission.— Strum *v.* Cunningham, 3 Ohio 286. The parties cannot be heard after the time limited for the hearing in the agreement of the parties. Cole *v.* Blunt, 2 Bosw. (N. Y.) 116.

Presumption.— It is held that an award need not show on its face that the parties met at the designated place. Hassenpflug *v.* Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200; Kimble *v.* Saunders, 10 Serg. & R. (Pa.) 193. *Contra*, Saunders *v.* Throckmorton, Ky. Dec. 324. So, in Strum *v.* Cunningham, 3 Ohio 286, as to a statutory arbitration, it was held that the same motive which induced the legislature to require that a time and place should be agreed on and stated in the submission also required that the agreement in that respect should be strictly observed — not having trusted to parol proof of this part of the agreement, but having directed that it should be a part of the submission, for the same reason the performance of it should appear from the award.

43. Territorial jurisdiction.—Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367 (holding that where a part of the subject-matter of the submission was land situated in another state, the fact that the arbitrators met in the latter state, the parties appearing before them without objection, could not vitiate the award; that the time and place of the meeting, whether in one state or the other, under such circumstances, was within the discretion of the arbitrators); McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505 (holding that the fact that the arbitration was held and an award rendered in one county did not prevent the award from being made the judgment of the court of another county, when such proceeding is authorized by the submission). See also *infra*, XI, E, 2.

44. Tittenson *v.* Peat, 3 Atk. 529. The doctrine of this case was afterward departed from. Curtis *v.* Sacramento, 64 Cal. 102, 28 Pac. 108 [*citing* Whatley *v.* Moreland, 2 C. & M. 347, 2 Dowl. P. C. 249, 3 L. J. Exch. 58, 4 Tyrw. 255; Paschal *v.* Terry, W. Kel. 132; Fetherstone *v.* Cooper, 9 Ves. Jr. 67].

45. In the former, proof of notice seems to have been considered unnecessary, and all that was required was proof of the execution of the award according to the submission. Miller *v.* Kennedy, 3 Rand. (Va.) 2, excluding the defense in an action on the award at law and holding that the only redress was by resort to a court of equity, upon the authority of 1 Saund. 328, (a) note 3, wherein, while the defense was excluded at law, the party obtained proper relief on the ground of corruption and partiality in the arbitrators upon a bill in exchequer. See Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286, holding that, where a bill in equity sets up an award and traces the claim of complainant through it, the award will be held *prima facie* good to support a decree *pro confesso*, though there is no averment that it was made upon notice. See also *infra*, IX, B.

46. Necessity of notice.— *Alabama.*— Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476, under statute.

Arkansas.— McFarland *v.* Mathis, 10 Ark. 560.

California.— Curtis *v.* Sacramento, 64 Cal. 102, 28 Pac. 108.

Delaware.— Meredith *v.* Sanborn, 5 Harr. (Del.) 349.

Georgia.— Walker *v.* Walker, 28 Ga. 140.

Illinois.—Vessel Owners' Towing Co. *v.* Taylor, 126 Ill. 250, 18 N. E. 663 [*affirming* 25 Ill. App. 503]; Ingraham *v.* Whitmore, 75 Ill. 24; Williams *v.* Schmidt, 54 Ill. 205; Reeves *v.* Eldridg, 20 Ill. 383.

Indiana.— Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028.

Iowa.— Dormoy *v.* Knower, 55 Iowa 722, 8 N. W. 670.

Kentucky.— Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Saunders *v.* Throckmorton, Ky. Dec. 324 (holding that notice is necessary where one of the conditions of a submission was that the parties should, with their witnesses, attend the arbitrators at any time

notice to which the parties are entitled is only such as will give them an opportunity to be heard, and it is not necessary that they should be notified of the time and place where the arbitrators will meet to finally determine the case.[47]

(II) *Sufficiency.* The parties must have formal notice, and it is not sufficient that they casually acquire information that the hearing is in progress;[48] but it is sufficient if the time is fixed in the presence of the parties,[49] or if, by the terms of the submission, the attorneys of the parties are made arbitrators.[50]

(III) *Presumption.* It need not appear affirmatively by the award that notice, or the proper notice, was given the parties, as this may be intended if it does not appear that the notice was not given.[51]

and place that should be appointed by the arbitrators); Sims *v.* Banta, 9 Ky. L. Rep. 286.

Louisiana.— Dreyfous *v.* Hart, 36 La. Ann. 929; Penny *v.* Carl, 10 La. Ann. 202.

Maine.— McKinney *v.* Page, 32 Me. 513.

Maryland.— Wilson *v.* Boor, 40 Md. 483; Bushey *v.* Culler, 26 Md. 534; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458; Young *v.* Reynolds, 4 Md. 375; Emery *v.* Owings, 7 Gill (Md.) 488, 48 Am. Dec. 580; Bullitt *v.* Musgrave, 3 Gill (Md.) 31; Rigden *v.* Martin, 6 Harr. & J. (Md.) 403; Goldsmith *v.* Tilly, 1 Harr. & J. (Md.) 361.

Massachusetts.— Hills *v.* Home Ins. Co., 129 Mass. 345; Crowell *v.* Davis, 12 Metc. (Mass.) 293.

New Hampshire.— Hook *v.* Philbrick, 23 N. H. 288. Where the submission provides that the arbitrator "shall collect all the evidence he can, and show it to the party before he decides, and that then either party may add what he can," etc., the arbitrator cannot omit to show the evidence which he has collected, and to give the parties notice or opportunity to be heard. Goodall *v.* Cooley, 29 N. H. 48.

New York.— Linde *v.* Republic F. Ins. Co., 50 N. Y. Super. Ct. 362; Elmendorf *v.* Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587. The award is in the nature of a judgment of an inferior court which has not obtained jurisdiction of the parties. Jordan *v.* Hyatt, 3 Barb. (N. Y.) 275.

Rhode Island.— Wood *v.* Helme, 14 R. I. 325.

South Carolina.—Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478.

Texas.— Green *v.* Franklin, 1 Tex. 497.

West Virginia.— Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

Wisconsin.— Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

United States.— Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Warren *v.* Tinsley, 53 Fed. 689, 3 C. C. A. 613, 2 U. S. App. 507.

England.— Gladwin *v.* Chilcote, 9 Dowl. P. C. 550, 5 Jur. 749; Thorburn *v.* Barnes, L. R. 2 C. P. 384, 36 L. J. C. P. N. S. 184, 16 L. T. Rep. N. S. 10, 15 Wkly. Rep. 623; Walker *v.* Frobisher, 6 Ves. Jr. 70, 5 Rev. Rep. 223.

Canada.—*In re* Johnson, 12 U. C. Q. B. 135; *In re* McMullen, 2 U. C. Q. B. 175; McCulloch *v.* McNevin, 6 L. C. Jur. 257.

See also, generally, *infra*, IV, D, 5, 7.

See 4 Cent. Dig. tit. "Arbitration and Award," § 165.

A surety in an agreement of submission need not be notified of the arbitration. Farmer *v.* Stewart, 2 N. H. 97; Binsse *v.* Wood, 47 Barb. (N. Y.) 624.

47. Not entitled to notice of time and place of final determination.— Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157; Zell *v.* Johnston, 76 N. C. 302. Arbitrators, like jurors, have, for the purpose of making their award, the privilege of consultation in private. Roloson *v.* Carson, 8 Md. 208.

48. Formal notice.— Vessel Owners' Towing Co. *v.* Taylor, 126 Ill. 250, 18 N. E. 663.

Question of fact.— Where there is evidence that the parties knew when the arbitrators were engaged in making their award and that it was intended that it should be made without the presence of the parties, the question whether or not a party had notice or waived notice was a question for the determination of the trial court. Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028. And evidence that, prior to making any investigation, the arbitrators asked instructions of a party who directed them to investigate the matter and return their award, was held sufficient to justify a finding of due notice of the hearing. Donnell *v.* Lee, 58 Mo. App. 288.

49. Time fixed in presence of parties.— Box *v.* Costello, 6 Misc. (N. Y.) 415, 27 N. Y. Suppl. 293.

Notice of hearing may be obviated by agreement, of the attorneys for the parties, as to the time and place of meeting. Shire *v.* Rex, 1 Browne (Pa.) 174.

50. Attorneys as arbitrators.—Hill *v.* Hill, 11 Sm. & M. (Miss.) 616.

51. *Alabama.*— Crook *v.* Chambers, 40 Ala. 239; Mindenhall *v.* Smith, Minor (Ala.) 380.

Illinois.— But see Reeves *v.* Eldridg, 20 Ill. 383.

Kentucky.—Keans *v.* Rankin, 2 Bibb (Ky.) 88.

Maryland.— Rigden *v.* Martin, 6 Harr. & J. (Md.) 403.

Mississippi.— Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286.

New York.— New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446.

Ohio.— Hassenpflug *v.* Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200.

Texas.— Offeciers *v.* Dirks, 2 Tex. 468.

Virginia.— Miller *v.* Kennedy, 3 Rand. (Va.) 2.

Wisconsin.— Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

3. Attendance of Witnesses. At common law, or without the aid of statute, arbitrators have no authority, of themselves, to compel the attendance of witnesses.[52]

4. Oath of Witnesses — a. Necessity. Though sometimes required by statute, it is not, at common law, necessary that the witnesses should be sworn, unless it is so provided in the submission.[53] But, in case of such provision, the witnesses must be sworn in order to make a valid award,[54] unless the requirement is waived.[55] On the other hand, the omission to swear witnesses has been held to be a mere irregularity, which could not be set up as a defense to an action on the award.[56] But, whether such omission be a mere irregularity or of such consequence that it might be pleaded in defense of an action on the award, the parties may waive the necessity for such oath[57] — as by failing to request the administration of the oath, or neglecting to make any objection at the hearing,[58] or at

United States.— Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904.

52. Compelling attendance of witnesses.— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191; Tobey *v.* Bristol County, 3 Story (U. S.) 800, 23 Fed. Cas. No. 14,065. So, it is held that a statute requiring a submission to be in writing or by order of court is not for the purpose of repealing the common law, but to offer the parties, when they see fit to adopt it, a more certain and adequate remedy for the adjustment of their controversies, as by proceeding under the statute the arbitrators could act as a quasi-judicial tribunal, clothed with the power to administer oaths and compel the attendance of witnesses. Thomasson *v.* Risk, 11 Bush (Ky.) 619. And a submission to arbitration being made a rule of court, it has been held that a suit is pending within the meaning of a statute enabling the court to issue process to compel attendance of witnesses. Elliott *v.* Queen City Assur. Co., 6 Ont. Pr. 30. See also, generally, Witnesses.

Habeas corpus to bring up witness.— In Marsden *v.* Overbury, 18 C. B. 34, 25 L. J. C. P. 200. 86 E. C. L. 34, the court granted a habeas corpus ad testificandum to bring up a prisoner in criminal custody for the purpose of giving evidence before an arbitrator. See also, generally, Habeas Corpus.

53. At common law.— *Iowa.*— Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502.

Louisiana.— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191.

Maine.— Sanborn *v.* Paul, 60 Me. 325.

Ohio.— State *v.* Jackson, 36 Ohio St. 281; Hassenpflug *v.* Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200.

South Carolina.—Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 9 S. E. 714; State *v.* McCroskey, 3 McCord (S. C.) 308.

Wisconsin.— Kane *v.* Fond du Lac, 40 Wis. 495.

United States.— Tobey *v.* Bristol County, 3 Story (U. S.) 800, 23 Fed. Cas. No. 14,065.

Affidavits.— If the submission to arbitration is, "so as the witnesses be examined on oath," affidavits cannot be read. Banks *v.* Banks, 1 Gale 46.

Discretion conferred by submission.— If the submission provides that the arbitrator shall be at liberty to examine the parties and the witnesses on oath if he shall think fit, it is held that it is for him to determine whether he will examine the witness on oath or not. Smith *v.* Goff, 3 Dowl. & L. 47, 14 M. & W. 264.

54. Wolfe *v.* Hyatt, 76 Mo. 156 (holding that no action could be maintained on the award); Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196. But, in Grafton Quarry Co. *v.* McCully, 7 Mo. App. 580, it was held that no express agreement that witnesses need not be sworn was necessary.

Liability for slander.— On the question of the liability of a person for slander in calling a witness a liar, it was held that an oath administered to a witness who testified before arbitrators was not binding where a new party came in and new matters were submitted after the oath had been administered. Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

55. Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196.

The presumption is that witnesses were sworn, and the award need not show it expressly. Tomlinson *v.* Hammond, 8 Iowa 40; Reeves *v.* McGlochlin, 65 Mo. App. 537. See also Annan *v.* Job, 10 Jur. 926.

56. Dater *v.* Wellington, 1 Hill (N. Y.) 319, holding that the omission to swear witnesses was an irregularity only, and could not be set up as a defense to an action.

57. Waiver of necessity for oath.—*Kansas.*— Russell *v.* Seery, 52 Kan. 736, 35 Pac. 812.

Missouri.— Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854.

Vermont.—Woodrow *v.* O'Conner, 28 Vt. 776.

England.— Wakefield *v.* Llanelly R. Co., 34 Beav. 245.

Canada.— *In re* Rushbrook, 46 U. C. Q. B. 73, holding that such consent may be shown by evidence *dehors* the submission.

58. *California.*— *In re* Connor, 128 Cal. 279, 60 Pac. 862.

Louisiana.— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191.

Massachusetts.— Maynard *v.* Frederick, 7 Cush. (Mass.) 247.

Nebraska.— O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256; Greer *v.* Canfield, 38 Nebr. 169, 56 N. W. 883.

the proper time in the court having authority to review the proceedings on a statutory award.[59]

b. By Whom Administered. At common law, arbitrators have no power to swear witnesses.[60] They were under the necessity of having the witnesses sworn by a magistrate, or, if the submission was in a pending cause, the custom was to have the witnesses sworn before a judge at chambers or in the court at Westminster.[61] The subject has been regulated by statute both in England, where the arbitrator was given power to swear witnesses,[62] and in the United States, where such provisions exist and also others which required such oaths, when necessary, to be administered by an officer authorized to generally administer oaths. These provisions, unless waived by the parties, must be complied with.[63]

New York.— Britton *v.* Hooper, 25 Misc. (N. Y.) 388, 55 N. Y. Suppl. 493; Matter of McGregor, 13 N. Y. Suppl. 191, 35 N. Y. St. 907; Bergh *v.* Pffeiffer, Lalor (N. Y.) 110, holding that, where the parties appeared before the arbitrators without objecting to such course, it would be presumed that they consented to the examination of witnesses without swearing them.

Pennsylvania.—Fairchild *v.* Hart, 1 Phila. (Pa.) 227, 8 Leg. Int. (Pa.) 130.

England.— Ridoat *v.* Pye, 1 B. & P. 91; Biggs *v.* Hansell, 16 C. B. 562, 81 E. C. L. 562.

Canada.— Reilly *v.* Gillan, 2 N. Brunsw. 120.

59. Weir *v.* West, 27 Kan. 650.

60. At common law.— Matter of Wells, 1 N. Y. Leg. Obs. 189; Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 9 S. E. 714; State *v.* McCroskey, 3 McCord (S. C.) 308 (holding that a person cannot be indicted for taking a false oath before an arbitrator); Street *v.* Rigby, 6 Ves. Jr. 815 [*citing* Halfhide *v.* Fenning, 2 Bro. Ch. 336]. *Compare* Imlay *v.* Wikoff, 4 N. J. L. 153. In this case it was agreed that the submission should be made a rule of court. The grounds of the decision do not appear further than that a rule to show cause why the award should not be set aside was discharged and an attachment issued, but it was upon the argument of counsel that the matter was to be considered as a cause referred by rule of court or not; that, if the former, then the arbitrators had express authority by statute; that, if not a cause referred by rule of court, the arbitrators derived their authority from the agreement of the parties and were a tribunal constituted with power to hear and determine, and, therefore, with power to administer an oath to a witness if it became necessary in the course of their proceedings.

Proceedings not under the statute.— Where there was a parol agreement to extend the time for making the award, though the original submission was in writing and the arbitrators proceeded under such oral agreement, it was held that, the statute requiring the submission to be in writing, the arbitrators were not acting under the statute but as at common law, and that they, therefore, had no authority to swear the witnesses, and an indictment would not lie for perjury in evidence given under an oath administered by the arbitrators acting under this parol agreement. People *v.* Townsend, 5 How. Pr. (N. Y.) 315.

61. Matter of Wells, 1 N. Y. Leg. Obs. 189 [*citing* Kyd Awards 95]; Morse Arb. & Award 132 [*citing* Russell Arb. (3d ed.) 176]. For the power of referee to administer an oath see REFERENCES.

62. Regulated by statute.— 14 & 15 Vict. c. 99, § 16; Russell Arb. & Award (8th ed.) 127.

63. Compliance with statute.— Thomasson *v.* Risk, 11 Bush (Ky.) 619 (holding that the statute requiring a submission to be in writing or by order of court did not repeal the common law, but was to afford parties a more certain and adequate remedy, as, by proceeding under the statute, the arbitrators could act as a quasi-judicial tribunal, clothed with the power to administer oaths); O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256; Howard *v.* Sexton, 4 N. Y. 157; Matter of Wells, 1 N. Y. Leg. Obs. 189; Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655 (holding that where the witnesses were, in form, sworn by the arbitrator, who was in fact a justice of the peace, it was sufficient, under a statute permitting the oath to be administered by the arbitrator, umpire, or any judge or justice of the peace of the county; that it was not necessary that the oath should be administered by the arbitrator himself, and, as the arbitrator in this case was authorized, by virtue of his office, to administer oaths to witnesses before persons acting as arbitrators, it was no reason why he could not administer oaths to witnesses before himself); State *v.* Jackson, 36 Ohio St. 281 (holding, in construing the statute in that state, that an earlier statute requiring, in arbitration proceedings, that the oath should be administered by a judge or justice of the peace, was not changed by a later statute permitting oaths, generally, to be administered by notaries public, and that a witness who was not sworn before the prescribed officer could not be indicted for perjury).

Objection — Waiver.—The irregular administration of the oath to a witness, like the failure to administer any oath at all, must, if known to the adverse party, be objected to at the time. O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256; Large *v.* Passmore, 5 Serg. & R. (Pa.) 51, holding that, as a witness might be examined by consent, without oath, the irregularity in the administration of an oath by an attorney might be waived.

5. Extent of Right of Hearing — a. As to Introduction of Evidence in General. Where the submission is not so framed that the arbitrators may hear and determine the matters without evidence *aliunde*, the parties have the right to introduce competent evidence in support of their respective claims, and the arbitrators have no authority to refuse to hear it.[64] From other cases, however, it appears that this rule, generally, extends only to the inhibition of such act, on the part of the arbitrator, as amonnts to a deprivation of a hearing, and not of the honest exercise of the judgment of the arbitrators in passing upon the admissibility of evidence or the competency of witnesses.[65] So, arbitrators are not governed by the technical rules of the common law in regard to the introduction of evidence,[66] and the fact that the arbitrators merely heard improper evi-

64. *Indiana.*— Milner *v.* Noel, 43 Ind. 324.
Louisiana.— Dreyfous *v.* Hart, 36 La. Ann. 929.
Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.
Missouri.—Newman *v.* Labeaume, 9 Mo. 30.
New Jersey.— Burroughs *v.* Thorne, 5 N. J. L. 910; Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.
New York.— Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; Garvey *v.* Carey, 7 Rob. (N. Y.) 286, 4 Abb. Pr. N. S. (N. Y.) 159, 35 How. Pr. (N. Y.) 282; Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405.
North Carolina.— Hurdle *v.* Stallings, 109 N. C. 6, 13 S. E. 720.
Oregon.— Stemmer *v.* Scottish Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498, holding, however, that, when the party objecting to the award had only announced his willingness to introduce testimony, without actually offering it, an award would not be set aside on the ground that the arbitrator refused to hear pertinent testimony.
Virginia.— Ligon *v.* Ford, 5 Munf. (Va.) 10.
Washington.—McDonald *v.* Lewis, 18 Wash. 300, 51 Pac. 387, holding that an award will be set aside where the arbitrators, because of an altercation between the parties, refuse to allow them to appear and give evidence.
West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698.
Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.
England.—Spettigue *v.* Carpenter, Dick. 66, 3 P. Wms. 361 (as to the refusal of an arbitrator to defer making his award until the party could satisfy him as to a certain point which the arbitrator took against the party); Phipps *v.* Ingram, 3 Dowl. P. C. 669; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163.
Canada.— Bull *v.* Bull, 6 U. C. Q. B. 357; *In re* McMullen, 2 U. C. Q. B. 175. See Ostell *v.* Joseph, 9 L. C. Rep. 440, 6 R. J. R. Q. 58.

Failure to request.— Where the submission was on mutual statements of the parties, and the arbitrators, after settling the principles on which they would award, heard that one of the parties wished his witnesses to be examined, but such party did not insist upon the examination, it was held that the neglect of the arbitrators to hear such witnesses was no ground for objection. Ormsby *v.* Bakewell, 7 Ohio 98.

65. Webster *v.* Haggart, 9 Ont. 27; Hotchkiss *v.* Hall, 5 Ont. Pr. 423; *In re* Small, 23 Ont. App. 543, wherein, upon an application to revoke a submission to arbitration to fix the renewal ground rental of land because the arbitrators declined to receive evidence of the gross and net rentals derived from properties on the other side of the street, Hagarty, C. J. O., said: "I think it both improper and inexpedient to attempt to lay down any hard and fast rule applicable to all cases of this character. Every case must stand on its special facts. Evidence may be in one sense admissible, although valueless in the view of those who have to form their judgment thereon. . . . In forming their decision as to the point submitted to them, they may decline entering upon the numberless '*res inter alios acta*' involved in the calculation which may be made by neighbouring owners as to the net value of their own properties. . . . They surely must have the right to consider that a certain class of so-called evidence as to other properties has not, and ought not to have, any weight or value to help them to a decision, and they may therefore properly decline any further hearing of it."

Presumption of immateriality.— In a suit in equity to enforce an award it was held that an answer which alleges that the arbitrator refused to hear evidence was insufficient for not showing what the evidence was, as it would be presumed the evidence was immaterial and that the arbitrator did right to disregard it. Elder *v.* McLane, 60 Tex. 383. See also Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

No inference of fraud.—Because arbitrators have rejected evidence in relation to an issue before them, it is not to be inferred that they acted fraudulently, but, rather, that the evidence had so far settled that particular inquiry as to render further proof unnecessary. Root *v.* Renwick, 15 Ill. 461. But see Phipps *v.* Ingram, 3 Dowl. P. C. 669.

66. **Not governed by technical rules.**—Sanborn *v.* Paul, 60 Me. 325 (holding that it is no objection to an award upon a contract that the contract was not particularly identified, unless it be shown that the contract which was used in evidence was not, in fact, the right one); Maynard *v.* Frederick, 7 Cush. (Mass.) 247.

dence, or the evidence of incompetent witnesses, will not operate to defeat an award.[67]

b. Presence at All Meetings — (i) *In General.* Where the submission does not contemplate an award without evidence by the parties, the parties are entitled to be present, unless they waive that right, at all the meetings where the merits of the controversy are under investigation. The arbitrators, in such cases, have no right to proceed *ex parte* to make an independent investigation.[68] But, where the evidence is heard and the award determined upon at a place designated for that purpose in the articles of submission, it is not necessary that the arbitrators should actually reduce their award to writing at that place, but this may be done elsewhere.[69]

(ii) *Hearing of Evidence in Presence of Parties.* Parties are entitled to be present at the hearing of the evidence or examination of the witnesses.[70] The arbitrator cannot take it upon himself to listen to evidence on behalf of either party behind the other party's back,[71] and arbitrators cannot make a bind-

67. *Kentucky.*— Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Lillard *v.* Casey, 2 Bibb (Ky.) 459.

Massachusetts.— Maynard *v.* Frederick, 7 Cush. (Mass.) 247.

Missouri.—Vaughn *v.* Graham, 11 Mo. 575.

New Hampshire.— Chesley *v.* Chesley, 10 N. H. 327.

Virginia.—Bassett *v.* Cunningham, 9 Gratt. (Va.) 684, holding the admission of improper testimony was not a ground to set aside the award, it not appearing upon the face of the award that the evidence was acted on.

England.— Lloyd *v.* Archbowle, 2 Taunt. 324, 11 Rev. Rep. 595; Sharman *v.* Bell, 5 M. & S. 504, 17 Rev. Rep. 419.

No inference of excess of authority.— That arbitrators went beyond the submission cannot be inferred because they have admitted illegal evidence. Offut *v.* Proctor, 4 Bibb (Ky.) 252; Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96.

Testimony of parties or interested witnesses.— Fuller *v.* Wheelock, 10 Pick. (Mass.) 135. Where the arbitrator has authority to examine parties, generally, he may examine a party in support of his own case. Warne *v.* Bryant, 3 B. & C. 590, 10 E. C. L. 269. But, where parties to a reference mutually agreed to strike out the clause giving the arbitrator power to examine the parties, it is a good exception that a party was thereafter examined over objection. Smith *v.* Sparrow, 4 Dowl. & L. 604, 11 Jur. 126, 16 L. J. Q. B. 139, 1 Saund. & C. 240. An act to the effect that the parties "shall be examined as competent witnesses," gives the parties both the right to be examined as witnesses, and confers on the arbitrators the power to examine them as witnesses. Golden *v.* Fowler, 26 Ga. 451.

68. Emery *v.* Owings, 7 Gill (Md.) 488, 48 Am. Dec. 580; Conrad *v.* Massasoit Ins. Co., 4 Allen (Mass.) 20; Lincoln *v.* Taunton Copper Mfg. Co., 8 Cush. (Mass.) 415; Eastern Counties R. Co. *v.* Eastern Union R. Co., 3 De G. J. & S. 610, 68 Eng. Ch. 463.

Ascertainment of incidental fact.—An award is not invalid because the referee, behind the backs of the parties and after he had shown them his figures and calculations, ascertained, for himself, from any source that the suit in which defendant had been summoned as trustee of plaintiff had been settled, in order to avoid mentioning it in the award and for the purpose of determining the form of the award. Vannah *v.* Varney, 69 Me. 221.

Second view by arbitrator alone.— Where a view has been had during a trial before a referee, it is no cause for setting aside the award that a second view was taken by the referee alone after the hearing, the fairness of the trial not being affected by the second view. Adams *v.* Bushey, 60 N. H. 290.

Private examination of papers.— The arbitrator may, without any impropriety, make a private examination of papers which have been publicly submitted as evidence. Newman *v.* Labeaume, 9 Mo. 30.

69. Conrad *v.* Johnson, 20 Ind. 421. See also *supra*, note 47.

70. Affidavits cannot be read under a submission that the witnesses shall be examined on oath. Banks *v.* Banks, 1 Gale 46. See also McEdward *v.* Gordon, 12 Grant Ch. (U. C.) 333.

71. *Arkansas.*— McFarland *v.* Mathis, 10 Ark. 560.

Illinois.— Alexander *v.* Cunningham, 111 Ill. 511; Moshier *v.* Shear, 102 Ill. 169, 40 Am. Rep. 573; Ingraham *v.* Whitmore, 75 Ill. 24.

Indiana.— Allen *v.* Hiller, 8 Ind. 310.

Iowa.— So, an award was set aside because an arbitrator had informed one of the parties that no evidence would be received upon a certain point, whereupon the party neither appeared nor sent his witnesses, whereas, at the hearing, evidence was, in fact, heard upon that point upon the other side. Sullivan *v.* Frink, 3 Iowa 66.

Kentucky.— Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935; Sims *v.* Banta, 9 Ky. L. Rep. 286.

Maine.— Small *v.* Trickey, 41 Me. 507, 66 Am. Dec. 255.

New York.— Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; Knowlton *v.* Mickles, 29 Barb. (N. Y.) 465.

ing award where they have received evidence on the one side in the absence of the party on the other, without notice to the latter, and after both parties have been heard in the matter.[72] The law is peculiarly jealous of any intercourse between a party to the arbitration and the arbitrators, and the latter have no right to listen to *ex parte* communications from one party in the absence of the other.[73] It is not always necessarily fatal to an award, however, that one party is heard in the absence of the other, and it is held that no such consequence results where the object of calling the party and the nature of the disclosure by

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.— Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82.

South Carolina.— Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478.

Virginia.—Shipman *v.* Fletcher, 82 Va. 601; Tate *v.* Vance, 27 Gratt. (Va.) 571.

United States.— Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Warren *v.* Tinsley, 53 Fed. 689, 2 U. S. App. 507, 3 C. C. A. 613.

England.— Plews *v.* Middleton, 6 Q. B. 845, 51 E. C. L. 845; Harvey *v.* Shelton, 7 Beav. 455, 13 L. J. Ch. 466, 29 Eng. Ch. 455; Oswald *v.* Grey, 24 L. J. Q. B. 69, 29 Eng. L. & Eq. 85; Drew *v.* Drew, 2 Macq. 1; Bedington *v.* Southall, 4 Price 232; Burton *v.* Knight, 2 Vern. 514; Lonsdale *v.* Littledale, 2 Ves. Jr. 451.

Canada.— *In re* McMullen, 2 U. C. Q. B. 175; Hickman *v.* Lawson, 8 Grant Ch. (U. C.) 386; McCauseland *v.* Tower, 14 N. Brunsw. 125; McNulty *v.* Jobson, 2 Ont. Pr. 119; Waters *v.* Daly, 2 Ont. Pr. 202.

Usage cannot justify arbitrators in hearing one party and his witnesses only in the absence of, and without notice to, the other. Oswald *v.* Grey, 24 L. J. Q. B. 69, 29 Eng. L. & Eq. 85. Although the lawful usage of merchants may be imported into the contract of reference, the courts have said that the practice of receiving evidence which the party affected has no opportunity of meeting is not a lawful usage. Russell Arb. & Award (8th ed.) 135 [*citing* Harvey *v.* Shelton, 7 Beav. 455, 13 L. J. Ch. 466, 29 Eng. Ch. 455; Brook *v.* Badart, 16 C. B. N. S. 403, 10 Jur. N. S. 704, 33 L. J. C. P. 246, 10 L. T. Rep. N. S. 378, 111 E. C. L. 403; Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725].

Evidence received by one of several arbitrators.— In Boyle *v.* Humphrey, 1 Ont. Pr. 187, it was held no objection to an award by three arbitrators, which award might have been made by any two of them, that one of the arbitrators who joined in the award had taken the evidence of a witness without notice to the opposite party, in the absence of the other arbitrators, such evidence never having been communicated to the other arbitrators.

Documentary evidence.—An award will not be sustained where the arbitrators, without the knowledge of the losing party, received documentary evidence. Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761; Cameron *v.* Castleberry, 29 Ga. 495; Jenkins *v.* Liston, 13 Gratt. (Va.) 535. But it is no objection that, after the hearing, the arbitrator received a paper relating to the case from one of the parties, with the assent of the other. Winsor *v.* Griggs, 5 Cush. (Mass.) 210.

Notice of meeting for other purposes.— Where notice was given to a party to attend a meeting "for the purpose of taking instructions" for the award, which meeting such party did not attend, but at which the other party attended and was examined privately, and upon which evidence the arbitrators acted, it was held that this private examination justified the setting aside of the award. Matter of Hick, 8 Taunt. 694, 21 Rev. Rep. 511, 4 E. C. L. 340.

Presumption.— Where it appears that, in the absence of one of the parties and without notice to him of the meeting of the arbitrators, evidence was heard, the presumption will be indulged that it was relevant and material. Lell *v.* Shiddell, 11 Ky. L. Rep. 365.

72. *Alabama.*— Rosenau *v.* Legg, 82 Ala. 568, 2 So. 441.

Georgia.— Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238; Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761.

Maryland.— Sisk *v.* Garey, 27 Md. 401.

Mississippi.— Rand *v.* Peel, 74 Miss. 305, 21 So. 10.

New Hampshire.— Bassett *v.* Harkness, 9 N. H. 164.

New York.— National Bank of Republic *v.* Darragh, 30 Hun (N. Y.) 29.

Rhode Island.— Cleland *v.* Hedly, 5 R. I. 163.

England.— Walker *v.* Frobisher, 6 Ves. Jr. 70, 5 Rev. Rep. 223; *In re* Hodgson, 4 Wkly. Rep. 635. But see Atkinson *v.* Abraham, 1 B. & P. 175.

Canada.— McCausland *v.* Tower, 14 N. Brunsw. 125; *Re* Ferris, 18 Ont. 395; Race *v.* Anderson, 14 Ont. App. 213; Williams *v.* Roblin, 2 Ont. Pr. 234; Whitely *v.* MacMahon, 32 U. C. C. P. 453.

73. Moshier *v.* Shear, 102 Ill. 169, 40 Am. Rep. 573; *In re* Tidswell, 33 Beav. 213, 10 Jur. N. S. 143; Harvey *v.* Shelton, 7 Beav. 455, 13 L. J. Ch. 466, 29 Eng. Ch. 455; *In re* Gregson, 70 L. T. Rep. N. S. 106, 10 Reports 408; Burton *v.* Knight, 2 Vern. 514; Fetherstone *v.* Cooper, 9 Ves. Jr. 67. An award cannot be sustained when the arbitrator acts, not upon his own volition, but upon the direction of one of the parties. Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623. See also Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761; and *supra*, III, E, F.

Attorney.— *In general.*— The arbitrators

him cannot prejudice the absent party — as where the only purpose is to fix a mere uncertainty.[74]

(III) *Controlled by Terms and Nature of Submission.* The necessity of notice, of the reception of evidence by the arbitrators, and the right to be present at the meetings of the arbitrators, are often controlled by the submission itself. Parties may so frame the submission that the arbitrators may decide without a formal hearing of the parties, and without a resort to evidence *aliunde*.[75] The nature of the reference may give the arbitrators power to make certain *ex parte* investigations,[76] and, when matter is referred to valuers, appraisers, surveyors, or

have no right to call before them the attorney of one of the parties after the case is submitted and, in the absence of the other or his attorney, consult in regard to a matter pertaining to the controversy. Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935.

Presenting list of authorities.—The *ex parte* presentation of a list of authorities to an arbitrator after the final submission was held to render the award void, especially when the parties had stipulated that neither should be represented by counsel. It was contended that the rule excluding communications made *ex parte*, between a party and the arbitrator, should not be applied here, but the court said that it was to be kept in mind that the arbitrator was the judge of the law as well as of the facts, and, also, that the parties had stipulated that they were not to be represented by counsel. Hewitt *v.* Reed City, 124 Mich. 6, 82 N. W. 616, 50 L. R. A. 128.

74. Aid in obviating uncertainties.— In Neely *v.* Buford, 65 Mo. 448, it was held that the fact that arbitrators, after the submission of the evidence and in the absence of one of the parties and his attorney, called in the attorney of the opposite party to point out certain items referred to in his brief which they were unable to find, was not such misconduct as to invalidate the award. See also Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718. So, in Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561 [*affirming* 61 Ill. App. 289], it was held that an application to set aside an award on the ground of misconduct should be denied where there appeared to have been no bad faith, the only act complained of consisting in the submission, in the absence of one of the parties, of the books of account to the other party to find the cause of a difference in the trial balance made by such other party and the arbitrators respectively. See also Stewart *v.* Waldron, 41 Me. 486. And in Herrick *v.* Blair, 1 Johns. Ch. (N. Y.) 101, it was held that the mere calling of a witness, who had been sworn and examined, for the purpose of ascertaining what his testimony was, because the arbitrators differed about it, was not misbehavior.

Admissions in favor of party objecting.— It is no objection that one of the parties was called into the presence of the arbitrator, in the absence of the other party, and asked if he admitted items in favor of such other party, where such admission was made or where, if such admission was not made, the items were charged against the party so called before the arbitrator. Anderson *v.* Wallace, 3 Cl. & F. 26, 6 Eng. Reprint 1347. But see Blanton *v.* Gale, 6 B. Mon. (Ky.) 260, holding otherwise where the award showed that it was founded, in part, upon admissions made to one of the arbitrators separately, and by him reported to the others at their final and only meeting on the business submitted to them.

75. Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252. As where, by the submission, the arbitrators are vested with authority to proceed informally, according to their own sense of propriety (Bridgeport *v.* Eisenman, 47 Conn. 34); where the matters are submitted to an arbitrator on certain written documents and such other evidence as he may collect (Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395); or where the parties hand the papers in the matter to the arbitrators, telling them to do what is right, and not offering to introduce any evidence (Rector *v.* Hunter, 15 Tex. 380).

Inadvertent omission of stipulation from submission.—Where it appeared that the parties intended to agree in their submission that the arbitration should proceed without witnesses or counsel, but, through inadvertence, the stipulation was omitted, and the parties afterward, at the hearing, agreed orally to the same effect, and then proceeded with the arbitration after the arbitrator had refused to allow the hearing of a witness offered, the award will not be set aside. Bennett *v.* Bennett, 25 Conn. 66.

76. Ex parte investigations.— Straw *v.* Truesdale, 59 N. H. 109, holding that, under a submission to locate a boundary line, the authority to determine the line includes authority to make measurements in the absence of, as well as in the presence of, the parties, for the purpose of finding the line, marking it upon the ground, and testing the evidence, and to decide whether measurements made in the absence of the parties should be made known to them as a reason for further hearing.

Limited power.— Where, upon submitting the question whether the dam of one party flooded the land of another, and whether the latter had the right to have the dam lowered, the arbitrators were "to survey the ground, take levels," etc., it was held that these words constituted no relinquishment of the right of the parties to be heard by their proofs, but simply defined certain special duties which the arbitrators were to perform in making up their judgment. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

Failure to view the premises cannot affect

the like, who are selected by reason of their special knowledge or skill with respect to the particular matters submitted, so that it is obvious the parties meant to rely upon these things rather than evidence *aliunde*, this justifies personal investigation and judgment on the part of the arbitrators, and even a refusal to hear evidence *aliunde*.[77]

6. Adjournment or Extension of Time — a. Power of Arbitrators to Adjourn. The adjournment of their meetings from time to time is within the power of the arbitrators.[78] Usually, the matter is one for the exercise of the arbitrators' discretion, and their action will not be revised unless it amounts to misconduct or the discretion is abused.[79] An application for an adjournment, made after the party

an award as to value in the absence of a request that the arbitrator should make such view, he being familiar with the premises. Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

Sufficiency of examination of premises.— Upon a charge of misconduct on the part of the arbitrators, such alleged misconduct consisting in that they did not examine the premises with sufficient accuracy to enable them to form a correct and just estimate of value, it was held that it was for the arbitrators to determine whether their examination was sufficiently minute and particular to satisfy their own minds. Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339.

Evidence of identity of land.— Where a valuation is to be made by comparison with another tract of land, the valuers must, where the other party is absent and has no notice, have other evidence of the identity of the land than such evidence as is derived from the party at whose instance the valuation is made. Rutherford *v.* Pillow, 5 Yerg. (Tenn.) 133.

Presumption of view.—Where an arbitrator is to take a view previously to entering on the reference, and he takes such view, the non-recital of the view is no objection to the award. Spence *v.* Eastern Counties R. Co., 7 Dowl. P. C. 697, 3 Jur. 846.

77. *Connecticut.*— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Maine.— Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650.

Michigan.— James *v.* Schroeder, 61 Mich. 28, 27 N. W. 850.

New York.—Wiberly *v.* Matthews, 91 N. Y. 648. See also Gernsheim *v.* Central Trust Co., 16 N. Y. Suppl. 127, 40 N. Y. St. 967. Upon this kind of a submission, if the arbitrators appear to be well acquainted with the value of the article, a failure to offer evidence as to value would not tend to show that the award was not within the submission. Cobb *v.* Dolphin Mfg. Co., 108 N. Y. 463, 15 N. E. 438.

Ohio.— Ormsby *v.* Bakewell, 7 Ohio 98.

England.—Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 24 L. J. Ch. 531, 53 Eng. Ch. 528.

78. *Georgia.*— Arbitrators are not limited to an adjournment from day to day, but may adjourn for a longer time if the ends of justice require it. Vinton *v.* Lindsey, 68 Ga. 291; Richardson *v.* Hartsfield, 27 Ga. 528, holding that the statute giving arbitrators authority to adjourn from day to day does not exclude the right to adjourn for a longer time.

Pennsylvania.— Under the statute in Pennsylvania, if only one arbitrator attended on the day of the hearing, it was held that he might obviate the absence of the others by adjourning. Stiles *v.* Carlisle, etc., Turnpike Road Co., 10 Serg. & R. (Pa.) 286; Wilson *v.* Cross, 7 Watts (Pa.) 495; Mitchell *v.* Wilhelm, 6 Watts (Pa.) 259. But see, *contra*, as to power of majority of referees, Harris *v.* Norton, 7 Wend. (N. Y.) 534.

Vermont.— Harrington *v.* Rich, 6 Vt. 666, holding that the power of the arbitrators is not determined by a neglect to attend at the time and place appointed for holding the arbitration, but they may appoint another session within any reasonable time, unless prevented by the terms of the submission or by express revocation of their authority.

West Virginia.—Boring *v.* Boring, 2 W. Va. 297.

United States.— Torrance *v.* Amsden, 3 McLean (U. S.) 509, 24 Fed. Cas. No. 14,103.

Canada.— An adjournment to enable one of the arbitrators to visit the property, without fixing a date for the next meeting, does not terminate the arbitration, and an award made on a subsequent date, all the arbitrators being present, is valid. Ontario, etc., R. Co. *v.* Le Curé, etc., de Ste. Anne, 7 Montreal Q. B. 110, 5 Montreal Super. Ct. 51, 21 Rev. Lég. 180.

Surprise.— It is no ground for setting aside an award that the unsuccessful party suffered a surprise because the arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose. Jones *v.* Boston Mill Corp., 6 Pick. (Mass.) 148; Solomon *v.* Solomon, 28 L. J. Exch. 129.

79. Discretion of arbitrators.— *Georgia.*— Vinton *v.* Lindsey, 68 Ga. 291.

Indiana.—Madison Ins. Co. *v.* Griffin, 3 Ind. 277.

New York.— Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201. Where a party goes to hearing before arbitrators and is willing to rely upon the testimony of a witness who is the principal witness on the other side, he is not entitled to an adjournment on the ground that he is surprised by the false swearing of such witness, and that he can prove the falsehood by the testimony of other witnesses if the arbitrators will allow an adjournment, it not appearing that he has since discovered

had received some intimation of the nature of the award and knew that the award was unfavorable to him, is too late.[80]

b. Introduction of Further Testimony — (I) *Right to Reopen.* Arbitrators have power to reopen a case for further testimony,[81] and, in the absence of other restriction, it is discretionary with them.[82] It is the duty of the parties to bring forward their testimony in the due course of the proceedings, and the arbitrators may refuse to hear one who has rested for a length of time without introducing his testimony.[83] And a refusal to reopen a cause after the award was substantially agreed upon, of which the party evidently had knowledge, for the purpose of introducing mere corroborative evidence, is not only within the discretion of the arbitrators, but is proper.[84]

(II) *Premature Award.* If, however, the hearing has not been closed and further time has been given to a party to produce evidence, or to be heard, or the parties are allowed to disperse under the impression that other meetings will be held, the arbitrators have no right to make their award in the meantime and without giving the opportunity for such further hearing which another meeting would afford.[85]

7. Waiver of Notice or Right to Be Present — a. In General. Parties may waive notice,[86] and, if a party appears before the arbitrators, he cannot afterward

the testimony of which he had no knowledge before the trial, even though he offers to enlarge the time for making the award. Woodworth *v.* Van Buskerk, 1 Johns. Ch. (N. Y.) 432.

Pennsylvania.— McDermott *v.* U. S. Insurance Co., 3 Serg. & R. (Pa.) 604; Becker *v.* Wesner, 1 Woodw. (Pa.) 202. Where, upon adjournment at a late hour of the night, a witness who had been subjected to a long cross-examination was allowed to depart without any intimation that he would be required at the next meeting, it was held not improper for the arbitrators at the next meeting to refuse to procure the witness for further examination. Fairchild *v.* Hart, 1 Phila. (Pa.) 227, 8 Leg. Int. (Pa.) 130.

England.— Gind *v.* Curtis, 14 C. B. N. S. 723, 108 E. C. L. 723. Where the arbitrators have honestly exercised their discretion as to the materiality of the evidence of a witness, their action, upon an application to afford time to examine such witness, though erroneous, will not be disturbed. Larchin *v.* Ellis, 11 Wkly. Rep. 281.

Abuse of discretion.— If arbitrators refuse a request for adjournment, based upon sufficient reasons and offered in proper season, it is sufficient ground for vacating the award. Coryell *v.* Coryell, 1 N. J. L. 441. See also Forbes *v.* Frary, 2 Johns. Cas. (N. Y.) 224; Torrence *v.* Amsden, 3 McLean (U. S.) 509, 24 Fed. Cas. No. 14,103, holding a refusal to postpone misconduct where the party was surprised by evidence which he was not, by reason of the unexpected absence of a witness, able to explain.

80. See *infra*, notes 81–85.

81. Sweeney *v.* Vaudry, 2 Mo. App. 352.

82. Discretionary power.— Blodgett *v.* Prince, 109 Mass. 44; Tennant *v.* Divine, 24 W. Va. 387; Ringer *v.* Joyce, 1 Marsh. 404, 4 E. C. L. 469.

Sufficiency of affidavit.— Whether or not a refusal to reopen the matter on the ground of newly-discovered testimony which was not known to the party at the time of the hearing before the arbitrators, can be reviewed, the evidence discovered ought to be stated in the affidavit in order that its materiality may be judged by those who have to pass upon it. Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157.

83. Hemming *v.* Parker, 13 L. T. Rep. N. S. 795, 14 Wkly. Rep. 328.

84. Coryell *v.* Coryell, 1 N. J. L. 441 (holding that the application for an adjournment is too late where it was probably made after the party had received some intimation of the nature of the award, and knew that it was unfavorable to him); Tennant *v.* Divine, 24 W. Va. 387. See also Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157.

85. *Alabama.*—Graham *v.* Woodall, 86 Ala. 313, 5 So. 687.

New Hampshire.— Hook *v.* Philbrick, 23 N. H. 288, holding that, if the parties merely separate without any adjournment, they are entitled to notice of subsequent meetings.

South Carolina.— Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478.

Virginia.—McCormick *v.* Blackford, 4 Gratt. (Va.) 133.

England.—Pepper *v.* Gorham, 4 Moore C. P. 148, 16 E. C. L. 365 (holding that if arbitrators informed a party present at the meeting that they would suspend proceedings until books of account had been referred to, and, afterward, they made an award in the absence of such party, without examining such books, the award should be set aside); Earle *v.* Stocker, 2 Vern. 251. See also Dodington *v.* Hudson, 1 Bing. 384, 8 E. C. L. 559.

Canada.— Grisdale *v.* Boulton, 1 U. C. Q. B. 407; Allison *v.* Desbrisay, 4 Nova Scotia 91.

86. Whitlock *v.* Ledford, 82 Ky. 390; Wiberly *v.* Matthews, 10 Daly (N. Y.) 153.

Attempt to revoke submission.—Where one party had ineffectually attempted to revoke a submission and refused to attend, it was held that the arbitrator might proceed *ex parte* without giving him notice. Harcourt *v.* Ramsbottom, 1 Jac. & W. 505.

object that he did not have legal notice of the time and place of meeting.[87] So, a party to an arbitration may authorize the arbitrators to proceed in his absence,[88] and, while a party may be justified in abandoning an arbitration proceeding because a witness has been improperly examined in the absence of the party and without notice to him, yet, if he subsequently proceeds after knowledge of the fact, he waives the irregularity.[89] But where there is no notice to a party, there is no presumption that he has waived notice or consented to the examination of witnesses in his absence.[90]

b. Voluntary Absence or Withdrawal After Notice. Where a party, though duly notified, will not attend, the arbitrators may proceed *ex parte* without his presence,[91] and they may likewise proceed where the party having notice voluntarily withdraws from the sittings of the arbitrators.[92] So, if a party has notice

Waiver of statutory notice.—An agreement that an arbitration may take place at a time within a number of days less than the time prescribed by notice, waives the notice prescribed by the statute. Spencer *v.* Curtis, 57 Ind. 221.

87. Pike *v.* Stallings, 71 Ga. 860; Harper *v.* Pike County Road Com'rs, 52 Ga. 659; Dickerson *v.* Hays, 4 Blackf. (Ind.) 44; Newton *v.* West, 3 Metc. (Ky.) 24; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Shockey *v.* Glasford, 6 Dana (Ky.) 9; Kane *v.* Fond du Lac, 40 Wis. 495.

Question of fact.—In an action on an award it is proper to submit to the jury the question whether the party waived his right to be present at the hearing of the arbitrators, without defining what would constitute such a waiver. Amos *v.* Buck, 75 Iowa 651, 37 N. W. 118. See also Whitlock *v.* Ledford, 82 Ky. 390.

Attendance of attorney.— White *v.* Robinson, 60 Ill. 499; Madison Ins. Co. *v.* Griffin, 3 Ind. 277; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Kane *v.* Fond du Lac, 40 Wis. 495.

Special appearance.— Where notice has not been served as required by statute, the party entitled to such notice may, without thereby waiving the defect, appear specially for the purpose of objecting to the want of service. Carter *v.* Slocum, 2 Phila. (Pa.) 401, 14 Leg. Int. (Pa.) 316. But where a party, who had notice of the first meeting of the arbitrators, at which meeting no evidence was received, appeared at the second meeting and made a formal protest against the proceedings on a ground different from that of want of notice, it was held that he was not entitled to notice of the first meeting, and that by the protest he had waived want of notice of the second meeting. *In re* Morphett, 2 Dowl. & L. 967, 10 Jur. 546, 14 L. J. Q. B. 259.

88. Cogswell *v.* Cameron, 136 Mass. 518; Page *v.* Ranstead, 10 Allen (Mass.) 295; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392. See also Hamilton *v.* Rankin, 3 De G. & Sm. 782, 19 L. J. Ch. 307; and *supra*, IV, D, 5, b, (III).

89. White *v.* Robinson, 60 Ill. 499; Small *v.* Trickey, 41 Me. 507, 66 Am. Dec. 255; Duckworth *v.* Diggles, 139 Mass. 51, 29 N. E. 221; Hewlett *v.* Laycock, 2 C. & P. 574, 12 E. C. L. 740; Kingwell *v.* Elliott, 7 Dowl. P. C. 423, 8 L. J. C. P. 241; Mills *v.* Bowyer's Soc., 3 Kay & J. 66; Thomas *v.* Morris, 16 L. T. Rep. N. S. 398.

90. *Georgia.*— Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238.

Illinois.— Taylor *v.* Vessel Owners' Towing Co., 25 Ill. App. 503 [*affirmed* in 126 Ill. 250, 18 N. E. 663].

New Jersey.— Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567.

New York.— Brown *v.* Lyddy, 11 Hun (N. Y.) 451.

United States.— Warren *v.* Tinsley, 53 Fed. 689, 3 C. C. A. 613, 2 U. S. App. 507. But see Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725.

91. *Arkansas.*—Couch *v.* Harrison, 68 Ark. 580, 60 S. W. 957.

Kentucky.— Whitlock *v.* Ledford, 82 Ky. 390.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

Missouri.— Mitchell *v.* Curran, 1 Mo. App. 453.

West Virginia.—Boring *v.* Boring, 2 W. Va. 297.

England.— Wood *v.* Leake, 12 Ves. Jr. 412. See also Angus *v.* Smythies, 2 F. & F. 381.

False testimony at adjourned meeting.— An award cannot, in the absence of any excuse given for the non-attendance at such meeting of the party complaining, be avoided on the ground that the adverse party obtained it by misrepresenting the facts at an adjourned meeting of the arbitrators. Norton *v.* Browne, 89 Ind. 333.

92. Caldwell *v.* Caldwell, 121 Ala. 598, 25 So. 825.

Absence by reason of neglect or misfortune. — Where the absence of a party is the result of his own neglect or misfortune, and nothing is done by him which might have been done, even after the day of the appointed hearing, to obtain a reopening of the case, such absence does not afford sufficient reason to vacate the award. Shroyer *v.* Barkley, 24 Mo. 346. See also Tryer *v.* Shaw, 27 L. J. Exch. 320, holding that, where an arbitrator has made an appointment and one of the parties, though under the mistaken notion that there would be notice of another meeting before an award was made, went away without tender-

of the original meeting, he need not be notified of the succeeding or adjourned meeting, whether he attends,[93] or fails to attend, the original meeting of which he had notice.[94]

E. Manner of Arriving at Decision — 1. Necessity of Joint Judicial Action. The power conferred upon arbitrators being judicial, it follows that their award should be the result of their joint judgment; therefore, it is improper for them to arrive at an agreement by striking an average between aggregate sums which, in the judgment of each, should be awarded.[95]

2. Authority to Render Majority Award — a. Necessity For Special Authorization — (I) *General Rule.* For the reason that a submission to arbitration is a delegation of power to be exercised for a private purpose, it has been established as a general rule that under a submission to a number of arbitrators, without the expression of an intention that a majority or less than the whole number may exercise the power conferred, it is necessary, to the validity of an award, that all the arbitrators should concur.[96]

ing evidence or intimating that he intended to offer it, the arbitrator might proceed *ex parte* without further notice.

Oral agreement.— On error to a judgment entered on an award in pursuance of the agreement of the parties, upon the objection that plaintiff in error was absent from the hearing a portion of the time, on account of a stipulation made between the attorneys that, if either party could not be present at a certain time, the case should be continued, and that neither party should take advantage of the absence of the other, it was held that the agreement not being in writing, nor brought to the attention of the arbitrators by an application for a continuance, it was too late to raise the objection. Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

93. Brown *v.* Leavitt, 26 Me. 251.

94. Boring *v.* Boring, 2 W. Va. 297.

95. Luther *v.* Medbury, 18 R. I. 141, 26 Atl. 37, 49 Am. St. Rep. 753.

An assent to the correctness of an average agreement, clearly given by arbitrators after the result has thus been reached by them, has been held to cure the irregularity. Whitlock *v.* Duffield, Hoffm. (N. Y.) 110.

Striking average between conflicting estimates of parties.— It has been held not improper for arbitrators to ask each of the parties separately at what sum they valued a water privilege which was the subject of arbitration, and then, after making their own estimates and comparing the estimates of the parties, to strike an average between the estimates so given, although it would have been different had they made no estimate themselves nor exercised their judgment as to the value. Brown *v.* Bellows, 4 Pick. (Mass.) 179.

96. *Connecticut.*— Gates *v.* Treat, 25 Conn. 71; Nettleton *v.* Gridley, 21 Conn. 531, 56 Am. Dec. 378; Patterson *v.* Leavitt, 4 Conn. 50, 10 Am. Dec. 98.

Georgia.— Smith *v.* Walden, 26 Ga. 249.

Illinois.—Bannister *v.* Read, 6 Ill. 92; Godfrey *v.* Knodle, 44 Ill. App. 638; Security Live Stock Ins. Assoc. *v.* Briggs, 22 Ill. App. 107.

Indiana.— Byard *v.* Harkrider, 108 Ind. 376, 9 N. E. 294; Baker *v.* Farmbrough, 43 Ind. 240.

Iowa.— Richards *v.* Holt, 61 Iowa 529, 16 N. W. 595.

Kentucky.— Payne *v.* Moore, 2 Bibb (Ky.) 163, 4 Am. Dec. 689.

Maine.— Hubbard *v.* Great Falls Mfg. Co., 80 Me. 39, 12 Atl. 878.

Maryland.— Harryman *v.* Harryman, 43 Md. 140.

Massachusetts.— Hills *v.* Home Ins. Co., 129 Mass. 345; Loring *v.* Alden, 3 Metc. (Mass.) 576; Towne *v.* Jaquith, 6 Mass. 46, 4 Am. Dec. 84.

Mississippi.— Willis *v.* Higginbotham, 61 Miss. 164.

New Hampshire.— Eames *v.* Eames, 41 N. H. 177; Quimby *v.* Melvin, 28 N. H. 250.

New Jersey.— Hoff *v.* Taylor, 5 N. J. L. 976.

New York.— Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

North Carolina.— Oakley *v.* Anderson, 93 N. C. 108; Mackey *v.* Neill, 53 N. C. 214.

Ohio.— Rhodes *v.* Baird, 16 Ohio St. 573.

Pennsylvania.— Weaver *v.* Powel, 148 Pa. St. 372, 23 Atl. 1070; Howard *v.* Pollock, 1 Yeates (Pa.) 509; Walters *v.* Pettit, 12 Pa. Co. Ct. 431, 2 Pa. Dist. 198.

Rhode Island.— Sherman *v.* Cobb, 15 R. I. 570, 10 Atl. 591; Sweet *v.* Mathewson, 1 R. I. 420.

Tennessee.— Memphis, etc., R. Co. *v.* Pillow, 9 Heisk. (Tenn.) 248; Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.

Texas.— Owens *v.* Withee, 3 Tex. 161.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

United States.— Hobson *v.* McArthur, 16 Pet. (U. S.) 182, 10 L. ed. 930; Leavitt *v.* Windsor Land, etc., Co., 54 Fed. 439, 12 U. S. App. 193, 4 C. C. A. 425.

England.— United Kingdom Mut. Steamship Assur. Assoc. *v.* Houston, [1896] 1 Q. B. 567, 65 L. J. Q. B. 484; Berry *v.* Penring, Cro. Jac. 399; Sallows *v.* Girling, Cro. Jac. 277; Marryatt *v.* Roderick, 1 Jur. 242, 6 L. J. Ex. 113, M. & H. 96, 2 M. & W. 369; Dalling *v.* Machett, Willes 215.

Canada.— *Re* O'Connor, 25 Ont. 568.

Rule of court contrary to submission.—Authority to make a majority award cannot be conferred by the terms of a rule of court un-

(II) *Matters of Public Concern.* The proceedings of special tribunals, under legislative authority, upon matters of purely public concern stand upon a different ground from arbitrations of purely private controversies; and, as to the former, the rule prevails that, in the absence of a specific requirement for unanimity, a majority of the arbitrators are invested with incidental authority to render a decision.[97]

(III) *Statutes Requiring Unanimity.* Under a statute providing for the special enforcement of awards made pursuant to the provisions and requiring that awards shall be by the unanimous concurrence of the arbitrators, the arbitrators cannot be authorized to make a majority award which can be enforced in the special mode provided by the statute, although a majority award made pursuant to such an agreement may be good at common law.[98]

(IV) *Statutes Permitting Majority Award.* In case of a statute which permits an award to be made by a majority of arbitrators, such authority is vested in them by force of the statute without a provision therefor in the agreement to submit, unless the submission contains a contrary provision, and provided the requirements of the statute have been complied with so as to bring the submission within its terms.[99]

der which the submission is made unless contained in the agreement for submission, because the rule is founded upon and must strictly follow the agreement of the parties. Welty *v.* Zentmyer, 4 Watts (Pa.) 75; Tedder *v.* Rapesnyder, 1 Dall. (Pa.) 293, 1 L. ed. 143; The Nineveh, 1 Lowell (U. S.) 400, 18 Fed. Cas. No. 10,276.

The contrary rule of the civil law — that, in the absence of a special provision, either of statute or of the submission, the award may be made by a majority of the arbitrators — has been held to prevail in Louisiana and South Carolina. Porter *v.* Dugat, 12 Mart. (La.) 245; Parnell *v.* Parnell, 3 Strobh. (S. C.) 486; Black *v.* Pearson, 1 McCord (S. C.) 137; Lockart *v.* Kidd, 2 Mill (S. C.) 216; Leatherwood *v.* Woodroof, 2 Brev. (S. C.) 380.

Partial provision for majority award. — Where it is expressly stated in the submission that a majority of the arbitrators shall have power to make an award with respect to some of the points therein submitted, it may be presumed that such authority extends to all of the matters upon which the arbitrators cannot agree, although the provision is not repeated throughout the submission as to every matter. Thirkell *v.* Strachan, 4 U. C. Q. B. 136.

Subsequent dissent of one arbitrator is no ground of complaint against an award which has been concurred in, executed, and published by all of them. Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173.

Evidence of dissent of one arbitrator is inadmissible to impeach an award which is not otherwise shown to have been made by a less number than all of the arbitrators, because it does not establish the fact that such arbitrator did not unite in making the award, but merely that he differed in his opinion from the other arbitrators. Jackson *v.* Gager, 5 Cow. (N. Y.) 383.

Parol evidence to show that one arbitrator signed as a witness and did not, in fact, concur in the award, for the purpose of impeachment where the award was not authorized to be made by a majority, has been held to be admissible, although the award appeared to have been regularly signed by all of the arbitrators. Parker *v.* Pawtucket Mut. F. Ins. Co., 3 R. I. 192.

Concurrence in ultimate decision sufficient. — The rule requiring unanimity of concurrence does not extend to the requirement that all of the arbitrators should concur in the decision of every question which arises in the proceedings as to the admission or rejection of every matter of evidence; but it is sufficient if all actually hear the cause and concur in the award which is finally made. Campbell *v.* Western, 3 Paige (N. Y.) 124.

97. *Kentucky.*— Hewitt *v.* Craig, 86 Ky. 23, 9 Ky. L. Rep. 232, 5 S. W. 280.

Maine.— Hubbard *v.* Great Falls Mfg. Co., 80 Me. 39, 12 Atl. 878.

New York.— Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

Wisconsin.— Darge *v.* Horicon Iron Mfg. Co., 22 Wis. 691.

United States.— Republic of Colombia *v.* Cauca Co., 106 Fed. 337.

98. Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476; Osborn, etc., Mfg. Co. *v.* Blanton, 109 Ga. 196, 34 S. E. 306; Jeffersonville R. Co. *v.* Mounts, 7 Ind. 669; Bowen *v.* Lazalere, 44 Mo. 383.

Amendment of statute pending arbitration. — A submission to arbitration which specifically refers to a statute as being under its provisions, which statute requires an award under its provisions to be unanimous, authorizes an award only in accordance with such provisions, although the statute is thereafter amended, before the making of the award, permitting it to be made by action of the majority. Stephens *v.* Hopper, 31 Ga. 589.

99. Spencer *v.* Curtis, 57 Ind. 221; Buxton *v.* Howard, 38 Ind. 109; Bulsom *v.* Lohnes, 29

(v) *Inference of Majority Authorization.* Although the agreement to submit to arbitration does not specifically provide for a decision of the majority, such authority may have been intended to be conferred, and this intention is to be inferred from a provision for the selection of a special arbitrator who is authorized to act only upon disagreement of those originally appointed;[1] but such intention is not to be inferred from a provision for a third or other additional arbitrator who is authorized to act throughout the proceedings without reference to any disagreement of the original arbitrators.[2]

b. Necessity For Unanimous Participation — (i) *General Rule.* Conferring upon arbitrators authority to render a majority award does not, by implication, authorize a majority, or any less number than the whole, to act upon the subject-matter submitted; and by granting such authority the parties cannot be held to have intended to dispense with the operation of the rule which gives to the parties a right to the presence and effect of the arguments, experience, and judgment of each arbitrator during the whole proceeding.[3] But unanimity of

N. Y. 291; Locke *v.* Filley, 14 Hun (N. Y.) 139; King *v.* Grey, 31 Tex. 22; Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764.

A parol submission not within the statute, which applies only to submissions in writing, must itself dispense with the necessity for unanimity, else a majority award is invalid. Cope *v.* Gilbert, 4 Den. (N. Y.) 347.

A submission not acknowledged and certified as required by N. Y. Code Civ. Proc. §§ 2366, 2371, which took effect Sept. 1, 1880, to which, alone, the provision respecting majority awards has been held to apply, permits an award being made only by unanimous concurrence. Lorenzo *v.* Deery, 26 Hun (N. Y.) 447.

1. *Illinois.*—Security Live Stock Ins. Assoc. *v.* Brigg, 22 Ill. App. 107.

Kentucky.— Greenwell *v.* Embree, 5 Ky. L. Rep. 313.

Mississippi.— Guerrant *v.* Smith, 48 Miss. 90.

New York.— Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Battey *v.* Button, 13 Johns. (N. Y.) 187.

Pennsylvania.— Quay *v.* Westcott, 60 Pa. St. 163.

West Virginia.—Stiringer *v.* Toy, 33 W. Va. 86, 10 S. E. 26.

United States.— Hobson *v.* McArthur, 16 Pet. (U. S.) 182, 10 L. ed. 930.

2. *Mississippi.*— Willis *v.* Higginbotham, 61 Miss. 164.

Pennsylvania.—Howard *v.* Pollock, 1 Yeates (Pa.) 509.

Rhode Island.— Luther *v.* Medbury, 18 R. I. 141, 26 Atl. 37, 49 Am. St. Rep. 753.

United States.— But see Republic of Colombia *v.* Cauca Co., 106 Fed. 337, where "the manner of selection of the third member" was considered as tending to show that the parties to the arbitration intended to authorize a majority award, it being held, however, in this case, that a majority award was impliedly authorized because the subject-matter was in the nature of a public controversy.

England.— United Kingdom Mut. Steamship Assur. Assoc. *v.* Houston, [1896] 1 Q. B. 567, 65 L. J. Q. B. 484.

Canada.— Sloan *v.* Halden, 14 U. C. Q. B. 495.

Intention of parties shown upon the hearing.— In case of a submission to two arbitrators, with authority in them to appoint a third, without any provision as to whether the third should be appointed to act during the whole proceedings or only after disagreement, and the parties on the hearing treated such third person as a special arbitrator and as though he had been appointed to act only upon disagreement, it was held that the non-attendance of such third arbitrator and failure to notify him formed no ground for impeaching an award by the two original arbitrators who did not disagree. Haywood *v.* Marsh, 11 Jur. 657, 16 L. J. Q. B. 330.

3. *Alabama.*—McCrary *v.* Harrison, 36 Ala. 577.

Connecticut.— *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Iowa.— Kent *v.* French, 76 Iowa 187, 40 N. W. 713.

Louisiana.— Porter *v.* Dugat, 12 Mart. (La.) 245.

Massachusetts.— Doherty *v.* Doherty, 148 Mass. 367, 19 N. E. 352; Short *v.* Pratt, 6 Mass. 496.

Missouri.— Shores *v.* Bowen, 44 Mo. 396.

Montana.— Dunphy *v.* Ford, 2 Mont. 300.

New Jersey.— Hoffman *v.* Hoffman, 26 N. J. L. 175.

New York.— Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Ackley *v.* Finch, 7 Cow. (N. Y.) 290.

Pennsylvania.— Bartolett *v.* Dixon, 73 Pa. St. 129.

Rhode Island.— Wood *v.* Helme, 14 R. I. 325.

Tennessee.— Palmer *v.* Van Wyck, 92 Tenn. 397, 21 S. W. 761; Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.

Vermont.— Rixford *v.* Nye, 20 Vt. 132; Blin *v.* Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738.

England.— Pering *v.* Keymer, 3 A. & E. 245, 1 H. & W. 285, 4 L. J. K. B. 199, 5 N. & M. 374, 30 E. C. L. 128; Beck *v.* Jackson, 1 C. B. N. S. 695, 87 E. C. L. 895; Templeman *v.* Reed, 9 Dowl. 962; Morgan *v.* Bolt,

action may be waived by the parties, and such waiver may be established by showing that the parties proceeded, without objection, with the hearing before a majority.[4]

(II) *Refusal of Minority to Act*—(A) *Failure to Appear After Notice.* The failure of one or a minority of a number of arbitrators to appear and act with the majority, after sufficient notice and reasonable opportunity therefor, constitutes, substantially, a dissent from the action of the majority which will enable the latter to proceed, in the absence of such minority, to the rendition of a majority award in case a majority award has been authorized,[5] unless unanimity of action be absolutely required, by statute, as a condition precedent to the exercise of authority.[6]

(B) *Refusal to Participate After Disagreement.* The refusal of one or a minority of a number of arbitrators, having authority to render a majority award, to proceed further with the hearing or discussion of the case, after a disagreement has arisen, does not divest the majority of power to proceed, in the absence of the minority, with the hearing and to render an award in accordance with their authority.[7]

7 L. T. Rep. N. S. 671, 11 Wkly. Rep. 265; Burton *v.* Knight, 2 Vern. 514, 1 Eq. Cas. Abr. 51.

Canada.— *In re* McDonald, 16 U. C. Q. B. 84; Raymond *v.* Luke, 2 N. Brunsw. 116; Freeman *v.* Ontario, etc., R. Co., 6 Ont. 413; Martin *v.* Kergan, 2 Ont. Pr. 370.

Participation after recommittal.—Where an award of arbitrators having power to make a majority award has been recommitted to them, they have no power to proceed to a re-examination of the matter except by a participation of the whole number, and in such case, where one of the arbitrators resigns or refuses to act, the authority of the others is at an end. Cary *v.* Bailey, 55 Iowa 60, 7 N. W. 410; Cumberland *v.* North Yarmouth, 4 Me. 459; Peterson *v.* Loring, 1 Me. 64.

As to an unauthorized delegation of authority to one or more of the arbitrators see *supra*, III, F.

4. **Waiver of unanimity of action.**— Badders *v.* Davis, 88 Ala. 367, 6 So. 834; Brewer *v.* Bain, 60 Ala. 153; Phipps *v.* Tomkins, 50 Ga. 641; Sweeny *v.* Vaudry, 2 Mo. App. 352.

Subsequent agreement without knowledge of rule.— Where one of the arbitrators was absent from the hearing, and the parties agreed that the majority might proceed without him, an award by such majority was upheld although the original agreement to submit did not confer such authority, and although the complaining party mistakenly supposed that the arbitrators had such authority as incidental to the submission. Howard *v.* Conro, 2 Vt. 492.

5. *Indiana.*— Kile *v.* Chapin, 9 Ind. 150.

Kentucky.— Hewitt *v.* Craig, 86 Ky. 23, 9 Ky. L. Rep. 232, 5 S. W. 280.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

Massachusetts.— Doherty *v.* Doherty, 148 Mass. 367, 19 N. E. 352; Phippen *v.* Stickney, 3 Metc. (Mass.) 384.

Missouri.— Shores *v.* Bowen, 44 Mo. 396.

New Jersey.—Broadway Ins. Co. *v.* Doying, 55 N. J. L. 569, 27 Atl. 927.

New York.— Bulsom *v.* Lohnes, 29 N. Y. 291; Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405; Crofoot *v.* Allen, 2 Wend. (N. Y.) 494.

Pennsylvania.— Dickerson *v.* Rorke, 30 Pa. St. 390; Wilson *v.* Cross, 7 Watts (Pa.) 495.

Tennessee.— Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.

England.—Dalling *v.* Machett, 2 Barnes Notes Cas. 53, Willes 215; Sallows *v.* Girling, Cro. Jac. 277; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112.

Express refusal to act obviates the necessity of notice, so as to warrant the majority in proceeding without the presence of the refusing arbitrator. *In re* McDonald, 16 U. C. Q. B. 84.

6. Hoff *v.* Taylor, 5 N. J. L. 976.

7. *Massachusetts.*— Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Carpenter *v.* Wood, 1 Metc. (Mass.) 409.

New Hampshire.— Dodge *v.* Brennan, 59 N. H. 138.

New York.— Battey *v.* Button, 13 Johns. (N. Y.) 187.

Pennsylvania.— Robinson *v.* Bickley, 30 Pa. St. 384.

Texas.— King *v.* Grey, 31 Tex. 22.

Virginia.— Doyle *v.* Patterson, 84 Va. 800, 6 S. E. 138.

England.—Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112.

Canada.— *In re* McDonald, 16 U. C. Q. B. 84; Jekyll *v.* Wade, 8 Grant Ch. (U. C.) 363; Mills *v.* Atlantic, etc., R. Co., 1 Montreal Super. Ct. 302; Freeman *v.* Ontario, etc., R. Co., 6 Ont. 413.

But a mere dissent, without refusal to participate, will not warrant a majority in proceeding without affording the minority an opportunity to be present, or in rendering an award in the absence of the minority. McCrary *v.* Harrison, 36 Ala. 577 (which holds that the importance of the presence of the minority after a disagreement is increased rather than diminished by the fact of disagreement, inasmuch as the majority might have been in error and the minority might have convinced them of their error, and changed the ultimate result); Pering *v.* Key-

c. Proof of Majority Award. An award which is executed by a majority of arbitrators is sufficient proof of a proper majority award in case the arbitrators have been authorized to act by majority.[8] In the absence of any showing to the contrary, it will be presumed that the reason for the non-execution by the minority was either a dissent from the majority opinion or a refusal to participate after having been accorded sufficient opportunity so to do.[9]

V. SPECIAL ARBITRATOR OR UMPIRE.

A. Distinction Between Special Arbitrator and Umpire. A special arbitrator is one who is called in to act only after a disagreement between other arbitrators, not alone, however, but only in conjunction with the others, so as to enable a majority of them to render an award. Likewise, an umpire is one who is called in to act only after a disagreement; but the nature of his authority differs from that of a special arbitrator in the fact that he acts, not with the other arbitrators for the making of a majority award, but alone, and that his sole award determines the matters submitted to him.[10]

B. Appointment by Arbitrators — 1. AUTHORITY TO APPOINT — a. General Rule. The authority of arbitrators, originally appointed by the parties to determine a controversy, to appoint a special arbitrator or umpire, for the purpose of

mer, 3 A. & E. 245, 1 Hurl. & W. 285, 4 L. J. K. B. 199, 5 N. & M. 374, 30 E. C. L. 128; Jekyll *v.* Wade, 8 Grant Ch. (U. C.) 363 (which holds that a discussion by letter with the minority after a disagreement was not a sufficient compliance with the requirement of unanimity of participation, so as to authorize the making of a majority award in the absence of the minority). But see Hall *v.* Kenyon, 2 Pa. Co. Ct. 544, 20 Wkly. Notes Cas. (Pa.) 21.

8. Execution by majority.—*Indiana.*—White Water Valley Canal Co. *v.* Henderson, 3 Ind. 3.

Maine.— Thompson *v.* Mitchell, 35 Me. 281; Knowlton *v.* Homer, 30 Me. 552.

Massachusetts.— Sperry *v.* Ricker, 4 Allen (Mass.) 17.

Nebraska.— O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256.

New Hampshire.— Eastman *v.* Burleigh, 2 N. H. 484.

New York.— Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405.

Ohio.— Windisch *v.* Hildebrant, 8 Ohio Dec. (Reprint) 67, 5 Cinc. L. Bul. 415.

Washington.—Bachelder *v.* Wallace, 1 Wash. Terr. 107.

England.— White *v.* Sharp, 1 C. & K. 348, 1 Dowl. & L. 1039, 8 Jur. 344, 13 L. J. Exch. 215, 12 M. & W. 712, 47 E. C. L. 348.

Canada.— Creelman *v.* McMullen, 18 Nova Scotia 138, 6 Can. L. T. 450; Purdy *v.* Burbridge, 3 Nova Scotia 150.

As to sufficiency of execution see *infra*, VI.

9. Presumption from non-execution by minority.— *Iowa.*— Thompson *v.* Blanchard, 2 Iowa 44.

Pennsylvania.— Bartolett *v.* Dixon, 73 Pa. St. 129; Robinson *v.* Bickley, 30 Pa. St. 384.

Washington.—Bachelder *v.* Wallace, 1 Wash. Terr. 107.

Wisconsin.— Darge *v.* Horicon Iron Mfg. Co., 22 Wis. 691.

England.— Young *v.* Bulman, 13 C. B. 623, 22 L. J. C. P. 160, 76 E. C. L. 623.

Burden is upon the complaining party to prove that an award was executed by a majority after refusing to consult the minority, if this does not appear on the face of the award. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200; Phipps *v.* Tompkins, 50 Ga. 641.

Recital of participation.— It is not essential to the validity of a majority award that it should recite that all of the arbitrators participated in the hearing or in the decision; the fact of failure of the minority to participate may be shown by parol evidence, and participation will be presumed until the contrary is shown. Rogers *v.* Tatum, 25 N. J. L. 281; Ackley *v.* Finch, 7 Cow. (N. Y.) 290. *Contra*, Blin *v.* Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738, which holds that an award signed by a majority of five arbitrators which does not set forth that the minority were present at the hearing or were notified thereof is insufficient.

10. *Connecticut.*— Ranney *v.* Edwards, 17 Conn. 309.

Georgia.— Crabtree *v.* Green, 8 Ga. 8.

Kentucky.— Tyler *v.* Webb, 10 B. Mon. (Ky.) 123; Keans *v.* Rankin, 2 Bibb (Ky.) 88.

Massachusetts.— Haven *v.* Winnisimmet Co., 11 Allen (Mass.) 377, 87 Am. Dec. 723.

New York.— Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Lyon *v.* Blossom, 4 Duer (N. Y.) 318.

Virginia.—Bassett *v.* Cunningham, 9 Gratt. (Va.) 684.

West Virginia.—Stiringer *v.* Toy, 33 W. Va. 86, 10 S. E. 26.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 623 [*affirmed* in 56 Fed. 378, 5 C. C. A. 524, 15 U. S. App. 134].

acting upon disagreement between them, is not to be implied as a consequence of the submission to them in general terms,[11] but the intention to delegate such power must be expressed either in the original submission[12] or by subsequent agreement of the parties.[13]

b. Whether Special Arbitrator or Umpire. The power of original arbitrators to appoint an umpire, for the purpose of acting, in the event of a disagreement, upon his sole responsibility, does not exist unless it be expressly conferred by the parties.[14]

2. Time of Appointment — a. Before Proceeding. The character of a special arbitrator or umpire being such that he has no authority to act except upon disagreement of the original arbitrators, it is not essential, unless it be required by the terms of the submission, to the validity of a proceeding by the original arbitrators that they should first appoint such special arbitrator or umpire.[15] However, the appointment may properly be made before the original arbitrators enter upon an investigation of the matters submitted to them, so that, in case a disagreement occurs, an award may conveniently be made without the necessity of rehearing the evidence, and because, if no disagreement occurs, the presence and participation of such appointee will not injuriously affect the award of the original arbitrator.[16]

11. Authority not implied.—*Indiana.*—McMahan *v.* Spinning, 51 Ind. 187.

Kentucky.—Allen-Bradley Co. *v.* Anderson, etc., Distilleries Co., 99 Ky. 311, 18 Ky. L. Rep. 216, 35 S. W. 1123; Daniel *v.* Daniel, 6 Dana (Ky.) 98.

North Carolina.— Norfleet *v.* Southall, 7 N. C. 189.

South Carolina.—Sharp *v.* Lipsey, 2 Bailey (S. C.) 113.

England.— Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725.

See 4 Cent. Dig. tit. "Arbitration and Award," § 191 *et seq.*

12. Authority in submission.—Veal *v.* Willingham, 80 Ga. 243, 4 S. E. 554.

Authority to appoint an umpire "if needful" authorizes such appointment by arbitrators in case of their disagreement. Smith *v.* Morse, 9 Wall. (U. S.) 76, 19 L. ed. 597.

13. Subsequent agreement.— Moseley *v.* Simpson, L. R. 16 Eq. 226, 42 L. J. Exch. 739, 28 L. T. Rep. N. S. 727, 21 Wkly. Rep. 694.

Subsequent agreement by parol, made at the time of disagreement of arbitrators, may authorize them to appoint an umpire, as an independent contract, which will not be in variance with a written submission not containing such authority. Jackson *v.* Wright, 3 Whart. (Pa.) 601; Sharp *v.* Lipsey, 2 Bailey (S. C.) 113.

Subsequent attendance by the parties before an umpire which the arbitrators have no authority to appoint, without objection upon that ground, is equivalent to a resubmission to such umpire. Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725.

14. Thus, the authority to appoint is not only not to be implied in any case from a simple submission to arbitrators, but it is not to be inferred from the delegation of authority, expressed in general terms, to appoint a third or other additional arbitrator, even if such appointee is authorized to act only in the event of a disagreement. Gaffy *v.* Hartford Bridge Co., 42 Conn. 143; Ranney *v.* Edwards, 17 Conn. 309; Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Reade *v.* Dutton, 2 Gale 228, 6 L. J. Exch. 16, 2 M. & W. 62; Matter of Hick, 8 Taunt. 694, 21 Rev. Rep. 511, 4 E. C. L. 340.

15. Not necessary.— Rogers *v.* Corrothers, 26 W. Va. 238; Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Bright *v.* Durnell, 4 Dowl. P. C. 756.

N. Y. Code Civ. Proc. § 2367, requires a special arbitrator or umpire, in arbitration proceedings under a statute, to sit with the original arbitrators on the hearing. Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196; Enright *v.* Montauk F. Ins. Co., 15 N. Y. Suppl. 893, 40 N. Y. St. 642.

The converse of this rule applies in case a third or other additional arbitrator is to be appointed, with authority to act as an arbitrator generally, and not merely upon disagreement of the others; for, in this case, unanimity of action is required throughout the whole proceedings. Badders *v.* Davis, 88 Ala. 367, 6 So. 834; Brewer *v.* Bain, 60 Ala. 153; Phipps *v.* Tompkins, 50 Ga. 641; Luther *v.* Medbury, 18 R. I. 141, 26 Atl. 37, 49 Am. St. Rep. 753; Sloan *v.* Halden, 14 U. C. Q. B. 495.

As to the existence of power to render a majority award see *supra,* note 96 *et seq.*

16. Appointment permissible.— *California.* — Dudley *v.* Thomas, 23 Cal. 365.

Kentucky.— Newton *v.* West, 3 Metc. (Ky.) 24; Tyler *v.* Webb, 10 B. Mon. (Ky.) 123; Whittaker *v.* Wallace, 1 Ky. L. Rep. 271. *Contra,* Royse *v.* McCall, 5 Bush (Ky.) 695.

Maryland.— Rigden *v.* Martin, 6 Harr. & J. (Md.) 403.

Massachusetts.— Bigelow *v.* Maynard, 4 Cush. (Mass.) 317.

Missouri.— Leonard *v.* Cox, 64 Mo. 32; Frissell *v.* Fickes, 27 Mo. 557.

b. Before Termination of Authority. Before the expiration of a time fixed for the making of an award by original arbitrators, who have authority to appoint an umpire in case they are unable to agree within such time, the appointment may be made before the expiration of the time-limit so as to authorize the appointee to act thereafter;[17] and, for the reason that such appointment need not be made so long as the original arbitrators might make an award, it has been held that such appointment may be deferred until the time-limit has expired.[18]

3. Method of Appointment — a. In Accordance With Submission. If the method of appointing a special arbitrator or umpire is provided for in the submission, an appointment in any other manner which is not consented to by the parties will not confer any authority upon the appointee — as that the appointment shall be made by the original arbitrators,[19] and that it shall be evidenced by indorsement in writing upon the submission signed by the arbitrators.[20]

b. In Accordance With Statute. An arbitration which purports to proceed under a statute requiring the selection to be in writing cannot be enforced under the statute unless the requirement has been complied with.[21]

c. In the Absence of Restrictions — (I) *Appointment by Parol.* In the absence of a requirement in the submission, or in a statute under which the arbitration proceeds, that the appointment of a special arbitrator or umpire shall be in writing or under seal, such appointment may be by parol, notwithstanding the submission be written or sealed.[22]

New York.— New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446; Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405; McKinstry *v.* Solomons, 2 Johns. (N. Y.) 57.

North Carolina.— Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167; Stevens *v.* Brown, 82 N. C. 460.

Pennsylvania.—See, *contra*, Sickel *v.* Keach, 2 Walk. (Pa.) 535.

South Carolina.— Peck *v.* Wakely, 2 McCord (S. C.) 279.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

United States.— Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60 [*affirming* 1 Hayw. & H. (U. S.) 163, 23 Fed. Cas. No. 13,671]; Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Frye *v.* Scott, 3 Cranch C. C. (U. S.) 294, 9 Fed. Cas. No. 5,144. *Contra*, Traverse *v.* Beall, 2 Cranch C. C. (U. S.) 113, 24 Fed. Cas. No. 14,153.

England.— Bates *v.* Cooke, 9 B. & C. 407, 17 E. C. L. 186; Harding *v.* Watts, 15 East 556; Winteringham *v.* Robertson, 27 L. J. Exch. 301; Roe *v.* Doe, 2 T. R. 644, 1 Rev. Rep. 566.

Compliance with statute.—Under the Texas arbitration statute, which provided for filing an agreement to arbitrate with the clerk of the court, and for appointment by each party of an arbitrator who might, upon disagreement, appoint an umpire, an umpire was appointed by agreement of the parties before the hearing, which was had before all three, and it was held that this was not such an essential non-compliance with the statute as to prevent entry of judgment upon the award. Forshey *v.* Galveston, etc., R. Co., 16 Tex. 516.

17. Richards *v.* Brockenbrough, 1 Rand. (Va.) 449; Coppin *v.* Hurnard, 1 Lev. 285, 2 Saund. 129; Mitchel *v.* Harris, 1 Ld. Raym. 671; Elliot *v.* Cheval, 1 Lutw. 541; Cudliffe *v.* Walters, 2 M. & Rob. 232; Watson *v.* Clement, Rolle 5.

18. Deferred until expiration of time-limit. —Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196; Harding *v.* Watts, 15 East 556; Adams *v.* Adams, 2 Mod. 169; Beck *v.* Sargent, 4 Taunt. 232.

19. The court has no power to appoint, upon a disagreement of arbitrators, where the agreement of submission provides for appointment by the original arbitrators. MacPherson *v.* Drumm, 17 Rev. Lég. 672.

20. Indorsement on submission.— Bryce *v.* Loutit, 21 Ont. App. 100.

Signing indorsement at different times.— Upon the ground that the signing of an indorsement appointing an umpire is a judicial act, requiring a joint exercise of judgment, it has been held that an indorsement of such appointment, signed at different times and places by the arbitrators, was not a sufficient compliance with the requirement. Lord *v.* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404. *Contra*, Hopper *v.* Wrightson, L. R. 2 Q. B. 367, 8 B. & S. 100, 36 L. J. Q. B. 97, 15 L. T. Rep. N. S. 566, 15 Wkly. Rep. 443.

21. Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196.

22. *Maine.*— Knowlton *v.* Homer, 30 Me. 552.

New Hampshire.— Chase *v.* Jefts, 51 N. H. 494.

New York.— Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516.

North Carolina.— Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167.

United States.— Frye *v.* Scott, 3 Cranch C. C. (U. S.) 294, 9 Fed. Cas. No. 5,144.

(II) *Appointment by Chance.* The appointment of a special arbitrator or umpire is a joint judicial act, which requires that the original arbitrators should each exercise his individual judgment, upon knowledge, of the qualifications and fitness of the person appointed to exercise the powers delegated to him. The appointment should be, essentially, a matter of choice and not of chance.[23]

(III) *Effect of Partisanship.* Upon the ground that the selection of a special arbitrator or umpire is essentially a judicial act, requiring the exercise of individual judgment, it has been held that a refusal of one of the appointing arbitrators to agree to any competent or disinterested person proposed by his associates, for no other reason than that he desired to be governed entirely by the wishes and instructions of the party appointing him, was sufficient to invalidate an award made by a person finally agreed upon.[24]

d. Waiver of Irregular Appointment. An unauthorized or irregular appointment of a special arbitrator or umpire will be deemed to have been waived by the parties if they proceed to a hearing[25] before such appointee, with knowledge of the irregularity and without objection.[26]

4. Proof of Appointment. An award which is shown to have necessitated the

Canada.— Ray *v.* Durand, 1 Chamb. (U. C.) 27.

23. Hence, upon failure of the arbitrators to agree, a resort to any method of chance for the selection of one of two or more persons named by each of them is, as a general rule, unwarranted, and confers no authority upon the person so selected. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196; Whitlock *v.* Duffield, Hoffm. (N. Y.) 110; Greenwood *v.* Titterington, 9 A. & E. 699, 8 L. J. Q. B. 182, 1 P. & D. 463, 36 E. C. L. 369; Jamieson *v.* Binns, 4 A. & E. 945, 5 L. J. K. B. 187, 31 E. C. L. 411; Tunno *v.* Bird, 5 B. & Ad. 488, 3 L. J. K. B. 5, 2 N. & M. 328, 27 E. C. L. 209; Ford *v.* Jones, 3 B. & Ad. 248, 1 L. J. K. B. 104, 23 E. C. L. 115; Wells *v.* Cooke, 2 B. & Ald. 218; Matter of Cassell, 9 B. & C. 624, 7 L. J. K. B. O. S. 329, 4 M. & R. 555, 17 E. C. L. 281; Young *v.* Miller, 3 B. & C. 407, 3 L. J. K. B. O. S. 54, 10 E. C. L. 189; European, etc., Steam Shipping Co. *v.* Crosskey, 8 C. B. N. S. 397, 6 Jur. N. S. 896, 29 L. J. C. P. 155, 8 Wkly. Rep. 236, 98 E. C. L. 397; Lord *v.* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404; Harris *v.* Mitchell, 2 Vern. 485; Direct Cable Co. *v.* Dominion Tel. Co., 28 Grant Ch. (U. C.) 648.

Choice between two proper persons.— It has been held, by way of exception to the general rule above stated, that a selection by chance may be upheld as a proper appointment where two or more persons are nominated who, upon the individual judgment of each of the arbitrators, are conceded to be equally fit and qualified, so that it may be said that, after a chance selection, the selection of the persons finally appointed was due, not merely to chance alone, but to the exercise of the joint will and judgment of the arbitrators. Hopper *v.* Wrightson, L. R. 2 Q. B. 367, 8 B. & S. 100, 36 L. J. Q. B. 97, 15 L. T. Rep. N. S. 566, 15 Wkly. Rep. 443, per Cockburn, C. J.; Neale *v.* Ledger, 16 East 51. *Contra*, Ford *v.* Jones, 3 B. & Ad. 248, 1 L. J. K. B. 104, 23 E. C. L. 115. But this exception can never be applicable if either of the appointing arbitrators does not have personal knowledge of the fitness of all of the persons nominated for a chance selection. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

24. Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304. But see Silver *v.* Connecticut River Lumber Co., 40 Fed. 192 (where the contrary was held in a case where one of the appointing arbitrators merely consulted with the party who appointed him, in reference to the selection, in concurrence with the other arbitrators and without objection from the complaining party, in the absence of a showing that the result of the selection was not satisfactory); Sharp *v.* Lipsey, 2 Bailey (S. C.) 113 (to the effect that, if the appointment is otherwise regular, it is not necessary to its validity that either of the parties should be consulted or that their consent should be obtained).

25. Proceeding to a hearing.— Knowlton *v.* Homer, 30 Me. 552; Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Tunno *v.* Bird, 5 B. & Ad. 488, 3 L. J. K. B. 5, 2 N. & M. 328, 27 E. C. L. 209.

26. Knowledge of the irregularity must be shown where it is sought to establish a waiver by proceeding with the hearing. The irregularity having been shown, knowledge thereof will not be presumed. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196; Greenwood *v.* Titterington, 9 A. & E. 699, 8 L. J. Q. B. 182, 1 P. & D. 463, 36 E. C. L. 369; Jamieson *v.* Binns, 4 A. & E. 945, 5 L. J. K. B. 187, 31 E. C. L. 411; *In re* Hodson, 7 Dowl. P. C. 569, 2 Jur. 1088, 1 W. W. & H. 540.

appointment of a special arbitrator or umpire need not show such appointment, as it may be shown by parol evidence.[27]

5. Substitution. The authority to appoint a special arbitrator or umpire extends, by necessary implication, to a substitution in the event of a non-acceptance or refusal of the appointee to act;[28] but, if the appointment is accepted and the appointee proceeds to act, the authority of the original arbitrators is exhausted and they cannot, by a subsequent attempt to appoint another, affect the authority of the one first appointed.[29]

C. Exercise of Authority — 1. Within Time Allowed Original Arbitrators. Although a special arbitrator or umpire may be legally appointed within the time allowed to the original arbitrators for making an award,[30] yet, until the expiration of that time, such special arbitrator or umpire has no authority to proceed to a hearing of the case,[31] unless, previous thereto, the original arbitrators have disagreed and given notice of their intention to proceed no further, and do not thereafter undertake to act.[32]

2. Upon Disagreement — a. Participation Without Disagreement. Although the appointment of a special arbitrator or umpire may be made previous to a disagreement between the original arbitrators,[33] authority to act in such capacity does not attach until such disagreement occurs.[34] Therefore, his presence or participation in the hearing previous to a disagreement is not necessary,[35] and no act of his, in the assumption of such authority previous to a disagreement, can have any validity[36] unless by consent or waiver of the parties.[37] But, where the

27. **Parol evidence.**—Rison *v.* Berry, 4 Rand. (Va.) 275; Osborne *v.* Wright, 12 U. C. Q. B. 65.

Mere recital of such appointment has been held not sufficient, of itself, to prove the facts. Still *v.* Halford, 4 Campb. 17.

Presumption of consent.— It has been held that the consent of an appointing arbitrator to the appointment of an umpire would be presumed even though such arbitrator dissents from the award upon other grounds. Savannah, etc., R. Co. *v.* Decker, 94 Ga. 149, 21 S. E. 372.

28. Cloud *v.* Sledge, 1 Bailey (S. C.) 105; Trippet *v.* Eyre, 3 Lev. 263, 1 Show. 76, 2 Vent. 113.

29. **Exhaustion of authority.**— Oliver *v.* Collings, 11 East 367.

Failure to object to unauthorized substitution.— After an umpire had been selected and sworn, and, at the instance of one of the parties, but without the consent of the other, he was discharged from the consideration of the case and another appointed in his stead, an award by the second was upheld, it appearing that the complaining party, with knowledge of the unauthorized substitution, had submitted his case without objection. Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811.

30. See *supra*, V, B, 2, b.

31. Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196.

Fixing the same date, for both arbitrators and umpire, as the time within which the award shall be made, has been held to vest no authority in the umpire to make an award on the last day, because his authority could not begin until the termination of the authority of the original arbitrators, which was not until after such date. Copping *v.* Hurnard, 1 Lev. 285, 2 Saund. 129; Anonymous, 2 Vern. 100.

32. Richards *v.* Brockenbrough, 1 Rand. (Va.) 449; Copping *v.* Hurnard, 1 Lev. 285, 2 Saund. 129; Smailes *v.* Wright, 3 M. & S. 559; Ray *v.* Durand, 1 Chamb. (U. C.) 27.

33. See *supra*, V, B, 2, a.

34. *Kentucky.*— Greenwell *v.* Embree, 5 Ky. L. Rep. 313.

South Carolina.— Lockart *v.* Kidd, 2 Mill (S. C.) 216.

Tennessee.— Cooley *v.* Dill, 1 Swan (Tenn.) 313.

United States.— Traverse *v.* Beall, 2 Cranch C. C. (U. S.) 113, 24 Fed. Cas. No. 14,153.

Engalnd.— But see *In re* Elliott, etc., R. Co., 2 De G. & Sm. 17, 12 Jur. 445.

Taking part in the discussion of questions, by an umpire previous to any disagreement between the arbitrators, which participation appeared not to be of such a character as to improperly influence the latter, has been held not sufficient ground for setting aside an award, made without disagreement, by the original arbitrators. Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251.

35. Keans *v.* Rankin, 2 Bibb (Ky.) 88; Enright *v.* Montauk F. Ins. Co., 15 N. Y. Suppl. 893, 40 N. Y. St. 642; Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524 [*affirming* 44 Fed. 151, 11 L. R. A. 623]; Haywood *v.* Marsh, 11 Jur. 657, 16 L. J. Q. B. 330.

36. Whittaker *v.* Wallace, 1 Ky. L. Rep. 271; Manufacturers, etc., F. Ins. Co. *v.* Mullen, 48 Nebr. 620, 67 N. W. 445; Christenson *v.* Carleton, 69 Vt. 91, 37 Atl. 226.

37. **Consent or waiver without knowledge will not be implied.**— In a case where an umpire was appointed before the proceedings, and one of the parties objected to his being

special arbitrator or umpire has been appointed before the occurrence of a disagreement, and, without any disagreement having occurred, he joins with the other arbitrators in the making of an award, the fact of the joinder will not affect the validity of the award.[38] But it has been held that such an award is invalid where the umpire who took part therein did not participate in hearing the case.[39]

b. Proof of Disagreement. In order to establish jurisdiction to act upon disagreement, it is not necessary to show an express admission of the original arbitrators that they could not agree[40] — the disagreement may be sufficiently shown by facts and circumstances attending the proceedings,[41] and the calling in of the umpire is sufficient *prima facie* evidence of a disagreement.[42]

3. Hearing After Disagreement — a. Necessity to Rehear Evidence — (i) *Not Necessary Unless Demanded.* After a disagreement between the original arbitrators, the special arbitrator, in conjunction with them, or the umpire acting upon his sole responsibility, may proceed to a consideration of the case as presented by the original arbitrators, and make an award thereon without hearing the evidence anew or additional evidence, unless such rehearing be specially requested by one of the parties,[43] or required by the terms of the submission[44] or

called in to act until the disagreement had occurred, and he was afterward called in and proceedings had before him without objection, it was held, in the absence of a showing that the objecting party had knowledge of the fact that the arbitrators had not disagreed, that the fact was sufficient ground upon which to impeach an award of the umpire, and that it could not be presumed that the complaining party had waived his objection. Christenson *v.* Carleton, 69 Vt. 91, 37 Atl. 226.

38. *Georgia.*— King *v.* Cook, 1 T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Kentucky.—Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251; Keans *v.* Rankin, 2 Bibb (Ky.) 88. *Contra,* Royse *v.* McCall, 5 Bush (Ky.) 695, [*citing* Daniel *v.* Daniel, 6 Dana (Ky.) 93].

Maryland.— Rigden *v.* Martin, 6 Harr. & J. (Md.) 403.

North Carolina.— Stevens *v.* Brown, 82 N. C. 460.

England.— Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 24 L. J. Ch. 531, 53 Eng. Ch. 528.

Canada.—Ritchie *v.* Snowball, 26 N. Brunsw. 258; Turner *v.* Burt, 24 N. Brunsw. 547; Ferguson *v.* Munro, 4 N. Brunsw. 660.

39. Byrne *v.* Usry, 85 Ga. 219, 11 S. E. 561, where the court said: "This certainly vitiates the award in so far as it rests upon him; if the two arbitrators agreed with each other, this agreement may have been brought about by his arguments and influence, and it is the safer course to set aside the award for his failure to hear the case before taking part in the decision of it."

40. Express admission.— Hill *v.* Marshall, 5 L. J. C. P. O. S. 161.

Recital of disagreement in award.— It is not essential to the validity of an award after disagreement that it should recite the fact of disagreement in order to show the authority of a special arbitrator or umpire, as this fact, or the contrary, may be shown by parol. Frye *v.* Scott, 3 Cranch C. C. (U. S.) 294, 9 Fed. Cas. No. 5,144.

41. Winteringham *v.* Robertson, 27 L. J. Exch. 301 (difference of opinion at the conclusion of the evidence as to its effect); Cudliffe *v.* Walters, 2 M. & Rob. 232 (disagreeing as to reception of evidence).

A submission to four arbitrators, with authority to call in a special arbitrator or umpire to act upon their disagreement, does not authorize action by the fifth arbitrator or umpire upon dissent merely of one of the arbitrators, because otherwise such a provision would have been of no utility, since, if three were of one opinion and one to the contrary, the opinion of a fifth could not produce unanimity, and, if he should agree with the dissenting arbitrator, there would still be a majority against him. Lockart *v.* Kidd, 2 Mill (S. C.) 216; Cooley *v.* Dill, 1 Swan (Tenn.) 313.

42. Calling in of umpire.—*Kentucky.*— Tyler *v.* Webb, 10 B. Mon. (Ky.) 123.

South Carolina.—Finney *v.* Miller, 1 Bailey (S. C.) 81.

Tennessee.— Powell *v.* Ford, 4 Lea (Tenn.) 278; Shields *v.* Renno, 1 Overt. (Tenn.) 313.

England.— Sprigens *v.* Nash, 5 M. & S. 193.

Canada.—White *v.* Kirby, 2 Ch. Chamb. (U. C.) 452.

43. *Florida.*— Blood *v.* Shine, 2 Fla. 127.

Maine.— Knowlton *v.* Homer, 30 Me. 552.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84.

South Carolina.— Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; Sharp *v.* Lipsey, 2 Bailey (S. C.) 113.

England.— Tunno *v.* Bird, 5 B. & Ad. 488, 3 L. J. K. B. 5, 2 N. & M. 328, 27 E. C. L. 209; Jenkins *v.* Leggo, 1 Dowl. N. S. 277, 11 L. J. Q. B. 71, 6 Jur. 397; Hall *v.* Lawrence, 4 T. R. 589.

44. Required by terms of submission.— Blood *v.* Shine, 2 Fla. 127; Sharp *v.* Lipsey, 2 Bailey (S. C.) 113.

a statute under which the arbitration proceeds.[45] But a just regard for the rights of parties requires that a full rehearing should be accorded them upon demand therefor, and a failure so to do is sufficient ground upon which to avoid the award,[46] unless a waiver can be established by clear and unequivocal evidence.[47]

(II) *Opportunity to Demand Rehearing* — (A) *Notice of Proceeding.* The reason of the rule above stated — that a rehearing of the evidence is not necessary except upon demand — does not apply unless the parties have been notified of the appointment of the special arbitrator or umpire, and of the proceedings by him, and have been accorded reasonable opportunity to make such demand.[48] And in this respect the same necessity exists in the case of a special arbitrator acting only after disagreement as in the case of an umpire.[49]

(B) *Waiver of Notice.* Notice of proceedings as to disagreement is not necessary to be given where a party, with knowledge of the proceedings, refuses or neglects to attend,[50] or in case notice has been expressly waived.[51] But waiver

45. Required by statute.— Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196; Warren *v.* Tinsley, 53 Fed. 689, 2 U. S. App. 507, 3 C. C. A. 613.

A common-law arbitration is not subject to the requirement of N. Y. Code Civ. Proc. § 2367, that any testimony which had not been heard by special arbitrators or umpire must be reheard unless the rehearing is expressly waived. Enright *v.* Montauk F. Ins. Co., 15 N. Y. Suppl. 893, 40 N. Y. St. 642.

46. Salkeld *v.* Slater, 12 A. & E. 767, 10 L. J. Q. B. 22, 4 P. & D. 732, 40 E. C. L. 380; Jenkins *v.* Leggo, 1 Dowl. N. S. 277, 6 Jur. 397, 11 L. J. Q. B. 71; *In re* Maunder, 49 L. T. Rep. N. S. 535.

47. Waiver.— Salkeld *v.* Slater, 12 A. & E. 767, 10 L. J. Q. B. 22, 4 P. & D. 732, 40 E. C. L. 380.

Agreement to submit notes of evidence.— Where the parties to an arbitration agreed that notes of the evidence before original arbitrators should be taken in writing by a clerk, which notes, in case of disagreement, should be submitted to the umpire and upon which he should be at liberty to make his award without examining witnesses, it was held that the umpire was warranted in refusing the request of one of the parties to examine witnesses, and in making his award solely upon the notes submitted to him. *In re* Firth, 19 L. J. Q. B. 169, 1 L. M. & P. 63.

48. In the absence of such notice and opportunity to be heard or to demand a rehearing no authority to proceed exists.

Connecticut.— Gaffy *v.* Hartford Bridge Co., 42 Conn. 143.

Georgia.—Walker *v.* Walker, 28 Ga. 140.

Illinois.— Alexander *v.* Cunningham, 111 Ill. 511; Ingraham *v.* Whitmore, 75 Ill. 24.

Indiana.— Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028, 52 Am. St. Rep. 467.

Kentucky.— Daniel *v.* Daniel, 6 Dana (Ky.) 93; Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232; Liverpool, etc., Ins. Co. *v.* Hall, 10 Ky. L. Rep. 449.

Louisiana.— Hunt *v.* Zuntz, 28 La. Ann. 500.

Maryland.— Selby *v.* Gibson, 1 Harr. & J. (Md.) 363 note; Goldsmith *v.* Tilly, 1 Harr. & J. (Md.) 361.

New Jersey.—Wheaton *v.* Crane, 27 N. J. Eq. 368; West Jersey R. Co. *v.* Thomas, 21 N. J. Eq. 205 [*affirmed* in 24 N. J. Eq. 567].

New York.— Linde *v.* Republic F. Ins. Co., 50 N. Y. Super. Ct. 362.

Pennsylvania.— Passmore *v.* Pettit, 4 Dall. (Pa.) 271, 1 L. ed. 830; Falconer *v.* Montgomery, 4 Dall. (Pa.) 232, 1 L. ed. 813.

South Carolina.— Small *v.* Courtney, 1 Brev. (S. C.) 205.

Virginia.— Coons *v.* Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804.

United States.— Lntz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Thornton *v.* Chapman, 2 Cranch C. C. (U. S.) 244, 23 Fed. Cas. No. 13,997; Taber *v.* Jenny, Sprague (U. S.) 315.

England.— *In re* Hawley, etc., R. Co., 2 De G. & Sm. 33, 12 Jur. 389; *In re* Templeman, 9 Dowl. P. C. 962, 6 Jur. 324.

Canada.— Eaton *v.* Campbell, 2 Nova Scotia Dec. 313.

49. Rule applied in case of special arbitrator.— Alexander *v.* Cunningham, 111 Ill. 511; Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522.

50. Implied waiver.— Ranney *v.* Edwards, 17 Conn. 309; Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557; Tunno *v.* Bird, 5 B. & Ad. 488, 3 L. J. K. B. 5, 2 N. & M. 328, 27 E. C. L. 209.

Casual knowledge a few hours before the hearing, of a proceeding by a special arbitrator after disagreement, has been held not to have afforded a party sufficient opportunity to appear or demand the right to introduce witnesses, so as to establish a waiver. Coons *v.* Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804.

Conflicting evidence decided by lower court. —Where the court below has decided, upon conflicting evidence, in a suit to set aside the award, that the complaining party had knowledge of the time and place when the umpire would proceed, and at which time and place such party was not present, such determination will be taken as final in the appellate court. Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714.

51. Express waiver.— Crabtree *v.* Green, 8 Ga. 8.

of notice will not lightly be presumed; and, when once the want of notice appears, the burden of establishing a waiver is upon the party who seeks to uphold an award which has been made after disagreement and without a rehearing of the evidence.[52]

b. Proceedings When Rehearing Not Necessary — (I) *Discretion as to Extent of Hearing* — (A) *General Rule.* The extent to which it is necessary for a special arbitrator or umpire to go in hearing the matters upon which the original arbitrators have disagreed, in the absence of a demand for a rehearing or in case of a waiver thereof, is a matter which rests in their sound discretion.[53]

(B) *Upon a Partial Disagreement* — (1) Necessity to Consider Entire Matter. If a rehearing of the entire case has not been required, upon a partial disagreement of the original arbitrators there is no reason or rule which prevents the special arbitrator or umpire from accepting as conclusive those matters about which there has been no disagreement, confining the subsequent investigation to the matters of difference.[54]

(2) Necessity to Make an Entire Award. Although the opinion of the original arbitrators, so far as they agree, may be adopted, such partial agreement does not constitute a partial award, so as to permit a separate award upon the matters of disagreement, but the subsequent consideration, by the special arbitrator in conjunction with the others, or by the umpire in his sole capacity, should result in a single and final determination,[55] unless a separate award is authorized in, or contemplated by, the submission.[56]

(II) *Matters Not Discretionary.* Upon general principles of justice, certain matters as to hearing after disagreement are not the subject of discretion. Thus, it had been held essential that the matters of difference between original arbitrators should not be presented or discussed by one in the absence of the other;[57] also, that evidence for one party upon the matters of disagreement should not be heard *ex parte*;[58] that the umpire should not arrive at his decision

Giving notice of intention not to attend, by statement thereof to one of the arbitrators, will dispense with the notice. Graham *v.* Graham, 12 Pa. St. 128.

Waiver of hearing before original arbitrators does not constitute a waiver of the right to be heard before the umpire. Brown *v.* Lyddy, 11 Hun (N. Y.) 451.

52. Burden of proof.— Alexander *v.* Cunningham, 111 Ill. 511; Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567 [*affirming* 23 N. J. Eq. 431]; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522.

The case of Hall v. Lawrence, 4 T. R. 589, so far as it may be held to establish a contrary doctrine, has been overruled in England and expressly disapproved by a number of courts in the United States. The case seems to hold that the parties need not be notified, or be given an opportunity for the introduction of evidence or to have their case reheard before a special arbitrator or umpire, the fact decided being that an umpire was warranted in refusing a request to introduce evidence after an award had been made; but the case has very generally been considered as turning upon the doctrine of waiver. Limited to the proposition that the parties may, with notice, waive their right to a rehearing, it may be supported as sound law. See also Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Graham *v.* Graham, 12 Pa. St. 128; Coons *v.* Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804; Salkeld *v.* Slater, 12 A. & E. 767, 10 L. J. Q. B. 22, 4 P. & D. 732, 40 E. C. L. 380.

53. Ranney *v.* Edwards, 17 Conn. 309.

54. Blood *v.* Shine, 2 Fla. 127; Whittaker *v.* Wallace, 1 Ky. L. Rep. 271; Finney *v.* Miller, 1 Bailey (S. C.) 81.

But an umpire is not bound to accept the opinion of the original arbitrators as conclusive even as to matters upon which they are agreed. Bassett *v.* Cunningham, 9 Gratt. (Va.) 684.

55. Crabtree *v.* Green, 8 Ga. 8; Haven *v.* Winnisimmet Co., 11 Allen (Mass.) 377, 87 Am. Dec. 723; Finney *v.* Miller, 1 Bailey (S. C.) 81; Wicks *v.* Cox, 11 Jur. 542; Winteringham *v.* Robertson, 27 L. J. Exch. 301; Tollit *v.* Saunders, 9 Price 612, 23 Rev. Rep. 732.

56. Powell *v.* Ford, 4 Lea (Tenn.) 278.

57. One arbitrator discussing matters of disagreement in absence of other.— Walker *v.* Charleston, Bailey Eq. (S. C.) 443; Mullins *v.* Arnold, 4 Sneed (Tenn.) 261; Brook *v.* Badart, 16 C. B. N. S. 403, 10 Jur. N. S. 704, 33 L. J. C. P. 246, 10 L. T. Rep. N. S. 378, 11 E. C. L. 403; Morgan *v.* Bolt, 7 L. T. Rep. N. S. 671, 11 Wkly. Rep. 265; *In re* Lawson, 19 Grant Ch. (U. C.) 84.

58. Hearing evidence ex parte.— Alexander *v.* Cunningham, 111 Ill. 511; Moore *v.* Powley, 1 Thoms. (Nova Scotia, 1st ed.) 87, 1 Thoms. (Nova Scotia, 2d ed.) 115.

by striking an average between aggregate sums decided upon by the original arbitrators,[59] and other essentials which cannot be disregarded may be required by the special circumstances of the case,[60] the terms of the submission, or other agreement of the parties.[61]

e. Participation of Arbitrators After Disagreement — (i) *With Special Arbitrator.* It is essential to the validity of an award, by the original arbitrators in conjunction with a special arbitrator who is authorized to act with them only in the making of a majority award, that the original arbitrators should participate in the hearing and consideration of the case after disagreement, and at least a majority of all must join in making the award.[62]

(ii) *With Umpire.* It is not essential to the validity of an award by an umpire, who is authorized to make an award upon his sole responsibility, that the original arbitrators should participate with him in the hearing or consideration of the case after disagreement, or join with him in making the award.[63] But such participation and joinder will not invalidate the award, because it is permissible for the umpire to have the advice and assistance of the arbitrators in the hearing and decision of the case, and because the joinder of the arbitrators may be rejected as surplusage.[64]

Presence at examination waived.— Where an umpire examined each party in the absence of the other, and it was not shown that either party had desired to be present at the examination of the other, the award was upheld. Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725.

59. Striking average.—Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524, which holds, nevertheless, upon the circumstances of the case, that an award of an umpire for sixty thousand dollars, which was an average between the amounts adjudged by the original arbitrators of five thousand and one hundred and fifteen thousand dollars, respectively, was not of itself sufficient to avoid the award.

As to striking average by arbitrators see *supra*, IV, E, 1.

60. Necessity to view premises.— Where a decision of the matters submitted to arbitration require a view of the premises involved in the controversy, it is not sufficient that the original arbitrators view the premises before disagreement, but it is necessary, to a subsequent award in which a special arbitrator joins, that he also should have viewed the premises. Palmer *v.* Van Wyck, 92 Tenn. 397, 21 S. W. 761.

61. Terms of submission.— Walker *v.* Charleston, Bailey Eq. (S. C.) 443, wherein relief in equity was granted against an award by an umpire who, after disagreement, and contrary to a special requirement of the submission, heard and determined the controversy in the absence of the original arbitrators.

An agreement to submit upon written arguments, without further notice to the parties or rehearing of the evidence, does not justify an award by a special arbitrator without reading the arguments submitted and without further notice to the parties. West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431 [*affirmed* in 24 N. J. Eq. 567].

62. *Connecticut.*—Gaffy *v.* Hartford Bridge Co., 42 Conn. 143.

Illinois.— Kelderhouse *v.* Hall, 116 Ill. 147, 4 N. E. 652.

Massachusetts.— Haven *v.* Winnisimmet Co., 11 Allen (Mass.) 377, 87 Am. Dec. 723.

New York.— Graham *v.* James, 7 Rob. (N. Y.) 468; Lyon *v.* Blossom, 4 Duer (N. Y.) 318.

Tennessee.— Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

England.— Beddall *v.* Page, 5 L. J. K. B. O. S. 101; Morgan *v.* Bolt, 7 L. T. Rep. N. S. 671, 11 Wkly. Rep. 265.

As to necessity for unanimous participation in order to make a majority award see *supra*, IV, E, 2, b.

63. Sheffield *v.* Clark, 73 Ga. 92; Sanford *v.* Wood, 49 Ind. 165; Kile *v.* Chapin, 9 Ind. 150; Scudder *v.* Johnson, 5 Mo. 551; Jackson *v.* Merritt, 11 Abb. Pr. (N. Y.) 370.

64. *Georgia.*— Sheffield *v.* Clark, 73 Ga. 92; King *v.* Cook, 1 T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.— Kelderhouse *v.* Hall, 116 Ill. 147, 4 N. E. 652.

Indiana.— Sanford *v.* Wood, 49 Ind. 165; Baker *v.* Farmbrough, 43 Ind. 240.

Kentucky.— Tyler *v.* Webb, 10 B. Mon. (Ky.) 123; Whittaker *v.* Wallace, 1 Ky. L. Rep. 271.

Maryland.— Rigden *v.* Martin, 6 Harr. & J. (Md.) 403.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84.

Missouri.— Frissell *v.* Fickes, 27 Mo. 557.

New York.— New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446; Lyon *v.* Blossom, 4 Duer (N. Y.) 318; Jackson *v.* Merritt, 11 Abb. Pr. (N. Y.) 370; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339.

North Carolina.— Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167; Stevens *v.* Brown, 82 N. C. 460.

Pennsylvania.— Boyer *v.* Aurand, 2 Watts (Pa.) 74.

VI. THE AWARD.

A. Form and Execution — 1. General Rule — Intention to Award. In the absence of a special requirement in the submission or in a statute under which the arbitration proceeds, no precise form in the making of an award need be observed; it is sufficient if the language employed evinces an intention to decide the matters submitted.[65] The question of intention is one of fact, to be determined

Tennessee.— Mullins *v.* Arnold, 4 Sneed (Tenn.) 261.

Vermont.—Woodrow *v.* O'Conner, 28 Vt. 776.

Virginia.— Rison *v.* Berry, 4 Rand. (Va.) 275.

United States.— *Compare* Goldsborough *v.* McWilliams, 2 Cranch C. C. (U. S.) 401, 10 Fed. Cas. No. 5,518, which holds that an award signed by two persons as arbitrators merely will not support an averment of an award by one of the persons as umpire.

England.— Bates *v.* Cooke, 9 B. & C. 407, 17 E. C. L. 186; Soulsby *v.* Hodgson, 3 Burr. 1474, 1 W. Bl. 463; Flaglane Chapel *v.* Sunderland Corp., 5 Jur. N. S. 894; Beck *v.* Sargent, 4 Taunt. 232.

65. Technical precision of language is not necessary.

Alabama.—Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725.

Illinois.— Steere *v.* Brownell, 113 Ill. 415.

Indiana.— Brown *v.* Harness, 10 Ind. App. 426, 38 N. E. 1098.

Kentucky.—Snyder *v.* Rouse, 1 Metc. (Ky.) 625; Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312.

Maine.— Kendall *v.* Bates, 35 Me. 357.

Massachusetts.— Spear *v.* Hooper, 22 Pick. (Mass.) 144.

New Hampshire.— Tracy *v.* Herrick, 25 N. H. 381.

New Jersey.— Rogers *v.* Tatum, 25 N. J. L. 281; Coxe *v.* Lundy, 1 N. J. L. 295.

New York.— Hiscock *v.* Harris, 74 N. Y. 108; Ott *v.* Schroeppel, 5 N. Y. 482; Hays *v.* Hays, 23 Wend. (N. Y.) 363; Platt *v.* Smith, 14 Johns. (N. Y.) 368; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96; Solomons *v.* McKinstry, 13 Johns. (N. Y.) 27.

Pennsylvania.— Bemus *v.* Clark, 29 Pa. St. 251.

Vermont.— Soper *v.* Frank, 47 Vt. 368.

Virginia.— Smith *v.* Smith, 4 Rand. (Va.) 95.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238.

England.—Whitehead *v.* Tattersall, 1 A. & E. 491, 28 E. C. L. 239; Lock *v.* Vulliamy, 5 B. & Ad. 600, 2 N. & M. 336, 27 E. C. L. 255; Eardley *v.* Steer, 1 C. M. & R. 327, 4 Dowl. P. C. 423, 4 L. J. Exch. 293.

Stating the amount in figures instead of in words, although inadvisable, is unobjectionable. Bozorth *v.* Prickett, 2 N. J. L. 251.

A simple indorsement on the submission of a finding of an amount due from one of the parties to the other has been held a sufficient award. Gaylord *v.* Gaylord, 4 Day (Conn.) 422; Dolbier *v.* Wing, 3 Me. 421.

Forms of awards, in whole, in part, or in substance, may be found set out in the following cases:

Alabama.—Georgia Home Ins. Co. *v.* Kline, 114 Ala. 366, 21 So. 958; Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Collier *v.* White, 97 Ala. 615, 12 So. 385; Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Johnson *v.* Maxey, 43 Ala. 521; Elrod *v.* Simmons, 40 Ala. 274; Reynolds *v.* Roebuck, 37 Ala. 408; Strong *v.* Beroujon, 18 Ala. 168; Burns *v.* Hindman, 7 Ala. 531.

California.— Blair *v.* Wallace, 21 Cal. 317.

Connecticut.—Averill *v.* Buckingham, 36 Conn. 359; White *v.* Fox, 29 Conn. 570; Brown *v.* Green, 7 Conn. 536; Bulkley *v.* Starr, 2 Day (Conn.) 552.

Georgia.— Pike *v.* Stallings, 71 Ga. 860; Richardson *v.* Hartsfield, 27 Ga. 528.

Illinois.— Seaton *v.* Kendall, 61 Ill. App. 289.

Indiana.— Carson *v.* Earlywine, 14 Ind. 256; Hays *v.* Miller, 12 Ind. 187.

Iowa.— Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806.

Kansas.— Weir *v.* West, 27 Kan. 650.

Kentucky.— Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251; Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.— Porter *v.* Buckfield Branch R. Co., 32 Me. 539.

Maryland.— Bushey *v.* Culler, 26 Md. 534; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458.

Massachusetts.—Benson *v.* White, 101 Mass. 48; Mickles *v.* Thayer, 14 Allen (Mass.) 114; Sears *v.* Vincent, 8 Allen (Mass.) 507; Fiske *v.* South Wilbraham Mfg. Co., 7 Allen (Mass.) 476; Sperry *v.* Ricker, 4 Allen (Mass.) 17; Strong *v.* Strong, 9 Cush. (Mass.) 560; Bigelow *v.* Maynard, 4 Cush. (Mass.) 317.

Nebraska.— Westover *v.* Armstrong, 24 Nebr. 391, 38 N. W. 843.

New Hampshire.— Girdler *v.* Carter, 47 N. H. 305.

New Jersey.— Hoffman *v.* Hoffman, 26 N. J. L. 175; Bell *v.* Price, 22 N. J. L. 578; Smith *v.* Demarest, 8 N. J. L. 195.

New York.— Cobb *v.* Dolphin Mfg. Co., 108 N. Y. 463, 15 N. E. 438; Ott *v.* Schroeppel, 5 N. Y. 482; Owen *v.* Boerum, 23 Barb. (N. Y.) 187; Jones *v.* Cuyler, 16 Barb. (N. Y.) 576; Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578; Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156; Purdy *v.* Delavan, 1 Cai. (N. Y.) 304.

North Carolina.— Crawford *v.* Orr, 84 N. C. 246; Brown *v.* Brown, 49 N. C. 123; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576.

upon a consideration of all the circumstances of the particular case, together with the contents of that which is claimed to be an award.[66] But requirements of the submission,[67] as well as express provisions of law, as to the manner of making an award, should be substantially complied with.[68]

2. PAROL AWARD. If a writing be not required by the terms of the submission or of a statute applicable to the proceeding, a parol award is good, especially if the submission is by parol;[69] and, even if the submission be in writing, unless

Ohio.— Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655; Prouse *v.* Painter, Tapp. (Ohio) 52.

Pennsylvania.— McCalmont *v.* Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; Gonsales *v.* Deavens, 2 Yeates (Pa.) 539.

South Carolina.— Betsill *v.* Betsill, 30 S. C. 505, 9 S. E. 652; Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31.

Tennessee.— Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239.

Texas.— Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612; Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764.

Vermont.— Soper *v.* Frank, 47 Vt. 368; Hartland *v.* Henry, 44 Vt. 593; Sabin *v.* Angell, 44 Vt. 523; Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140.

Virginia.— Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671; Armstrong *v.* Armstrong, 1 Leigh (Va.) 491; Macon *v.* Crump, 1 Call (Va.) 575.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238; State *v.* Rawson, 25 W. Va. 23; Tennant *v.* Divine, 24 W. Va. 387; Dunlap *v.* Campbell, 5 W. Va. 195.

United States.— Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Swann *v.* Alexandria Canal Co., 1 Hayw. & H. (U. S.) 163, 23 Fed. Cas. No. 13,671.

England.— Spooner *v.* Payne, 4 C. B. 328, 16 L. J. C. P. 225, 56 E. C. L. 328; Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725; Emery *v.* Wase, 8 Ves. Jr. 505.

Canada.— Hodder *v.* Turvey, 20 Grant Ch. (U. C.) 63.

66. The intention to make an award need not be stated; in such case parol evidence is admissible to show that the paper in question was intended as an award. Saunders *v.* Heaton, 12 Ind. 20.

An award in the form of an opinion may be sufficient to show an intention to render a final determination. Williams *v.* Paschall, 4 Dall. (Pa.) 284, 1 L. ed. 835; Matson *v.* Trower, R. & M. 17, 27 Rev. Rep. 725.

A mere suggestion or proposition is not an award; therefore, in case of a dispute between an architect and his clerk, relating to the wages of the latter, which was referred to arbitration, where the arbitrator stated in a letter to the architect that he had examined the claims of the clerk, which did not seem to justify any demand for remuneration under the circumstances, and proposing, evidently by way of a liberal compromise, that the architect should pay the clerk a certain sum, it was held that this was a mere suggestion and not a decided opinion upon which the clerk could recover as upon an award. Lock *v.* Vulliamy, 5 B. & Ad. 600, 2 N. & M. 336, 27 E. C. L. 255.

An award in the form of a recommendation may, nevertheless, be given effect as a final determination where such intention appears. West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555; Smith *v.* Hartley, 10 C. B. 800, 15 Jur. 755, 20 L. J. C. P. 169, 2 L. M. & P. 340, 70 E. C. L. 800. See also Clapcott *v.* Davy, 1 Ld. Raym. 611.

A signed memorandum, shown to have been intended as instructions to a solicitor upon which to draft an award, has been held not binding as an award. Shaw *v.* Morton, 13 U. C. C. P. 223.

67. An indorsement of the award upon a lease, required by the terms of a submission, was held to have been sufficiently complied with by making an award on a separate paper, and annexing it to the lease with a wafer. Montague *v.* Smith, 13 Mass. 396.

The indorsement of a note and delivery of a receipt, delivered by the parties, respectively, to the arbitrators, was held to be exclusive as to the manner in which the arbitrators should make an award. Allen *v.* Galpin, 9 Barb. (N. Y.) 246, 250, where the court said that the parties "might have directed it to be written upon parchment, or engraved upon brass; or that the arbitrators should cause it to be printed; and if the arbitrators did not choose to do as they were authorized, their acts would not bind the parties."

Indenting an award, required in terms by a submission, has been held not to be binding on the arbitrators, and that an award not indented was good. Gatliffe *v.* Dunn, 1 Barnes Notes Cas. 55.

68. English language required.—Under La. Const. art. 6, § 15, the language of all public records must be that "in which the constitution of the United States is written," and it has, therefore, been held that, inasmuch as the court is prohibited from reëxamining an award on its merits, and is confined to the ministerial duty of enforcing it when presented for homologation, the award becomes a part of the records of the court and must be in the English language, in accordance with the constitution. Ditman *v.* Hotz, 9 Mart. (La.) 200, 202.

As to the necessity for writing see *infra*, VI, A, 2.

As to necessary recitals see *infra*, VI, A, 4, a.

69. *Alabama.*— Byrd *v.* Odem, 9 Ala. 755.

Illinois.—Phelps *v.* Dolan, 75 Ill. 90; Smith *v.* Douglass, 16 Ill. 34.

there is evidence of an intention that the award should also be written, a writing is not essential to its validity;[70] but a parol award will be of no effect if a writing be required by the submission,[71] by a statute under which it proceeds,[72] or by the rules of an association under which the arbitrators act.[73]

3. SEPARATE WRITINGS. Separate writings of arbitrators, which are intended by them to form parts of one award, are to be taken together in construing it or deciding upon its effect, whether the result of the separate instrument is to avoid the award[74] or to validate it;[75] and statements written on the award may be considered as a part of it and receive the same construction as if such statements had been inserted in the body of the award, whether written on the margin,[76]

Indiana.— Sanford *v.* Wood, 49 Ind. 165; Smith *v.* Stewart, 5 Ind. 220.

Iowa.— Skrable *v.* Pryne, 93 Iowa 691, 62 N. W. 21.

Kentucky.— Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262; Massie *v.* Spencer, 1 Litt. (Ky.) 320.

Mississippi.—McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298.

Missouri.— Williams *v.* Perkins, 83 Mo. 379; Walt *v.* Huse, 38 Mo. 210; Hamlin *v.* Duke, 28 Mo. 166; Donnell *v.* Lee, 58 Mo. App. 288.

New Hampshire.— Jones *v.* Dewey, 17 N. H. 596.

New York.—Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

Pennsylvania.—Gay *v.* Waltman, 89 Pa. St. 453; McManus *v.* McCulloch, 6 Watts (Pa.) 357.

Vermont.— Marsh *v.* Packer, 20 Vt. 198.

England.— Rawling *v.* Wood, 1 Barnes Notes Cas. 54; Walters *v.* Morgan, 2 Cox C. C. 369.

A subsequent ineffectual writing will not invalidate an award which has been completed by parol, in a case where a written award has not been required. Donnell *v.* Lee, 58 Mo. App. 288; Jones *v.* Dewey, 17 N. H. 596.

70. Goodell *v.* Raymond, 27 Vt. 241.

A written award, not delivered, has been held to be binding where its contents were made known to the parties, although the submission was in writing, but did not require a written award, upon the ground that the award was good as being delivered by parol. Denman *v.* Bayless, 22 Ill. 300.

71. Written award required by submission. — Tudor *v.* Scovell, 20 N. H. 171.

72. Written award required by statute.— McKnight *v.* McCullough, 21 Iowa 111; Raguet *v.* Carmouche, 5 La. Ann. 133; Darling *v.* Darling, 16 Wis. 644.

Under the statute of frauds, which requires contracts relating to real estate to be in writing, an award which determines the right of property to real estate cannot be by parol. Buker *v.* Bowden, 83 Me. 67, 21 Atl. 748; Donnell *v.* Lee, 58 Mo. App. 288; Jones *v.* Dewey, 17 N. H. 596; Gaylord *v.* Gaylord, 48 N. C. 367. But see Shelton *v.* Alcox, 11 Conn. 240; Hopson *v.* Doolittle, 13 Conn. 236.

As to matters concerning real estate, but not involving rights of property therein, as to which a writing would not be required see *supra*, II, B, 1, c, (II), (C).

The law of the place of the submission controls the question of validity upon a parol award; wherefore it has been held that, although the law of the forum required a written award, a parol award was, nevertheless, good in pursuance of a submission made in another state with reference to a matter upon which a written award was not required. Green *v.* East Tennessee, etc., R. Co., 37 Ga. 456.

As a common-law award, a parol award may be enforced, although it may not be enforced in the manner provided by a statute requiring the award to be in writing.

Alabama.— Byrd *v.* Odem, 9 Ala. 755.

Illinois.— Phelps *v.* Dolan, 75 Ill. 90.

Indiana.— Carson *v.* Earlywine, 14 Ind. 256.

Missouri.— Hamlin *v.* Duke, 28 Mo. 166.

Texas.— But see Stephenson *v.* Price, 30 Tex. 715.

A verbal agreement to abide by a verbal award pursuant to a written submission, which has the effect of changing it to a mere verbal one, has been held not to give effect to a parol award in regard to a matter respecting which the statute of frauds required the award to be in writing. French *v.* New, 28 N. Y. 147.

A writing will be presumed, in the absence of an allegation to the contrary, in a case where a writing is necessary and where the award is subsequently drawn in question. Brown *v.* Mize, 119 Ala. 10, 24 So. 453.

73. The rules of an association, which require awards of its arbitration committee to be in writing, have been held not applicable to a submission of a matter to certain members of the committee, so that their action should not be in any official capacity under the association rules, but merely as arbitrators, so constituted by the parties. Murdock *v.* Blesdell, 106 Mass. 370.

74. Cameron *v.* Castleberry, 29 Ga. 495; Rhodes *v.* Hardy, 53 Miss. 587; Mathews *v.* Miller, 25 W. Va. 817.

Explanatory matter in an annexed instrument, showing that a particular matter which was not embraced in the submission was not acted upon, does not affect the validity of the award. Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 16.

75. Ott *v.* Schroeppel, 5 N. Y. 482; Johnson *v.* Latham, 20 L. J. Q. B. 236, 2 L. M. & P. 205.

76. Statements written on margin of award.— Whitcher *v.* Whitcher, 49 N. H. 176,

on the back,[77] or underneath the award.[78] Separate awards may be made at the same time upon distinct matters submitted by a single agreement,[79] and a single award upon distinct matters is proper where separate awards are not required.[80]

4. RECITALS — a. When Necessary. In the absence of a special provision requiring recitals of compliance with the terms of the submission or a statute applicable to the proceedings, it is not, generally, necessary that such recital should be made, although, in some cases, it has been held that requirements relating to jurisdiction, as conditions precedent thereto, must be shown in the award to have been fulfilled.[81]

b. Misrecitals. In accordance with the general rule that awards will be liberally construed in order to effectuate the intention of the arbitrators, misrecitals of facts not required to be recited may be disregarded and the award be given effect according to the actual facts and the real intention of the arbitrators,[82] and the arbitrator cannot, by a false recital, assume to himself authority beyond that which the submission confers upon him.[83] The submission, rather than the award, controls the question of what matters were submitted to arbitration;[84] but a recital of the submission is not conclusive of what the parties really submitted,[85]

6 Am. Rep. 486; Platt *v.* Smith, 14 Johns. (N. Y.) 368.

77. Statements written on back of award. — Griffith *v.* Jarrett, 7 Harr. & J. (Md.) 70.

78. Statements written underneath award. — Rhodes *v.* Hardy, 53 Miss. 587.

79. Separate awards. — Jones *v.* Welwood, 71 N. Y. 208; Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore 272, 28 Rev. Rep. 565, 11 E. C. L. 20.

Intention to make separate awards. — In a case where the parties had agreed that a statement of their accounts should be made an essential part of the award, an award in general terms was made, containing no such statement, and subsequently, when the award was drawn in question for failure to comply with the submission in respect of form, upon an offer to introduce in evidence such a statement and annex it to the award, it was held that the defect could not thus be cured, especially since it did not appear that the arbitrators had intended to make the statement a part of their award. Fobes *v.* Backus, 1 Grant (Pa.) 393.

Under a statute requiring a statement of the proceedings, an award in general terms, which refers to statements of the proceedings, which have been delivered to the parties, has been held not sufficient to enable the court to enter judgment on the award under the statute. Day *v.* Laflin, 6 Metc. (Mass.) 280.

80. Koerner *v.* Leathe, 149 Mo. 361, 51 S. W. 96.

But a single award is not permissible, in the absence of special authority, upon separate claims of different parties under separate submissions. Giles *v.* Royal Ins. Co., (Mass. 1901) 60 N. E. 786.

81. Province of recitals. — "It is held sufficient if it can be shown, otherwise than by the recital contained in the award, that the arbitrators had been duly constituted, and had, in making the award, pursued their authority. And these facts are not proved by the recital of them in the award, nor is the award evidence of anything except that for which the parties or the court from whom it derives its validity and effect, have made it evidence. The omission of the recital is therefore of no consequence whatever." Houghton *v.* Burroughs, 18 N. H. 499, 502.

As to recital of oath of arbitrators see *supra*, III, D.

As to recital of notice of hearing to parties see *supra*, IV, D, 2, b, (III).

As to recital of participation of all the arbitrators see *supra*, IV, E, 2, c.

As to recital of appointment of umpire or special arbitrator see *supra*, V, B, 4.

As to recital of disagreement between original arbitrators see *supra*, V, C, 2, b.

82. Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Brown *v.* Hankerson, 3 Cow. (N. Y.) 70; Diblee *v.* Best, 11 Johns. (N. Y.) 103; Ross *v.* Overton, 3 Call (Va.) 309, 2 Am. Dec. 552; Thames Iron Works, etc., Co. *v.* Reg., 10 B. & S. 33, 20 L. T. Rep. N. S. 318; Baker *v.* Hunter, 4 Dowl. & L. 696, 16 L. J. Exch. 203, 16 M. & W. 672; Harlow *v.* Read, 1 C. B. 733, 3 Dowl. & L. 203, 9 Jur. 642, 14 L. J. C. P. 239, 50 E. C. L. 733; Watkins *v.* Phillpotts, M'Clel. & Y. 393, 29 Rev. Rep. 809; Adams *v.* Adams, 2 Mod. 169.

A mistake in the name of one of the parties has been held sufficient upon which to refuse an attachment for enforcement of the award. Davies *v.* Pratt, 16 C. B. 586, 81 E. C. L. 586; Lee *v.* Hartley, 9 Dowl. P. C. 883.

A misrecital of the christian name of an arbitrator in the award of an umpire, showing the manner of such arbitrator's appointment, has been held to be immaterial. Trew *v.* Burton, 1 Cr. & M. 533, 2 L. J. Exch. 236.

83. Price *v.* Popkin, 10 A. & E. 139, 3 Jur. 433, 8 L. J. Q. B. 198, 2 P. & D. 304, 37 E. C. L. 95.

84. Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678.

85. Thames Iron Works, etc., Co. *v.* Reg., 10 B. & S. 33, 20 L. T. Rep. N. S. 318; Paull *v.* Paull, 2 C. & M. 235, 2 Dowl. P. C. 340, 3 L. J. Exch. 11, 4 Tyrw. 72.

and a recital in an award of the contents of the submission has been held to be proof neither of the submission nor of the terms of the submission.[86]

B. Signing the Award — 1. Necessity to Sign — a. When Writing Required. In a case where an award in writing is required it cannot be given effect as a written award unless it is signed by the arbitrators;[87] and, although a written award be not required, an award in writing which is not signed by the arbitrators cannot be given effect as a parol award unless it appears to have been delivered without any intention to sign.[88]

b. Signature by Unauthorized Person. The validity of an award, which is duly signed by the arbitrators authorized to make it, is not affected by the signing by another person with them who has no authority to act as arbitrator.[89]

2. Time of Signing — a. After Decision. It is not essential to the validity of an award that it should be made and signed immediately upon arriving at a decision, if it, in fact, be duly signed at a subsequent time.[90]

b. After Publication. An award which has been published without being signed may be given validity by signing it thereafter, provided it be signed within the time limited for completing the award.[91]

3. Presence of Arbitrators — a. Signing Coincident With Decision. In a number of cases it has been stated as a general rule that an award which is not signed by the arbitrators in the presence of each other could not be given effect as a valid award; but the reasons given show that the intention of the rule is to require merely the joint participation of arbitrators in the consideration of the case in arriving at a decision, and, therefore, the rule that an award is invalid unless signed by the arbitrators in each other's presence should be confined to the cases in which the signing follows immediately upon the arrival at a decision.[92]

b. Signing After Decision. After the arbitrators have arrived at a decision upon the matters submitted to them the mere signing of the award at a subsequent time does not involve the exercise of judgment or judicial discretion, and, therefore, it is no valid objection to an award in such a case that it was subsequently signed by each arbitrator without the presence of the others.[93]

86. Collins *v.* Freas, 77 Pa. St. 487.

87. State *v.* Gurnee, 14 Kan. 111.

88. Morrison *v.* Russell, 32 N. C. 273.

89. Cones *v.* Vanosdol, 4 Ind. 248; Estice *v.* Cookerell, 26 Miss. 127; Rison *v.* Berry, 4 Rand. (Va.) 275; Beck *v.* Sargent, 4 Taunt. 232.

As to signature of umpire or special arbitrator without disagreement of the original arbitrators see *supra*, V, C, 3, c.

90. Richardson *v.* Hartsfield, 27 Ga. 528; Phillips *v.* Phillips, 2 Ky. L. Rep. 232.

91. Saunders *v.* Heaton, 12 Ind. 20. See also Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714, which holds that a determination of the trial court upon conflicting testimony that an award was actually signed before publication would not be reviewed on appeal.

92. Henderson *v.* Buckley, 14 B. Mon. (Ky.) 236; French *v.* Butler, 39 Mich. 79; Daniels *v.* Ripley, 10 Mich. 237; Hinton *v.* Mead, 2 C. L. R. 325, 1 Jur. N. S. 46, 24 L. J. Exch. 140, 3 Wkly. Rep. 161; Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 24 L. J. Ch. 531, 53 Eng. Ch. 528; Stalworth *v.* Inns, 2 D. & L. 42, 9 Jur. 285, 13 M. & W. 466, 14 L. J. Exch. 81; Wright *v.* Graham, 3 Exch. 131, 18 L. J. Exch. 29; Anning *v.* Hartley, 27 L. J. Exch. 145; Turner *v.* Burt, 24 N. Brunsw. 547.

The signing of a majority award is subject to the same rule as that of a unanimous award, so as to require that the majority should sign their award in the presence of each other. Peterson *v.* Ayre, 15 C. B. 724, 2 C. L. R. 722, 23 L. J. C. P. 129, 2 Wkly. Rep. 373, 80 E. C. L. 724; Wade *v.* Dowling, 4 E. & B. 44, 2 C. L. R. 1642, 18 Jur. 728, 23 L. J. Q. B. 302, 2 Wkly. Rep. 567, 82 E. C. L. 44; Nott *v.* Nott, 5 Ont. 283.

Presumption of presence.— In the absence of a showing that an award was not made and signed by the arbitrators in each other's presence, if it appears to be regularly signed by all of them, presence will be presumed. Sullivan *v.* King, 24 U. C. Q. B. 161; Towsley *v.* Wythes, 16 U. C. Q. B. 139.

93. Steere *v.* Brownell, 113 Ill. 415; Campbell *v.* Upton, 113 Mass. 67; Blodgett *v.* Prince, 109 Mass. 44; Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Little *v.* Newton, 9 Dowl. P. C. 437, 5 Jur. 246, 10 L. J. C. P. 88, 2 M. & G. 351, 2 Scott N. R. 159, 40 E. C. L. 637; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112; Williams *v.* Squair, 10 U. C. Q. B. 24.

C. Sealing the Award. In the absence of a special requirement it is not essential to the validity of the award that it should be under seal,[94] notwithstanding the submission itself be under seal,[95] not even for the purpose of determining the right or title to real estate.[96] But an unsealed award is invalid if a seal is required by the submission[97] or by statute applicable to the proceedings,[98] unless the provision is merely directory.[99]

D. Acknowledgment of the Award. A statutory provision requiring arbitrators to acknowledge the execution of awards before designated officers must be complied with in order to entitle the successful party to entry of judgment on the award under the statute.[1]

E. Attestation of Award. An award at common law need not be witnessed in order to be valid; and, therefore, an award pursuant to a submission which does not comply with the provisions of a statute requiring attestation may be good at common law without being witnessed;[2] but an award without attestation cannot be enforced in the manner provided by a statute which requires attestation.[3] The omission has, however, been held merely a formal one, which might be cured after publication and delivery to the parties,[4] or even after it has been filed in court for enforcement.[5]

F. Stamping the Award. An award is not to be regarded as an agreement, contract, or certificate, so as to come within the terms of a statute requiring such instruments to be stamped.[6]

94. King *v.* Cook, 1 T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

95. **Submission under seal.**— Grove *v.* Swartz, 45 Md. 227; Owen *v.* Boerum, 23 Barb. (N. Y.) 187.

96. **Real estate involved.**— Crabtree *v.* Green, 8 Ga. 8. But see Darby *v.* Russel, 5 Hayw. (Tenn.) 138, 9 Am. Dec. 767.

As to matters concerning real estate, but not involving the right or title thereto, see *supra*, II, B, 1, c, (II), (C).

97. **Seal required by submission.**—*Georgia.*— King *v.* Cook, 1 T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.— Mann *v.* Richardson, 66 Ill. 481.

Kentucky.— McCullough *v.* Myers, Hard. (Ky.) 197.

Maryland.— Grove *v.* Swartz, 45 Md. 227; Price *v.* Thomas, 4 Md. 514.

New York.— Stanton *v.* Henry, 11 Johns. (N. Y.) 133.

Pennsylvania.—Rea *v.* Gibbons, 7 Serg. & R. (Pa.) 204.

West Virginia.— But see, *contra*, Mathews *v.* Miller, 25 W. Va. 817, 824, where the court said: "None of the authorities cited directly sustain the text in Morse on Arb. It seems to us not to be a very material matter, that the award should be under seal. An award is just as specific without the scrolls as with them, and, if it be otherwise valid and binding, it would be taking a very narrow and technical view of the case to hold it bad, merely because it did not have the seals of the arbitrators attached."

England.— Sallows *v.* Girling, Cro. Jac. 277; Anonymous, 5 L. J. K. B. O. S. 16.

One seal may be adopted by several arbitrators, and the intention so to do may be shown by parol evidence, even in the absence of a statement in the award that it was executed "under their hands and seals." Cheney *v.* Gates, 12 Vt. 565.

Seals may be affixed after publication, when required by the submission, provided it is done before the expiration of the time limited for the delivery of the award. Forrer *v.* Coffman, 23 Gratt. (Va.) 871.

98. **In Connecticut** it is provided by statute that awards which concern the right, title, or boundaries of real estate shall be under seal. White *v.* Fox, 29 Conn. 570.

99. **Directory statute.**— Price *v.* Kirby, 1 Ala. 184, which holds that the statutory requirement for sealing an award is sufficiently complied with by a recital in the award that it is made "under their hands and seals."

1. Heath *v.* Tenney, 3 Gray (Mass.) 380; Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388; Matter of Grening, 74 Hun (N. Y.) 62, 26 N. Y. Suppl. 117, 56 N. Y. St. 196.

As to acknowledgments, generally, see ACKNOWLEDGMENTS [1 Cyc. 506].

2. **At common law.**— Carson *v.* Earlywine, 14 Ind. 256; Valle *v.* North Missouri R. Co., 37 Mo. 445.

3. **Required by statute.**— Estep *v.* Larsh, 16 Ind. 82; Jeffersonville R. Co. *v.* Mounts, 7 Ind. 669; Darling *v.* Darling, 16 Wis. 644; and cases cited *infra*, notes 4, 5.

4. **Omission cured.**— Newman *v.* Labeaume, 9 Mo. 30.

5. Lovell *v.* Wheaton, 11 Minn. 92; Tucker *v.* Allen, 47 Mo. 488; Field *v.* Oliver, 43 Mo. 200. But see New Albany, etc., R. Co. *v.* McPheters, 12 Ind. 472, which holds that attestation after filing of the award for enforcement should not be permitted.

6. Celley *v.* Gray, 37 Vt. 136.

Even if a stamp be held essential to its enforcement, the award is not void on account of the omission, but the proper stamp may thereafter be affixed in the manner provided by statute for supplying such omissions. Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150; Preston *v.* Eastwood, 7 T. R. 95.

G. Publication of the Award — 1. General Rule — Publication Necessary. Publication of an award is essential to its validity — which means that it should be made known in the manner specified in, or contemplated by, the submission or the provisions of a statute applicable thereto, compliance with which by the arbitrators amounts to a completion of the award and renders them *functi officio*.[7]

2. Formal Notice to the Parties — a. In the Absence of Requirement. Unless a formal notice to the parties of the making of an award has been required it is not essential to its validity, because, in such case, the parties are each bound to take notice of the completion of an award in accordance with the submission,[8] although a contrary rule has been announced in some of the cases.[9]

7. *Illinois.*— Denman *v.* Bayless, 22 Ill. 300; Low *v.* Nolte, 16 Ill. 475.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Francis *v.* Ames, 14 Ind. 251.

Massachusetts.— Kingsley *v.* Bill, 9 Mass. 198.

Missouri.— McClure *v.* Shroyer, 13 Mo. 104.

New Hampshire.— Varney *v.* Brewster, 14 N. H. 49.

North Carolina.— Morrison *v.* Russell, 32 N. C. 273.

Vermont.— Morse *v.* Stoddard, 28 Vt. 445; Rixford *v.* Nye, 20 Vt. 132.

Wisconsin.— Russell *v.* Clark, 60 Wis. 284, 18 N. W. 844.

Canada.— Harpel *v.* Portland Tp. Municipality, 17 U. C. Q. B. 455; Blanchet *v.* Charron, 4 L. C. Jur. 8; Huyck *v.* Wilson, 18 Ont. Pr. 44; Herbert *v.* Wright, 1 Quebec 304 [*affirming* 18 Rev. Lég. 538].

As to when and how arbitrators become *functi officio* see *supra*, III, G, 1.

An award not required to be in writing should be evidenced by some external act or announced to the party, else it cannot be ascertained at what decision the arbitrators have arrived in their own minds. Thompson *v.* Miller, 15 Wkly. Rep. 353.

An admission in pleading that an award was made is equivalent to an admission that it was made in conformity to the submission. Morse *v.* Stoddard, 28 Vt. 445.

An averment that an award was duly published means that notice of the award, as required by the submission, was duly given. Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

An award made and published on Sunday has been held to be void, on the ground that it is a judicial act. Story *v.* Elliot, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423. *Aliter*, where the hearing and determination occurred before Sunday, in which case the making and publication of the award was held to be a mere ministerial act. Kiger *v.* Coats, 18 Ind. 153, 81 Am. Dec. 351; Blood *v.* Bates, 31 Vt. 147.

8. **Notice unnecessary.**— Denman *v.* Bayless, 22 Ill. 300; Russell *v.* Smith, 87 Ind. 457; Fargo *v.* Reighard, 13 Ind. App. 39, 39 N. E. 888, 41 N. E. 74; Parsons *v.* Aldrich, 6 N. H. 264; Juxon *v.* Thornhill, Cro. Car. 132; Hodsden *v.* Harridge, 2 Saund. 61*h*.

A simple requirement of publication does not necessitate the giving of such notice. McClure *v.* Shroyer, 13 Mo. 104; Hunt *v.* Wilson, 6 N. H. 36.

A requirement of publication in writing does not necessitate the giving of written notice to the parties, but only that the award shall be in writing. Thompson *v.* Mitchell, 35 Me. 281; Morse *v.* Stoddard, 28 Vt. 445.

Correction of award after delivery of copies without further notice.— Under a submission requiring an award of a boundary line to be made and published to the parties in writing, the arbitrators made and signed an award and delivered copies thereof to the parties, and at the same time stated to them orally the actual decision as to the location of the line, and also that it was uncertain whether the award as drawn correctly expressed the decision, and that if it should afterward be ascertained, upon inquiry of the surveyor, that the award was incorrectly expressed it would be corrected. Thereupon the parties separated, and, thereafter, the chairman of the arbitrators corrected the original award, which was left in his possession, to conform to the decision actually made and orally stated to the parties, but did not again present the paper as altered to the other arbitrators nor again notify either of the parties of the alteration, and it was held that an action to enforce the original award as amended could not be maintained, because it had never been published to the parties in writing in accordance with the submission. Cladwell *v.* Dickinson, 13 Gray (Mass.) 365.

The death of a party without notice on the day following that on which the award was completed has been held, in the absence of a requirement of notice, not to affect its validity. Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473.

Delivery of an award to one party within the time limited for making it is a sufficient publication, without notice to the other parties, where such notice has not been required. Rixford *v.* Nye, 20 Vt. 132.

Where an award is directed to both parties, such notice may, in the absence of evidence to show that no notice was given to one of them, be presumed. King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

9. Francis *v.* Ames, 14 Ind. 251, 252 (which holds that, in the case of a "simple common-law arbitration, it would have been necessary, as the time and place of rendering the award therein were not fixed, to give

b. Compliance With Requirements—(I) *SERVICE OF ORIGINAL.* The original award need not be served upon, or delivered to, either of the parties unless this has been required;[10] but when required, compliance is essential to the validity of the award[11] unless the requirement be waived.[12]

(II) *SERVICE OF COPY.* The service of a copy of the award upon the parties, if not required by the terms of the submission or by statute, is not essential to its validity;[13] but a failure to deliver copies to the parties in requisite manner and form will prevent enforcement of the award when such delivery is required by the terms of the submission[14] or of a statute applicable to the proceedings,[15]

notice of the award to both parties"); Kingsley *v.* Bill, 9 Mass. 198 (which holds that a declaration containing no allegation that the award was published or made known to defendant except by bringing the action is fatally defective. This case was disapproved in Denman *v.* Bayless, 22 Ill. 300, except upon the supposition that the submission provided for notification).

10. Not necessary.— *Maine.*—Thompson *v.* Mitchell, 35 Me. 281.

New Hampshire.—Houghton *v.* Burroughs, 18 N. H. 499.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596.

North Carolina.—Crawford *v.* Orr, 84 N. C. 246.

Virginia.— Pollard *v.* Lumpkin, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

See also cases cited *infra,* notes 11, 12.

As to the time of delivery with respect to the termination of authority of arbitrators see *supra,* III, G, 1, c *et seq.*

11. Ready for delivery on demand.— A requirement that the award shall be delivered to the parties or to such of them as shall demand it is sufficiently complied with by making a single award within the time limited, since the requirement does not contemplate a duplicate until the latter be demanded. Martin *v.* McCormick, 34 N. J. L. 23.

Ready for delivery to the parties.— A requirement that an award shall be executed and ready for delivery to the parties has been held to necessitate execution in duplicate, so that each party may have a counterpart. Gidley *v.* Gidley, 65 N. Y. 169; Pratt *v.* Hackett, 6 Johns. (N. Y.) 14; Buck *v.* Wadsworth, 1 Hill (N. Y.) 321. But see *In re* Oulton, 25 N. Brunsw. 19, which holds that delivery to the successful party of the original, and of a copy to the other party, is a sufficient delivery to the parties.

Reading an award to the parties has been held a sufficient compliance with the requirement that the award should be made in writing and ready to be delivered on a certain day. Rundell *v.* La Fleur, 6 Allen (Mass.) 480.

Intention to make and serve duplicate.— Where the arbitrators, after having made and signed their award, gave it to a clerk to be copied, for the purpose of delivering duplicate to the parties, and, subsequently, one of the arbitrators refused to sign the copy or consent to a delivery, it was held that there was no valid award, although a delivery had not been required, because the award had not been completed in accordance with the purpose of the arbitrators as to the manner of publication and delivery. Williams *v.* Rumbough, 5 Lea (Tenn.) 606.

A material variance between duplicates, rendering it uncertain what was intended to be awarded, is fatal to the award where each of the duplicates has been delivered as the award. Green *v.* Lundy, 1 N. J. L. 497. *Aliter* in case of a slight variance in the phraseology, such variance not producing any material conflict in the meaning. Spofford *v.* Spofford, 10 N. H. 254; Platt *v.* Smith, 14 Johns. (N. Y.) 368.

A knowledge of the variance, by a party to whom an inaccurate counterpart is delivered, and of the fact that the one delivered to the other party was the correct award intended to be made, has been held sufficient to cure the defect, which might otherwise have been fatal, in a case where the delivery of duplicates had not been specially required. Schenck *v.* Voorhees, 7 N. J. L. 383.

12. Acceptance of a copy without objection waives a requirement of a delivery of the original or a counterpart. Gidley *v.* Gidley, 65 N. Y. 169; Sellick *v.* Addams, 15 Johns. (N. Y.) 197.

Failure to demand after notice is a waiver of the requirement that the award should be ready for delivery, since it must be presumed that, had he made the demand, the delivery would have followed. Burnap *v.* Losey, 1 Lans. (N. Y.) 111; Perkins *v.* Wing, 10 Johns. (N. Y.) 143.

Leaving the award with the arbitrators, by subsequent agreement, for the benefit of all the parties, is a waiver of the requirement that it should be delivered to the parties. Tracy *v.* Herrick, 25 N. H. 381.

13. Not necessary.— Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Wade *v.* Powell, 31 Ga. 1; Seely *v.* Pelton, 63 Ill. 101; Boots *v.* Canine, 58 Ind. 450; Carson *v.* Earlywine, 14 Ind. 256; Fargo *v.* Reighard, 13 Ind. App. 39, 39 N. E. 888, 41 N. E. 74.

14. Required by submission.—Low *v.* Nolte, 16 Ill. 475.

Informal notice of the contents of an award, given by the arbitrators to one of the parties, is not a sufficient compliance with the requirement in a submission that the award, or a copy thereof, shall be delivered. Anderson *v.* Miller, 108 Ala. 171, 19 So. 302.

15. Required by statute.— Anderson *v.* Anderson, 65 Ind. 196; Conrad *v.* Johnson, 25 Ind. 487; Estep *v.* Larsh, 16 Ind. 82; Flat-

unless such service has been waived by the party who raises the objection that a copy of the award was not delivered to him.[16]

H. Return of the Award — 1. Necessity For Return. An award which is not intended to be returned to any court need not be so returned in order that it may be valid and binding;[17] but, if the arbitration proceeds under a rule of court or statute requiring such return, compliance with the requirement is essential to its enforcement,[18] unless the parties stipulate for performance without such return,[19] or in case performance has been partially effected.[20]

2. Sufficiency of Return — a. Court of Return. An award, made pursuant to an arbitration which proceeds under a statute requiring that it shall be returned to a court within a specified jurisdiction, cannot be enforced if returned to another court.[21]

b. Manner of Return. In order that an award of arbitrators which is required to be returned to court may be enforced, it should be returned in the manner prescribed — as that the award be inclosed in a sealed envelope,[22] that it

ter *v.* McDermott, 15 Ind. 389; Marshall *v.* Bozorth, 17 Pa. St. 409; Lloyd *v.* Harris, 8 C. B. 63, 65 E. C. L. 63.

In Alabama it has been held that: "The provision, that a copy of the award shall be delivered to each of the parties, is directory." Crook *v.* Chambers, 40 Ala. 239, 242.

In Georgia it has been held that the intention of the statute requiring service of a copy of the award is to give the parties opportunity to take exceptions thereto, and that, where a party has appeared upon the hearing for entry of judgment, has been heard upon exceptions, and does not show that he has been taken by surprise or lost any right by failure to receive a copy, the award should not be set aside on that ground. McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505; Anderson *v.* Taylor, 41 Ga. 10.

In Kentucky the failure to furnish and deliver copies of an award, immediately upon making the award and fifteen days before the next succeeding term of court, as required by statute, does not invalidate the award; but if the copy be not delivered at all, and proper objection has been taken upon this ground, the judgment may be set aside and a continuance allowed to await a service of the copy, and, if immediate delivery has not been made, this will be no ground of objection to entry of judgment on the award if the copy has been delivered fifteen days before the court meets. Carson *v.* Carson, 1 Metc. (Ky.) 434; Adams *v.* Hammon, 10 B. Mon. (Ky.) 5; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157; Ward *v.* Rhodes, 14 Ky. L. Rep. 80.

16. Accepting the original, without objection upon the ground of failure to deliver a copy, is a waiver of compliance with a requirement for service of the copy, if, indeed, it be not a substantial compliance. Anderson *v.* Miller, 108 Ala. 171, 19 So. 302.

An attempt to revoke the submission has been considered as a waiver of the requirement for delivery of a copy of the award. Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405.

Retention of award by arbitrators, under agreement of the parties, until the first day of a certain term of court, operates as a waiver of the statutory requirement that copies of the award must be made and delivered within fifteen days. Marsh *v.* Curtis, 71 Ind. 377 [*cited* in Coulter *v.* Coulter, 81 Ind. 542].

After pretending to comply with an award a party will not be allowed to raise the objection that a copy of it had not been delivered to him. Terry *v.* Moore, 3 Misc. (N. Y.) 285, 22 N. Y. Suppl. 785, 52 N. Y. St. 406.

The objection must be taken in the trial court, or else it will not be entertained on appeal. Cones *v.* Vanosdol, 4 Ind. 248; Weir *v.* West, 27 Kan. 650; Hollenback *v.* Fleming, 6 Hill (N. Y.) 303.

17. Willingham *v.* Harrell, 36 Ala. 583; Tyler *v.* Dyer, 13 Me. 41.

18. Anderson *v.* Anderson, 65 Ind. 196.

In West Virginia, under the statute which provides for the return of an award to the court, the party against whom the award is made may maintain a suit in equity to set it aside when it has been executed and is ready to be returned, although a return has not, in fact, been made. Mathews *v.* Miller, 25 W. Va. 817.

19. Luke *v.* Leland, 6 Cush. (Mass.) 259.

20. Willingham *v.* Harrell, 36 Ala. 583.

21. McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505; Marshall *v.* Hicks, 61 Ga. 72.

Legislative change of courts pending arbitration. — Where an award was made returnable to the district court, which was afterward abolished by the legislature and whose jurisdiction was assumed by the supreme judicial court, it was held that the award might be returned to the latter court at any term prior to the period limited in the submission, and that such legislative action was not an impairment of the obligation of a contract. Kendall *v.* Lewiston Water Power Co., 36 Me. 19.

22. Award opened before presentation to court. — Under a statute requiring that the award shall be inclosed in a sealed envelope and returned to the court, and remain sealed until opened by the clerk, it was held that an award so inclosed and sealed, which was deposited by counsel for one of the parties with

be transmitted to the clerk of the court[23] or to the court,[24] and that such transmission be made at a designated term.[25]

I. Liberal Construction and Interpretation — **1. In General.** Following the general rule of favorable construction which is now applied to arbitration proceedings,[26] courts do not travel out of their way for the purpose of overturning awards; but, on the other hand, they will refrain from exact and technical interpretation, and will indulge every reasonable presumption, whenever there is any room for such indulgence, in favor of the finality and validity of an award.[27] The

the clerk of the proper court among the papers in an action brought on the award, and afterward opened by some person unknown to the clerk or the court, could not be enforced under the statute. Curley *v.* Chadburne, 119 Mass. 489.

In Iowa it has been held that a failure to inclose the award in a sealed envelope, as required by statute, is not sufficient ground for setting aside the award, in a case where the award was handed to the clerk by one of the arbitrators and all suspicion of prejudice was expressly rebutted by admitted or established facts. Higgins *v.* Kinneady, 20 Iowa 474.

23. Delivery in person to the clerk is a sufficient compliance with a statutory provision that the award shall be transmitted. McKnight *v.* McCullough, 21 Iowa 111.

Filing in term-time is not essential under a requirement for return to the clerk of the court. McKnight *v.* McCullough, 21 Iowa 111; Lovell *v.* Wheaton, 11 Minn. 92.

24. An address to the clerk of the court, to which the award is returnable, without any other writing upon the envelope declaring its contents, has been held a sufficient compliance with the requirement that the award shall be inclosed in a sealed envelope and transmitted to the court. Morrell *v.* Old Colony R. Co., 158 Mass. 69, 32 N. E. 1030.

Delivery by a person other than one of the arbitrators has been held no sufficient ground of objection to the award in the absence of a showing of any irregularity, occurring by reason of the means of transmission, which would cast suspicion upon the paper actually received. McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505.

Transmission to the clerk of the court is a sufficient compliance with the requirement that the award shall be transmitted to the court. James *v.* Southern Lumber Co., 153 Mass. 361, 26 N. E. 995.

25. At a designated term.—Chisolm *v.* Cothran, 40 Ga. 273; Skeels *v.* Chickering, 7 Metc. (Mass.) 316; Gerrish *v.* Morss, 2 Pick. (Mass.) 625; Durell *v.* Merrill, 1 Mass. 411; Russell *v.* Clark, 60 Wis. 284, 18 N. W. 844.

Filing in the clerk's office has been held not a sufficient compliance with the requirement for return to a specified term. Burghardt *v.* Owen, 13 Gray (Mass.) 300.

Under a statutory provision that the court shall be always open, it was held that a requirement for the return of an award to a term or session of the court within a designated time was sufficiently complied with by return to the court at any time within the prescribed limit, whether or not the court was holding a regular session. James *v.* Southern Lumber Co., 153 Mass. 361, 26 N. E. 995.

26. See *supra*, I, A, 3.

27. *Alabama.*— Burns *v.* Hendrix, 54 Ala. 78; Wolff *v.* Shelton, 51 Ala. 425.

Delaware.—Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Georgia.— King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.— Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561; McMillan *v.* James, 105 Ill. 194; Hadaway *v.* Kelly, 78 Ill. 286; Burrows *v.* Guthrie, 61 Ill. 70; Henrickson *v.* Reinback, 33 Ill. 299; Hubbard *v.* Firman, 29 Ill. 90; McDonald *v.* Arnout, 14 Ill. 58; Merritt *v.* Merritt, 11 Ill. 565.

Maine.— Hanson *v.* Webber, 40 Me. 194; Tyler *v.* Dyer, 13 Me. 41.

Maryland.— Maryland, etc., R. Co. *v.* Porter, 19 Md. 458; Garitee *v.* Carter, 16 Md. 309; Roloson *v.* Carson, 8 Md. 208; Lewis *v.* Burgess, 5 Gill (Md.) 129; Archer *v.* Williamson, 2 Harr. & G. (Md.) 62.

Massachusetts.— Shurtleff *v.* Parker, 138 Mass. 86; Gordon *v.* Saxonville Mills, 14 Allen (Mass.) 219; Strong *v.* Strong, 9 Cush. (Mass.) 560.

Minnesota.— Hoit *v.* Berger-Crittenden Co., 81 Minn. 356, 84 N. W. 48. See also Johnston *v.* Paul, 22 Minn. 17.

Nebraska.— Bentley *v.* Davis, 21 Nebr. 685, 33 N. W. 473; Sides *v.* Brendlinger, 14 Nebr. 491, 17 N. W. 113.

New Hampshire.— Joy *v.* Simpson, 2 N. H. 179.

New Jersey.— Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

New York.— Hiscock *v.* Harris, 74 N. Y. 108; Otto *v.* Schroeppel, 5 N. Y. 482; Locke *v.* Filley, 14 Hun (N. Y.) 139.

North Carolina.— Osborne *v.* Calvert, 83 N. C. 365; Stevens *v.* Brown, 82 N. C. 460; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576.

Pennsylvania.— Gonsales *v.* Deavens, 2 Yeates (Pa.) 539; Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87.

Texas.— Green *v.* Franklin, 1 Tex. 497.

Vermont.— Soper *v.* Frank, 47 Vt. 368; Kendrick *v.* Tarbell, 26 Vt. 416.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698.

Wisconsin.—Call *v.* Ballard, 65 Wis. 187, 26 N. W. 547; Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

United States.— Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121.

language of the arbitrator will be taken according to its obvious meaning, in order to arrive at his intention.[28]

2. Construed With Reference to Circumstances. Whether the arbitrators have authority in any particular, or whether the award conforms to the powers conferred by the submission, as well as the proper construction to be given to the award as made, will be decided according to the terms of the submission and bond and the language of the award, and with reference to, and in view of, all the surrounding facts and circumstances.[29]

J. Award and Authority as Dependent Upon Submission — 1. Conformity to Submission in General — a. Rule Stated. The submission furnishes the source and prescribes the limits of the arbitrators' authority, without regard to the form of the submission,[30] and the award, both in substance and in form,[31] must conform to the submission, and the arbitrators are inflexibly limited to a decision of the particular matters submitted. Any attempt to pass judgment upon other questions, or to extend their authority to other persons, is unauthorized, and, consequently, without legal force.[32]

England.— Cargey *v.* Aitcheson, 2 B. & C. 170, 1 L. J. K. B. O. S. 252, 9 E. C. L. 81; Hawkins *v.* Colclough, 1 Burr. 274, 2 Ld. Ken. 553; Bowes *v.* Fernie, 4 Myl. & C. 150, 18 Eng. Ch. 150; Wood *v.* Griffith, 1 Swanst. 52, 1 Wils. C. P. 34, 18 Rev. Rep. 18.

Canada.— Barrie *v.* Northern R. Co., 22 U. C. Q. B. 25; Rector, etc., St. George's Parish *v.* King, 2 Can. Supreme Ct. 143.

28. See *supra*, VI, A, 1.

29. *Illinois.*— Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561; Kanouse *v.* Kanouse, 36 Ill. 439 (holding that an award will be construed in the light of the submission and a bond to secure the forthcoming of the property in controversy); Williams *v.* Warren, 21 Ill. 541 (wherein the court supported its opinion, that the submission in question authorized the award of a conveyance of land, by referring to the covenant of the party to procure conveyances to be made to the person to whom directed by the award).

Maine.— Gordon *v.* Tucker, 6 Me. 247.

Maryland.— Maryland, etc., R. Co. *v.* Porter, 19 Md. 458; Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502.

Missouri.—Squires *v.* Anderson, 54 Mo. 193.

New York.— Masury *v.* Whiton, 111 N. Y. 679, 18 N. E. 638, 19 N. Y. St. 141; Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405; McBride *v.* Hagan, 1 Wend. (N. Y.) 326, wherein, upon considering whether the parties intended to submit the question of ownership of property, or merely the question of damages by reason of certain acts with regard to the property, the fact that the party took a bond of submission in the penalty of a certain amount, whereas, if it had been intended to submit the question of ownership, the parties were putting it in the power of the arbitrators to decide a question of an amount exceeding many times that of the bond, it was held that this circumstance was strong to show what the parties intended to submit.

30. It is immaterial whether the submission is special or general, or whether it is by parol or obligation under seal. In either case the submission must be substantially followed. Tucker *v.* Page, 69 Ill. 179.

31. Young *v.* Shook, 4 Rawle (Pa.) 299 [*citing* Henderson *v.* Williamson, 2 Saund. 62, note 3, 1 Str. 116].

Detailing grounds of decision.— It is no objection to an award that the arbitrator has detailed the means by which he came to his conclusion. Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

32. *Alabama.*—Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Ehrman *v.* Stanfield, 80 Ala. 118; Bogan *v.* Daughdrill, 51 Ala. 312; Reynolds *v.* Reynolds, 15 Ala. 398.

Arkansas.— Lee *v.* Onstott, 1 Ark. 206.

California.— Curtis *v.* Sacramento, 64 Cal. 102, 28 Pac. 108; White *v.* Arthur, 59 Cal. 33.

Connecticut.— Waller *v.* Shannon, 44 Conn. 480.

Delaware.— Stevens *v.* Gray, 2 Harr. (Del.) 347.

Georgia.—Richardson *v.* Payne, 55 Ga. 167; Crane *v.* Barry, 54 Ga. 500.

Illinois.— Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; Sherfy *v.* Graham, 72 Ill. 158; Tucker *v.* Page, 69 Ill. 179; Buntain *v.* Curtis, 27 Ill. 374; Denman *v.* Bayliss, 22 Ill. 300; Ives *v.* Ashelby, 26 Ill. App. 244; Glade *v.* Schmidt, 20 Ill. App. 157 [*citing* White *v.* Arthur, 59 Cal. 33].

Iowa.— Thompson *v.* Blanchard, 2 Iowa 44.

Kentucky.— Blanton *v.* Gale, 6 B. Mon. (Ky.) 260; Brown *v.* Warnock, 5 Dana (Ky.) 492; Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Sthreshly *v.* Broadwell, 1 J. J. Marsh. (Ky.) 340; Milner *v.* Turner, 4 T. B. Mon. (Ky.) 240; McCullough *v.* Myers, Hard. (Ky.) 197; Smith *v.* Cutrights, Ky. Dec. 145.

Louisiana.— *In re* Wallace, 31 La. Ann. 335; Davis *v.* Leeds, 7 La. 471; Harrod *v.* Lewis, 3 Mart. (La.) 311.

Maine.— Boynton *v.* Frye, 33 Me. 216.

Maryland.—Ebert *v.* Ebert, 5 Md. 353; Bullitt *v.* Musgrave, 3 Gill (Md.) 31; Shriver *v.* State, 9 Gill & J. (Md.) 1; Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412; Archer *v.* Williamson, 2 Harr. & G. (Md.) 62; Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502; Carter *v.* Calvert, 4 Md. Ch. 199.

Massachusetts.— Camp *v.* Sessions, 105 Mass. 236; Estes *v.* Mansfield, 6 Allen (Mass.)

b. Arbitrator Cannot Acquire Jurisdiction by His Own Decision. Though, in some sense, the arbitrator must, in the first instance, determine his course under the submission,[33] his power is, nevertheless, confined strictly to the matters submitted, and he cannot decide upon his own jurisdiction, and thereby take upon himself authority which the submission does not confer.[34]

c. Where Rule of Decision Is Fixed. To adopt a different rule of decision from that which the terms of the authority require the arbitrators to apply is as

69; Hubbell *v.* Bissell, 13 Gray (Mass.) 298; Bigelow *v.* Newell, 10 Pick. (Mass.) 348; Bean *v.* Farnam, 6 Pick. (Mass.) 269; Cutter *v.* Whittemore, 10 Mass. 442; Towne *v.* Jaquith, 6 Mass. 46, 4 Am. Dec. 84; Boardman *v.* England, 6 Mass. 70; Tudor *v.* Peck, 4 Mass. 242; Worthen *v.* Stevens, 4 Mass. 448. A supererogatory statement, in an award as to the limits of a close, is not evidence, in a subsequent action against the same defendant, for entering a part of plaintiff's close different from that alleged in the submission. Morton *v.* Dresser, 108 Mass. 71.

Michigan.— Sawtells *v.* Howard, 104 Mich. 54, 62 N. W. 156.

Minnesota.— If there is no prejudice to the party complaining of an excess of authority the award will not be set aside. Daniels *v.* Willis, 7 Minn. 374.

Mississippi.— Williams *v.* Williams, 11 Sm. & M. (Miss.) 393; Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

Missouri.— Squires *v.* Anderson, 54 Mo. 193; Valle *v.* Northern Missouri R. Co., 37 Mo. 445; Lorey *v.* Lorey, 60 Mo. App. 417; Hinkle *v.* Harris, 34 Mo. App. 223.

New Hampshire.—Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Robinson *v.* Moore, 17 N. H. 479; Adams *v.* Adams, 8 N. H. 82; Thrasher *v.* Haynes, 2 N. H. 429. An award made contrary to the principles agreed on by the parties at the hearing may be set aside or corrected in equity. Bean *v.* Wendell, 20 N. H. 213.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333; Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724 [*affirming* 50 N. J. Eq. 103, 24 Atl. 319]; Dolan *v.* Lee, 40 N. J. Eq. 338; Young *v.* Young, 6 N. J. Eq. 450.

New York.— Hiscock *v.* Harris, 74 N. Y. 108; Briggs *v.* Smith, 20 Barb. (N. Y.) 409; Allen *v.* Galpin, 9 Barb. (N. Y.) 246; New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446, 7 Hill (N. Y.) 329; Leach *v.* Weeks, 2 Abb. Pr. N. S. (N. Y.) 269; Matter of Williams, 4 Den. (N. Y.) 194; Buck *v.* Wadsworth, 1 Hill (N. Y.) 321; McBride *v.* Hagan, 1 Wend. (N. Y.) 326; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Solomons *v.* McKinstry, 13 Johns. (N. Y.) 27; Pratt *v.* Hackett, 6 Johns. (N. Y.) 14.

North Carolina.—Bryant *v.* Fisher, 85 N. C. 69.

Oregon.— Parrish *v.* Higinbotham, (Oreg. 1901) 65 Pac. 984; Garrow *v.* Nicolai, 24 Oreg. 76, 32 Pac. 1036.

Pennsylvania.— Collins *v.* Freas, 77 Pa. St. 493; McCracken *v.* Clarke, 31 Pa. St. 498; Levezey *v.* Gorgas, 4 Dall. (Pa.) 71, 1 L. ed. 746.

South Carolina.— Sessions *v.* Barfield, 2 Bay (S. C.) 94.

Tennessee.— Palmer *v.* Van Wyck, 92 Tenn. 397, 21 S. W. 761; Mays *v.* Myatt, 3 Baxt. (Tenn.) 309; Toomey *v.* Nichols, 6 Heisk. (Tenn.) 159.

Texas.— Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976.

Vermont.— Cook *v.* Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Howard *v.* Edgell, 17 Vt. 9; Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

Virginia.— Pollock *v.* Sutherlin, 25 Gratt. (Va.) 78; Ross *v.* Pleasants, Wythe (Va.) 147.

West Virginia.— Dunlap *v.* Campbell, 5 W. Va. 195.

Wisconsin.— Pettibone *v.* Perkins, 6 Wis. 616; Gear *v.* Bracken, 1 Pinn. (Wis.) 249.

United States.— McCormick *v.* Gray, 13 How. (U. S.) 26, 14 L. ed. 36; Carnochan *v.* Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516; Mobile *v.* Wood, 95 Fed. 537.

England.— Price *v.* Popkins, 10 A. & E. 139, 3 Jur. 433, 8 L. J. Q. B. 198, 2 P. & D. 304, 37 E. C. L. 95; Ross *v.* Boards, 8 A. & E. 290, 7 L. J. Q. B. 209, 35 E. C. L. 597; Gillon *v.* Mersey, etc., Nav. Co., 3 B. & Ad. 493, 23 E. C. L. 221; Bonner *v.* Liddell, 1 B. & B. 80; Pascoe *v.* Pascoe, 3 Bing. N. Cas. 898, 3 Hodges 188, 6 L. J. C. P. 322, 5 Scott 117, 32 E. C. L. 412; Skipper *v.* Grant, 10 C. B. N. S. 237, 100 E. C. L. 237; Baillie *v.* Edinburgh, etc., Oil Gas Light Co., 3 Cl. & F. 639, 6 Eng. Reprint 1577; Nickels *v.* Hancock, 7 De G. M. & G. 300, 56 Eng. Ch. 232; Fisher *v.* Pimbley, 11 East 188; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Bowes *v.* Fernie, 4 Myl. & C. 150, 18 Eng. Ch. 150.

Canada.— Tully *v.* Chamberlain, 31 U. C. Q. B. 299; Hill *v.* Hill, 11 U. C. Q. B. 262; Bond *v.* Bond, 15 U. C. C. P. 613; Tate *v.* Janes, 1 L. C. Jur. 151.

See 4 Cent. Dig. tit. "Arbitration and Award," § 280 *et seq.*

Partial validity.— See *infra*, VI, J, 10.

Ratification of unauthorized award.— See *infra*, VII.

33. If there is any dispute or doubt as to the matter, the arbitrator must determine what his authority is, and presumptions will be indulged in favor of such determination. Republic of Colombia *v.* Cauca Co., 106 Fed. 337.

34. Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 51 N. W. 1149; Sawyer *v.* Freeman, 35 Me. 542; Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398, 23 N. Y. St. 192;

much a departure from the submission as to pass upon a matter not submitted, or to omit to consider a matter embraced in the submission.[35] And if the arbitrator is required to award in accordance with the law, and the right to recover depends upon the determination of a particular question in a particular manner, an award in favor of the right, which shows a failure to determine the question as the law required, is bad.[36]

d. Effect of Promise to Perform Award. The general words in the submission that the parties agree to abide by and perform the award, or that the award shall be final and conclusive, cannot operate to give effect to an award which does not conform to the submission.[37]

2. Award Need Not Be Limited in Express Terms. The rule requiring that the award shall not go beyond the submission is not to be so strictly construed as to make it necessary that it should be averred, in terms, that the award is so limited. On the contrary, every intendment will be indulged that the award is in conformity with the submission; and, even where the words of the award are so comprehensive that they may take in matters which are not within the submission, yet it will be presumed that nothing beyond the submission is awarded, unless the contrary is expressly shown.[38] If, after reciting his authority, the

Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Walker *v.* Walker, 60 N. C. 255.

Question of law.— Upon the construction of a written submission and award, whether items awarded are outside the written submission is a question of law for the court. Truesdale *v.* Straw, 58 N. H. 207; Adams *v.* Adams, 8 N. H. 82.

35. Borrowe *v.* Milbank, 6 Duer (N. Y.) 680, 5 Abb. Pr. (N. Y.) 28; Palmer *v.* Van Wyck, 92 Tenn. 397, 21 S. W. 761; Rutherford *v.* Pillow, 5 Yerg. (Tenn.) 133; Bacon Abr. tit. Arbitrament and Award, (E), 325 [*citing* Bonner *v.* Liddell, 1 B. & B. 80].

Discretionary or mandatory words in submission.— Where it is provided that, if an arbitrator shall award in a particular manner, then he shall or may award in a certain manner, the latter provision is imperative. Crump *v.* Adney, 1 C. & M. 355, 2 L. J. Exch. 150, 3 Tyrw. 270 [*cited* in Russell Arb. & Award (8th ed.) 245].

Value estimated by money standard.— Under a submission to arbitrators of the question of the value or price to be paid for land purchased by one of the parties from the other, such value or price to be paid in stock at par value, it was held that this did not authorize the arbitrators to ascertain the value of the land according to any but a money standard, and the award was set aside because the arbitrators, without notice to, and in the absence of, the purchaser, estimated the land at above its money value, according to a supposed depreciation in the stock. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

The award of an umpire need not show on its face that the property was appraised at its value at private sale, the submission requiring such appraisal, where the fact appeared from the individual valuations made by the appraisers and that made by the umpire, taken together. Crosby *v.* Moses, 48 N. Y. Super. Ct. 146.

Construction of contract submitted.— A contract to build a railroad provided for alterations of the line which were necessary or expedient, without extra allowance, and reserved the right of the railroad company to substitute piling for embankment. The construction of this contract and the determination of all claims thereunder were submitted to arbitration, and it was held that an award which allowed extra compensation for alterations of the line and substitution of piling did not transcend the authority of the submission. Porter *v.* Buckfield Branch R. Co., 32 Me. 539.

36. Estes *v.* Mansfield, 6 Allen (Mass.) 69. See *infra*, IX, B, 1, a, (II), (C).

37. Bethea *v.* Hood, 9 La. Ann. 88; McCracken *v.* Clarke, 31 Pa. St. 498; U. S. *v.* Farragut, 22 Wall. (U. S.) 406, 22 L. ed. 879.

38. *Alabama.*— Ehrman *v.* Stanfield, 80 Ala. 118; Burns *v.* Hendrix, 54 Ala. 78; Wolff *v.* Shelton, 51 Ala. 425; Jones *v.* Blalock, 31 Ala. 180; Reynolds *v.* Reynolds, 15 Ala. 398.

Arkansas.— Where the submission of a claim to dower out of personalty was not in writing, and could not be proved by other evidence, it was held that it would be presumed from the award that no claims other than those in the nature of dower were submitted. Green *v.* Ford, 17 Ark. 586.

California.— Blair *v.* Wallace, 21 Cal. 317.

Illinois.— Hubbard *v.* Firman, 29 Ill. 90.

Indiana.— McCullough *v.* McCullough, 12 Ind. 487. Where arbitrators make an award "of and concerning the matters to us referred," finding for one of the parties and against the other in a certain sum, including certain judgments which were not originally between the parties, it will be presumed that the judgments were, by assignment or otherwise, demands between the parties at the time of submission. Hays *v.* Miller, 12 Ind. 187, 189. See also Banfill *v.* Leigh, 8 T. R. 571.

Maryland.— Ebert *v.* Ebert, 5 Md. 353 [*citing* Caton *v.* McTavish, 10 Gill & J. (Md.) 192].

Massachusetts.— Gaylord *v.* Norton, 130 Mass. 74.

arbitrator proceeds to make his award "of and concerning the said premises," he professes to make his award of and concerning the matters then pending between the parties as submitted.[39]

3. Scope of Submission — a. Comprehensive Submission — (I) *General Rule.* When the submission is general of all matters and differences between the parties, the authority of the arbitrator is broad enough to include the right to consider and pass upon all matters of account, claims, debts, or demands which the parties have against each other.[40]

(II) *Concerning Real Property.* Questions concerning real property may

Michigan.— Bush *v.* Davis, 34 Mich. 190.

New Hampshire.— Richardson *v.* Huggins, 23 N. H. 106; Parsons *v.* Aldrich, 6 N. H. 264; Joy *v.* Simpson, 2 N. H. 179.

New York.— Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470; Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268; Bacon *v.* Wilber, 1 Cow. (N. Y.) 117.

North Carolina.—Bryant *v.* Fisher, 85 N. C. 69.

Oregon.— Parrish *v.* Higinbotham, (Oreg. 1901) 65 Pac. 984.

Pennsylvania.— Wightman *v.* Pettis, 29 Pa. St. 283; Buckley *v.* Ellmaker, 13 Serg. & R. (Pa.) 71.

Vermont.— Soper *v.* Frank, 47 Vt. 368; Lamphire *v.* Cowan, 39 Vt. 420; Rixford *v.* Nye, 20 Vt. 132. A defense that an award of arbitrators is void because not following the submission cannot be raised for the first time on appeal. Sargeant *v.* Butts, 21 Vt. 99.

Virginia.— Pollock *v.* Sutherlin, 25 Gratt. (Va.) 78.

England.— Brown *v.* Watson, 6 Bing. N. Cas. 118, 8 Dowl. P. C. 22, 8 Scott 386, 37 E. C. L. 538; Banfill *v.* Leigh, 8 T. R. 571; Barry *v.* Rush, 1 T. R. 691.

Matters authorized by statute.— Under a statute allowing a submission of such demands only as might be the subject of a personal action at law, or of a suit in equity, if the submission is "of all demands" between the parties, and the award finds that one of the parties shall recover of the other a certain sum in full of all matters submitted, the legal presumption is that the arbitrators considered only such demands as might have been submitted under the statute. Fiske *v.* South Wilbraham Mfg. Co., 7 Allen (Mass.) 476.

Pursuance to the principles and manner of proceeding as prescribed by the submission will be presumed. Backus *v.* Fobes, 20 N. Y. 204; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578.

De et super præmissis.— The award need not be expressly confined as *de et super præmissis*, or by words of like effect. Sperry *v.* Ricker, 4 Allen (Mass.) 17; Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Solomons *v.* McKinstry, 13 Johns. (N. Y.) 27 [*citing* Ratcliffe *v.* Bishop, 1 Keb. 865; Hopper *v.* Haskett, 1 Keb. 738, 1 Lev. 132, 1 Salk. 72]; Buckley *v.* Ellmaker, 13 Serg. & R. (Pa.) 71. "This rule is founded on the obvious fact, that arbitrators cannot in general know and investigate subjects not submitted." Joy *v.* Simpson, 2 N. H. 179, 182.

39. Harrison *v.* Lay, 13 C. B. N. S. 528, 536, 106 E. C. L. 528.

40. Burns *v.* Hindman, 7 Ala. 531; Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328; Barker *v.* Belknap, 39 Vt. 168; Adams *v.* Ham, 5 U. C. Q. B. 292.

On a submission of all injuries, an award of all debts, duties, and trespasses is a good award, for whatever is against law is an injury. Bacon Abr. tit. Arbitrament and Award, (E), 324.

All matters of civil rights.— A submission of all matters in dispute comprehends every question and all matters of civil rights between the parties. Baker *v.* Townsend, 1 Moore C. P. 122, 7 Taunt. 422, 18 Rev. Rep. 521, 2 E. C. L. 428.

Prosecutions for assaults and batteries may be included in a reference of all business, of whatever kind, in dispute between the parties. Noble *v.* Peebles, 13 Serg. & R. (Pa.) 319.

Judgments and executions are embraced in a general submission of "all manner of action and actions, cause and causes of action, and suits in law or equity, bills, bonds, specialties, sum and sums of money, quarrels, conditions, debates, differences, dues, controversies, trespasses, damages and demands whatsoever, at any time had." Kauffman *v.* Myer, 6 Watts (Pa.) 134, 136. See also Baker *v.* Merrifield, 13 N. H. 357.

Law and facts.— Under a general submission the arbitrators have power to pass on the law and the facts. See *supra*, III, E, 2.

Equitable and legal demands.— So, where the arbitrators are not restricted, the submission includes equitable as well as legal demands and claims. Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328; Delver *v.* Barnes, 1 Taunt. 48, 9 Rev. Rep. 707. And where the parties refer matters to arbitrators for "a just and equitable settlement as to the rights and obligations of the parties under the contract," any order of the arbitrators which may be referred to this clause as to a just and equitable settlement will be upheld. Cobb *v.* Dolphin Mfg. Co., 108 N. Y. 463, 467, 15 N. E. 438. So where, in order to devise a plan whereby "any persons equitably entitled to compensation for taxes" should receive the same, under claims to have certain taxes refunded, the matter was referred to a committee to suggest a plan for this purpose, who recommended that the claims be submitted to arbitration, which was done, it was held that the equitable claims were submitted. Smith *v.* Wilkinsburg, 172 Pa. St. 121, 122, 33 Atl. 371.

be submitted without being specially named, and a general submission of all demands includes questions concerning real, as well as personal, property.[41]

b. Restricted Submission — (I) *In General.* If the submission is not so broad as to include all matters between the parties, or all matters in dispute, or is otherwise restricted, while the award may settle every question which necessarily arises from the particular matters submitted, it must be confined strictly to these.[42]

41. *Illinois.*— Merritt *v.* Merritt, 11 Ill. 565.

Massachusetts.— Penniman *v.* Rodman, 13 Metc. (Mass.) 382.

New York.— Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268; Sellick *v.* Addams, 15 Johns. (N. Y.) 197; Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

North Carolina.—Bryant *v.* Fisher, 85 N. C. 69.

Pennsylvania.— Gratz *v.* Gratz, 4 Rawle (Pa.) 411.

Canada.— Benedict *v.* Parks, 1 U. C. C. P. 370.

42. See cases cited generally, *supra*, VI, J, 1, a.

Amount of debt — Right to order payment. — Under a submission to "determine which of the said several items of claim the estate of Mrs. Boulton is bound, as matter of law, to pay," the authority of the arbitrator is confined to deciding the question of legal liability, and is not authorized to find the sum payable, in respect of the several items, or to order payment of them. Armstrong *v.* Cayley, 2 Ch. Chamb. (U. C.) 128, 131. And, where a confession of judgment provided that it was to be released on payment of the amount a person named should say was due, the person so designated to ascertain the amount due has no authority to award payment in specific personal property. State *v.* Jones, 2 Gill (Md.) 49.

Annulment of contract.— Where parties submit their controversies growing out of the work specified in a building contract, and such contentions or matters of difference as may arise in the premises, the arbitrators have no authority to annul the contract, unless it clearly appears that the right to annul was one of the questions submitted. St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202.

Appraisal — Other matters excluded.— Where the parties chose persons to value, in tobacco, certain lands purchased, it was held that the arbitrators had no power to adjust accounts or settle any other disputes between the parties. Ross *v.* Pleasants, Wythe (Va.) 147. So, a submission, under a contract by one joint owner to sell to the other all his interest at a price to be determined by appraisers, does not authorize the determination of the extent of either party's interest. Brown *v.* Bellows, 4 Pick. (Mass.) 179. A submission of "the question of damages," in an action for debauching plaintiff's wife, does not embrace the question of defendant's liability. Samson *v.* Young, 50 N. H. 62, 64.

Assignment of dower — Distribution not included.— Under a submission upon an assignment of dower and to determine whether the widow is entitled to the whole of other land claimed by her husband's heirs, the arbitrators are not authorized to award a distribution among the heirs. Brown *v.* Mize, 119 Ala. 10, 24 So. 453.

Dealing outside of contract submitted.— A clause in a building contract providing that, if any differences shall arise between the parties in relation to the contract, the work to be performed under it, etc., the decision of the architect shall be final, is a submission of specific questions, and the architect's decision is not binding upon the parties as to the matters of dealing entirely outside of the contract in question — as a claim for money lent or goods sold and delivered. Busse *v.* Agnew, 10 Ill. App. 527.

Improper items considered.— An award, which took into account moneys, paid and received, for insurance of a vessel, under a submission of controversies concerning the earnings and expenses of the vessel, is outside of the terms of the submission, and could not support an action thereon. Sawyer *v.* Freeman, 35 Me. 542. The submission of a controversy between parties as to their respective liability to pay the mutual expense of "cleaning out a drainage canal" does not authorize an award based upon an inquiry of the expense of "deepening" the canal, and an action cannot be maintained upon a bond given to secure the performance of the award on account of failure to perform the award thus made. Noble *v.* Wiggins, 52 N. C. 535.

To run boundary line — *In general.*— The submission of a controversy about a boundary line, to determine the location of said line, and also to run the line in accordance with a previous line, limits the authority to ascertaining the single point where the line had previously been run, and an award undertaking to establish a new line is without the submission and void. Wyman *v.* Hammond, 55 Me. 534. To the same effect see Walker *v.* Simpson, 80 Me. 143, 13 Atl. 580; Ross *v.* Linder, 17 S. C. 593. But where devisees of land, not agreeing to the division of it according to the will, submitted, in general terms, an award "from the proofs adduced to the arbitrators, from the tenor of the will, and evident intention of the testator," is good, although the line specified is not the line mentioned in the will. Hollingsworth *v.* Lupton, 4 Munf. (Va.) 114.

Submission rendering arbitration nugatory. — Where the courses in a deed were clearly stated, under an agreement that the arbitrators should render the lines "according to the deed," it was held that the deed was de-

(II) *Matters on One Side.* If the demands or claims on one side only form the subject of difference or dispute between the parties, the arbitrators cannot consider demands or claims put forth on the other side.[43]

(III) *Personal Rights Only Submitted.* Where personal rights are submitted, the arbitrator cannot bind a man's right to real things.[44]

(IV) *Matters in Controversy or in Dispute.* The submission of matters in dispute does not include all demands, but only those which are in dispute.[45] But to such a submission the parties give definite application by appearing before the arbitrators and presenting their claims and litigating their demands; the subject-matter of the submission is thereby rendered certain, and to that the award must be referred.[46]

c. Matters Involved in Suit — (I) *In General.* Where, pending a suit, the parties, out of court, submit the entire controversy between them to arbitration, the whole subject-matter is submitted, and whatever claim will arise in the suit is embraced in the submission.[47] It has been held that the cause of action is the

cisive, and, therefore, any finding of the arbitrators could be of no effect. Coughran *v.* Alderete, (Tex. Civ. App. 1894) 26 S. W. 109.

Validity of contract — Debt not included.— Where questions only as to the validity of a certain sale, and the amount of corn transferred thereby to be accounted for by defendant, were submitted to arbitration, an award as to the amount owed by defendant for the corn was unauthorized and void. Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Whether goods delivered correspond with samples.— So, a submission of the question whether goods sold by sample and delivered correspond to the sample, and must be accepted, does not authorize the arbitrators to award damages for a refusal to accept the goods. Leach *v.* Weeks, 2 Abb. Pr. N. S. (N. Y.) 269.

43. Black *v.* Hickey, 48 Me. 545 (holding that, where the value of a tenant's betterments was submitted and the referee considered and deducted therefrom an account which defendant claimed was due to him from the tenant, such deduction was erroneous); Worthen *v.* Stevens, 4 Mass. 448; Scott *v.* Barnes, 7 Pa. St. 134.

Cannot arrange purchase and sale.— Where A and B agree to submit a demand made by A against B for a building and land, the arbitrators have no authority to award that A shall pay B a certain amount of money and that B shall convey the land. While the arbitrators may take into consideration any equities involved in the title, this equitable jurisdiction does not extend to making an award against the claimant against whom no award was submitted. The arbitrators have no authority to thus arrange a purchase and sale. Robinson *v.* Moore, 17 N. H. 479. See also Culver *v.* Ashley, 17 Pick. (Mass.) 98, holding that authority to estimate the value of chattels to be taken in payment of the debt, if any, at their valuation, does not authorize an award that the creditor should take them at the valuation, and, the indebtedness being to a less amount, pay the excess to the debtor.

Dower awarded on condition.— An award giving to a widow a child's share in lieu of dower, on condition that she pay a part of her husband's debts, does not conform to a submission for the assignment of dower. Brown *v.* Mize, 119 Ala. 10, 24 So. 453.

44. Bacon Abr. tit. Arbitrament and Award, (E), 324 [*citing* Rolle Abr. 243, pl. 12, 13].

45. Gear *v.* Bracken, 1 Pinn. (Wis.) 249. Any matter is included under a general submission of matters in variance, if the particular matter in question was in variance. Gratz *v.* Gratz, 4 Rawle (Pa.) 411. See also Young *v.* Shook, 4 Rawle (Pa.) 299. And a submission restricting the arbitrators to "all said controversies which we cannot settle ourselves" does not include matters not in controversy and not laid before the arbitrators. Trescott *v.* Baker, 29 Vt. 459; Robinson *v.* Morse, 29 Vt. 404. See also *infra*, IX, A, 2.

46. Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367; Brewer *v.* Bain, 60 Ala. 153; Price *v.* White, 27 Mo. 275. See also *infra*, VI, J, 6, c; IX, A, 2, a, (III).

47. Whole subject-matter is submitted.— Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811; McMillan *v.* James, 105 Ill. 194; Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251.

Before answer filed.— After a suit brought to settle a partnership and before answer filed, the parties agreed to submit to arbitration and the suit was dismissed. In an action brought upon the award, defendant insisted that the award was invalid, because it embraced matters which were not submitted. Though the agreement was somewhat obscure in this connection, it was held, by a fair construction, to submit to the arbitrators the whole of the partnership transactions involved in the suit, notwithstanding the answer of defendant had not been filed, because, if suit had been carried on, defendant would have had a right, by way of defense, to present any claims which he had against plaintiff arising out of the partnership transactions. It was, therefore, proper, under such a submission, for the arbitrators to take into consideration all matters of the partnership and those which might have been set up by defendant in his answer, and to render the award, which would embrace all matters of controversy between the parties resulting from the partnership. Newton *v.* West, 3 Metc. (Ky.) 24.

basis of the submission, and not the particular form of the declaration nor of the particular issues which may have been formed.[48] But, on the other hand, the pleadings and the issues formed thereby may be looked to by way of aid in ascertaining the scope of the submission.[49] If the submission is of matters involved in action only, it includes nothing else, and matters accruing subsequent to the commencement of the action cannot be considered.[50]

(II) *Matters in Suit, and Other Matters.* But, if the submission is not alone of the suit or matters involved therein, but of all matters in difference between the parties in addition to the specific submission of the matters involved in the suit, then the arbitrators are not restricted to the latter.[51] Nor are they,

Affirmative relief without cross-bill, where a suit in equity for an accounting is discontinued and the subject-matter thereof referred to arbitration. McCune *v.* Lytle, (Pa. 1900) 47 Atl. 190.

Particular right and not cause of action.— Though a submission state that the parties had a cause then subsisting between them, relative to the right to turn the water from a certain spring, having submitted to "leave the same matter" to the decision of arbitrators, the matter referred was the right to turn the water, and not to the determination of a cause then subsisting. Dutton *v.* Gillet, 5 Conn. 172.

48. Cook *v.* Carpenter, 34 Vt. 121, 80 Am. Dec. 670.

Action on contract — Award must find contract.— Where the action was on an express contract which defendant denied, the arbitrators, in order to find for plaintiff, must find upon an express contract. Lynch *v.* Nugent, 80 Iowa 422, 46 N. W. 61.

Distinction between action and cause of action.— If the submission be of all actions, the arbitrators cannot make an award of causes of actions, but it is otherwise if the submission be of all actions and quarrels, because the word "quarrels" comprehends causes of action. Bacon Abr. tit. Arbitrament and Award, (E), 326 [*citing* Rolle Abr. 246].

Compare also Actions, I, A, B [1 Cyc. 641, 642]; II, F, 2 [1 Cyc. 713].

49. Pleadings and issues looked into.—Ives *v.* Ashelby, 26 Ill. App. 244; Jackson *v.* Hoffman, 31 La. Ann. 97; Masury *v.* Whiton, 111 N. Y. 679, 18 N. E. 638, 19 N. Y. St. 141.

Matters admissible under amendment.— In Ing *v.* State, 8 Md. 287, it was held that, under the statute of 1778 in that state, any matter which might be introduced into the action by amendment is within the submission. See also Rone *v.* Hines, 7 Ky. L. Rep. 93.

Under rule of court.—Where defendant has not filed an account and set-off, a submission to arbitration under a rule of court embraces only the matters set up in the declaration and plaintiff's bill of particulars, and an award for a recovery in favor of defendant is erroneous. Austin *v.* Clark, 8 W. Va. 236; Swann *v.* Deem, 4 W. Va. 368. See also Harrison *v.* Wortham, 8 Leigh (Va.) 296; Backman *v.* Reigart, 3 Penr. & W. (Pa.) 270, holding that where an amicable action in case is submitted to arbitration, nothing is submitted that might not be adjudicated in a declaration in that form of action.

Where the submission is oral and the terms do not appear in the record, the issues are the questions submitted. Bulsom *v.* Lampman, 1 Kan. 324.

50. Matters arising subsequently.— Carmack *v.* Grant, 5 Litt. (Ky.) 32; Smith *v.* Kincaid, 7 Humphr. (Tenn.) 28. But an award that nothing is due is sufficient, because it is to be presumed that things remain in *statu quo* from the time of the submission. Dickins *v.* Jarvis, 5 B. & C. 528, 8 D. & R. 285, 11 E. C. L. 569.

51. Harmon *v.* Jennings, 22 Me. 240; Jones *v.* Welwood, 71 N. Y. 208.

Distinction in terms used.— The distinction has been made between the submission of "all matters in difference between the parties in the cause," which is construed to cover all matters of difference, and of "all matters in difference in this cause between the parties," which is construed to confine the submission to questions in the action. Malcolm v. Fullarton, 2 T. R. 645, 646, 1 Rev. Rep. 567. But it was suggested by Buller, J., in Smith *v.* Muller, 3 T. R. 624, 626, that the distinction was too refined for general understanding, and it was recommended to make a general reference a reference "of all matters in difference between the parties," omitting the words "in the cause," and a reference to be restricted to the matters in the cause, "of all matters in difference in the cause," omitting the words "between the parties." In the Scotch courts, by a technical construction of the reference "of a cause and all questions," it is held that the reference is only of all matters in dispute in the cause. Russell Arb. & Award (8th ed.) 87 [*citing* Baillie *v.* Edinburgh Oil Gas Light Co., 3 Cl. & F. 639, 6 Eng. Reprint 1577]. But see Harrison *v.* Wortham, 8 Leigh (Va.) 296, 303, wherein the submission was "of all matters of difference between the parties in this suit," and the court said that there was a well-settled distinction between such a submission and a general reference of all matters of difference between the parties, to which Malcolm *v.* Fullerton, 2 T. R. 645, 1 Rev. Rep. 567, was cited, and then proceeded to hold that the arbitrator was right in disallowing a set-off which was not the proper subject of set-off in the suit.

under such a submission, bound by any balance between the parties as it stood when the suit was brought, but they may regard it as the accounts appeared at the date of the submission.[52]

d. Powers and Orders Incidental to Nature of Submission — (I) *In General.* Where the submission is in general terms of all matters or differences, or requires general inquiry into, and determination with respect to, all matters connected with the particular transaction in difference or dispute, the arbitrator has power to pass upon and determine everything incidental to the matters submitted, or connected with the particular matters in difference or dispute.[53] The fact that certain subjects are specifically mentioned, as matters to be submitted and examined, does not justify the conclusion that all others were intended to be exeluded, when it appears from the submission that the purpose of the parties is to procure a settlement of all questions between them connected with the general subject-matter of the submission.[54]

(II) *Submission by Partners.* Upon a submission of all matters in difference between partners, the arbitrators may award a dissolution,[55] or award the joint property to one, and direct him to pay the other a sum in gross and to discharge and satisfy debts owing by the firm,[56] and the arbitrators may determine such other matters between sueh parties as the nature of the submission and their relations require.[57]

52. Woods *v.* Page, 37 Vt. 252.

53. *Illinois.*—Williams *v.* Warren, 21 Ill. 541; Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

Maine.— Gerry *v.* Eppes, 62 Me. 49.

Massachusetts.— Penniman *v.* Rodman, 13 Metc. (Mass.) 382; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Higby *v.* Upton, 3 Metc. (Mass.) 409.

New Hampshire.— Ford *v.* Burleigh, 60 N. H. 278; Chase *v.* Strain, 15 N. H. 535, holding that the authority to settle the value of certain labor performed by one party authorized an award determining said value and ordering payment thereof.

New York.— Locke *v.* Filley, 14 Hun (N. Y.) 139. See also Owen *v.* Boerum, 23 Barb. (N. Y.) 187; Waite *v.* Barry, 12 Wend. (N. Y.) 377.

North Carolina.— Pearson *v.* Barringer, 109 N. C. 398, 13 S. E. 942; Bryant *v.* Fisher, 85 N. C. 69 (holding that the submission of all matters between the parties authorizes an award upon all the matters submitted and the cancellation of mortgages which are, in fact, the subject of controversy between the parties and brought before the arbitrators); Brown *v.* Brown, 49 N. C. 123.

Pennsylvania.— Connor *v.* Simpson, 104 Pa. St. 440.

South Carolina.— Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714 (holding that, under a submission to determine the value of extra work under a building contract, where the principal contract is for a gross sum, the fact that the arbitrators entered into an investigation of the cost of the work and material under the principal contract, in order to determine the value of the extra work, is not improper, and furnishes no ground for setting aside an award in a suit in equity); Perkins *v.* Kershaw, 1 Hill Eq. (S. C.) 344.

Tennessee.— Henniken *v.* Brown, 4 Baxt. (Tenn.) 397.

Texas.— Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612.

Wisconsin.— Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

England.— Winter *v.* Lethbridge, 1 M'Clel. 253, 13 Price 533, 27 Rev. Rep. 721; Baker *v.* Townsend, 1 Moore C. P. 120, 7 Taunt. 422, 18 Rev. Rep. 521, 2 E. C. L. 428.

Discretion of arbitrator.—Where the agreement provides that the arbitrator should determine "whether or not there has been any breach of the contract and, if so, what damages, if any," etc., an award finding a breach of the contract, but no damages, is not bad for that reason. Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150. So, a submission to determine how much shall be paid for the grant of a right of way authorizes the arbitrators to award that nothing shall be paid therefor. Sears *v.* Vincent, 8 Allen (Mass.) 507.

54. Locke *v.* Filley, 14 Hun (N. Y.) 139.

55. Bacon Abr. tit. Arbitrament and Award, (E), 324 [*citing* Green *v.* Waring, 1 W. Bl. 475]; Vawdrey *v.* Simpson, [1896] 1 Ch. 166, 65 L. J. Ch. 369, 44 Wkly. Rep. 123; Walmsley *v.* White, 67 L. T. Rep. N. S. 433, 40 Wkly. Rep. 675.

56. Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268, under a general submission of all accounts, dealings, controversies and demands, as well individual as partnership concerns and transactions. See also *infra*, VI, J, 6, b, (III).

57. Uncollected assets due each party.— And a submission of all questions in difference authorizes the arbitrator to determine what amount of uncollected assets is due to each party. Simons *v.* Mills, 80 Cal. 118, 22 Pac. 25.

Character of instrument as pledge or bill of sale.— A submission of all "partnership matters and accounts" confers authority to determine whether or not a certain instru-

(III) *Prior Settlements or Receipts.* If the submission is broad enough, as including all matters between the parties, or all matters in difference or dispute, the arbitrators may go behind a former receipt or settlement;[58] and, in like manner, the arbitrators are not concluded by a former award where the submission, from its nature or express terms, is broad enough to include the matters which have been submitted to the prior arbitration.[59]

(IV) *Directions*—(A) *In General.* In connection with the rule already stated as to the power of the arbitrator, springing from, and incidental to, the nature of the submission,[60] the arbitrator has such power to direct the conduct of

ment between the parties constitutes a bill of sale of the interest of one of the partners in a portion of the partnership property, or a mere pledge to secure a debt. Fulmore *v.* McGeorge, 91 Cal. 611, 616, 28 Pac. 92.

Individual accounts.— A submission of "all accounts, disputes, controversies and reckonings, of whatsoever nature, now existing between the same parties," authorizes an award, not only upon the individual accounts between the parties, but also upon accounts between one of the parties and a copartnership, of which the other party is the sole survivor. Wooden *v.* Little, 3 McCord (S. C.) 487.

Lien upon assets.— Under a submission to settle disputes between partners, it was held that the arbitrators, upon finding the balance due from the firm to one of the partners, might declare this balance a lien upon the assets. Redick *v.* Skelton, 18 Ont. 100.

Orders not within or incident to the submission.—An award of damages to one of the parties for a discontinuance of the business by the other is not within a submission to examine and adjust the mutual accounts and determine the rights of the parties with reference to the property. Bullock *v.* Bergman, 46 Md. 270. So, a submission to determine the interest of one of the parties does not authorize a general settlement of disputes. Gerhardt *v.* Davis, 12 Quebec Super. Ct. 137. And an award that all of the partnership stock and effects shall go to one of the partners, when the submission contemplates a division between the two, is bad. Wood *v.* Wilson, 2 C. M. & R. 241, 4 L. J. Exch. 193. And if, in consideration of a sum of money, paid by one to the other, parties enter into a partnership and covenant that, in case of dissolution, they will submit all matters relating to the partnership to arbitration, the arbitrators cannot determine whether any part of the money which was the consideration of the partnership should be refunded. Tattersall *v.* Groote, 2 B. & P. 131, 14 Rev. Rep. viii. So, a submission of "the whole matters of the account," the submission expressly reciting that the parties had no difficulty as to the separation and division of the property on hand, does not authorize or require a determination of anything as to the capital stock contributed by the partners. Wolff *v.* Shelton, 51 Ala. 425.

58. Maynard *v.* Frederick, 7 Cush. (Mass.) 247, 250 (holding that, under a submission of all matters arising out of the "trade and dealings" or "trade and business" of the parties, and that the award "shall be in full settlement and discharge from one to the other concerning and in respect to their said trade and dealings, from the commencement thereof to the date of the submission," the arbitrators are authorized to inquire into all matters, without restriction as to time, and may go behind a receipt given by one of the parties to the other); Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410. But where one claimed, in the right of his wife, to be entitled to certain portions of the estate of the father and other relatives of the wife's mother, which had come into the hands of another as legal representative of his father, and the parties mutually agreed to refer to arbitration all differences between them and all of said claims, it was held that the submission did not include claims which had been adjusted and settled in a previous settlement some years before. Calvert *v.* Carter, 18 Md. 73.

Fraud in former settlement.— Where the submission is of "all claims, whether in law or equity," the arbitrators may inquire whether a previous settlement of a suit in equity by the entry "Bill dismissed" was fraudulently obtained. Mickles *v.* Thayer, 14 Allen (Mass.) 114, 115.

Item due upon former settlement.— Upon a submission of all matters in dispute, the arbitrators may take into account an unpaid item which is due upon a submission made between the parties. Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167.

Where annual settlements are required by law.— Under a submission to arbitrators by a school district and its treasurer, of a controversy between them as to "the money alleged to be due and owing by . . such treasurer, to the plaintiff," the arbitrators may make an award, based on a report covering several years, though the district board was required to make annual settlements with the treasurer. Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 67, 29 N. W. 806.

59. See Carey *v.* Wilcox, 6 N. H. 177. Where a suit to set aside an award is submitted to arbitration, the validity of the first award is submitted. Morris *v.* Morris, 9 Gratt. (Va.) 637. But a claim within the scope of a final reference is held not to be a matter in difference on a subsequent reference, where mutual releases were directed on the former reference. Trimingham *v.* Trimingham, 4 M. & W. 786 [*cited* in Russell Arb. & Award (8th ed.) 851].

60. See *supra*, VI, J, 3, d, 1; *infra*, VI, J, 3, h.

the parties as is necessary to accomplish a settlement and satisfaction of the matters in dispute.[61] It has been held, however, that where the arbitrator is authorized to direct what, if anything, shall be done, or what he shall think fit to be done, this is permissive only.[62] And directions regulating future use of property or conduct of parties will not be sustained unless they are clearly within the scope of the submission.[63]

(B) *Releases.* Arbitrators have power to order one party to the submission to execute a release to another party thereto of and concerning any claim or demand constituting a portion of the subject-matter of the arbitration or constituting the whole of the subject-matter of the arbitration.[64] If the submission is general of all controversies and demands, the arbitrators have power, clearly incidental to the submission, to award mutual and general releases;[65] but if the submission is

61. Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511; Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31. See also Taylor *v.* Shuttleworth, 6 Bing. N. Cas. 277, 8 Dowl. P. C. 280, 9 L. J. C. P. 138, 8 Scott 565, 37 E. C. L. 621; Mays *v.* Cannell, 15 C. B. 107, 3 C. L. R. 218, 1 Jur. N. S. 183, 24 L. J. C. P. 41, 3 Wkly. Rep. 138, 80 E. C. L. 107; Miller *v.* De Burgh, 4 Exch. 809, 19 L. J. Exch. 127, 1 L. M. & P. 177; Prosser *v.* Gorringe, 3 Taunt. 426; Walker *v.* Frobisher, 6 Ves. Jr. 70, 5 Rev. Rep. 223.

Any act in satisfaction.— It seems that the arbitrator may award as satisfaction that one party shall beg the other's pardon. Glover *v.* Barrie, 1 Salk. 71 [*cited* in Russell Arb. & Award (8th ed.) 236]. But the arbitrators cannot bind a man's liberty or right to real things where personal rights are submitted, and no one can be supposed to submit more than his personal estate to answer a personal injury. But, if the arbitrators award a horse, money, a quart of wine, or the like, in satisfaction of the trespass, this is good, for here a new personal duty is raised instead of the former. Bacon Abr. tit. Arbitrament and Award, (E), 324 [*citing* Rolle Abr. 243, p.. 12, 13]. So, for a case where it was awarded that one party should provide two fowls at his mansion-house, "to be eat by the plaintiff and his friends," see Boisloe *v.* Baily, 6 Mod. 221. And, for a submission to determine the truth or falsity of certain publications, and, if found false, to fix the duty of the party making the publication, see Lynch *v.* Nugent, 80 Iowa 422, 46 N. W. 61, holding that there was nothing in the submission requiring the arbitrators to adjudge that the publications be retracted in case they were found to be false.

Direction as to future conduct of business. —Thus, where partners agree to dissolve, and the terms and conditions are to be settled by an arbitrator, he has authority to award that one shall not, during the life of the other, carry on business within a fixed number of miles of the place in which the partnership had been engaged in the same business. Morley *v.* Newman, 5 D. & R. 317, 27 Rev. Rep. 528.

Surrender of note.— So, under a submission of all matters in controversy arising out of a copartnership, it is not beyond the power of the arbitrator to award that one of the parties shall give up to the other certain promissory notes signed by the latter. Leavitt *v.* Comer, 5 Cush. (Mass.) 129.

Future use of spring.— Under the power to regulate the future use of a spring and to order and determine what the arbitrator should think fit to be done, the arbitrator may affect the enjoyment of other rights of the parties and make regulations as to the flowing of the water, though such award interferes with the customary enjoyment of other streams not the subject of dispute. Winter *v.* Lethbridge, 1 M'Clel. 253, 13 Price 533, 27 Rev. Rep. 721.

62. Grenfell *v.* Edgcome, 7 Q. B. 661, 14 L. J. Q. B. 322, 53 E. C. L. 661; Angus *v.* Redford, 2 Dowl. N. S. 735, 12 L. J. Exch. 180, 11 M. & W. 69; Nicholls *v.* Jones, 6 Exch. 373, 20 L. J. Exch. 275, 2 L. M. & P. 335; Russell Arb. & Award (8th ed.) 245.

63. Boynton *v.* Frye, 33 Me. 216; Clement *v.* Durgin, 1 Me. 300 (holding that a submissio.. to determine and assess the amount of damages for the obstruction to a mill-dam did not authorize an attempt to regulate the future use of the stream); Bonner *v.* Liddell, 1 B. & B. 80; Hooper *v.* Hooper, M'Clel. & Y. 509.

64. Weston *v.* Stuart, 11 Me. 326; Guerrant *v.* Smith, 48 Miss. 90; Dockery *v.* Randolph, (Tex. Civ. App. 1895) 30 S. W. 270; Morse Arb. & Award, 192.

Release on one side sufficient.— Where, under the provisions of a submission, the arbitrators are to "fix the terms and times of payment, and the forms of all the releases," the arbitrators are not bound to order releases to be made at all events any more than they are bound to order one of the parties at all events to pay money to the other; but they are first to decide whether either party is entitled to recover any sum of the other, and whether either party, or both, should give a release; and if, after deciding these points and determining that one should pay a certain sum to the other, they award that the other should execute a release to him, this is sufficient, and it is not necessary that they should order both parties to execute releases. Tallman *v.* Tallman, 5 Cush. (Mass.) 325, 328.

65. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Shepherd *v.* Briggs, 28 Vt. 81.

of particular matters, as of matters only which are in difference, a general release is in excess of authority.[66]

(c) *Conveyances.* Where the right to land, or a conveyance thereof, is involved in the submission, the arbitrators have authority to direct a conveyance.[67]

(v) *Order as to Acts Unlawful or Contra Bonos Mores.* However general the submission may be, the arbitrators cannot award as to matters which, of themselves, are not the proper subjects of submission, as against public policy,[68] or direct acts to be done which are not lawful or which are criminal.[69]

(vi) *Reasonableness and Possibility of Performance.* An award must be reasonable and of things possible of performance.[70] But, it is not a sufficient objection to an award that its performance might be impossible, if such award gives an alternative which is possible of performance.[71]

(vii) *Fixing Time of Payment.* Where all matters in difference are referred, and the arbitrators are to ascertain what, if anything, is due by one party to the other, they may, unless restricted by the submission, give a reasonable time for payment,[72] and the nature of the contract under which the differences have arisen may justify an award of future payments by instalments.[73]

Mutual or several releases.— Power to order and award the execution of mutual releases is fully satisfied and fairly pursued by an award of several releases. Smith *v.* Demarest, 8 N. J. L. 195.

66. Gear *v.* Bracken, 1 Pinn. (Wis.) 249; Hill *v.* Thorn, 2 Mod. 309.

Construction of submission and award.— A submission touching divers other matters as well as those particularly mentioned is equivalent to a general submission of all questions between the parties, and will sustain an award of general releases. Slocum *v.* Damon, 1 Pinn. (Wis.) 520. See also Munro *v.* Alaire, 2 Cai. (N. Y.) 320. And where the submission was of particular matters only, an award of releases, qualified so as to operate only upon the demands, controversies, etc., "touching the premises, that is, respecting the matters submitted, or any matter or thing thereunto relating," is not in excess of authority. Blin *v.* Hay, 2 Tyler (Vt.) 304, 310, 4 Am. Dec. 738.

67. Williams *v.* Warren, 21 Ill. 541; Loring *v.* Whittemore, 13 Gray (Mass.) 228; Penniman *v.* Rodman, 13 Metc. (Mass.) 382; Den *v.* Allen, 2 N. J. L. 32; Miller *v.* Moore, 7 Serg. & R. (Pa.) 164. See also *infra*, VI, J, 6, 7.

68. Criminal prosecution.—Concerning costs of a criminal prosecution, the arbitrators have no power to award, under a general submission. Harrington *v.* Brown, 9 Allen (Mass.) 579. See also Russell Arb. & Award (8th ed.) 86; Horton *v.* Benson, Freem. K. B. 204. And see *supra*, II, C.

69. Turner *v.* Swainson, 2 Gale 133, 5 L. J. Exch. 266, 1 M. & W. 572; Lewis *v.* Rossiter, 44 L. J. Exch. 136, 33 L. T. Rep. N. S. 260, 23 Wkly. Rep. 832; Alder *v.* Savill, 5 Taunt. 454, 1 E. C. L. 237 (holding that an award on a submission of differences between a lessee and a neighboring landowner, that the lessee shall do an act for the benefit of the neighbor which would be waste on the estate of the lessor, is bad); Bacon Abr. tit. Arbitrament and Award, (E), 340.

70. Dunlap *v.* Campbell, 5 W. Va. 195.

Impossible ex naturæ rei.— If the arbitrators award a thing impossible *ex naturæ rei*, it is void; but if they award a thing which cannot be done, but not, in the nature of the act itself, contradictory or repugnant, this may be a good award; for there is no construction to be made of the award but by the words thereof. Thus, an award to pay a sum of money at a day past is void, but an award that one shall pay twenty pounds where he hath not twenty pence is good, for no contradiction appears in the award itself. An award that one shall turn the river Thames is void. Bacon Abr. tit. Arbitrament and Award, (E), 339.

Rendered impossible by stranger or party. — If an act possible at first afterward becomes impossible by the act of the party or a stranger, the party is not freed from his obligation to perform the award. Russell Arb. & Award (8th ed.) 197 [*citing* Comyns Dig. 547].

For orders as to strangers see *infra*, VI, J, 5, b.

71. See *infra*, VI, J, 6, b, (v); VI, J, 10, a.

72. Reasonable day of payment.—Egleston *v.* Taylor, 45 U. C. Q. B. 479; Addison *v.* Corbey, 11 U. C. Q. B. 433.

Execution of note.— Under a bond conditioned to pay the amount of the award, the arbitrators awarded that the party should give the other his note for a specified sum, payable at a future day. It was held that this amounted to ordering the party to pay the money at a future day, and not to the doing of a collateral act, and, therefore, was within the submission. Booth *v.* Garnett, 2 Str. 1082.

Express requirement of submission.— An action cannot be maintained upon an arbitration bond to perform an award, which merely directs the payment of a certain sum, if the agreement in the submission requires that the award "shall be made to be executed within ten days of the award." Waller *v.* Shannon, 44 Conn. 480, 483.

73. Future payments in instalments.—Donican *v.* Mulry, 69 Iowa 583, 29 N. W. 612, an

But, on the other hand, it is held that where their duty is limited to fixing a price or assessing a sum for damages, which the parties have agreed to pay on being fixed by the arbitrators, they have no power to fix a time for payment.[74]

e. Matters Fixed by Agreement. Matters which might have been determined under the submission, but which are settled by agreement of the parties, are not strictly matters in difference and need not be determined or stated in the award.[75]

f. Matters Considered or Withdrawn by Consent. An award which decides matters beyond the original submission may, nevertheless, be enforced when it appears that the matters outside of the submission were brought before the arbitrators, without objection, and were fully considered.[76] So if, after submission,

award that one party pay to the other a certain amount in a certain time, in equal payments, under a submission of a contract by which the former was to pay to the latter, during his life, a certain sum annually. So, in Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140, where a party contracted to furnish another with board, etc., as long as the latter should choose, and all questions of damages connected with the contract were submitted to arbitration, it was held that while a court of law could not, in an action on the contract, have rendered any judgment but one for a certain sum payable at once, arbitrators have more extended powers in this respect, and an award that payment be made at a future day, by instalments, may clog payment by requiring a performance of conditions; that an award that the obligor in the contract should pay the obligee a certain sum annually during his life is good.

Limitation of time.— A direction in an award that one of the parties should, from the date of the award until the completion of certain repairs, pay to the other party a certain sum per week as compensation for the loss he would sustain until the completion, was held to be bad for not limiting the payment of such compensation to such time as the party remained in possession of the premises. Lewis *v.* Rossiter, 44 L. J. Exch. 136, 33 L. T. Rep. N. S. 260, 23 Wkly. Rep. 832.

Entirety of verdict for entry of judgment. — An award of damages, payable in instalments, is void, because damages must be entire, as in case of a verdict, and judgment cannot be entered on such a verdict. Shoemaker *v.* Meyer, 4 Serg. & R. (Pa.) 452. But, on the other hand, it is held that, while a statutory award which would not stand as a verdict will not authorize judgment thereon, and, as a general rule, an award for debt or damages payable in future instalments would be had, in a case of account render the arbitrators have powers similar to those of a chancellor, and may, therefore, make a special award in the nature of a decree, adapted to the particular circumstances of the case; and a decree in such terms would be good. Geary *v.* Cunningham, 10 Serg. & R. (Pa.) 230.

74. Egleston *v.* Taylor, 45 U. C. Q. B. 479. See also Gear *v.* Bracken, 1 Pinn. (Wis.) 249; Benwell *v.* Huxman, 1 C. M. & R. 935, 3 Dowl. P. C. 500, 4 L. J. Exch. 99, 5 Tyrw. 509.

75. Gomez *v.* Garr, 6 Wend. (N. Y.) 583 (holding that, where a day of payment is agreed upon in the submission, a failure to specify it in the award is immaterial); Prouse *v.* Painter, Tapp. (Ohio) 52; Woods *v.* Page, 37 Vt. 252. See also Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156. If the agreement of the parties provides for a release, the award need not direct it. Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522. But, under a submission providing that any sums allowed by the arbitrator are to be added to, or deducted from, the balance upon the items agreed upon by the parties, it may fairly be inferred that this is to be done by the arbitrator. Merritt *v.* Thompson, 27 N. Y. 225.

Admission in pleading.—Where, pending an action, there is a conditional submission to arbitration for the purpose of effecting a compromise or settlement, referring only such matters as the parties themselves shall not agree upon in the items of their mutual accounts, but referring all the said matters in disagreement, an item which stands admitted by the pleadings does not fall within the submission, and should not be passed upon by the arbitrators. Merritt *v.* Thompson, 27 N. Y. 225.

Annexing account with admitted items.— But the annexing to an award of an account stated, which embraced items not submitted, but which have been agreed upon by the parties and were evidently so stated in order to show the balance due under the award, does not vitiate the award, especially where the allowance of the items objected to was in favor of the objecting party; and, according to an agreed case that, if the award should be held valid, judgment should be entered for the balance as stated, judgment for such balance was affirmed. Zell *v.* Johnston, 76 N. C. 302.

Stipulation as to correctness of particular items.— Where mutual accounts are submitted, an agreement that an annexed statement of disbursements and collections shall be taken to be correct does not prevent the arbitrator from hearing evidence in relation to items not included in the statement. The term "correct" does not mean "complete." Adams *v.* Macfarlane, 65 Me. 143.

76. **Matters considered.**— *Massachusetts.*— Brown *v.* Bellows, 4 Pick. (Mass.) 179, holding that, where parties point out property to be appraised, they will be considered as agreeing that everything pointed out is included in

some of the matters are withdrawn by the parties from the consideration of the arbitrators, such matters need not be considered, and an award embracing the other matters covered by the submission, and presented to them by the parties, is good.[77]

g. Matters Arising Subsequent to Submission. Matters which arise between the date of the submission and the time of the award are not within the terms of a general submission of all demands, but the arbitrators are confined to such demands or matters of difference as exist at the time of the submission.[78] But it is held that an award of a release or discharge of all matters subsequent to the date of the submission will not, necessarily, render the award bad, as the court will intend that there were no differences existing between the date of the submission and the date of the award,[79] and that, where the time for making an award is enlarged by reëxecution of the bonds of submission, the arbitrator may award interest on principal beyond the date of the original submission and up to the time of the reëxecution.[80]

h. Liability For Future Amounts or Damages. But the question submitted may be such that the determination of liability at the time of the submission involves liability for future amounts or damages. Where the submission is not

the contract under which the appraisement is had.

Nebraska.— Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

New Jersey.— Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724; Veghte *v.* Hoagland, 10 N. J. Eq. 45.

Oregon.— Belt *v.* Poppleton, 11 Oreg. 201, 3 Pac. 27.

Pennsylvania.— Alexander *v.* Westmoreland Bank, 1 Pa. St. 395.

Matters settled after submission.— Though matters which are settled between the parties after submission and before the trial are not strictly matters of difference between them, yet, if one of the parties brings such matters into the accounting before the arbitrators and presents them as credits due to the other, and no objection is made, the arbitrators have a right to suppose that they are a part of the accounts which are to be adjusted. Woods *v.* Page, 37 Vt. 252.

Admitted item.— Where, upon a reference of all matters in difference, a demand on one side is immediately admitted upon its being laid before the arbitrators, they cannot leave such claim out of consideration in making their award, upon the theory that the item is not a matter in dispute. Hutchinson *v.* Shepperton, 13 Q. B. 955, 13 Jur. 1098, 66 E. C. L. 955; Robson *v.* Railston, 1 B. & Ad. 723, 20 E. C. L. 665.

77. **Matters withdrawn.**— Ballance *v.* Underhill, 4 Ill. 453; Nashau R., etc., Corp. *v.* Boston R., etc., Corp., 157 Mass. 268, 31 N. E. 1060; Brown *v.* Bellows, 4 Pick. (Mass.) 179 (holding that an award is not void by reason of the exclusion of certain property from the amount of property appraised, it appearing that the parties were present and indicated what articles should be appraised); Varney *v.* Brewster, 14 N. H. 49; Tennant *v.* Divine, 24 W. Va. 387.

A claim abandoned before the arbitrator is not a matter in difference. Bird *v.* Cooper, 4 Dowl. 148; Lawrence *v.* Bristol, etc., R. Co., 16 L. T. Rep. N. S. 326.

A promise to pay certain claims embraced in the submission does not have the effect of withdrawing such claims from the consideration of the arbitrators, if the promise, as made, leaves unsettled the question of liability. Steere *v.* Brownell, 113 Ill. 415.

For amendment of submission see *supra*, II, H.

78. Thrasher *v.* Haynes, 2 N. H. 429; Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557 [*citing* Barnardston *v.* Foulyer, 10 Mod. 204]; Stewart *v.* Webster, 20 U. C. Q. B. 469.

Note executed on day of submission.— In an action on a note given on the same day as a submission of all matters in controversy between the parties to arbitration, it was held that the note was not properly within the submission, it being, by intendment of law, given after the submission. Bixby *v.* Whitney, 5 Me. 192.

79. See Pomroy *v.* Kibbee, 2 Root (Conn.) 92; Hill *v.* Thorn, 2 Mod. 309.

Delivery of obligation in satisfaction.— If the submission be of all controversies to the time of the submission, and the award be that one of them should deliver up an obligation made since the submission, in satisfaction of all matters, etc., this is good, because the bond is given only in satisfaction and does not mean that the arbitrators have passed judgment on a bond not in existence at the time of the submission. Bacon Abr. tit. Arbitrament and Award, (E), 326 [*cited* in Buckley *v.* Ellmaker, 13 Serg. & R. (Pa.) 71].

Upon dissolution of partnership.— In Thirkell *v.* Strachan, 4 U. C. Q. B. 136, it was held, where arbitrators were authorized to dissolve the partnership, that, in order to accomplish this, they might, if it became necessary, look into the existing state of the concern in regard to property, liabilities, etc., and that this was not taking up matters of dispute that had arisen after the submission, by way of settling them as differences.

80. Watkins *v.* Phillpotts, 1 M'Clel. & Y. 393, 29 Rev. Rep. 809.

restricted, such future damages may be concluded by the award,[81] and it is held that, where an award covers the construction of a contract, questions subsequently arising between the same parties under the contract will be concluded by such construction.[82] But, on the other hand, a submission of this character, which contemplates the settlement of the full damages, cannot be construed as a submission of prospective damages only;[83] and if the apparent intention of the submission is that only damages due at the time of the submission shall be determined, an award as to future damages is void.[84] Sometimes the submission is for the purpose of ascertaining what damage will flow from a particular act, and it is held that the intention of the parties is that the damages are to be considered as already done.[85]

81. Cheshire Bank *v.* Robinson, 2 N. H. 126 (holding that a submission of all demands may include damages for the breaches of a bond already accrued, or to accrue in the future); Lewis *v.* Rossiter, 44 L. J. Exch. 136, 33 L. T. Rep. N. S. 260, 23 Wkly. Rep. 832 (as to the power to award damages for the continuing breach of a covenant up to the date of the award, under a power to order and direct what should be done either immediately or prospectively). See also Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436, 6 H. L. Cas. 600, 26 L. J. Ch. 276, 29 L. J. Ch. 377, 56 Eng. Ch. 436; and *supra*, VI, J, 3, d, (IV).

Yearly damages for indefinite time.—A submission concerning past and future damages from a flowage occasioned by a mill-dam does not authorize an award of future yearly damages for an indefinite time to be binding upon the heirs and assigns of the party. Littlefield *v.* Smith, 74 Me. 387. See also Gordon *v.* Tucker, 6 Me. 247, where, upon objection for want of mutuality in the case of a submission to determine damages past and future for injury to land by the maintenance of a mill-dam, it was held that a simple award of damages, without any assurance of protection, was good, inasmuch as the party had, as to past damages, received his equivalent, and as to future damages the payment thereof would operate as a bar to any further proceedings which might be brought upon the same subject-matter by the claimant; and the fact that this mutuality might not extend to protect the mill-owners from the subsequent grantees would not affect the award, because the parties had not seen fit to stipulate in the bond for any assurance to run with the land.

Interest on deferred payments.— Where an arbitrator has authority to make an award according to the principles of justice, and gives time for the payment of the principal sum found due, the fact that the award requires the party to pay interest on such sum from the date of the award will not avoid it, as the terms of the submission are broad enough to authorize the order. Noyes *v.* McLaflin, 62 Ill. 474.

Value as of date of award.— Where parties submitted to persons the value in tobacco of certain lands, without fixing the time for valuation or to which the valuation should refer in case of fluctuations in the price of land or of tobacco, it was held that the valuation should be governed by circumstances at the time of making it, and not at the time of the contract. Ross *v.* Pleasants, Wythe (Va.) 147.

82. Allen-Bradley Co. *v.* Anderson, etc., Distilling Co., 16 Ky. L. Rep. 350.

83. Duren *v.* Getschell, 55 Me. 241.

84. Cullifer *v.* Gilliam, 31 N. C. 126, holding, over the contention that the award was valid because the intention of the parties was to follow the provisions of the statute which permitted the assessment of annual damages in the future, in such cases, to be binding for a certain number of years, against which the dam-owner might have relief if he removes his dam, and the other party have additional damages if the dam is raised, that the award could not be said to be in pursuance of these provisions, because it awarded future damages without making any provision for relief in case of removal of the dam, or for additional damages in case the dam should be raised.

85. Maryland, etc., R. Co. *v.* Porter, 19 Md. 458, holding that a submission to arbitration of the amount of damages which a party "may sustain" by reason of the construction of a railroad through his land authorized an award of a sum for damages actually sustained.

Liability depending upon contingency.— Upon the dissolution of a firm one of the partners purchased the interest of the other. The seller subsequently engaged in the same business at the same place. A submission by them to arbitration stated that the buyer claimed and the seller denied that, at the time of the purchase and dissolution, the seller agreed not to engage in the same trade, and the seller agreed that, if the decision of the arbitrators was against him, he would then discontinue the trade while the other party remained in it, or, at the election of the other party, pay such damages as the arbitrators should allow. An award that the parties did make the above contract, and that the buyer's damages were of a certain amount, was within the terms of the submission and was valid and binding, the seller having failed to discontinue the business. Curtis *v.* Gokey, 68 N. Y. 300. But where the submission did not authorize the arbitrators to make an award before any damages had in fact been sustained, an award, not for damages which the party had sustained, but for those which

4. Effect of Penalty of Bond. The power of the arbitrator in respect to the amount to be awarded is not controlled by the penalty of the arbitration bond.[86]

5. As to Parties — a. Award and Authority Confined to Parties to Submission — (i) *General Rule.* As a general rule the power of the arbitrator is confined to the parties, and the claims of such parties, who joined in the submission. An award can have no effect to establish rights or duties in favor of or against persons who are not parties to the submission.[87] An action cannot be maintained, against a guarantor upon a contract guaranteeing the payment of an amount to be found due from another, by showing an award fixing the amount, under a submission to which the guarantor is not a party.[88] So, the changing of a contract by an award of the arbitrators, even though for a surety's benefit,[89]

the arbitrators supposed he would sustain in the event of the happening of a contingency, was held to be premature and void. Allen *v.* Galpin, 9 Barb. (N. Y.) 246.

86. The penalty is important only when the action is for damages for breach of the bond. *Ex p.* Wallis, 7 Cow. (N. Y.) 522.

87. *Connecticut.*— Benedict *v.* Pearce, 53 Conn. 496, 5 Atl. 371; Chapman *v.* Champion, 2 Day (Conn.) 101.

Georgia.— Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81.

Illinois.— Woodward *v.* Woodward, 14 Ill. 370.

Kentucky.— Milner *v.* Turner, 4 T. B. Mon. (Ky.) 240; Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232.

Maine.— Emery *v.* Fowler, 38 Me. 99, holding that a subsequent grantee of one of the parties to a submission to determine a boundary line is not concluded, in an action of trespass brought against him, by an award after the grant, unless he had actual or constructive notice of the arbitration.

Massachusetts.— Munn *v.* Reed, 4 Allen (Mass.) 431, holding that, if a father and next friend of an infant submits, in his own name, his own claim for damages for injuries to the infant, an award of a sum to the father and another sum to the infant will not bar a subsequent action by the infant, as the submission covered only the father's claim.

New Hampshire.— Mahagan *v.* Mead, 63 N. H. 130.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333; Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724.

New York.— Coan *v.* Osgood, 15 Barb. (N. Y.) 583.

Tennessee.—Mays *v.* Myatt, 3 Baxt. (Tenn.) 309.

Texas.— Snow *v.* Walker, 42 Tex. 154.

Vermont.— Robinson *v.* Hawkins, 38 Vt. 693, holding that the neglect of a party to present a claim, under a general submission, of all matters existing between the parties will not operate to deprive him of his remedy against one who was not a party to the submission.

England.— Hill *v.* Levey, 3 H. & N. 7, 4 Jur. N. S. 286, 28 L. J. Exch. 80, 7 Wkly. Rep. 691. Arbitrators cannot cancel a deed of apprenticeship where the apprentice is not a party to the submission. Wicks *v.* Cork, 11 Jur. 542.

Impeachment by stranger.—The validity of an award cannot be impeached by one not a party thereto. Penniman *v.* Patchin, 6 Vt. 325.

Strangers to suit.— Where two parties submit to arbitration a suit pending between two other parties, it is held that an award in that suit is not binding upon the parties to the submission. Vosburgh *v.* Bame, 14 Johns. (N. Y.) 302.

Assignee and obligor — Effect on assignor. — Where a suit by an assignee of a bond against the obligor was referred to arbitration, and the award found the debt to have been discharged by payment to, and set-off against, the assignor, and a judgment was entered in favor of the obligor, it was held that the award was sufficient to establish the liability of the assignor and to support an assumpsit on such liability in a subsequent action by the assignee against him. Scates *v.* Wilson, 9 Leigh (Va.) 473.

88. Chapman *v.* Champion, 2 Day (Conn.) 101.

Award against principal — Effect as to surety.— In an action to enforce liability of a surety on a bond an award against the principal is not admissible evidence. Beall *v.* Beck, 3 Harr. & M. (Md.) 242. In this case the award was in a former suit against the principal, and judgment was entered on the award in that suit. The case in reality turned upon the effect on the surety of the judgment against the principal, and has since been variously cited and commented upon in this connection. See, generally, Principal and Surety.

Surety on contract permitting arbitration. — A surety to a contract providing for a submission of particular disputes to arbitration if they should arise, is bound by the contract and by a submission made under the contract between the parties, but no further, and if other questions are included in the submission, the surety cannot be bound as to the latter. Cooke *v.* Odd Fellows' Fraternal Union, 49 Hun (N. Y.) 23, 1 N. Y. Suppl. 498, 17 N. Y. St. 490.

Surety on replevin bond.— But where the parties in an action of replevin submit to arbitration, it has been held that the sureties in the replevin bond are bound by the award. Lee *v.* Grimes, 4 Colo. 185.

89. Titus *v.* Durkee, 12 U. C. C. P. 367.

without the consent of such surety, will release the surety from any liability under the contract.[90]

(II) *Exceptions.* Exceptions seem to have been recognized to this general rule, however, to the extent of permitting an award to be used as evidence for or against a stranger under the particular circumstances.[91] And the rule is further subject to the condition that the submission or award has not been ratified or adopted by the stranger;[92] that he, having some interest in the subject-matter, has not, by his conduct, estopped himself from questioning the award,[93] or that money ordered to be paid to a stranger is not in discharge of a debt owing by a party to the submission.[94]

b. Direction of Act By or To Stranger — (I) *Performance or Procurement of Act by Stranger.* An award directing performance or the procurement of an act by a stranger is void — at least in that respect — and, when a party cannot enforce an award in the particulars in which it operates in his own favor, he cannot be concluded by it in those respects in which it operates against him.[95]

90. Coleman *v.* Wade, 6 N. Y. 44, holding that, where lessor and lessee submitted to arbitration all matters in controversy between them arising out of the demise, an award extending the time for payment by lessee beyond that fixed in the lease discharged the sureties for the lessee's performance thereof.

91. As evidence in favor of stranger.— In an action for false imprisonment against a servant of the East India Company, the defendant was permitted to give in evidence, in mitigation of damages, a release given by plaintiff to the company, in pursuance of an award between plaintiff and the company, in which plaintiff was awarded compensation for injuries done in and by the company's servants, including defendant, of matters in difference, comprehending, in terms, the claim in the action in which the award was offered as evidence. Shelling *v.* Farmer, 1 Str. 646. And an award as to the right to a chattel, which had been deposited with the arbitrator, was held to preclude the party against whom it was made from maintaining trover against the arbitrator for refusing to deliver up the chattel to him, since the award deciding against him is evidence that the withholding of the chattel was not a conversion. Gunton *v.* Nurse, 2 B. & B. 447, 5 Moore C. P. 259; Russell Arb. & Award (8th ed.) 318.

As evidence against stranger.— In Rockwell *v.* Lawrence, 1 Hun (N. Y.) 471, 3 Thomps. & C. (N. Y.) 475, the action was for the price of personal property, the ownership of which had been in dispute between plaintiff and defendant's vendor, and an award under a submission by plaintiff and defendant's vendor was held to be admissible as evidence of plaintiff's title, upon the same footing as a bill of sale from defendant's vendor.

92. Ratification by stranger.— See Terre Haute, etc., R. Co. *v.* Harris, 126 Ind. 7, 25 N. E. 831; Boston *v.* Brazer, 11 Mass. 447; Snow *v.* Walker, 42 Tex. 154; Evans *v.* Cogans, 2 P. Wms. 450. An objection that an award would not have been binding on the other party had he not ratified it is held to be untenable. Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356. See also Smith *v.* Sweeny, 35 N. Y. 291; and *infra*, VI, J, 7; VI, J, 10.

93. Estoppel.— Russell *v.* Allard, 18 N. H. 222, holding that whether one had so acquiesced in an arbitration was a question of fact; but that proof that he had attended the arbitration as a witness and that he did not, on that occasion, object to the proceedings was not proof of such acquiescence. So, where it was submitted to arbitrators to determine which of two persons a tenant should pay rent to, and the tenant was privy to the submission, assented to it and entered into the possession of the premises at the time with knowledge of the submission, he is bound to take notice thereof, though he has no actual notice of the decision. Humphreys *v.* Gardner, 11 Johns. (N. Y.) 61.

Abandonment of claim against one of joint trespassers.— Under the rule that where one, by his own act, discharges one of two joint trespassers, he cannot bring an action against the other, it is held that an award against one is a bar to relief against the other. Adams *v.* Ham, 5 U. C. Q. B. 292. See also Baltes *v.* Bass Foundry, etc., Works, 129 Ind. 185, 28 N. E. 319, wherein defendant, in an action for labor and material, counter-claimed for damages against one of alleged tort-feasors, and the parties submitted the whole controversy to arbitration, and it was held that defendant thus elected to rely upon this proceeding for his entire compensation.

94. See *infra*, note 98.

95. Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712; Brazill *v.* Isham, 1 E. D. Smith (N. Y.) 437; Martin *v.* Williams, 13 Johns. (N. Y.) 264; Barnet *v.* Gilson, 3 Serg. & R. (Pa.) 340; Barney *v.* Fairchild, Rolle Abr. Arb. N, 9, p. 259 [*cited* in Russell Arb. & Award (8th ed.) 205]. See also *infra*, VI, J, 10.

To find surety.— An award that one of the parties shall be bound in a bond, is good, but not that he shall find a surety to enter into the bond. Cooke *v.* Whorwood, 2 Keb. 767, 2 Lev. 6, 2 Saund. 337; Oldfield *v.* Wilmer, 1 Leon. 140, 304. So, an award directing that two defendants should give plaintiff an indorsed commercial promissory note was held

(II) *Act to Stranger — Payment.* An award directing the payment of money to a stranger is not good unless it appears that such payment is for the benefit of a party to the submission.[96] But, on the other hand, while an award requiring a stranger to do an act is held to be bad, an award to do an act to a stranger is good, because it obliges only an endeavor, and this shall be supposed to be for the other party's benefit.[97] An award directing payment to a stranger, for the benefit of a party to the submission, or that one of the parties discharge the other of a debt to the stranger, is good, as by performance of such an order the party may discharge himself.[98] And it has been held that the creditor, not a

to be unauthorized. George *v.* Smith, 4 U. C. C. P. 291.

To do an act on land of stranger.— Where an award, under a submission authorizing the arbitrator to direct what shall be done, directs a party to do an act on land belonging to a stranger, it is held that this latter provision is not good, though such an order might be good if conditional upon the consent of the owner of the land. Dodington *v.* Bailward, 5 Bing. N. Cas. 591, 7 Dowl. P. C. 640, 8 L. J. C. P. 331, 7 Scott 733, 35 E. C. L. 318; Turner *v.* Swainson, 2 Gale 133, 5 L. J. Exch. 266, 1 M. & W. 572; Lewis *v.* Rossiter, 44 L. J. Exch. 136, 33 L. T. Rep. N. S. 260, 23 Wkly. Rep. 832.

Surplusage — *Release.*— If one who is not an actual party to the submission at the time it was made ratifies it so that payment of the amount awarded to the party in the submission will be a complete discharge of the claim involved, an order in the award that such party join in a release may be rejected as surplusage. Smith *v.* Sweeny, 35 N. Y. 291.

Including surety on arbitration bond.— An award requiring payment by a party and the surety on his arbitration bond is not void for including the surety, but this part may be rejected. Richards *v.* Brockenbrough, 1 Rand. (Va.) 449. And where a judgment is rendered in favor of A and B against C, upon an award filed pursuant to the statute, it will not be reversed because B had no claim against C, he having joined with A in executing the submission of all matters arising out of a contract between A and C, for the faithful performance of which contract B was bound by separate instrument. Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

Against party or his executors.— An award that defendant, or his executors or administrators, shall execute a release is not void for uncertainty, because: (1) it might be read as if it were that he and his executors, etc., and (2) the introduction of the words in the award would not vitiate it, because the executors and administrators would be bound without such words. Russell Arb. & Award (8th ed.) 195 [*citing* Bacon Abr. tit. Arbitrament and Award, (E), 249; Freeman *v.* Bernard, 1 Ld. Raym. 247]; Dawney *v.* Vesey, 2 Vent. 249. And, under a submission providing that the arbitrators' authority shall not be revoked by the death of either party, if the party against whom the balance is found dies pending the reference, it is proper and sufficient for the award to direct his personal representative to pay such sum out of the assets of decedent. Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 565, 11 E. C. L. 20.

96. Laing *v.* Todd, 13 C. B. 276, 76 E. C. L. 276; Wood *v.* Adcock, 7 Exch. 468, 16 Jur. 251, 21 L. J. Exch. 204. But see Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87, holding that, under an award directing payment to strangers, it will be presumed that the payment was for the benefit of a party, unless the contrary appears.

97. Bacon Abr. tit. Arbitrament and Award, (E), 339. See also Norwich *v.* Norwich, 3 Leon. 62.

Procurement of act of stranger as a condition.— An award is held to be good where the plain meaning of it is that the party is to pay an amount unless, by a certain day, he shall make a conveyance of the property described in the award, in which latter event he is to receive from the other party a transfer of certain shares in a company and be discharged from the payment of the money; and it does not matter that the party required to convey must convey in conjunction with other persons not parties. Thornton *v.* Carson, 7 Cranch (U. S.) 596, 3 L. ed. 451. See also Kirk *v.* Unwin, 5 Exch. 908, 20 L. J. Exch. 345, 2 L. M. & R. 519.

98. *Indiana.*— Scearce *v.* Scearce, 7 Ind. 286.

Massachusetts.— Boston *v.* Brazer, 11 Mass. 447.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420.

Virginia.— Macon *v.* Crump, 1 Call (Va.) 575, holding that, under a submission by one of two co-executors, an award of a sum of money to him and his co-executor is good.

England.— Wood *v.* Adcock, 7 Exch. 468, 16 Jur. 251, 21 L. J. Exch. 204 (holding that the direction that one party pay money to one of the arbitrators is good if it appears that such payment is for the benefit of one of the parties to the submission, and *distinguishing* Mackey *v.* West, 2 A. & E. 356, 29 E. C. L. 175, which held that, under a reference of partnership disputes, a direction that one of the parties pay a sum of money to the arbitrators, to be applied by him to the payment of certain specified demands, was bad, although the payment appeared to be for the benefit of the parties to the arbitration, in that there the defendant could not have discharged himself by paying the money directly to the plaintiff); Beckett *v.* Taylor, 2 Keb. 546, 1 Mod. 9 (holding that an award

party to the submission, when payment by one of the parties has been ordered, to satisfy an obligation of another party to the submission, may maintain an action for the sum so awarded.[99]

e. Joint and Several Submission — (I) *Two or More Parties on Each Side.* Where a submission is by more than one party on each side, of all matters in controversy between them, or any of them, it is held that the award is good, although nothing is awarded concerning one of the parties.[1]

(II) *Two on One Side, One on the Other.* And if two on the one part and one on the other part submit themselves, the arbitrator may make an award between one of the two on the one part and him on the other part, as such a submission includes the joint demands of the two as well as their individual demands.[2] But, on the other hand, if the difference is between one person on the one side and all the parties on the other, and the submission be on condition that the award shall comprehend all the parties, it has been held otherwise.[3]

(III) *Payment to One Party For Benefit of Another Party.* Where several parties on the one part and one party on the other part submit to arbitration, it is no objection that one of the several parties on the one part is ordered to pay to another party on the same side, in order to discharge from liability to the latter the sole party on the other part.[4]

(IV) *Submission by One of Several Interested.* One party may submit for himself, though others are interested,[5] and he may submit for himself and take upon himself the peril of the others' dissent or non-acquiescence, though, if the others dissent, they will not be bound, because they are strangers.[6] But, on

that one of the parties discharge the other of a debt to a third person is good, as equity could compel such third person to give a discharge); Dale *v.* Mottram, 2 Barn. K. B. 291; Bedam *v.* Clerkson, 1 Ld. Raym. 123. A direction that one party shall pay money to the servant of another has been upheld. Dudley *v.* Mallery, 3 Leon. 62; Norwich *v.* Norwich, 3 Leon. 62. And an award may direct payment to a third person for the use of a party, even though such person does not appear to be invested with express authority by the party for whose benefit the money is to be paid. Snook *v.* Hellyer, 2 Chit. 43, 23 Rev. Rep. 741, 18 E. C. L. 493.

99. Scearce *v.* Scearce, 7 Ind. 286. But see Millard *v.* Baldwin, 3 Gray (Mass.) 484.

1. French *v.* Richardson, 5 Cush. (Mass.) 450 [*citing* Hayne *v.* Hilborne, 2 Lutw. 1625]; Joyce *v.* Haines, Hardres 399; Bacon Abr. tit. Arbitrament and Award, (E), 329.

2. French *v.* Richardson, 5 Cush. (Mass.) 450; Dater *v.* Wellington, 1 Hill (N. Y.) 319; Fidler *v.* Cooper, 19 Wend. (N. Y.) 285 [*citing* Baspole's Case, 8 Coke 193; Chapman *v.* Dalton, 1 Plowd. 289]; Wood *v.* Adcock, 7 Exch. 468, 16 Jur. 251, 21 L. J. Exch. 204; Carter *v.* Carter, 1 Vern. 259; Bacon Abr. tit. Arbitrament and Award, (E), 329.

Where the real issues are between two of three parties to a submission, which two alone appear before the arbitrators, an award as to their rights is binding upon them. Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367. And where the award is silent as to any others than the persons really submitting it will not be invalidated by reciting that the submission was between two parties on the one part and one on the other. Caldwell *v.* Dickinson, 13 Gray (Mass.) 365.

Submission omitting "between them, or either of them."— And a submission of all matters between several parties, without saying "between them, or either of them," has been held sufficient to support an award in favor of one of them against another one. Athelston *v.* Moon, Comyn 547 [*cited* in Fidler *v.* Cooper, 19 Wend. (N. Y.) 285].

3. Bacon Abr. tit. Arbitrament and Award, (E), 329. In Bean *v.* Newbury, 1 Keb. 790, 1 Lev. 139, it was held that, under a submission by two on the one part and one on the other, an award between one of the two on the one part and the sole party on the other was void; but the submission in this case was with the clause "so that the award be ready," etc., before a certain day. See also, in this connection, *infra*, VI, J, 6, c.

4. Boston *v.* Brazer, 11 Mass. 447, holding that where a city, in widening a street, is liable to injured abutters, and is entitled to compensation from benefited abutters, and the determination of these matters is submitted to arbitration by the city and the abutters, an award which directs payment from a benefited abutter to an injured one, instead of to the city directly, is valid.

5. Jones *v.* Bailey, 5 Cal. 345; McBride *v.* Hagan, 1 Wend. (N. Y.) 326; Fletcher *v.* Pollard, 2 Hen. & M. (Va.) 544.

6. Forrer *v.* Coffman, 23 Gratt. (Va.) 871; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Strangford *v.* Green, 2 Mod. 228.

Award against party who signed as firm.— Where the condition of a bond was that A & Co. should comply with the award of arbitrators, and the award was that A (who, in fact, signed the bond as A & Co.) should pay, or cause to be paid by A & Co., a sum of money in full settlement of the matters submitted,

the other hand, it is held that, if it is an implied condition of the assent of certain parties to the submission that all the parties interested in the subject-matter shall be bound, an award void as to one party is void as to all,[7] and it seems than an award will be of no effect, even as against a party to the submission, when the purpose of the submission could not be accomplished without binding the rights of a person as to whom the award could not operate, as where the undivided interest of such a person necessarily pervades the several portions of the subject-matter, and the award is invoked under circumstances which involve the consid eration of the joint interests as a whole.[8]

(v) *Joint Award Under Joint Submission.* Where several parties make a joint submission of their claims to arbitration, the award is good, though it does not distinguish the portion of money that each party is to receive.[9]

(vi) *Submission by Parties in Different Capacities.* If the submission is general, embracing all matters in difference between the parties, this will include demands made in a representative, as well as in an individual, capacity to bind him,[10] and if all matters growing out of a guardianship are submitted to arbitration, an award cancelling a note given to the ward by the guardian individually, for money received from him, is held to be within the submission.[11] And where a submission is of matters which concern one of the parties in his own right and also in a representative character, an award in his favor is not objectionable because it fails to show his respective interests in his individual and representative capacities, where the submission does not require it.[12] But where claims against a party, both in his own right and in a representative capacity, are submitted to arbitration, it is held that an award is bad which does not distinguish between the moneys which are to be paid by him in his representative capacity and those for which he is personally liable.[13]

this was held, in effect, an award that A & Co. should pay, or, considering the bond as A's sole obligation, and as a stipulation that he should pay, then the award was within the condition, and in either case sufficient. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412. See also Gilbert *v.* Knight, 3 Tex. App. Civ. Cas. § 315.

7. Power *v.* Power, 7 Watts (Pa.) 205.

8. Power *v.* Power, 7 Watts (Pa.) 205, as to partition. So, if one of the holders of a joint promissory note and one of the makers submit to arbitration the question whether the note is valid as to such maker, an award that the note is not valid as to him will not bar a suit by all the holders against all the makers of the note. Woody *v.* Pickard, 8 Blackf. (Ind.) 55. This is in analogy to the effect of an award under the submission by one partner only when set up against the firm, or to a plea of *non est factum* by partners, where it is sought to enforce an award against the partners under a submission entered into by one of them only, notwithstanding the party to the submission would be liable in an action against him for breach of his bond. See, for example, McBride *v.* Hagan, 1 Wend. (N. Y.) 326; Tillinghast *v.* Gilmore, 17 R. I. 413, 22 Atl. 942; Stead *v.* Salt, 3 Bing. 101, 10 Moore C. P. 389, 11 E. C. L. 58. For the right of one partner to submit for the firm see Partnership.

Plea to bill in equity.—While an award under an agreement, entered into after the bill is filed, to refer the whole subject-matter of the suit to an arbitrator may be pleaded to the bill, yet where all parties to the suit were not parties to the award, though the plaintiff was, and the prayer of the bill was for the execution of the trust deeds under which some of the parties to the suit were interested who were not parties to the award, it was held that the plea of the award should be ordered to stand for an answer, with liberty to except. In such a case the plea could not conclude the suit. Dryden *v.* Robinson, 2 Sim. & St. 529.

9. Vannah *v.* Carney, 69 Me. 221; McGill *v.* Proudfoot, 4 U. C. Q. B. 40.

10. King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715; Elletson *v.* Cummins, 2 Str. 1144.

For personal liability of executor or administrator on a general submission see Executors and Administrators.

11. Overby *v.* Thrasher, 47 Ga. 10.

12. Strong *v.* Beronjon, 18 Ala. 168, holding that if it should become a material question in a future suit upon the same matters, evidence would be admissible to prove the facts.

13. Hoffman *v.* Hoffman, 26 N. J. L. 175; Lyle *v.* Rodgers, 5 Wheat. (U. S.) 394, 5 L. ed. 117. But see Perrin *v.* Perrin, 32 U. C. Q. B. 606.

Individual award — Effect upon successor. — Where an administratrix and a guardian of an estate submit to arbitration a claim of a creditor against the estate, and the award was against the administratrix individually, it was held that the creditor could not maintain an action against another who succeeded the administratrix as administrator of the es-

6. Finality and Completeness — a. General Rule as to Finality. The object of submitting to arbitration being to obtain such a settlement as shall put an end to the dispute and conclude the matters submitted, it is a fundamental rule that no award can be good which is not final, or which fails to give either party repose and quiet in return for the obligation imposed upon him.[14]

b. Application of Rule of Finality — (I) *In General.* The award must be such a disposition of the matters submitted that nothing further remains to fix the rights and obligations of the parties; that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties, and that further litigation shall not be necessary in order to adjust the matters submitted.[15] But it is sufficient if, looking at the whole award, it appears that the

tate. James *v.* Lawrence, 7 Harr. & J. (Md.) 73.

Submission as individual and officer of stock company.— Under a submission of matters between two persons individually, and between one of them individually and the other as an officer of a stock company, an award, after finding that the parties were equal owners of the stock of the company, which orders one of the parties to pay to the other, is good, because the finding that they were equal owners of the stock was a finding that the company was a chartered partnership, and the settlement of the difficulties between the parties was necessarily a settlement of the difficulties between the company and each of the parties. King *v.* Jemison, 33 Ala. 499.

14. *Arkansas.*—Manuel *v.* Campbell, 3 Ark. 324; Lee *v.* Onstott, 1 Ark. 206.

California.— Jacob *v.* Ketcham, 37 Cal. 197.

Georgia.— King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.—Ingraham *v.* Whitmore, 75 Ill. 24; Henrickson *v.* Reinback, 33 Ill. 299.

Louisiana.— Segur *v.* Brown, 1 Mart. (La.) 266, distinguishing between report of referee and award of arbitrators.

Maine.— Colcord *v.* Fletcher, 50 Me. 398; Banks *v.* Adams, 23 Me. 259.

Maryland.— Ebert *v.* Ebert, 5 Md. 353; Carter *v.* Calvert, 4 Md. Ch. 199.

Massachusetts.—Smith *v.* Holcomb, 99 Mass. 552; Fletcher *v.* Webster, 5 Allen (Mass.) 566; Paine *v.* Paine, 15 Gray (Mass.) 299.

Minnesota.— Hoit *v.* Berger-Crittenden Co., 81 Minn. 356, 84 N. W. 48.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333; Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

North Carolina.— Patton *v.* Baird, 42 N. C. 255.

Pennsylvania.— Connor *v.* Simpson, 104 Pa. St. 440; McCracken *v.* Clarke, 31 Pa. St. 498; Young *v.* Shook, 4 Rawle (Pa.) 299; Gonsales *v.* Deavens, 2 Yeates (Pa.) 539; Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87; Semple *v.* Hutchinson, 4 Phila. (Pa.) 249, 18 Leg. Int. (Pa.) 22.

South Carolina.— Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31; Hattier *v.* Etinaud, 2 Desauss. Eq. (S. C.) 570, holding that, in an action to foreclose a mortgage, an award pleaded by the defendants, which ordered payment of a certain sum by the mortgagor, without fixing the time of payment, and allowed him to use the property until payment of such amount, was bad as lacking finality and mutuality, placing the mortgagee altogether in the power of the mortgagor.

Tennessee.— Toomey *v.* Nichols, 6 Heisk. (Tenn.) 159 [*citing* 1 Bacon Abr. tit. Arbitrament and Award, (E), 331].

West Virginia.— Dunlap *v.* Campbell, 5 W. Va. 195.

Wisconsin.— Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

United States.— Carnochan *v.* Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516; The Nineveh, 1 Lowell (U. S.) 400, 18 Fed. Cas. No. 10,276; James *v.* Thurston, 1 Cliff. (U. S.) 367, 13 Fed. Cas. No. 7,186; Talbott *v.* Hartley, 1 Cranch C. C. (U. S.) 31, 23 Fed. Cas. No. 13,732.

England.— Marshall *v.* Dresser, 3 Q. B. 879, 3 G. & D. 253, 12 L. J. Q. B. 104, 43 E. C. L. 1018; Manser *v.* Heaver, 3 B. & Ad. 295, 23 E. C. L. 135; Baillie *v.* Edinburgh Oil Gas Light Co., 3 Cl. & F. 639, 6 Eng. Reprint 1577; Nickels *v.* Hancock, 7 De G. M. & G. 300, 56 Eng. Ch. 232; Ross *v.* Clifton, 9 Dowl. P. C. 356, 5 Jur. 268; Warley *v.* Beckwith, Hob. 306; Turner *v.* Turner, 3 Russ. 494, 3 Eng. Ch. 494.

Canada.— Harrington *v.* Edison, 11 U. C. Q. B. 114; Beatty *v.* McIntosh, 4 U. C. Q. B. 259; Bowen *v.* Samis, 2 Ont. Pr. 76.

See 4 Cent. Dig. tit. "Arbitration and Award," § 291 *et seq.*

See also *infra*, VI, J, 6, c.

15. *California.*— Porter *v.* Scott, 7 Cal. 312.

Louisiana.— St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202.

Massachusetts.— Strong *v.* Strong, 9 Cush. (Mass.) 560. An award that the arbitrators have come "to the final conclusion that in the amount of damages we do not agree on any sum, but our agreement is, that each party pay his own arbitrators," is not such a final award as will bar another action on the same cause. Smith *v.* Holcomb, 99 Mass. 552, 553.

New Jersey.— Hazen *v.* Addis, 14 N. J. L. 333.

New York.— Hicks *v.* Magoun, 38 N. Y. App. Div. 573, 56 N. Y. Suppl. 484.

North Carolina.— Cannady *v.* Roberts, 41 N. C. 422.

matter is determined,[16] and any words used in an award after this purpose is accomplished may be regarded as surplusage.[17]

(II) *That Suits Shall Cease.* An award that a suit involving the matters submitted shall be no further prosecuted, or that all suits between the parties shall cease, is sufficiently final, because it must be taken to mean, not that the suits may be begun again, but that they shall cease absolutely and forever, so that the right itself is gone with the remedy.[18] So, where the right is one which rests in action only, an award which declares that the action should not be prosecuted, and that money awarded is in lieu of the claim involved, operates as an actual extinguishment of the right which rests in action.[19] And where an action and all matters in difference are referred to arbitration, an award that plaintiff has no demand on defendant on any account is final, though the suit is not, in terms, ended.[20]

(III) *Award Need Not Execute Itself or Preclude Possibility of*

Pennsylvania.— Spalding *v.* Irish, 4 Serg. & R. (Pa.) 322 [*citing* Selsby *v.* Russel, Comb. 456].

England.— Hewitt *v.* Hewitt, 1 Q. B. 110, 4 P. & D. 598, 41 E. C. L. 460.

See also *infra*, VI, J, 6, b, (VI).

16. *California.*— Fulmore *v.* McGeorge, 91 Cal. 611, 28 Pac. 92.

Kentucky.—Short *v.* Kincaid, 1 Bibb (Ky.) 420.

Massachusetts.— Caldwell *v.* Dickinson, 13 Gray (Mass.) 365.

North Carolina.— Where the arbitrators have done everything that they could do upon matters submitted to make an award final, and the award is, therefore, as final as the nature of the thing submitted will admit of, it is sufficient. Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576.

South Carolina.— Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31.

Vermont.— All that is meant by the requisite degree of finality is that all that is submitted shall be decided and not left to depend upon some after determination to be made by the parties, or by other arbitrators — so that one looking into the award would say: "This ends the business!" and not: "This settles nothing!" Redfield J., in Akely *v.* Akely, 16 Vt. 450.

Virginia.— Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442.

England.— Jackson *v.* Yabsley, 5 B. & Ald. 848, 7 E. C. L. 461; Cargey *v.* Aitchison, 2 B. & C. 170, 1 L. J. K. B. O. S. 252, 9 E. C. L. 81.

Award on back of submission.— See *infra*, note 42.

17. Surplusage.— Short *v.* Kincaid, 1 Bibb (Ky.) 420; Wright *v.* Cromford Canal Co., 1 Q. B. 98, 4 P. & D. 730, 41 E. C. L. 454. Where parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, he decided in favor of one of the parties, but recommended that the printed statute be compared with the parliament-roll before the matter was settled, under a doubt whether the statute was not misprinted, and it was held that the opinion was in the nature of an award and became final between the parties. Price *v.* Hollis, 1 M. & S. 105.

18. Purdy *v.* Delavan, 1 Cai. (N. Y.) 304; Squire *v.* Grevell, 6 Mod. 34; Strangford *v.* Green, 2 Mod. 228. *Contra*, Tipping *v.* Smith, 2 Str. 1024, holding that an award that all manner of proceedings depending at law should be no further prosecuted, was not final, because it stayed the only proceedings then pending, so that, if plaintiff had brought no suit, he was at liberty to do so, or even to discontinue what was brought and bring new ones.

Discontinuance and payment of costs.— An award that certain actions be discontinued and each party pay his own costs is final. Blanchard *v.* Lilly, 9 East 497.

No ground for distinction between terms.— There is no ground for distinction that an award which shall say that a suit shall be discontinued or dismissed, or shall cease, is good, and an award which shall say a suit shall not be further prosecuted is not good. The force and effect of the expressions are the same. Purdy *v.* Delavan, 1 Cai. (N. Y.) 304.

"Nonsuit" and "dismissal" distinguished.— In Knight *v.* Burton, 6 Mod. 231, it was held that while an award that one of the parties be nonsuited is void, because it is not final, when the award is that a suit commenced be dismissed, it must be understood that the suit shall be dismissed and cease forever.

19. Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522, wherein the matter in controversy related to the right of dower, and it was held that, until assigned, the right is one which rests in action only, and, therefore, an award which declared that an action should cease and not be prosecuted, and ordering the payment of money in lieu of the claim, operated as an actual extinguishment of the right of dower.

20. Rixford *v.* Nye, 20 Vt. 132 (holding that the legal effect of the submission and the award pursuant thereto is to put an end to the suit; that in this case the parties so understood it and acted accordingly, the suit having been discontinued by an entry upon the files); Jackson *v.* Yabsley, 5 B. & Ald. 848, 7 E. C. L. 461.

Litigation. An award is none the less final because it does not execute itself or preclude all future controversies. If it leaves nothing to be done but the performance of a mere ministerial act, it is not faulty for want of finality. It is no objection that litigation may ensue in enforcing it.[21] This rule is forcefully illustrated by the instances of submissions for the settlement of partnership affairs, in which it is held that, where the rights and duties of the partners toward each other are settled, the award is sufficiently final, notwithstanding litigation may spring up on account of the rights and duties of the parties in respect to third persons — as where one of the parties is burdened with the responsibilities of the partnership for its liabilities to such third persons, or there is no actual division of the assets.[22] Arbitrators are not clothed with power to take hold of partnership property and administer the assets.[23]

(iv) *Direction of Conveyance.* Under a submission of mere ownership, or of other questions not requiring a deed to effect mutuality, it is no objection that a conveyance is not directed.[24]

21. *Kentucky.*— Short *v.* Kincaid, 1 Bibb (Ky.) 420, holding that any other construction of the word "final" would place it in the power of either party to make the award incomplete or not final, because he would not perform it.

Rhode Island.— Harris *v.* Social Mfg. Co., 8 R. I. 133, 5 Am. Rep. 549.

South Carolina.— Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31.

Vermont.— Akely *v.* Akely, 16 Vt. 450.

Virginia.— Smith *v.* Smith, 4 Rand. (Va.) 95.

England.— Lingood *v.* Eade, 2 Atk. 501; Philips *v.* Knightley, 2 Str. 903.

Nature of remedy not controlling.— An award, valid in other respects, is not invalidated on account of the nature of the remedy to which the parties are left in order to enforce obedience to the award, provided the remedy be sufficient. Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 23 Eng. Ch. 276.

22. Illustrations of rule.— *Illinois.*— Henrickson *v.* Reinback, 33 Ill. 299.

Kentucky.— Johnston *v.* Dulin, 10 Ky. L. Rep. 403.

Massachusetts.— Strong *v.* Strong, 9 Cush. (Mass.) 560.

New Hampshire.— Parker *v.* Dorsey, 68 N. H. 181, 38 Atl. 785.

New Jersey.— Bell *v.* Price, 22 N. J. L. 578; McKeen *v.* Oliphant, 18 N. J. L. 442.

New York.— Case *v.* Ferris, 2 Hill (N. Y.) 75. In Backus *v.* Fobes, 20 N. Y. 204, partners submitted to arbitration, a creditor thereto assenting to the agreement, under which the arbitrators were to divide and appropriate the assets of the firm for the payment of debts, to determine which of the partners should pay the creditor, and to discharge the other partner, and it was held that the fact that some of the personal property which was before the arbitrators at the hearing was not divided and disposed of was no objection to the award when set up in an action by the creditor against the partner who was discharged of that debt, because the submission did not require that the joint property in each article in the inventory of assets should be terminated by the award.

Pennsylvania.—Wilson *v.* Brown, 82 Pa. St. 437. But see Semple *v.* Hutchinson, 4 Phila. (Pa.) 249, 18 Leg. Int. (Pa.) 22.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420.

Deficiency not provided for.—An award between partners providing for the application of the partnership assets, if there should be a surplus, but not providing for the event of a deficiency, is not necessarily invalid. The court may, in the proper case, assume that the state of the assets is such as to render the latter provision unnecessary. Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 23 Eng. Ch. 276.

23. Partnership property.— Johnston *v.* Dulin, 10 Ky. L. Rep. 403; Lamphire *v.* Cowan, 39 Vt. 420; Lingood *v.* Eade, 2 Atk. 501.

24. Crabtree *v.* Green, 8 Ga. 8, holding that, under a submission directing that when the award is made it shall be entered as the judgment of the court, the determination of the ownership of the land is as effective as would be a judgment in ejectment. In Johnson *v.* Wilson, Willes 248, the arbitrators divided and allotted the whole of the estate in severalty among the parties, which had been previously held by them as tenants in common, but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners, and for this defect the award was held to be void. This case was discredited in Gratz *v.* Gratz, 4 Rawle (Pa.) 411, wherein Kennedy, J., declared that he should not feel bound by it were the same questions to come before him for determination. But see also *infra*, VI, J, 7, b, (iv).

Right of support for building.— An award that one person shall have the right of support for his building and the timbers thereof in a wall erected by the other, and that the latter shall have the same right of support for his building and the timbers thereof, in the manner of the former, is not bad because it does not require the parties to execute conveyances of the right, because if such conveyances are necessary, they can be obtained by proceedings in equity as well as if they were

(v) *Conditional or Alternative Award.* An award may be conditional, so that, to entitle a party to the benefit of it, he may be compelled to show that he has performed, or offered to perform, the condition.[25] An alternative award is good if it finally determines the matters submitted, but only gives to the party charged an option to discharge his liability in one of two ways, or if it orders one thing to be done or, in default thereof, another thing.[26] But a mere hypothetical award of a particular sum, leaving the right of the party to it undetermined,[27] or an alternative award, not made unconditionally, but left to be dependent upon some future determination, is bad.[28] An award is void if there is a condition, and the condition leads to a new controversy.[29]

specifically required by the award. Truesdale *v.* Straw, 58 N. H. 207.

25. Conditional award.— *Alabama.*—Burns *v.* Hindman, 7 Ala. 531.

Massachusetts.—Com. *v.* Pejepscut, 7 Mass. 399.

Pennsylvania.—Grube *v.* Getz, 3 Pa. Co. Ct. 124.

South Carolina.— Brown *v.* Davis, 2 Brev. (S. C.) 468.

Vermont.— Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140.

England.— Furser *v.* Prowd, Cro. Jac. 423. But it was formerly held that a conditional award was void. Crofts *v.* Harris, Carth. 187.

A direction to do an act on the premises of a third party has been held to be good if made conditionally upon obtaining consent of the owner of the land. Turner *v.* Swainson, 2 Gale 133, 5 L. J. Exch. 266, 1 M. & W. 572.

Control over event.— But if the award is to become void upon the happening of an event, whether the event is in the control of the parties or not, it is held that the award is void, because the proviso destroys the certainty and finality of the determination of the matters submitted. Sherry *v.* Richardson, Popham 15; Kinge *v.* Fines, Sid. 59.

26. Alternative award.— *Maine.*— Hanson *v.* Webber, 40 Me. 194.

Michigan.— Clement *v.* Comstock, 2 Mich. 359.

Mississippi.— Williams *v.* Williams, 11 Sm. & M. (Miss.) 393.

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

United States.— Thornton *v.* Carson, 7 Cranch (U. S.) 596, 3 L. ed. 451.

England.—Gabriel *v.* Langton, 4 Wkly. Rep. 88.

Alternative in nature of penalty.— If an award orders one thing to be done, or if not done as ordered, then another thing to be done, in the nature of a penalty, it is sufficient. Russell Arb. & Award (8th ed.) 238 [*citing* Kockill *v.* Wetherall, 2 Keb. 838; Royston *v.* Rydall, Rolle Abr. tit. Arb. H, 8].

27. Hypothetical award.— Lell *v.* Hardesty, 13 Ky. L. Rep. 831]; Carnochan *v.* Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516; Starnes *v.* Molson, 29 L. C. Jur. 278; Goode *v.* Waters, 20 L. J. Ch. 72.

Good for part certain.— Under a submission to arbitration giving power to raise questions of law for the opinion of the court, the arbitrators awarded a certain sum as compensation for damages, and, in a subsequent part of the award, said, "for the purpose of raising the question for the determination of the court, in case it should be pleased to entertain the same." They made such award on a certain principle explained, but that, if the court should think that the damages ought to be estimated on another principle which they stated, then they should award another certain sum, and it was held that the first sum was positively awarded and that the hypothetical adjudication which followed might be rejected as surplusage. Wright *v.* Cromford Canal Co., 1 Q. B. 98, 4 P. & D. 730, 41 E. C. L. 454. See also *infra*, note 91.

28. Coghill *v.* Hord, 1 Dana (Ky.) 350, 25 Am. Dec. 148; Connor *v.* Simpson, 104 Pa. St. 440, holding that where the arbitrator thus made an alternative award of two different sums, depending upon a question of law which he declined to decide because he was not a lawyer, an action could not be maintained upon the award, and it was error for the court to decide the question of law and give judgment for one of the sums found by the arbitrator.

See also *infra*, VI, J, 10.

Costs to be paid by party in default.— Where the costs of making the submission a rule of court are in the discretion of the arbitrator, an award that such costs should be paid by such of the parties through whose default, in performance of the award, it should become necessary, is bad for want of finality. Williams *v.* Wilson, 1 C. L. R. 921, 9 Exch. 90, 23 L. J. Exch. 17; Smith *v.* Wilson, 2 Exch. 327, 18 L. J. Exch. 320.

Acquittance not condition.— An award that one party shall pay the other a certain amount, on condition that each should acquit the other on all things submitted, is not a conditional, but a final, award. Linfield *v.* Ferne, 3 Lev. 18.

29. Lincoln *v.* Whittenton Mills, 12 Metc. (Mass.) 31. But see Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576, wherein it was held that an award of a certain sum upon transactions between merchants, with the express condition that, if any outstanding debts are made to appear due, they are to be allowed against the balance found, does not render the award so uncertain that a verdict upon it should be set aside where defendant has not claimed any benefit by reason of the condition.

(VI) *Reservation or Delegation of Future Authority.* The final determination of all matters submitted must be by the arbitrators, and they cannot reserve to themselves or delegate to others the power of performing any part of that duty thereafter. As far as the judicial determination of the matters involved is concerned, that must be completely made when the arbitrators purport to decide the case.[30] A reservation of authority to make alterations and corrections is a reservation of judicial authority, and therefore obnoxious to this rule.[31] But it is not objectionable if the award completely determines the matters submitted, leaving to be done acts which are purely ministerial, or amount to mere computation.[32] If the reservation is only as to matters not submitted, the award may be

30. Reservation of judicial authority.— *Alabama.*— Comer *v.* Thompson, 54 Ala. 265.

Kentucky.— Lell *v.* Hardesty, 13 Ky. L. Rep. 831, holding that an award which provides for the hearing of further evidence is not final, notwithstanding further evidence was not heard.

Maine.— Colcord *v.* Fletcher, 50 Me. 398.

Maryland.— Archer *v.* Williamson, 2 Harr. & G. (Md.) 62.

Massachusetts.— Lincoln *v.* Whittenton Mills, 12 Metc. (Mass.) 31.

Minnesota.— Hoit *v.* Berger-Crittenden Co., 81 Minn. 356, 84 N. W. 48.

Mississippi.— Rhodes *v.* Hardy, 53 Miss. 587.

New Hampshire.—An award that defendant shall pay certain sums "unless he shows it paid" is invalid. Whitcher *v.* Whitcher, 49 N. H. 176, 177, 6 Am. Rep. 486. See also Pedley *v.* Goddard, 7 T. R. 73, 4 Rev. Rep. 382. Where an award expressly leaves part of the matter submitted to be settled by further award, an indorsement on the original submission, extending the time for making the award, does not imply that the partial award shall be good even though no further hearing were had and no final award is ever made. Davis *v.* Dyer, 54 N. H. 146.

New York.—Herbst *v.* Hagenaers, 137 N. Y. 290, 33 N. E. 315, 50 N. Y. St. 687 [*affirming* 62 Hun (N. Y.) 568, 17 N. Y. Suppl. 58, 43 N. Y. St. 54].

Pennsylvania.— Spalding *v.* Irish, 4 Serg. & R. (Pa.) 322; Hamilton *v.* Hart, 23 Wkly. Notes Cas. (Pa.) 567.

England.— Winch *v.* Saunders, Cro. Jac. 584, 2 Rolle 214; Thinne *v.* Rigby, Cro. Jac. 314; *In re* Tandy, 9 Dowl. P. C. 1044, 5 Jur. 726; Lindsay *v.* Lindsay, 11 Ir. C. L. 311; *In re* Goddard, 19 L. J. Q. B. 205, 1 L. M. & P. 25; Selby *v.* Russell, 12 Mod. 139; Glover *v.* Barrie, 1 Salk. 71; Pedley *v.* Goddard, 7 T. R. 73, 4 Rev. Rep. 382.

See also *supra*, III, F, G.

To do an act acceptably to third person.— An award which requires the doing of an act in a manner acceptable to a third person is not final. Littlefield *v.* Smith, 74 Me. 387; Tomlin *v.* Fordwich, 5 A. & E. 147, 5 L. J. K. B. 209, 6 N. & M. 594, 31 E. C. L. 559. And a direction to execute such bond for security for such releases as a stranger shall advise has been held bad. Rolle Abr. tit. Arb. H, 6; Emery *v.* Emery, Cro. Eliz. 726.

An award subject to the opinion of another is invalid. Ellison *v.* Bray, 9 L. T. Rep. N. S. 730.

Terms considered as final adjudication.— Where an action by a lessee for damages for breach of a covenant for quiet enjoyment was referred to arbitrators, an award that a certain sum was to be paid the lessee, reciting that any arrears of rent due from the lessee should be paid by him, was held to be sufficiently final, and the recital was in effect a statement that the arbitrators had adjudicated such arrears in making the award. Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904.

Completion of award after reservation of authority.— Where the arbitrators reserve to themselves the right to reconsider a claim which they allowed the party against whom they awarded, and then completed the award without reconsidering the claim, it was held that the reservation was void and the award good for the sum awarded. Byars *v.* Thompson, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

31. Alterations and corrections.— McCrary *v.* Harrison, 36 Ala. 577; Hooker *v.* Williamson, 60 Tex. 524.

32. Purely ministerial acts.— Archer *v.* Williamson, 2 Harr. & G. (Md.) 62; Carter *v.* Calvert, 4 Md. Ch. 199; Owen *v.* Boerum, 23 Barb. (N. Y.) 187; Solomons *v.* McKinstry, 13 Johns. (N. Y.) 27 [*affirming* 2 Johns. (N. Y.) 57 (holding that an award that, upon proof of errors in addition or calculation of interest, such proof being made by the party against whom, to the party in whose favor, the award was made, the successful party in the award should immediately refund the amount of such error was sufficiently final, because the rational presumption was that the award adopted the mode recognized in courts of justice, and that the errors referred to were exclusively confined to mistakes which the umpire might have made in multiplication or addition of figures; that no part of the controversy was left open, as the terms above used meant that the correction of mistakes depended upon proof by legal means, and that the party against whom the award was made could not have such relief except by application to a court of equity; that, therefore, that part of the award which provided for the correction of errors was merely surplusage, and gave no other remedy than that which the party would have had without the provision)]; Thorpe *v.* Cole, 2 C. M. & R. 367, 4 Dowl. 457, 5 L. J. Exch. 24, 281, 1 M. & W. 531. In Lingood *v.* Eade, 2 Atk. 501, it was

good as to the matters submitted, and void only as to the reservation of authority.[33] And where the submission embraces the determination of a right, as depending upon some future act, it does not destroy the finality of the award that the liability fixed by it is made to depend upon the doing of that act.[34]

c. Decision of All Matters Submitted — (I) *Rule Requiring Completeness.* The power of the arbitrators being confined by the submission, as already shown, the rule is not only that the arbitrators cannot go beyond the submission, but that they must decide all the matters embraced in the submission which are brought before them by the parties, or which are not withdrawn from their consideration by the parties. If they violate this rule, or if the award shows that they have not acted within it, the award will be void.[35] It is no answer to say that a party

held that where the arbitrators awarded mutual releases and left it to the court to give directions to the master to settle the form thereof, the award was good. So, a direction that one party should execute such bond to secure the amount awarded as the opponent's counsel should advise was held to be a delegation to the counsel, not as arbitrator, but to act merely ministerially. Cater *v.* Startut, Rolle Abr. tit. Arb. H, 7, Style 217. But an award directing certain parties to execute such conveyances, releases, etc., as might be necessary to pass their respective interests, was held to be void because it reserved to the arbitrator power to appoint another to settle the proper deeds. *In re* Tandy, 9 Dowl. P. C. 1044, 5 Jur. 726. Where it was awarded that one party should pay his part of the expense of a voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage, this was held good, because the expense and the loss might be ascertained by calculation. Beale *v.* Beale, 3 Vent. 65 [*cited* in Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576]. It would seem, however, that some of these cases — as, for instance, the last one above cited — do not show as strict an application of the rule against the reservation or delegation of authority as those cited generally to the rule, *supra*, note 30 — as for instance, Colcord *v.* Fletcher, 50 Me. 398; Hoit *v.* Berger-Crittenden Co., 81 Minn. 356, 84 N. W. 48; Herbst *v.* Hagenaers, 137 N. Y. 290, 33 N. E. 315, 50 N. Y. St. 687.

33. **Reservation as to matters not submitted.**— Manser *v.* Heaver, 3 B. & Ad. 295, 23 E. C. L. 135; Goddard *v.* Mansfield, 19 L. J. Q. B. 305.

But if the delegation of authority is partial, it will, nevertheless, avoid the award, which is indivisible. Tomlin *v.* Fordwich, 5 A. & E. 147, 5 L. J. K. B. 209, 6 N. & M. 594, 31 E. C. L. 559; Johnson *v.* Latham, 19 L. J. Q. B. 329, 1 L. M. & P. 348. See also *infra*, VI, J, 10.

34. Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Miller *v.* De Burgh, 4 Exch. 809, 19 L. J. Exch. 127, 1 L. M. & P. 177 (under a submission with power to order what the arbitrator should think fit to be done by either of the parties); Boodle *v.* Davies, 3 A. & E. 200, 1 Hurl. & W. 420, 4 N. & M. 788, 30 E. C. L. 109 (under a submission empowering the arbitrators to award as to the future use and enjoyment of property, and the future care and management thereof).

See also *supra*, VI, J, 3, d.

Terms employed in award not covering future use.— In Benson *v.* White, 101 Mass. 48, it was held that a provision in an award, that certain property should continue to be held by the parties as they had before held it, did not destroy the finality of the award where such provision was not a condition upon which the award was to operate, but was intended only as an expression that the award had no reference to such property.

35. *California.*—White *v.* Arthur, 59 Cal. 33; Porter *v.* Scott, 7 Cal. 312. A useless and invalid determination of one item properly presented within the general terms of a submission is as fatal to the award as an omission to notice the item at all. This is not a case within the doctrine that an award may be good in part and bad in part. Muldrow *v.* Norris, 12 Cal. 331.

Connecticut.—Parkhurst *v.* Powers, 2 Root (Conn.) 531.

Florida.— O'Bryan *v.* Reed, 2 Fla. 448.

Illinois.— Steere *v.* Brownell, 113 Ill. 415; Stearns *v.* Cope, 109 Ill. 340; Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; Sherfy *v.* Graham, 72 Ill. 158; Tucker *v.* Page, 69 Ill. 179; Buntain *v.* Curtis, 27 Ill. 374; Whetstone *v.* Thomas, 25 Ill. 361; Ballance *v.* Underhill, 4 Ill. 453; Busse *v.* Agnew, 10 Ill. App. 527. If two parties submit their respective claims, and the arbitrators consider the claims of one only, and refuse to consider the claims of the other, the latter may pay the amount awarded against him and maintain a suit for his original claim. Pritchard *v.* Daly, 73 Ill. 523.

Iowa.— Amos *v.* Buck, 75 Iowa 651, 37 N. W. 118; Love *v.* Burns, 35 Iowa 150; Sharp *v.* Woodbury, 18 Iowa 195; Thompson *v.* Blanchard, 2 Iowa 44.

Kansas.— Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Kentucky.— Burnam *v.* Burnam, 6 Bush (Ky.) 389.

Maryland.—Archer *v.* Williamson, 2 Harr. & G. (Md.) 62; Griffith *v.* Jarrett, 7 Harr. & J. (Md.) 70.

Massachusetts.— Rollins *v.* Townsend, 118 Mass. 224; Camp *v.* Sessions, 105 Mass. 236; Parker *v.* Clark, 104 Mass. 431; Houston *v.* Pollard, 9 Metc. (Mass.) 164; Boardman *v.* England, 6 Mass. 70.

against whom an award is made would have submitted the part awarded upon, without the other, where it is not certain that the same, or a similar award, or one for the same party, would have been made if all parts submitted had been passed upon.[36]

(II) *AWARD MAY BE CONFINED TO MATTERS PRESENTED*—(A) *In General.* Parties have the right to submit a part only of their disputes, or of the subjects which might be covered by the submission, and, where the submission is general, it is not necessary that the award should embrace any matters except those which are brought to the attention of the arbitrator by the parties.[37] In this connection

New Hampshire.— Tudor *v.* Scovell, 20 N. H. 171; Varney *v.* Brewster, 14 N. H. 49; Whittemore *v.* Whittemore, 2 N. H. 26.

New Jersey.— Harker *v.* Hough, 7 N. J. L. 428; Richards *v.* Drinker, 6 N. J. L. 307.

New York.— Jones *v.* Welwood, 71 N. Y. 208.

North Carolina.— Walker *v.* Walker, 60 N. C. 255.

Oregon.— Belt *v.* Poppleton, 11 Oreg. 201, 3 Pac. 27.

Pennsylvania.— Hamilton *v.* Hart, 125 Pa. St. 142, 23 Wkly. Notes Cas. (Pa.) 480, 17 Atl. 473; Johnston *v.* Brackbill, 1 Penr. & W. (Pa.) 364.

Tennessee.— Conger *v.* James, 2 Swan (Tenn.) 213; Gooch *v.* McKnight, 10 Humphr. (Tenn.) 229. An award is not partial and incomplete unless there is an omission of a well-founded matter of litigation within the purview of the submission. Powell *v.* Ford, 4 Lea (Tenn.) 278.

Texas.— Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976.

Vermont.— Young *v.* Kinney, 48 Vt. 22; Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198.

West Virginia.— Bean *v.* Bean, 25 W. Va. 604.

Wisconsin.—Consolidated Water Power Co. *v.* Nash, 109 Wis. 490, 85 N. W. 485; Canfield *v.* Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252; Pettibone *v.* Perkins, 6 Wis. 616; Gear *v.* Bracken, 1 Pinn. (Wis.) 249.

United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869.

England.— Doe *v.* Horner, 8 A. & E. 234, 2 Jur. 417, 7 L. J. Q. B. 164, 3 N. & P. 344, W. W. & H. 348, 34 E. C. L. 569; Stone *v.* Phillipps, 4 Bing. N. Cas. 37, 6 Dowl. P. C. 247, 3 Hodges 302, 7 L. J. C. P. 54, 5 Scott 275, 33 E. C. L. 584; Wakefield *v.* Llanelly R., etc., Co., 3 De G. J. & S. 11, 68 Eng. Ch. 9; Mitchell *v.* Staveley, 16 East 58, 14 Rev. Rep. 287; Randall *v.* Randall, 7 East 81, 3 Smith K. B. 90, 8 Rev. Rep. 601; Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 23 Eng. Ch. 276; Fagan *v.* Fagan, 12 Ir. Ch. 483; Winter *v.* Munton, 2 Moore C. P. 723; Bowes *v.* Fernie, 4 Myl. & C. 150, 18 Eng. Ch. 150; Bradford *v.* Bryan, Willes 268.

Canada.— Baby *v.* Davenport, 2 U. C. Q. B. 65; Benedict *v.* Parks, 1 U. C. C. P. 370; Kemp *v.* Henderson, 10 Grant Ch. (U. C.) 54; Tate *v.* Janes, 1 L. C. Jur. 151; Atkinson *v.* Potts, 10 N. Brunsw. 262.

See also *supra*, VI, J, 6, a.

Appraisement.— Failure to include in an appraisement any part of the property is fatal to the appraisement. Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 51 N. W. 1149; Hong Sling *v.* National Assur. Co., 7 Utah 441 (as to omission to take into consideration values of articles missing or destroyed); Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5. But where items were not included in the schedule submitted to appraisers, and were not claimed before the appraisers to be included in the policy, it was held that the insured could not complain that such items were not included in the award. Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

See also *infra*, VI, J, 10, b, (II).

Decision of facts.— Where an action for injuries occasioned by the negligence of a person alleged to be defendant's servant was referred to arbitration by rule of court, and the main question involved was whose servant was the driver of a wagon the starting and driving of which caused the injury, this latter was held to be a question of fact which the arbitrator was bound to decide, and which could not be referred to the court as a matter of law. Preston *v.* Knight, 120 Mass. 5.

Estoppel by objection to consideration of item.— If one of the parties objects to a particular demand made by the other, that it ought not to be taken into consideration by the arbitrators, and, therefore, it is not examined by them, he cannot afterward be heard to say that such demand was within the submission. Page *v.* Foster, 7 N. H. 392.

36. Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198. And this applies with peculiar force when the claims are on different sides of the submission. Morse *v.* Hale, 27 Vt. 660.

37. *California.*— Carsley *v.* Lindsay, 14 Cal. 390; Muldrow *v.* Norris, 12 Cal. 331.

Connecticut.— Parmelee *v.* Allen, 32 Conn. 115.

Georgia.— Sheffield *v.* Clark, 73 Ga. 92.

Illinois.—Whetstone *v.* Thomas, 25 Ill. 361; Ballance *v.* Underhill, 4 Ill. 453; McDonald *v.* Bacon, 4 Ill. 428; Busse *v.* Agnew, 10 Ill. App. 527.

Maine.— Hayes *v.* Forskoll, 31 Me. 112.

Massachusetts.—Hodges *v.* Hodges, 9 Mass. 320.

New Hampshire.—Whittemore *v.* Whittemore, 2 N. H. 26.

New York.— New York, etc., Lumber Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Jones *v.* Welwood, 71 N. Y. 208; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96. By not bringing a particular question before the arbitrators, the parties will be held

it is held that an objection, by one against whom an award is made, that the claim against him which was included in the submission was not settled by the award is not available to prevent entry of judgment on the award.[38]

(B) *Presumptions.* Unless the contrary appears expressly, or is shown, it will be presumed that all matters which were presented to the arbitrators were passed upon by them, and that the award is in conformity to the submission in this regard.[39]

(C) *Extensiveness of Award as Compared With Submission*—(1) NEED NOT BE COEXTENSIVE IN TERMS. An award need not be, in terms, as extensive as the submission. If the submission is general, and it does not appear that anything else was in dispute or that any other matters existed than those which are embraced in the award or were brought to the attention of the arbitrators, the

to have put such construction on the submission that the award will not be objectionable for failure of the arbitrators to take into consideration such question. Shepard *v.* Merrill, 2 Johns. Ch. (N. Y.) 276.

North Carolina.—Walker *v.* Walker, 60 N. C. 255.

Pennsylvania.—Hewitt *v.* Furman, 16 Serg. & R. (Pa.) 135.

Texas.— Houston, etc., R. Co. *v.* Newman, 2 Tex. App. Civ. Cas. § 349.

Vermont.— Young *v.* Kinney, 48 Vt. 22.

West Virginia.— Tennant *v.* Divine, 24 W. Va. 387.

England.— Baspole's Case, 8 Coke 193; Middleton *v.* Weeks, Cro. Jac. 200; Rees *v.* Waters, 4 Dowl. & L. 567, 16 M. & W. 263; Hawksworth *v.* Brammall, 5 Myl. & C. 281, 46 Eng. Ch. 281; Trimingham *v.* Trimingham, 4 N. & M. 786; Fagan *v.* Fagan, 12 Ir. Ch. 483.

Canada.— Baby *v.* Davenport, 2 U. C. Q. B. 65.

The reason seems to be that in such case there is no enumerated item omitted which, as a condition precedent, was to have been adjudicated, and, though the agreement may in some sense be broken, this does not arise from neglect on the part of the arbitrators. Whittemore *v.* Whittemore, 2 N. H. 26.

No controversy before the arbitrators.— Where an action for the recovery of damages was submitted, an objection that the award did not decide that the acts done by defendant were without right was held to be untenable where it did not appear that there was any controversy on the subject before the arbitrators. Jones *v.* Cuyler, 16 Barb. (N. Y.) 576.

Parties must bring forward their evidence. — If a party omits to present his evidence as to a particular point, he cannot object because it was not considered. Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251.

Action for breach of bond.— If the agreement be by bond to submit all demands to arbitration, but only a part of those existing between the parties are laid before the arbitrator, an action will lie for a breach of the agreement. Whittemore *v.* Whittemore, 2 N. H. 26.

38. The reason is that the complaining party could not be prejudiced if it does not appear certainly that the claim was one of the matters submitted; and, therefore, if it was not included in the submission, it was properly excluded from consideration, and if it was included in the submission, the award being general, it would be conclusively presumed that it was settled by the award, so as to conclude the other party from thereafter setting it up. Tennant *v.* Divine, 24 W. Va. 387. See also Warfield *v.* Holbrook, 20 Pick. (Mass.) 531. But as to the effect of an award under a general submission see *infra*, IX, 2.

39. *Alabama.*— Burns *v.* Hendrix, 54 Ala. 78.

Delaware.— Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Georgia.— Sheffield *v.* Clark, 73 Ga. 92.

Illinois.—Darst *v.* Collier, 86 Ill. 96; Hadaway *v.* Kelly, 78 Ill. 286; Seaton *v.* Kendall, 61 Ill. App. 289.

Indiana.— Hawes *v.* Coombs, 34 Ind. 455; McCullough *v.* McCullough, 12 Ind. 487; Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 473.

Maine.— Hayes *v.* Forskoll, 31 Me. 112.

Maryland.— Ebert *v.* Ebert, 5 Md. 353; Caton *v.* MacTavish, 10 Gill & J. (Md.) 192.

Massachusetts.— Gaylord *v.* Norton, 130 Mass. 74; Sperry *v.* Ricker, 4 Allen (Mass.) 17; Strong *v.* Strong, 9 Cush. (Mass.) 560; Tallman *v.* Tallman, 5 Cush. (Mass.) 325.

Michigan.— Clement *v.* Comstock, 2 Mich. 359.

Nebraska.— Sides *v.* Brendlinger, 14 Nebr. 491, 17 N. W. 113.

New Hampshire.— Bean *v.* Wendell, 22 N. H. 582.

Pennsylvania.— Dickerson *v.* Rorke, 30 Pa. St. 390.

Texas.— Smith *v.* Clark, 22 Tex. Civ. App. 485, 54 S. W. 1052.

Vermont.— Young *v.* Kinney, 48 Vt. 22.

Wisconsin.—McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668; Wood *v.* Treleven, 74 Wis. 577, 43 N. W. 488.

England.—Aitcheson *v.* Cargey, 2 Bing. 199, M'Clel. 367, 9 Moore C. P. 381, 13 Price 369, 26 Rev. Rep. 298, 9 E. C. L. 544; Bennett *v.* Brighton Corp., 17 L. T. Rep. N. S. 509, 16 Wkly. Rep. 361.

Where an arbitrator awards mutual and general releases, he must be deemed to have passed upon all the matters submitted. Wharton *v.* King, 2 B. & Ad. 528, 9 L. J. K. B. O. S. 271, 22 E. C. L. 223; Trimingham *v.* Trimingham, 4 N. & M. 786.

award will be good, though it disposes of a particular matter, or is not so comprehensive as the submission,[40] for it will be presumed that other matters were not submitted by the parties to the consideration of the arbitrators.[41]

(2) "Of and Concerning the Premises." If it appears from the recitals in the award that the arbitrators had fully heard and considered all the evidence, this is sufficient to show that they have passed upon all the matters in difference, and the award need not purport to be made "of and concerning the premises," in express terms.[42] But, on the other hand, if the submission is general, and the adjudication applies, in terms, to a particular matter, the award, purporting to be made of and concerning the matters submitted, will be presumed to be good until it is shown that there were other matters presented to the arbitrators which they neglected or refused to decide, and this is true even if the submission contains the *ita quod* clause.[43]

(3) Award of One Thing as Ending Many — (a) In General. An award of one particular thing, for the ending of any number of matters in difference, is sufficient if it concludes all such matters.[44]

40. *Georgia.*— Crabtree *v.* Green, 8 Ga. 8.
Illinois.— Tucker *v.* Page, 69 Ill. 179; Ballance *v.* Underhill, 4 Ill. 453; Busse *v.* Agnew, 10 Ill. App. 527.
Kentucky.—Engleman *v.* Engleman, 1 Dana (Ky.) 437, holding that, where several claims are submitted under a general submission, an award for one of the parties on one or more, and silent as to the others, will be taken to be against him on the latter claims.
Massachusetts.— Tallman *v.* Tallman, 5 Cush. (Mass.) 325; Leavitt *v.* Comer, 5 Cush. (Mass.) 129 (holding that if two partners submit all matters in controversy between them upon the dissolution of a partnership, both individual and partnership matters, an award concerning the latter only, is good, unless it appears that there were in fact individual demands in controversy); Hodges *v.* Hodges, 9 Mass. 320.
Michigan.— Clement *v.* Comstock, 2 Mich. 359.
New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Wright *v.* Wright, 5 Cow. (N. Y.) 197.
Ohio.— Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.
Virginia.— Horrel *v.* McAlexander, 3 Rand. (Va.) 94.
United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869. If the submission be of all actions, real and personal, an award of actions personal only is good, as it will be presumed that no actions real were depending between the parties. Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121.
England.— Hawkins *v.* Colclough, 1 Burr. 274, 2 Ld. Ken. 553; Ormelade *v.* Cooke, Cro. Jac. 354; Wyatt *v.* Curnell, 1 Dowl. N. S. 327; Bacon Abr. tit. Arbitrament and Award, (E), 327.
Award up to date before submission.— In Barnes *v.* Greenwel, Cro. Eliz. 858, the submission was of all suits, etc., depending until the day of the date of the bond of submission, which was the fourth day of September, and the arbitrator made an award of all matters until the third day of September. It was held that the award was good because it would not be presumed that there were other matters depending, unless they were shown. To the same effect see Ott *v.* Schroeppel, 5 N. Y. 482; Busfield *v.* Busfield, Cro. Jac. 577; Ingram *v.* Milnes, 8 East 445. But see Young *v.* Reuben, 1 Dall. (Pa.) 119, 1 L. ed. 63.

41. See *supra*, note 39.

42. Peters *v.* Peirce, 8 Mass. 398; Brown *v.* Croydon Canal Co., 9 A. & E. 522, 8 L. J. Q. B. 92, 36 E. C. L. 282; Gray *v.* Gwennap, 1 B. & Ald. 106, 18 Rev. Rep. 442; Craven *v.* Craven, 7 Taunt. 644, 1 Moore C. P. 403, 18 Rev. Rep. 623, 2 E. C. L. 529; Kyd Awards 172. See also Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561; Sohier *v.* Easterbrook, 5 Allen (Mass.) 311; New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.
Award indorsed on submission or bond.— An award indorsed on the arbitration bond or submission, directing one party to pay a certain sum to the other, "according to the principles of the within bond." is good, without stating that the arbitrators passed upon all matters submitted. Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156. See also Gaylord *v.* Gaylord, 4 Day (Conn.) 422; Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671. Such an award was held to be "of and concerning the premises." Dolbier *v.* Wing, 3 Me. 421.

43. Ott *v.* Schroeppel, 5 N. Y. 482; Wright *v.* Wright, 5 Cow. (N. Y.) 197 [*citing* Risdon *v.* Inglet, Cro. Eliz. 838; Ormelade *v.* Cooke, Cro. Jac. 354; Middleton *v.* Weeks, Cro. Jac. 200]; Hawkins *v.* Colclough, 1 Burr. 274, 2 Ld. Ken. 553; Baspole's Case, 8 Coke 97; Ingram *v.* Milnes, 8 East 445; Bacon Abr. tit. Arbitrament and Award, (E), 327. See also Harrison *v.* Creswick, 13 C. B. 399, 16 Jur. 315, 21 L. J. C. P. 113, 76 E. C. L. 399; Perry *v.* Mitchell, 2 Dowl. & L. 452, 14 L. J. Exch. 88, 12 M. & W. 792; Bradley *v.* Phelps, 6 Exch. 897, 21 L. J. Exch. 310.

44. Hazen *v.* Addis, 14 N. J. L. 333 [*citing* Hopper *v.* Hackett, 1 Keb. 738, 1 Lev. 132, 1

(b) Finding of Balance. Where the submission is general of all matters, or the questions are merely of mutual indebtedness or pecuniary claim, or the claims are for damages capable of being liquidated and ascertained, if the arbitrators, professing to decide the whole subject, find a balance from the one to the other, the award is good although the principles from which their balance resulted are not stated.[45] So, where it appears that the judgment was made up upon a general view of what seemed to the arbitrators just and equitable between the parties, the award will not be set aside because the arbitrators have failed specifically to allow an item admitted in the claim of one party.[46]

(4) Under Submission of Enumerated Matters. Where the submission is of divers matters, distinctly enumerated, and it appears from the whole award that the matters submitted were adjudicated upon, it is sufficient though each particular is not specified in the award, unless the submission requires a separate finding as to each matter.[47] But if more than one separate and distinct matter

Salk. 72]; Smith *v.* Demarest, 8 N. J. L. 195; Bacon Abr. tit. Arbitrament and Award, (E), 328.

45. *Alabama.*—Brewer *v.* Bain, 60 Ala. 153.

Connecticut.— Gaylord *v.* Gaylord, 4 Day (Conn.) 422.

Illinois.— Stearns *v.* Cope, 109 Ill. 340; Darst *v.* Collier, 86 Ill. 96.

Indiana.— Hays *v.* Miller, 12 Ind. 187.

Massachusetts.— Harden *v.* Harden, 11 Gray (Mass.) 435; Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Houston *v.* Pollard, 9 Metc. (Mass.) 164. Upon a submission of all claims, whether at law or equity, existing between the parties, the award need not expressly dispose of a pending suit if it purports to be in full of all matters referred. Mickles *v.* Thayer, 14 Allen (Mass.) 114.

Nebraska.— Sides *v.* Brendlinger, 14 Nebr. 491, 17 N. W. 113.

Texas.— Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919.

Vermont.— Bowman *v.* Downer, 28 Vt. 532.

Wisconsin.— Call *v.* Ballard, 65 Wis. 187, 26 N. W. 547; Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

United States.— Myers *v.* York, etc., R. Co., 2 Curt. (U. S.) 28, 17 Fed. Cas. No. 9,997.

England.— Jewell *v.* Christie, L. R. 2 C. P. 296, 36 L. J. C. P. 168, 15 L. T. Rep. N. S. 580; Brown *v.* Croydon Canal Co., 9 A. & E. 522, 1 P. & D. 391, 2 W. W. & H. 124, 36 E. C. L. 282; Beaufort *v.* Swansea Harbour Trustees, 8 C. B. N. S. 146, 98 E. C. L. 146; Harrison *v.* Creswick, 13 C. B. 399, 16 Jur. 315, 21 L. J. C. P. 113, 76 E. C. L. 399; Baker *v.* Cotterill, 7 Dowl. & L. 20, 14 Jur. 1120, 18 L. J. Q. B. 345; Bradley *v.* Phelps, 6 Exch. 897, 21 L. J. Exch. 310; Hopper *v.* Hackett, 1 Keb. 738, 1 Lev. 132, 1 Salk. 72.

General and special submission.— Where the submission is of particular matters and also a general submission of all other demands, an award concerning the particular things, and also for a money payment, is sufficient, as the money payment will be intended to cover all other demands. Strong *v.* Strong, 9 Cush. (Mass.) 560. See also Waters *v.* Pedley, 2 L. J. K. B. O. S. 152.

Separate items of damage.— Under a submission to determine the value of land to be taken for a railroad and damages which the owner will sustain by reason of the road running across his land, the award need not separately find the sum fixed for the value of the land to be taken and that for the damages sustained. Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160.

46. Bean *v.* Wendell, 22 N. H. 582.

47. *Maine.*— Hanson *v.* Webber, 40 Me. 194; Dolbier *v.* Wing, 3 Me. 421.

Massachusetts.— Bigelow *v.* Maynard, 4 Cush. (Mass.) 317.

New York.— Morewood *v.* Jewett, 2 Rob. (N. Y.) 496.

England.— Whitworth *v.* Hulse, L. R. 1 Exch. 251, 12 Jur. N. S. 652, 35 L. J. Exch. 149, 14 L. T. Rep. N. S. 445, 14 Wkly. Rep. 736; Rickards *v.* Rickards, 3 Nova Scotia Dec. 227. If the parties intend that arbitrators shall award distinctly upon each issue, they should so state in the submission. Duckworth *v.* Harrison, 7 Dowl. P. C. 71, 1 H. & H. 349, 2 Jur. 1090, 8 L. J. Exch. 41, 4 M. & W. 432.

Canada.— Rector, etc., St. George's Parish *v.* King, 2 Can. Supreme Ct. 143.

If required by submission.— It has been held that if, on the construction of the agreement of submission, the arbitrator is to decide, separately, the matters referred, he must do so; for, if this is the bargain of the parties, it must be observed; otherwise the arbitrator does not follow the authority given him. Whitworth *v.* Hulse, L. R. 1 Exch. 251, 12 Jur. N. S. 652, 35 L. J. Exch. 149, 14 L. T. Rep. N. S. 445, 14 Wkly. Rep. 736.

Particular reference to one item to the exclusion of others.— Where the award is for a particular item, without mentioning other items which have been properly submitted to the arbitrators, it has been held that, by thus deciding as to the particular items, it will appear, from the omission to refer to the other items, that they were not decided, and the court will not conjecture that the sum awarded is a general balance. Johnston *v.* Brackbill, 1 Penr. & W. (Pa.) 364. See also, to the same point, Carter *v.* Ross, 2 Root (Conn.) 507; Camp *v.* Sessions, 105 Mass. 236.

is specifically submitted, and the general finding does not, necessarily, include all such matters, the award must show that each of the separate matters was considered and passed upon by the arbitrators.[48]

(5) Express Exception of Matters From Decision. If the arbitrators award in relation to one or more things, and say that they will not meddle with the rest, or expressly except from the decision a particular matter within the scope of the submission, the whole award is void,[49] and in such a case it is immaterial whether the submission is general or special.[50]

7. Mutuality of Award — a. Rule Requiring Mutuality. An award to be binding must be mutual.[51] If it covers only a part of the several connective matters submitted to arbitration, giving to one party a benefit and awarding nothing to the other party, but leaving the latter under the necessity of further pursuing his rights in connection with the matters not embraced in the award, the award it is void for want of mutuality.[52] It does not matter that the arbi-

48. Muldrow *v.* Norris, 12 Cal. 331; Houston *v.* Pollard, 9 Metc. (Mass.) 164; Bowman *v.* Downer, 28 Vt. 532, wherein the court distinguished the cases where, besides ascertaining a certain sum to be paid, the arbitrators are required to direct the specific performance of certain acts, in which cases greater certainty than a general award is required. That was the case in Randall *v.* Randall, 7 East 81, 3 Smith K. B. 90, 8 Rev. Rep. 601, where the arbitrators were not only to determine the questions, but also to fix the value to be put on certain hop-poles and potatoes, and also rent to be annually paid by one party to the other, and it was held that a general finding of indebtedness could not be taken as an award as to the annual rent; and this case is distinguished in Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195, from those involving mere questions of mutual indebtedness. So, where the arbitrators were authorized to determine concerning all claims, differences, and disputes relating to certain alleged defects in a building, and certain charges for extra work, etc., and to ascertain what balance might be due in respect of the extras and omission, an award of a gross sum to be paid to the builder, without any decision of the alleged defects, was held to be bad. Ryder *v.* Fisher, 3 Bing. N. Cas. 874, 5 Scott 86, 3 Hodges 222, 32 E. C. L. 401. See also Mississippi, etc., R. Co. *v.* Sioux City, etc., R. Co., 49 Iowa 604; and, generally, the cases cited *supra*, V, J, 6, c, (I).

Where the costs of the cause and of the special jury are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each, otherwise the award is bad. George *v.* Lousley, 8 East 13, 9 Rev. Rep. 366. See also Stonehewer *v.* Farrar, 6 Q. B. 730, 9 Jur. 203, 14 L. J. Q. B. 122, 51 E. C. L. 730; Morgan *v.* Smith, 1 Dowl. N. S. 617, 11 L. J. Exch. 379, 9 M. & W. 427; Richardson *v.* Worsley, 5 Exch. 613, 19 L. J. Exch. 317.

49. Ott *v.* Schroeppel, 5 N. Y. 482 [*citing* Turner *v.* Turner, 3 Russ. 494, 3 Eng. Ch. 494]; Wright *v.* Wright, 5 Cow. (N. Y.) 197 [*citing* Barnes *v.* Greenwel, Cro. Eliz. 858]. Where a claim appeared to be within the submission and the language of the arbitrator was that it was "not taken into account," it was held that this would be understood to mean, not that the claim was rejected by the arbitrator or abandoned by the party, but that the arbitrator made no determination in respect to its validity, and left the demand open. Moore *v.* Cockcroft, 4 Duer (N. Y.) 133.

Expressions not showing refusal to meddle. —Where the award was that all suits and actions should cease and all matters be determined, except in relation to a particular bond, which was awarded to stand in force, it was held that this was not a disclaimer to meddle with the bond, but an express award upon that part. Berry *v.* Penring, Cro. Jac. 399 [*cited* in Richards *v.* Drinker, 6 N. J. L. 307, and in Wright *v.* Wright, 5 Cow. (N. Y.) 197]. So, an award that a particular claim was not a matter then in difference between the parties was held to mean, in effect, that such matter was not referred to the arbitrator, and the award was not obnoxious for the objection that, by such a clause, the arbitrator indicated that he had not adjudicated upon a claim submitted. Cockburn *v.* Newton, 9 Dowl. P. C. 671, 2 M. & G. 899, 3 Scott N. R. 261, 40 E. C. L. 912.

50. Wright *v.* Wright, 5 Cow. (N. Y.) 197.

51. Yeamans *v.* Yeamans, 99 Mass. 585; Williams *v.* Williams, 11 Sm. & M. (Miss.) 393; Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712; Thursby *v.* Helbert, Carth. 159, 3 Mod. 272, 1 Show. 82; Nichols *v.* Grummon, Hob. 68; Tipping *v.* Smith, 2 Str. 1024.

See 4 Cent. Dig. tit. "Arbitration and Award," § 289 *et seq.*

52. Void for want of mutuality.— Conger *v.* James, 2 Swan (Tenn.) 213; Gooch *v.* McKnight, 10 Humphr. (Tenn.) 229.

Properties compared.— The rule that an award must be mutual means nothing more than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made against the other for the cause submitted, or, in other words, that it shall be final. Purdy *v.* Delavan, 1 Cai. (N. Y.) 304; Blackledge *v.* Simpson, 3 N. C. 187, 2 Am. Dec. 614; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576; Macon *v.* Crump, 1 Call (Va.) 575.

An award which complies with the agreement to submit, disposes of all the questions

trators intended that the award should be mutual, if, as a matter of fact, it is not mutual.[53]

b. Award on Both Sides — (I) *General Rule.* Originally, an award, in order to be mutual, must have awarded something on both sides.[54] But this has long been exploded, and the rule is that an award need not, in terms, order something to be done on both sides. On the contrary, if what is ordered to be done on the one side necessarily embraces a complete decision of all the matters in controversy, it is sufficient.[55] But if both parties are required to do certain acts, and those which are to be done by the one are void, and that part is the consideration of the acts required to be done by the other, the award is void for want of mutuality,[56] and, if a party on the one side cannot be compelled to perform, he cannot compel performance on the other side.[57]

(II) *Presumption That Act on One Side Is in Satisfaction* — (A) *General Rule.* The court will intend that an award of one or more things to be done by one, without anything to be done by the other, is in satisfaction of all claims by the other.[58]

(B) *Award of Payment Without Order of Release.* An award is sufficiently mutual which awards the payment of a certain sum, without awarding a release or acquittance on the other side;[59] and it has been held that such an award is suffi-

referred, and responds in all particulars to the submission, is not obnoxious for the objection that it lacks mutuality. Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Bacon *v.* Dubarry, 1 Ld. Raym. 246.

53. Intent immaterial.— Semple *v.* Hutchinson, 4 Phila. (Pa.) 249, 18 Leg. Int. (Pa.) 22.

54. As, for example, having awarded that an obligor in a single bond should pay the debt, the award was held not binding, for want of mutuality, unless it was added that he should thereupon be discharged. Horrel *v.* McAlexander, 3 Rand. (Va.) 94 [*citing* Kyd Awards 224; Browl. 58; Hob. 49]. See also Veale *v.* Warner, 1 Saund. 327*c*; Tipping *v.* Smith, 2 Str. 1024.

55. The true rule.— *Alabama.*— Strong *v.* Beroujon, 18 Ala. 168.

Maine.— Gordon *v.* Tucker, 6 Me. 247.

Massachusetts.— Peters *v.* Peirce, 8 Mass. 398.

New York.— Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

Virginia.— Horrel *v.* McAlexander, 3 Rand. (Va.) 94.

See also *supra*, VI, J, 6, c, (II), (C).

56. Reynolds *v.* Reynolds, 15 Ala. 398. An award which recognizes mutual obligations and fixes the amount to be discharged on one side without fixing the amount to be discharged on the other, is void. Comer *v.* Thompson, 54 Ala. 265. See also *infra*, VI, J, 10.

57. Copeland *v.* Wading River Reservoir Co., 105 Mass. 397.

There must be such mutuality in the submission between the parties to it that payment by one of the sum awarded will afford protection to him. Furbish *v.* Hall, 8 Me. 315; Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712; Onion *v.* Robinson, 15 Vt. 510; Belmont *v.* Tyson, 3 Blatchf. (U. S.) 530, 3 Fed. Cas. No. 1,281; Marsh *v.* Wood, 9 B. & C. 659, 7 L. J. K. B. O. S. 327, 4 M. & R. 504, 17 E. C. L. 296. Thus, where the owner of mortgaged premises entered into an arbitration agreement with a railroad company to assess damages for taking part of the mortgaged premises, and the railroad company had no knowledge of the mortgage, on a bill subsequently filed by the mortgagee to subject the land to the mortgage and to compel the application of the amount awarded to the mortgagor, it was held a good objection that, while the company was sought to be held to its performance, it could not have obtained title to the land if complainant had objected, and that, for this reason of want of mutuality, the award was not binding. Stephenson *v.* Oatman, 3 Lea (Tenn.) 462. See also *supra*, VI, J, 5, a.

58. *Illinois.*— Gerrish *v.* Ayres, 4 Ill. 245.

Indiana.— Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253.

New Jersey.— McKeen *v.* Oliphant, 18 N. J. L. 442.

New York.— Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522 [*citing* Mawe *v.* Samuel, 12 Mod. 234, 2 Rolle 1].

Virginia.— Horrel *v.* McAlexander, 3 Rand. (Va.) 94 [*citing* Kyd Awards, 224].

England.—Baspole's Case, 8 Coke 97*b* [*cited* in Purdy *v.* Delevan, 1 Cai. (N. Y.) 304]; Ormelade *v.* Cooke, Cro. Jac. 354.

59. *Alabama.*— Reynolds *v.* Reynolds, 15 Ala. 398.

Florida.— Blood *v.* Shine, 2 Fla. 127.

New Hampshire.— Spofford *v.* Spofford, 10 N. H. 254.

New Jersey.— McKeen *v.* Oliphant, 18 N. J. L. 442.

New York.— Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268; Solomons *v.* McKinstry, 13 Johns. (N. Y.) 27; Weed *v.* Ellis, 3 Cai. (N. Y.) 253.

Vermont.— The rule is applied that if, by manifest implication, that matter appears which, if positively expressed, would render

ciently mutual without also directing the dismissal of a suit involving the matter submitted to arbitration.[60]

(III) *OWNERSHIP OR TITLE SUBMITTED.* Thus, where the question submitted is as to the ownership of certain property and the amount to be paid for the same, an award which specifies only that a certain amount should be paid is sufficiently mutual, since, by necessary inference, the title to the property is adjudged to be in the other party.[61] If the award itself establishes the title, it is not necessary that a release[62] or bill of sale should be awarded.[63]

(IV) *MUTUAL RELEASES.* An award which puts a final end to the controversy and orders mutual releases or receipts is not obnoxious to the objection that it is not mutual,[64] and an objection, that defendant is first to perform and execute on his part before plaintiff is to execute the general release, is not good.[65]

c. Different Remedies by Opposing Parties. It is not a valid objection to an award that both parties will not have the same remedy to enforce performance.[66]

the award good, that is sufficient to support it. Lamphire *v.* Cowan, 39 Vt. 420.

Virginia.— Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671; Horrel *v.* McAlexander, 3 Rand. (Va.) 94; Macon *v.* Crump, 1 Call (Va.) 575.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698.

United States.— Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121.

England.— Baspole's Case, 8 Coke 97*d*; Horton *v.* Benson, Freem. K. B. 204. See also Haywood *v.* Marsh, 11 Jur. 657, 16 L. J. Q. B. 330. In Veale *v.* Warner, 1 Saund. 327*a*, [*citing* Pickering *v.* Watson, 2 W. Bl. 1117; Hawkins *v.* Colclough, 1 Burr. 274, 2 Ld. Ken. 553; Tomlinson *v.* Arriskin, Comyns 328; Bacon *v.* Dubarry, 1 Ld. Raym. 246; Fox *v.* Smith, 2 Wils. C. P. 267; Cayhill *v.* Fitzgerald, 1 Wils. C. P. 28, 58], it was held that an award was void where everything was to be performed on the one part and nothing on the other. In the note, however, it appeared that the plea in question showed that the arbitrators made their award "of and upon the said premises specified in the said condition," and it was said that it did not seem so clear that the award here pleaded was in fact bad, but, on the contrary, in all probability, it would be held to be sufficiently mutual and final at this day; and that, from the above averment, it must be necessarily intended that the money was awarded to be paid "in satisfaction or on account of the premises," that is, of all matters which have been submitted to the arbitrators, and that the award, without directing a release. was as much a bar to another action as if a release had been expressly awarded.

60. Macon *v.* Crump, 1 Call (Va.) 575. But see Vosburgh *v.* Bame, 14 Johns. (N. Y.) 302.

61. Hanson *v.* Webber, 40 Me. 194.

62. Release need not be awarded.—Jones *v.* Boston Mill Corp., 6 Pick. (Mass.) 148, holding that, where a question of boundaries was submitted, an award that the plaintiff have title as far as a certain line, and that defendant, who was in possession, should give plaintiff a release, was sufficient, without directing plaintiff to give a release to defendant of land on the other side of the line — that a release was not necessary to either party, because the award itself established the title.

Where conveyance to be effected.— But an award which requires payment for land to one party, without directing a conveyance by the other, is bad for want of mutuality, because in such a case the land cannot be vested without a conveyance. Miller *v.* Moore, 7 Serg. & R. (Pa.) 164. See also Loring *v.* Whittemore, 13 Gray (Mass.) 228.

63. Bill of sale need not be awarded.—Ford *v.* Burleigh, 60 N. H. 278. An award that a party shall have a cow at a certain time, without any provision that the other party shall deliver it, transfers the title. Girdler *v.* Carter, 47 N. H. 305.

64. Hill *v.* Hill, 11 Sm. & M. (Miss.) 616; Munro *v.* Alaire, 2 Cai. (N. Y.) 320; Harris *v.* Knipe, 1 Lev. 58; Bacon *v.* Dubarry, 1 Ld. Raym. 246.

65. The objection was raised and overruled in Marks *v.* Marriott, 1 Ld. Raym. 114 [*cited* approvingly in Munro *v.* Alaire, 2 Cai. (N. Y.) 320], holding that defendant's release would not be construed to deprive him of his remedy on the bond, if plaintiff should refuse to perform on his part; and, further, because other matter was awarded to be done by plaintiff without being dependent on the releases.

66. Kunckle *v.* Kunckle, 1 Dall. (Pa.) 364, 1 L. ed. 178, holding that if, under a statutory reference, the court can enforce performance of one part of the award by execution, it is no valid objection that it cannot enforce the other part by execution, if it can do so by attachment; that in such case the remedies are mutual, though not by the same kind of process. This case was referred to approvingly in Reynolds *v.* Reynolds, 15 Ala. 398, which considered it as holding that one party may be entitled to recover by judgment or action, and the other to enforce a compliance by an attachment. In addition to the holding of the first case as above set out, however, the court therein further said that, if the report awards money to be paid on one side and certain other things to be done on the other, the court will enforce neither if it cannot enforce both; and in Pennington *v.* Bowman, 10 Watts (Pa.) 283, it was held that, under a submission under the Pennsylvania act of 1806, the only mode which the court

8. Certainty in Award — a. Rule Requiring Certainty. An award must be certain. It should be so expressed that no reasonable doubt can arise upon its face as to the meaning of the arbitrators or that the matters in dispute have been finally and conclusively settled, according to the terms of the submission and the intention of the parties.[67] Each party should not only know what he is to do, but should also be able to compel the other to perform what he is ordered to do. This cannot be the case unless the arbitrators make use of language which is intelligible as well to the parties themselves as to those who may be called on to enforce their decisions,[68] so that the award may be enforceable without the aid of

has in enforcing the award being by execution on the judgment, as on the verdict of a jury, the remedy of the parties must be mutual.

For cumulative remedies see *infra*, XI, E, 2, c.

67. *Arkansas.*— Manuel *v.* Campbell, 3 Ark. 324; Lee *v.* Onstott, 1 Ark. 206.

California.— Jacob *v.* Ketcham, 37 Cal. 197; Carsley *v.* Lindsay, 14 Cal. 390; Pierson *v.* Norman, 2 Cal. 599.

Connecticut.— Parkhurst *v.* Powers, 2 Root (Conn.) 531; Carter *v.* Ross, 2 Root (Conn.) 507.

Georgia.— Stanford *v.* Treadwell, 69 Ga. 725; King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.— Ingraham *v.* Whitmore, 75 Ill. 24; Burrows *v.* Guthrie, 61 Ill. 70; McDonald *v.* Bacon, 4 Ill. 428.

Indiana.— Hollingsworth *v.* Pickering, 24 Ind. 435; Hays *v.* Hays, 2 Ind. 28; Parker *v.* Eggleston, 5 Blackf. (Ind.) 128.

Iowa.—Woodward *v.* Atwater, 3 Iowa 61. Though an award may be wanting in certainty and definiteness, yet, if it is designed for the benefit of the party objecting, it is not for him to take advantage of such defect. Tomlinson *v.* Hammond, 8 Iowa 40.

Kentucky.— Blanton *v.* Gale, 6 B. Mon. (Ky.) 260; Coghill *v.* Hord, 1 Dana (Ky.) 350, 25 Am. Dec. 148; Turpin *v.* Banton, Hard. (Ky.) 312; McCullough *v.* Myers, Hard. (Ky.) 197.

Maryland.— Calvert *v.* Carter, 6 Md. 135; Ebert *v.* Ebert, 5 Md. 353.

Massachusetts.— Leominster *v.* Fitchburg, etc., R. Co., 7 Allen (Mass.) 38; Fletcher *v.* Webster, 5 Allen (Mass.) 566; Houston *v.* Pollard, 9 Metc. (Mass.) 164.

Mississippi.—Williams *v.* Williams, 11 Sm. & M. (Miss.) 393; Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

New Jersey.— McKeen *v.* Oliphant, 18 N. J. L. 442; Hazen *v.* Addis, 14 N. J. L. 333.

New York.— Hiscock *v.* Harris, 74 N. Y. 108; Bacon *v.* Wilber, 1 Cow. (N. Y.) 117; Purdy *v.* Delavan, 1 Cai. (N. Y.) 304.

Ohio.— Thomas *v.* Molier, 3 Ohio 266.

Pennsylvania.— McCracken *v.* Clarke, 31 Pa. St. 498; Gratz *v.* Gratz, 4 Rawle (Pa.) 411; Barnet *v.* Gilson, 3 Serg. & R. (Pa.) 340; Gonsales *v.* Deavens, 2 Yeates (Pa.) 539; Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87.

Rhode Island.—An award that a mill-owner should "keep on said cap log flash-boards twelve inches wide at all times, except in times of freshet," was set aside for uncertainty, the word "freshet" so varying in meaning as to necessitate constant litigation. Harris *v.* Social Mfg. Co., 9 R. I. 99, 100, 11 Am. Rep. 224.

Tennessee.— Duberry *v.* Clifton, Cooke (Tenn.) 328.

Vermont.— Hazeltine *v.* Smith, 3 Vt. 535.

West Virginia.— Rogers *v.* Corrothers, 26 W. Va. 238; Dunlap *v.* Campbell, 5 W. Va. 195.

Wisconsin.— Pettibone *v.* Perkins, 6 Wis. 616; Slocum *v.* Damon, 1 Pinn. (Wis.) 520.

England.— Lund *v.* Hudson, 1 Dowl. & L. 236, 12 L. J. Q. B. 365; Price *v.* Popkin, 10 A. & E. 139, 3 Jur. 433, 8 L. J. Q. B. 198, 2 P. & D. 304, 37 E. C. L. 95; Doe *v.* Horner, 8 A. & E. 234, 2 Jur. 417, 7 L. J. Q. B. 164, 3 N. & P. 344, W. W. & H. 348, 35 E. C. L. 569; Wakefield *v.* Llanelly R., etc., Co., 3 De G. J. & S. 11, 68 Eng. Ch. 9.

Canada.— Great Western R. Co. *v.* Hunt, 12 U. C. Q. B. 124; Harrington *v.* Edison, 11 U. C. Q. B. 114.

See 4 Cent. Dig. tit. "Arbitration and Award," § 298 *et seq.*

Uncertainty in an award renders it bad for want of finality.— Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319. See also King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715, wherein it is said that, if an award is certain, it is, generally, final.

68. *Alabama.*— Reynolds *v.* Reynolds, 15 Ala. 398.

Arkansas.— Manuel *v.* Campbell, 3 Ark. 324.

Georgia.— Goldin *v.* Beall, 107 Ga. 354, 33 S. E. 406.

Louisiana.— St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202.

New York.— Stanley *v.* Chappell, 8 Cow. (N. Y.) 235; Schuyler *v.* Van der Veer, 2 Cai. (N. Y.) 235.

North Carolina.—An award, upon the right of parties under a will, which involves the construction of a will, and which is really more difficult to construe than the will, cannot be given effect as settling the rights of the parties. Crissman *v.* Crissman, 27 N. C. 498.

England.— Stonehewer *v.* Farrar, 6 Q. B. 730, 9 Jur. 203, 14 L. J. Q. B. 122, 51 E. C. L. 730.

The test of sufficient certainty or definiteness is whether or not the award may be intelligently executed. Etnier *v.* Shope, 43 Pa. St. 110.

extraneous circumstances, for, unless the uncertainty requires no more to obviate it than a mere reference to a rule or provision of law, or to some fixed standard or mere mathematical calculation, it cannot be cured by averment.[69]

b. Application of Rule — (I) *Certainty to Common Intent* — (A) *In General.* Exact certainty, or provision against all possible contingencies, is not indispensable to the validity of an award — certainty to a common or reasonable intent is all that the law requires.[70] If, by necessary implication, that appears

Awards under rule of court.— In considering objections on account of uncertainty, not so much certainty is required, in order to enable the court to enter up judgment, as in the case of an award under rule of court. Gardner *v.* Masters, 56 N. C. 462.

Statutory remedy.— If the submission authorizes or requires judgment to be entered on the award, the award must be so certain that it may be enforced by execution. McCracken *v.* Clarke, 31 Pa. St. 498.

Character of conveyance.— In directing a conveyance or other deed, the arbitrators should specify the nature and character of the instrument, though he need not himself prepare it. Russell Arb. & Award (8th ed.) 244 [*citing* Thinne *v.* Rigby, Cro. Jac. 314; *In re* Tandy, 9 Dowl. P. C. 1044, 5 Jur. 726; Tebbutt *v.* Ambler, 2 Dowl. N. S. 677, 7 Jur. 304, 12 L. J. Q. B. 220; Tipping *v.* Smith, 2 Str. 1024]; Beatty *v.* McIntosh, 4 U. C. Q. B. 259.

Direction to give security.— An award directing a party to give security is not sufficiently certain if it does not direct the kind of security to be given. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235; Jackson *v.* De Long, 9 Johns. (N. Y.) 43; Thinne *v.* Rigby, Cro. Jac. 314; Tipping *v.* Smith, 2 Str. 1024. But in Peck *v.* Wakely, 2 McCord (S. C.) 79, it was held that an award that plaintiff should give to defendant sufficient indemnity to satisfy certain contracts and certain supposed claims, meant personal responsibility and was sufficiently certain. And in Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470, it was held that an award ordering that notes directed to be given should be "satisfactorily secured," having a well-known commercial meaning, was not void for indefiniteness. But see George *v.* Smith, 4 U. C. C. P. 291.

69. *Alabama.*—Roundtree *v.* Turner, 36 Ala. 555.

Illinois.— Howard *v.* Babcock, 21 Ill. 259 [*citing* McDonald *v.* Bacon, 4 Ill. 428].

Massachusetts.— Benson *v.* White, 101 Mass. 48, holding that an award, which describes a suit which is to be dismissed as a suit in equity in a certain county, is not uncertain where there is no proof that there is more than one suit to which the description might apply.

New Hampshire.—Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

New Jersey.— McKeen *v.* Allen, 17 N. J. L. 506.

Pennsylvania.— Stanley *v.* Southwood, 45 Pa. St. 189; Gratz *v.* Gratz, 4 Rawle (Pa.) 411.

United States.—Alexander *v.* McNear, 28 Fed. 403.

England.— Salmon's Case, 5 Coke 77, Cro. Eliz. 432; Winter *v.* Garlick, Salk. 75. In Cargey *v.* Aitcheson, 2 Dowl. & R. 222, 16 E. C. L. 80, the submission was of matters in difference concerning the value of certain stock and goods, the sum that each party should contribute toward the payment of two thousand five hundred pounds, and the costs of certain actions. The award, after settling their respective portions, was that all such sums as the parties had already expended in respect of those actions should be considered as part of their respective shares, as settled by that award. But the court refused to set aside the award for uncertainty, though they said they should hesitate to grant an attachment for non-performance, but would leave the party to his remedy by action on the award. In that case, it will be perceived, there was no dispute about the sums they had paid, but only as to what proportions of the original debt and costs they were bound to pay; and, therefore, the sums already paid by the parties was matter of averment, as indicated in McKeen *v.* Allen, 17 N. J. L. 506. See also Galvin *v.* Thompson, 13 Me. 367.

70. *Alabama.*— Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725.

Georgia.— Pike *v.* Stallings, 71 Ga. 860.

Illinois.— Ingraham *v.* Whitmore, 75 Ill. 24; Tucker *v.* Page, 69 Ill. 179; Burrows *v.* Guthrie, 61 Ill. 70; Henrickson *v.* Reinback, 33 Ill. 299.

Kentucky.— Brown *v.* Warnock, 5 Dana (Ky.) 492; Short *v.* Kincaid, 1 Bibb (Ky.) 420; Baker *v.* Crockett, Hard. (Ky.) 388.

Maine.— Orcutt *v.* Butler, 42 Me. 83.

Maryland.—Archer *v.* Williamson, 2 Harr. & G. (Md.) 62.

Massachusetts.— Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Strong *v.* Strong, 9 Cush. (Mass.) 560.

New Hampshire.— Panker *v.* Dorsey, 68 N. H. 181, 38 Atl. 785; Truesdale *v.* Straw, 58 N. H. 207.

New Jersey.— McKeen *v.* Allen, 17 N. J. L. 506.

New York.— Perkins *v.* Giles, 50 N. Y. 228; Locke *v.* Filley, 14 Hun (N. Y.) 139; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96; Purdy *v.* Delavan, 1 Cai. (N. Y.) 304.

North Carolina.— Crawford *v.* Orr, 84 N. C. 246; Carson *v.* Carter, 64 N. C. 332; Thompson *v.* Deans, 59 N. C. 22; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576.

Pennsylvania.— Wood *v.* Earl, 5 Rawle (Pa.) 44.

Rhode Island.— Harris *v.* Social Mfg. Co., 9 R. I. 99, 11 Am. Rep. 224.

Vermont.— Soper *v.* Frank, 47 Vt. 368.

which, if positively expressed, would render the award good, nothing more will be required,[71] and, according to the liberal construction extended to these proceedings, if an award is susceptible of two interpretations, that one will be adopted which will give effect to the award.[72]

(B) *Award Capable of Being Rendered Certain.* When an award furnishes a substantial basis by and through which the parties can, by calculation, by reference to a fixed standard or rule of law, or by the inspection of particular things or documents, work out the contemplated result in accordance with the principles settled by, and the rights of the parties declared in, the award, it will be regarded as sufficient. In such cases courts give much force to the maxim *certum est quod certum reddi potest.*[73] The rule is applied even where the award, instead of set-

England.— Hawkins *v.* Colclough, 1 Burr. 274, 2 Ld. Ken. 553; Mays *v.* Cannell, 15 C. B. 107, 3 C. L. R. 218, 1 Jur. N. S. 183, 24 L. J. C. P. 41, 3 Wkly. Rep. 138, 80 E. C. L. 107; Johnson *v.* Latham, 20 L. J. Q. B. 236, 2 L. M. & P. 205.

Canada.— Adam *v.* Carter, 11 N. Brunsw. 49; Montgomery *v.* Moore, 2 Ont. Pr. 98.

Certainty required in contract.— An award which is sufficiently certain to be obligatory as a contract is valid as an award.

Illinois.— Williams *v.* Warren, 21 Ill. 541.

Michigan.— Bush *v.* Davis, 34 Mich. 190.

New York.— Perkins *v.* Giles, 50 N. Y. 228; Boughton *v.* Seamans, 9 Hun (N. Y.) 392.

Vermont.— Akely *v.* Akely, 16 Vt. 450.

Wisconsin.— Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

71. Necessary implication.—*Illinois.*—Whittemore *v.* Mason, 14 Ill. 392, holding that, where arbitrators were authorized to decide to whom a certain piece of fence belonged, and awarded that defendant might take away the nails and stakes put into the fence by one M, a former owner, the effect of this award was to give the residue to plaintiff, and was sufficiently certain.

Massachusetts.— Sears *v.* Vincent, 8 Allen (Mass.) 507, holding that, where the subject-matter of an action is submitted, an award that plaintiff shall pay all the costs of the suit is, by necessary implication, a finding that he shall recover no damages. See also Stickles *v.* Arnold, 1 Gray (Mass.) 418; Buckland *v.* Conway, 16 Mass. 396.

New Jersey.— Coxe *v.* Lundy, 1 N. J. L. 295.

Pennsylvania.— McDermott *v.* U. S. Insurance Co., 3 Serg. & R. (Pa.) 604, holding that an award that plaintiff has failed to establish his claim is equivalent to an award that he has no cause of action.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420; Hicks *v.* Gleason, 20 Vt. 139.

Payment not ordered.— It is no objection that the award does not, in words, direct payment by the one party to the other of the amount at which the damages are assessed, as such direction is fairly to be implied from the finding of damages and the setting forth of facts in the award sufficient to show a legal liability to pay them. Jones *v.* Cuyler, 16 Barb. (N. Y.) 576. See also Fulmore *v.* McGeorge, 91 Cal. 611, 28 Pac. 92; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576. Formerly, direction of payment was necessary, because it was considered that the omission deprived the successful party of the benefit of his remedy by attachment. Russell Arb. & Award (8th ed.) 237 [*citing* Edgell *v.* Dallimore, 3 Bing. 634, 4 L. J. C. P. O. S. 193, 11 Moore C. P. 541, 11 E. C. L. 309; Hopkins *v.* Davies, 1 C. M. & R. 846, 3 Dowl. P. C. 508, 4 L. J. Exch. 113, 5 Tyrw. 506].

The precise terms of the submission need not be employed by the arbitrators. Zell *v.* Johnston, 76 N. C. 302.

72. Susceptible of two interpretations.— Hiscock *v.* Harris, 74 N. Y. 108; Cullifer *v.* Gilliam, 31 N. C. 126; Borretts *v.* Patterson, 1 N. C. 27, 1 Am. Dec. 576; Buckley *v.* Ellmaker, 13 Serg. & R. (Pa.) 71; Wood *v.* Griffith, 1 Swanst. 52, 1 Wils. C. P. 34, 18 Rev. Rep. 18.

The court will not presume the uncertainty of the award, but such must appear upon its face. Pierson *v.* Norman, 2 Cal. 599; Gibbs *v.* Berry, 35 N. C. 388; Rogers *v.* Corrothers, 26 W. Va. 238. See also Clement *v.* Comstock, 2 Mich. 359. Where nothing on the face of the award shows that it may not be rendered certain by matter intrinsic, the presumption will be, until the contrary is shown, that it is certain. Case *v.* Ferris, 2 Hill (N. Y.) 75.

73. *Alabama.*— Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222, holding that, upon an arbitration for the assessment of damages for a railroad right of way which has been already surveyed, an award which refers to the agreement, and assesses the damages at a certain sum for the right of way, taken "according to the survey," is not void for uncertainty.

Georgia.— Anderson *v.* Taylor, 41 Ga. 10.

Illinois.— McMillan *v.* James, 105 Ill. 194; Burrows *v.* Guthrie, 61 Ill. 70 (holding that an award may properly refer to an account); Henrickson *v.* Reinback, 33 Ill. 299; Farr *v.* Johnson, 25 Ill. 522. An award which provides that certain amounts shall be paid in proportion to the parties' interests, which are specially stated in the bill and admitted in the answer, is sufficiently certain. Gudgell *v.* Pettigrew, 26 Ill. 305.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

Michigan.— Clement *v.* Comstock, 2 Mich. 359, holding that an award that one should deliver to another all the personal property which the former had taken by virtue of two

ting out the particulars of the conclusions arrived at, refers to and adopts a previous decision or report, the contents of which are ascertainable with certainty.[74]

(II) *Ascertainment of Amount.* Where the duty required of the arbitrators is the ascertainment of a definite sum, an award which, by failing to fix the amount, leaves that part of the controversy uncertain, and which furnishes no data from which the amount can be computed, is bad.[75] But it is not always

chattel mortgages (describing them), and also by a certain writ of replevin (specifying it), was sufficiently certain, as the presumption was that the mortgages and replevin writ showed what the property was.

Mississippi.— A failure to survey a body of land does not make the appraisement of five dollars and fifty cents per acre void for uncertainty where the contract providing therefor described the tract as containing "680 acres, more or less." Atkinson *v.* Whitney, 67 Miss. 655, 663, 7 So. 644.

New Hampshire.— Parker *v.* Dorsey, 68 N. H. 181, 38 Atl. 785; Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Andrews *v.* Foster, 42 N. H. 376. See also Pike *v.* Gage, 29 N. H. 461.

New Jersey.— Rogers *v.* Tatum, 25 N. J. L. 281; Imlay *v.* Wikoff, 4 N. J. L. 153.

New York.— Locke *v.* Filley, 14 Hun (N. Y.) 139; Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96 (holding that an award on boundary lines, referring to lines of another survey, cannot for that reason be considered uncertain, unless it affirmatively appear that the lines referred to are vague and indefinite; and where the arbitrators cause a survey to be made, and attach a diagram thereof to their award, thus rendering the lines mathematically certain, the map may be taken into consideration as part of the award).

Pennsylvania.—Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87.

Tennessee.— Farris *v.* Caperton, 1 Head (Tenn.) 606: Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

Vermont.— Whitcomb *v.* Preston, 13 Vt. 53.

Wisconsin.— Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

United States.— Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Kingston *v.* Kincaid, 1 Wash. (U. S.) 448, 14 Fed. Cas. No. 7,821.

England.— Wohlenberg *v.* Lageman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600; Massy *v.* Aubry, Style 365; Beale *v.* Beale, 3 Vent. 65.

Reconveyance of mortgaged property.— An award "that the plaintiff shall pay the defendant a certain sum on a particular day, and that then the defendant shall reassign the land mortgaged to him by the plaintiff," is sufficiently certain though it does not say for what term the reassignment shall be—whether for years, life, or in fee — for it shall be understood to be for the whole interest mortgaged. Bacon Abr. tit. Arbitrament and Award, (E). 335 [*citing* Rosse *v.* Hodges, 1 Ld. Raym. 233].

Averment connecting submission and award. —An award may be rendered sufficiently certain by averments connecting the award with the submission. Gaylord *v.* Gaylord, 4 Day (Conn.) 422; Rogers *v.* Tatum, 25 N. J. L. 281; Bryant *v.* Milner, 1 N. C. 398.

74. Santee *v.* Keister, 6 Binn. (Pa.) 36; Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

Statements delivered to parties.— But in Massachusetts, where arbitrators — under the submission prescribed by Mass. Rev. Stat. c. 114, under which an award is not effectual until accepted by the court of common pleas — do not set forth in their award their doings and the result thereof, but refer in their award to statements of their proceedings, which they have delivered to the parties, the award cannot legally be accepted and confirmed. Day *v.* Laflin, 6 Metc. (Mass.) 280.

75. Failure to fix amount.— *Alabama.*— Roundtree *v.* Turner, 36 Ala. 555.

Indiana.— Hollingsworth *v.* Pickering, 24 Ind. 435; Hays *v.* Hays, 2 Ind. 28.

Iowa.— An award of arbitrators, in a dispute between a county and its treasurer, was, in respect to the amount due, in these words, held sufficiently certain: "We find the said J. D. Hillman deficient in the teachers' fund $660.90; interest thereon, at six per cent, to December 15, 1883, $144.48. We find J. D. Hillman deficient in the contingent fund $143.24; interest on the same to December 15, 1883, $10.67. Total deficiency, with interest added, on all fund, $957.08." Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 68, 29 N. W. 806.

Kentucky.— Blanton *v.* Gale, 6 B. Mon. (Ky.) 260.

Nebraska.— St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Dec. 486; School Dist. No. 3 *v.* Aldrich, 13 N. H. 139.

New Jersey.— Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

New York.— Brown *v.* Hankerson, 3 Cow. (N. Y.) 70.

Pennsylvania.— Spalding *v.* Irish, 4 Serg. & R. (Pa.) 322; Burkholder *v.* McFerran, 3 Serg. & R. (Pa.) 421.

Rhode Island.— Harris *v.* Social Mfg. Co., 8 R. I. 133, 5 Am. Rep. 549.

Tennessee.— Duberry *v.* Clifton, Cooke (Tenn.) 328.

Virginia.— Cauthorn *v.* Courtney, 6 Gratt. (Va.) 381.

United States — Alexander *v.* McNear, 28 Fed. 403.

England.— Hewitt *v.* Hewitt, 1 Q. B. 110, 4 P. & D. 598, 41 E. C. L. 460; Hurst *v.* Bambridge, Rolle Abr. tit. Arbitration, Q, 7; Titus *v.* Perkins, Skin. 247; Watson *v.* Watson, Style 28. In Pope *v.* Brett, 2 Saund. 292, an award that A should be paid by B money due

absolutely necessary that an award should state in figures the exact amount to be paid — it is sufficiently certain if nothing remains but a mere mathematical calculation.[76]

(III) *Statement of Conclusion Sufficient.* If the award shows a final disposition of all the matters submitted, it need not indicate the steps by which the arbitrators arrived at their conclusion, and special findings of fact are not neces-

to A as well for task-work as for day-work, and that then A should pay B twenty-five pounds, was held void for uncertainty, because the amount to be paid for task-work, etc., had not been stated. But see Waddle *v.* Downman, 13 L. J. Exch. 115, 12 M. & W. 562, holding that an agreement by the parties that, if the arbitrators should think plaintiff not entitled to recover on account of some articles of iron machinery, the arbitrators should allow him their value at the market price of pig-iron, authorized a mere finding that defendant was to pay plaintiff for these articles as machinery or as pig-iron, and that an award which merely directed defendant to pay for them as pig-iron was good without fixing the amount.

Amount "in furniture."— An award of arbitrators for a certain sum of money "in furniture" is void for uncertainty, and will not support an execution, nor will the court treat the words "in furniture" as surplusage and strike it out, for it cannot be treated as a finding in money, the probable intention, not expressed, being to award the delivery of certain furniture assessed at a certain value. Ramler *v.* Brotherline, 1 Pearson (Pa.) 462.

Deduction of unascertained amount.— An award of a certain sum to one party, from which is to be deducted a sum or sums not fixed by, or capable of being ascertained from, the award, is bad. Parker *v.* Eggleston, 5 Blackf. (Ind.) 128 (wherein the award was in favor of one party for a certain amount, with the exception of an allowance, not fixed, for hauling a number of staves); Fletcher *v.* Webster, 5 Allen (Mass.) 566; Fallon *v.* Kelehar, 16 Hun (N. Y.) 266; Waite *v.* Barry, 12 Wend. (N. Y.) 377; Spalding *v.* Irish, 4 Serg. & R. (Pa.) 322; Zerger *v.* Sailer, 6 Binn. (Pa.) 24.

Contingency.— Where the matters involved in a suit, brought by plaintiff for a violation of the contract under which defendant was to furnish the plaintiff board, etc., as long as he should choose, were submitted to arbitration, an award that defendant should pay to plaintiff a certain sum annually during his life is not uncertain in a legal sense, because the amount depends upon the duration of plaintiff's life. A contract to pay so much money on such a contingency would not be void for uncertainty. Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140.

76. Fixing amount in figures.— *Louisiana.* — St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202.

Maine.— Colcord *v.* Fletcher, 50 Me. 398.

Maryland.— An award to determine the respective rights of parties in a fund is sufficiently certain if it gives the proportion coming to each. Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

Michigan.— Bush *v.* Davis, 34 Mich. 190. But, if the accounts in the books of account referred to are so incomplete that the amount cannot be computed therefrom without other evidence, the award is void. Mather *v.* Day, 106 Mich. 371, 64 N. W. 198.

Missouri.— Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854.

New York.— Waite *v.* Barry, 12 Wend. (N. Y.) 377.

Pennsylvania.— Wood *v.* Earl, 5 Rawle (Pa.) 44.

England.—Hopcraft *v.* Hickman, 3 L. J. Ch. 43, 2 Sim. & St. 130; Higgins *v.* Willes, 3 M. & R. 382. An award that two persons shall pay a debt in proportion to the shares which they hold in a certain ship is sufficiently certain, the ratio of their shares not being a subject of dispute. Wohlenberg *v.* Legeman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600. But an award to pay a moiety of a debt for which A is bound, without saying in what sum, is bad. Gray *v.* Gray, Rolle Abr. tit. Arbitration, Q. 2, 263.

Amount with interest.— To award a certain amount in money, and "interest thereon" from a particular date, is intended to mean, and must be construed to mean, the principal debt, and legal interest upon it. And it is not necessary to explain, in direct and specific terms, that which the law fixes and defines. Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312; Skeels *v.* Chickering, 7 Metc. (Mass.) 316; Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156. So, an award of the amount of three judgments, designated by amount and dates, with interest, is sufficiently certain, since, by the law, the judgments bear interest from their dates. White *v.* Jones, 8 Serg. & R. (Pa.) 349.

Balance not stated.— If sums are found due on each side, the balance need not be stated. Chase *v.* Jefts, 51 N. H. 494; Platt *v.* Hale, 1 Jur. 358, 6 L. J. Exch. 144, M. & H. 191, 2 M. & W. 391.

Value of separate items may be found without stating the aggregate. Saunders *v.* Heaton, 12 Ind. 20; Kendrick *v.* Tarbell, 26 Vt. 416. An award finding two separate sums on two separate issues, without mentioning the aggregate, is good. Smith *v.* Festiniog R. Co., 4 Bing. N. Cas. 23, 6 Dowl. P. C. 190, 3 Hodges 305, 1 Jur. 844, 5 Scott 255, 33 E. C. L. 577. See also *supra*, VI, J, 6, c, (II), (C), (3).

For award of costs see *infra*, VIII, B, 1, d, (I).

sary. It is sufficient if the result is stated.[77] In this respect the same rule governs as is applied to the verdict of a jury.[78] Where the submission is general, of all matters, an award of a particular sum in favor of one of the parties is sufficiently certain.[79]

(IV) *DESCRIPTION OF PROPERTY.* Property must be so described in an award that it may be identified — that the rights and duties of the parties in relation to it may be known with reasonable certainty.[80] The description of property in an

77. *California.*— *In re* Connor, 128 Cal. 279, 60 Pac. 862; Carsley *v.* Lindsay, 14 Cal. 390.

Connecticut.— *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Georgia.— Crabtree *v.* Green, 8 Ga. 8.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422, holding that, under a submission of all matters in dispute with respect to certain land, an award determining that one of the parties has the legal and equitable title, and ordering the other to render immediate possession, sufficiently implies a determination of all questions relating to the title, such as questions of fraud between the parties.

Maine.— Comery *v.* Howard, 81 Me. 421, 17 Atl. 318; Hanson *v.* Webber, 40 Me. 194.

Maryland.— Ebert *v.* Ebert, 5 Md. 353; Caton *v.* MacTavish, 10 Gill & J. (Md.) 192.

Massachusetts.— Blackwell *v.* Goss, 116 Mass. 394; Brown *v.* Bellows, 4 Pick. (Mass.) 179, 192, holding that an award is not uncertain because a "sawmill, fixtures," etc., and two acres of land, were appraised together, at one sum, the parties understanding at the time what articles were included.

Michigan.— Clement *v.* Comstock, 2 Mich. 359.

New Jersey.—Smith *v.* Demarest, 8 N. J. L. 195.

North Carolina.— Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130; Clanton *v.* Price, 90 N. C. 96; Osborne *v.* Calvert, 83 N. C. 365; King *v.* Falls of Neuse Mfg. Co., 79 N. C. 360; Blossom *v.* Van Amringe, 63 N. C. 65; Patton *v.* Baird, 42 N. C. 255.

Pennsylvania.— Graham *v.* Graham, 12 Pa. St. 128.

Tennessee.— Powell *v.* Riley, 15 Lea (Tenn.) 153; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420.

England.— Aitcheson *v.* Cargey, 2 Bing. 199, M'Clel. 367, 9 Moore C. P. 381, 13 Price 369, 26 Rev. Rep. 298, 9 E. C. L. 544; Doe *v.* Richardson, 8 Taunt. 697, 21 Rev. Rep. 513, 4 E. C. L. 341.

Canada.— Bond *v.* Bond, 15 U. C. C. P. 613. See also Everett *v.* Whiteford, 4 U. C. Q. B. 261.

Separate findings of law and fact under statute.— Under a code provision that the rules prescribed in the case of a reference shall be applicable to arbitrators, referees being required, by another provision of the code, to make separate statements of law and fact, an award not containing such separate statements is erroneous unless the requirement is waived. But the defect is not jurisdictional and does not render the award absolutely void. Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388. See also Graves *v.* Scoville, 17 Nebr. 593, 24 N. W. 222; Murry *v.* Mills, 1 Nebr. 456. And for awards sufficiently conforming to the requirement see O'Neill *v.* Clark, 57 Nebr. 760, 78 N. W. 256; Westover *v.* Armstrong, 24 Nebr. 391, 38 N. W. 843.

78. **Analogy to verdict of jury.**— Blossom *v.* Van Amringe, 63 N. C. 65.

79. **Finding of balance** see *infra*, VI, J, 6, c, (II), (C), (3), (b).

80. *Connecticut.*— An award which gives one a share in land, without saying what proportion or how much, is bad. Carter *v.* Ross, 2 Root (Conn.) 507.

Maine.— Banks *v.* Adams, 23 Me. 259, holding that an award to do some act other than the payment of money, in order to be good, should be so certain that a specific performance of the act can be decreed; that, therefore, an action cannot be maintained for an amount awarded in consideration that the other party pay a certain amount in property, "as good as she had received," the kind and quality of the property being thus left undetermined.

New Jersey.—McKeen *v.* Allen, 17 N. J. L. 506; Sheppard *v.* Stites, 7 N. J. L. 90.

New York.—An award "to finish the house" and "to pay for the stove," without saying what house or what stove, is void for uncertainty. Schuyler *v.* Van der Veer, 2 Cai. (N. Y.) 235. An award that A should deliver "the said farm," is void for uncertainty. Brown *v.* Hankerson, 3 Cow. (N. Y.) 70.

North Carolina.—Crissman *v.* Crissman, 27 N. C. 498, holding that an award, upon the rights of parties under a will, which gives to certain parties the right to occupy premises which are not definitely ascertained or ascertainable, with reference to the will, is not sufficiently certain to conclude the rights of the parties under the will.

Ohio.— Thomas *v.* Molier, 3 Ohio 266.

Pennsylvania.— Etnier *v.* Shope, 43 Pa. St. 110. A statutory award which finds a certain sum for plaintiff, upon condition that he deliver possession of a number of articles not definitely specified, is void for uncertainty. Sicard *v.* Peterson, 3 Serg. & R. (Pa.) 468. So, a statutory award which finds for one party in a certain sum, payable upon conveyance by the other party of a certain amount of land, is void for uncertainty in not describing the land. Murray *v.* Bruner, 6 Serg. & R. (Pa.) 276.

England.— Cockson *v.* Ogle, 1 Lutw. 550 (holding that an award that defendant should deliver certain goods and boxes, specifying them, and also "several books," without nam-

award may be by reference, and if the description be certain to a common intent it will be sufficient.[81]

(v) *As to Boundaries.* An award as to boundaries of lands should be of such certainty as to enable an officer to give possession.[82] But an award which runs a distinct line between particularly described objects is sufficiently certain and conclusive of the location of the line, unless it be shown that the objects described are non-existent or incapable of location.[83]

(vi) *As to Time.* When uncertainty as to the time of the performance of an act leaves the rights of the parties only partially determined, the award is bad.[84] But an award which finds a sum due is not uncertain because it does not fix the day of payment, as in such case the money is payable immediately.[85]

(vii) *As to Parties.* An award must be certain as to the particular persons whose rights or duties are affected by its orders;[86] but, under the general

ing them, was void for uncertainty); Bedam *v.* Clerkson, 1 Ld. Raym. 123 (holding an award that defendant should deliver to plaintiff "a certain writing obligatory, or a certain bill obligatory, which he had before," was bad, though, in that case, inasmuch as, by the terms of the award, defendant was entitled to a general release on payment of eight pounds, and plaintiff, in a suit on the arbitration bond, had assigned no other breach but the non-payment thereof, the action was maintained).

81. By reference.— Clement *v.* Comstock, 2 Mich. 359.

Land.— A description sufficient in a deed will be good in an award. Crabtree *v.* Green, 8 Ga. 8; Williams *v.* Warren, 21 Ill. 541. See also Imlay *v.* Wikoff, 4 N. J. L. 153. "All the land held by a certain conveyance from a certain person" is not a void description. Whitcomb *v.* Preston, 13 Vt. 53. An award finding in favor of "the plaintiff by running a line beginning," etc., may be supported as an award to plaintiff of the land adjoining his own up to the dividing line. Massey *v.* Thomas, 6 Binn. (Pa.) 333.

Line to be ascertained by survey.— If an award concerning land claims decides their relative merits and the mode of surveying them, and leaves the boundary to be ascertained by the survey, it is sufficiently certain. Galloway *v.* Webb, Hard. (Ky.) 318. But see Cox *v.* Smyth, Hard. (Ky.) 411, holding that an award, sustaining the validity of one of two conflicting interests, could not be enforced in chancery where it was uncertain in defining the form and location of the entry, and where it did not appear that the survey, which was necessary to determine the validity of the entry, was submitted to the arbitrators.

82. Aldrich *v.* Jessiman, 8 N. H. 516.

83. Crawford *v.* Orr, 84 N. C. 246.

Such award may be impeached by parol proof that the monuments referred to do not exist. Giddings *v.* Hadaway, 28 Vt. 342.

Presumption.—Unless such uncertainty appears upon the face of the award, it will be presumed that the points exist and can be located. Rogers *v.* Corrothers, 26 W. Va. 238.

Description not requiring straight line.— An award establishing a boundary line, from one known monument to another, by land of one of the parties, is void for uncertainty as to the line so described, as such description does not require a straight line. Clark *v.* Burt, 4 Cush. (Mass.) 396.

84. Evans *v.* Sheldon, 69 Ga. 100; Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; Carnochan *v.* Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516. Where an award orders an act to be done in satisfaction — as that one party shall beg the other's pardon — time and place are essential ingredients, and if the award leaves these to be fixed by the injured party, it seems it would be uncertain. Glover *v.* Barrie, 1 Salk. 71 [*cited* in Russell Arb. & Award (8th ed.) 236]. See also Boisloe *v.* Baily, 6 Mod. 221; and *supra*, VI, J, 6, b, (vi).

Reasonable certainty sufficient.— Where an award gave plaintiff a certain sum on surrender by him of a lease held by him of certain premises at the end of the first year of the term of the lease, but did not fix the date of payment thereof, the same was payable when the surrender was to be made. Soper *v.* Frank, 47 Vt. 368. So, an award dated the thirteenth day of October, 1840, ordering that a sum of money be paid on the "28th day of October next," was held sufficient as making the money payable on the twenty-eighth day of that present month of October. Brown *v.* Smith, 8 Dowl. P. C. 867. And an award directing that A shall forthwith execute certain reconveyances to B, and that B shall forthwith execute indemnities and releases to A, means, in the latter case, that B shall execute releases as soon as A shall put himself in the position to call for such execution by himself executing the reconveyances. Boyes *v.* Bluck, 13 C. B. 652, 22 L. J. C. P. 173, 76 E. C. L. 652.

Act on request or in reasonable time.— If the arbitrator directs one party to pay money or execute a release to the other, it is held sufficiently certain, though he mentions no time, because, if a request to do the act is necessary, it will be intended that it must be done in convenient time, and, if no request is necessary, it must be done in a reasonable time. Russell Arb. & Award (8th ed.) 192 [*citing* Freeman *v.* Bernard, 1 Salk. 69].

85. Finding sum due.— Ehrman *v.* Stanfield, 80 Ala. 118; Imlay *v.* Wikoff, 4 N. J. L. 153.

86. Lawrence *v.* Hodgson, 1 Y. & J. 16, 30

rule already stated, this may be fairly intended, though not positively expressed.[87]

(VIII) *IMMATERIAL VARIANCE BETWEEN SUBMISSION AND AWARD.* The submission and award need not conform exactly in the designation of persons and things if the same are in fact intended in both.[88]

9. REPUGNANCY IN AWARD. An award which is repugnant, or inconsistent with itself, is bad — that is, it cannot make orders which are directly in opposition to the rights of the parties, as found and declared.[89]

10. PARTIAL INVALIDITY OF AWARD — a. As Rendering Award Void Pro Tanto — (I) *IN GENERAL.* Originally, it seems, an award which was bad in part was considered altogether bad.[90] But, from an early day, it has been the general rule that an award which is good in part and bad in part will be sustained as to that which is good if the two parts are severable — if the void part is not necessary to the finality of the award under the submission, or if it be not the consideration of the thing awarded to be done on the other side.[91]

Rev. Rep. 754, wherein the award was bad which provided that A or B should do a certain act. See also Rainforth *v.* Hamer, 25 L. T. Rep. N. S. 247.

87. Fairly intended.— Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764 (holding, over the objection that it cannot be ascertained in whose favor the award is made, that an award, entitled in the names of the parties as plaintiff and defendant, and reciting that the arbitrators found for the plaintiff in a certain sum, is sufficient); Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904 (wherein it was held to sufficiently appear that payment was to be made to the one party in the record, in the suit involved in the reference, to whom it could be judicially awarded to be paid). So, a direction that a nuisance erected on defendant's land should be pulled down was held sufficiently certain without saying by whom it should be pulled down, because it would be intended that defendant, who was the owner of the soil, was the party meant. Armitt *v.* Breame, 2 Ld. Raym. 1076, 1 Salk. 76. And, on a reference of an action, a direction that defendant pay the costs was held sufficient without saying to whom, because plaintiff would be intended to be the party to receive them. Baily *v.* Curling, 20 L. J. Q. B. 235, 2 L. M. & P. 161 [*cited* in Russell Arb. & Award (8th ed.) 196].

Surplusage.— An award that a party or his executors or administrators should execute a release was held not void for uncertainty because it might be read as if the order were against him and his executors, etc., and that the introduction of these parties into the award was only cautionary, and would not vitiate it, as they would be bound anyway. Russell Arb. & Award (8th ed.) 195 [*citing* Bacon Arb. tit. Arbitrament and Award, (E), 4; Freeman *v.* Bernard, 1 Ld. Raym. 247; Dawney *v.* Vesey, 2 Vent. 249].

88. Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405; Munro *v.* Alaire, 2 Cai. (N. Y.) 320; Grier *v.* Grier, 1 Dall. (Pa.) 173, 1 L. ed. 87; Spooner *v.* Payne, 4 C. B. 328, 16 L. J. C. P. 225, 56 E. C. L. 328.

89. Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85 (wherein, under a submission, by divided parties of a religious society, of a dispute as to which was entitled to the use of the church, it was held that, upon deciding that neither party had a right to use the church, the arbitrators had no authority to determine that each of the parties should enjoy its use alternately); Ames *v.* Milward, 8 Taunt. 637, 4 E. C. L. 312; Shaver *v.* Scott, 5 U. C. Q. B. O. S. 575.

If the award is separable the first part shall prevail, and the other part, creating the repugnance, shall be rejected. Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522. See also *infra*, VI, J, 10.

90. Before the time of James I, according to Holt, C. J., an award which was void in part was void *in toto*. Russell Arb. & Award (8th ed.) 201 [*citing* Furlong *v.* Thornigold, 12 Mod. 533].

91. Established rule.—*Alabama.*—Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Burrus *v.* Meadors, 90 Ala. 140, 7 So. 469; Bogan *v.* Daughdrill, 51 Ala. 312; Reynolds *v.* Reynolds, 15 Ala. 398.

California.— Connor *v.* Pratt, 128 Cal. 279, 60 Pac. 862; Williams *v.* Walton, 9 Cal. 142; Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

Connecticut.— Parmelee *v.* Allen, 32 Conn. 115 (holding that an action may be maintained on an award which gives damages for trespass, although, in the same award, there is a provision for the location of a boundary line which affects title to land, and which provision is void because of the non-compliance of the submission with the statute); Dutton *v.* Gillet, 5 Conn. 172.

Georgia.—Richardson *v.* Payne, 55 Ga. 167; Powell *v.* Edmondson, 33 Ga. 476; Walker *v.* Walker, 28 Ga. 140, holding that, if an award be good in part and bad in part and also be incomplete, yet, if the incompleteness be as to matter belonging to the void part, the effect of the incompleteness will be confined to that part, and the part which is good will be sustained.

Illinois.— Stearns *v.* Cope, 109 Ill. 340.

Indiana.—Beeber *v.* Bevan, 80 Ind. 31; Carson *v.* Earlywine, 14 Ind. 256; Kintner *v.* State, 3 Ind. 86.

(II) *Several Orders Against Same Party.* The rule that an award may be good in part is properly invoked where the several parts of the award are

Iowa.— Lynch *v.* Nugent, 80 Iowa 422, 46 N. W. 61.

Kentucky.— Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251; Carson *v.* Carson, 1 Metc. (Ky.) 434; Brown *v.* Warnock, 5 Dana (Ky.) 492; Cartwright *v.* Trumbo, 1 A. K. Marsh. (Ky.) 359; Galloway *v.* Webb, Hard. (Ky.) 318; Allen-Bradley Co. *v.* Anderson, etc., Distilling Co., 16 Ky. L. Rep. 350.

Maine.— Littlefield *v.* Waterhouse, 83 Me. 307, 22 Atl. 176; Clement *v.* Foster, 69 Me. 318 (holding that an award given for a larger sum than is proper, by a mere error of computation, which can be corrected by mathematical calculation, is good for the proper sum under the rule stated); Stanwood *v.* Mitchell, 59 Me. 121; Orcutt *v.* Butler, 42 Me. 83; Merrill *v.* Gardner, 40 Me. 232 (holding that an award which cannot be sustained as to the giving of a lien for the security of the amount awarded may, nevertheless, be sustained as to the amount awarded); Boynton *v.* Frye, 33 Me. 216; Gordon *v.* Tucker, 6 Me. 247.

Maryland.— Garitee *v.* Carter, 16 Md. 309; Ebert *v.* Ebert, 5 Md. 353; Caton *v.* MacTavish, 10 Gill & J. (Md.) 192; Cromwell *v.* Owings, 6 Harr. & J. (Md.) 10.

Massachusetts.— Campbell *v.* Upton, 113 Mass. 67; Harrington *v.* Brown, 9 Allen (Mass.) 579; Brown *v.* Evans, 6 Allen (Mass.) 333; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220 (holding that, under a submission to determine the validity of an agreement against a deceased insolvent's estate, an award that nothing was due to the claimants from the estate, followed by a statement that the estate had a good claim against the claimants, was good as to the first part and bad as to the last); Barrows *v.* Capen, 11 Cush. (Mass.) 37; Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Shearer *v.* Handy, 22 Pick. (Mass.) 417; Dickey *v.* Sleeper, 13 Mass. 244; Peters *v.* Peirce, 8 Mass. 398.

Michigan.— Beam *v.* Macomber, 33 Mich. 127.

Mississippi.— Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

Missouri.—Ellison *v.* Weathers, 78 Mo. 115.

Nebraska.— Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Tracy *v.* Herrick, 25 N. H. 381; Chase *v.* Strain, 15 N. H. 535; Thrasher *v.* Haynes, 2 N. H. 429.

New Jersey.— Rogers *v.* Tatum, 25 N. J. L. 281; Hoagland *v.* Veghte, 23 N. J. L. 92; McKeen *v.* Oliphant, 18 N. J. L. 442; Burr *v.* Fairholme, 3 N. J. L. 520.

New York.— Doke *v.* James, 4 N. Y. 568; Shrump *v.* Parfitt, 84 Hun (N. Y.) 341, 33 N. Y. Suppl. 409, 67 N. Y. St. 242; Keep *v.* Keep, 17 Hun (N. Y.) 152; Harrington *v.* Higham, 15 Barb. (N. Y.) 524; Butler *v.* New York, 1 Hill (N. Y.) 489; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; McBride *v.* Hagan, 1 Wend. (N. Y.) 326; Bacon *v.* Wilber, 1 Cow. (N. Y.) 117; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96; Martin *v.* Williams, 13 Johns. (N. Y.) 264 (holding that an award requiring one party to the submission to cause a third person, whom it did not appear had any right to its possession, to deliver the possession of the land to the other party, was void *pro tanto*, because the delivery of possession was wholly disconnected with the other matters involved in the submission and which were covered by the award).

North Carolina.— Knight *v.* Holden, 104 N. C. 107, 10 S. E. 90; Griffin *v.* Hadley, 53 N. C. 82.

Oregon.— Garrow *v.* Nicolai, 24 Oreg. 76, 32 Pac. 1036.

Pennsylvania.— South *v.* South, 70 Pa. St. 195; Wynn *v.* Bellas, 34 Pa. St. 160; Babb *v.* Stromberg, 14 Pa. St. 397.

South Carolina.—Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; McCall *v.* McCall, 36 S. C. 80, 15 S. E. 348; Gibson *v.* Broadfoot, 3 Desauss. (S. C.) 11.

Tennessee.— Pearce *v.* Roller, 5 Lea (Tenn.) 485; Kincaid *v.* Smith, 4 Humphr. (Tenn.) 150 (holding that, where the matter submitted was a claim of a plaintiff against a defendant, an award that plaintiff owed to defendant a certain amount was unauthorized, and would not sustain a judgment for defendant for that amount, but would sustain a general judgment for defendant); Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465 (holding that, under a submission providing that the award should be made the judgment of a justice of the peace, an award which erroneously gives judgment instead of simply finding the facts and leaving it to the justice to enter the judgment, was bad in this respect, but that the good and bad parts of the award were severable).

Vermont.— Hartland *v.* Henry, 44 Vt. 593; Sabin *v.* Angell, 44 Vt. 523; Giddings *v.* Hadaway, 28 Vt. 342; Dalrymple *v.* Whitingham, 26 Vt. 345.

Virginia.— Taylor *v.* Nicolson, 1 Hen. & M. (Va.) 67.

United States.— Lyle *v.* Rodgers, 5 Wheat. (U. S.) 394, 5 L. ed. 117; Republic of Colombia *v.* Cauca Co., 106 Fed. 337; Wise *v.* Geiger, 1 Cranch C. C. (U. S.) 92, 30 Fed. Cas. No. 17,908.

England.—Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Champion *v.* Wenham, Ambl. 245; Manser *v.* Heaver, 3 B. & Ad. 295, 23 E. C. L. 135; Pickering *v.* Watson, 2 W. Bl. 1117; Harrison *v.* Lay, 13 C. B. N. S. 528, 100 E. C. L. 528; Webb *v.* Ingram, Cro. Jac. 663; George *v.* Lousley, 8 East 13, 9 Rev. Rep. 366; Ayland *v.* Nicholls, Freem. K. B. 265; Armitage *v.* Walker, 2 Jur. N. S. 13, 2 Kay & J. 211; Bargrave *v.* Atkins, 3 Lev. 413; Lewis *v.* Rossiter, 44 L. J. Exch. 136, 33 L. T. Rep. N. S. 260, 23 Wkly. Rep. 832; *In re* Goddard, 19 L. J. Q. B. 305, 1 L. M. & P. 25; Winter *v.*

against the same party, or where several sums are awarded against the same party, the award being bad as to one of the orders.[92]

(III) *BAD AS TO COSTS.* If the award in relation to costs is not within the submission, or is otherwise objectionable — as for want of certainty — it is bad only *pro tanto*, and the invalid part as to the costs will not destroy the validity of the award as to the residue.[93]

(IV) *VOID AS TO THOSE NOT PARTIES.* Though an award cannot bind those who are not parties to the submission, the fact that it is against one who is not a party will not render it void as against others who are parties.[94]

b. As Rendering Award Void In Toto — (I) *IN GENERAL.* It is indispensable that the part of an award allowed to stand should appear to be in no way affected by the departure from the submission,[95] and must be in itself final.[96] An award can be sustained in part only in those cases where the subject appears clearly capable of being separated. If the award is not severable and is bad in part — as where that which would be otherwise good is so connected with that which is bad as to show that justice could not be done by permitting a part of the award to have effect — the whole must fall.[97]

Lethbridge, 1 M'Clel. 253, 13 Price 533, 27 Rev. Rep. 721; Pope *v.* Brett, 2 Saund. 292; Doe *v.* Richardson, 8 Taunt. 697, 21 Rev. Rep. 513, 4 E. C. L. 341.

Canada.— Guay *v.* Fradet, 5 Quebec 226.

See 4 Cent. Dig. tit. "Arbitration and Award," § 328 *et seq.*

Void condition.— Where there was a provision in an award that the party shall be entitled to receive the sum awarded after he shall have performed a condition, which condition the arbitrators had no power to impose, it was held that the condition was void, but would not prevent a recovery for the money. New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446. But see Com. *v.* Pejepscut, 7 Mass. 399.

92. *Maine.*— Banks *v.* Adams, 23 Me. 259.

Minnesota.— Bouck *v.* Bouck, 57 Minn. 490, 59 N. W. 547.

Mississippi.— Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

New Jersey.— Hoagland *v.* Veghte, 23 N. J. L. 92.

North Carolina.— Osborne *v.* Calvert, 83 N. C. 365.

Pennsylvania.— Barnet *v.* Gilson, 3 Serg. & R. (Pa.) 340, holding that an award for a certain sum, and also that the party against whom it is awarded shall give security for its payment, if required, is void for the security on account of uncertainty, and because such an award is not within the power of the arbitrator, but it may still be good for the payment.

Wisconsin.— Darling *v.* Darling, 16 Wis. 644.

England.—Kendrick *v.* Davis, 5 Dowl. P. C. 693, W. W. & D. 376; Addison *v.* Gray, 2 Wils. C. P. 293.

Alternative orders.— When an award directs one or another of two things to be done in the alternative, and either of the two is uncertain, unauthorized, or impossible of performance, it is incumbent upon the party to perform the other. Wharton *v.* King, 2 B. & Ad. 528, 9 L. J. K. B. O. S. 271, 22 E. C. L. 223; Oldfield *v.* Wilmer, 1 Leon. 140, 304; Lee *v.* Elkins, 12 Mod. 585; Simmonds *v.* Swaine, 1 Taunt. 549; Bond *v.* Bond, 15 U. C. C. P. 613. See also McDonald *v.* Arnout, 14 Ill. 58; Clement *v.* Comstock, 2 Mich. 359; Thornton *v.* Carson, 7 Cranch (U. S.) 596, 3 L. ed. 451. An award to pay money or give security is valid for the money, though void as to the security, and the latter may be rejected as surplusage. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235. But an award that one party should have land or its value in money, without fixing the time for such election or ascertaining the value of the land, was held to be bad for want of finality. Coghill *v.* Hord, 1 Dana (Ky.) 350, 25 Am. Dec. 148.

93. See *infra*, VIII, B, 2.

94. Sears *v.* Vincent, 8 Allen (Mass.) 507; Mathews *v.* Mathews, 1 Heisk. (Tenn.) 669. See also Weir *v.* West, 27 Kan. 650; Smith *v.* Smith, 4 Rand. (Va.) 95.

An award against party and surety on bond.— Where an award requires one of the parties and the surety on his arbitration bond to pay a certain sum, that part referring to the surety will be regarded as surplusage. Richards *v.* Brockenbrough, 1 Rand. (Va.) 449.

95. McCormick *v.* Gray, 13 How. (U. S.) 26, 14 L. ed. 36.

96. Toomey *v.* Nichols, 6 Heisk. (Tenn.) 159.

97. *Alabama.*—Ehrman *v.* Stanfield, 80 Ala. 118; Reynolds *v.* Reynolds, 15 Ala. 398.

Illinois.— Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; Glade *v.* Schmidt, 20 Ill. App. 157.

Indiana.— McCullough *v.* McCullough, 12 Ind. 487.

Maine.— Sawyer *v.* Freeman, 35 Me. 542; Boynton *v.* Frye, 33 Me. 216; Philbrick *v.* Preble, 18 Me. 255, 36 Am. Dec. 718.

Massachusetts.—Hubbell *v.* Bissell, 13 Gray (Mass.) 298; Lincoln *v.* Whittenton Mills, 12 Metc. (Mass.) 31; Shearer *v.* Handy, 22 Pick. (Mass.) 417.

Michigan.— Mather *v.* Day, 106 Mich. 371, 64 N. W. 198.

(II) *Failure to Decide Part of Matters — Ita Quod Clause.* Formerly, it seems that, when the submission was made conditional by the clause *ita quod arbitrium fiat præmissis*, and recited several distinct matters, if the arbitrator omitted to decide one of them and there were no general words in the award which could be construed to embrace the decision of particular matter, the whole award was bad.[98] But, unless the submission expressly made it conditional, under an *ita quod* clause, that all matters in dispute were to be adjudged, an award of a part was good.[99] This, however, so far as the exception is concerned,

Mississippi.— Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

Missouri.— Ellison *v.* Weathers, 78 Mo. 115.

New Hampshire.—Chase *v.* Strain, 15 N. H. 535; Adams *v.* Adams, 8 N. H. 82; Thrasher *v.* Haynes, 2 N. H. 429. But see Richardson *v.* Huggins, 23 N. H. 106, wherein, upon holding that the award was merely inoperative as to claims of too late a date to be embraced in the award, unless they were such that they could not be separated from the residue, the court said that it did not feel called upon to first presume that claims arising some time after the date of the bond were in fact considered and decided by the arbitrators, and then that the claims were of such a character that they could not be distinguished from the other part of the award.

New Jersey.— Hoagland *v.* Veghte, 23 N. J. L. 92; Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

New York.— Jones *v.* Welwood, 71 N. Y. 208; Briggs *v.* Smith, 20 Barb. (N. Y.) 409.

North Carolina.—Bryant *v.* Fisher, 85 N. C. 69.

Tennessee.— Where it is submitted to arbitrators to determine the value of work done by one party and the amount of payments made by the other therefor, an award which finds the value of the work, but does not determine the amount of payments, is altogether bad. Conger *v.* James, 2 Swan (Tenn.) 213.

Texas.— Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976, holding that, under a submission to arbitrators to ascertain the share which each devisee or legatee was entitled to receive out of the decedent's estate, and to determine the amount to be charged upon such share in favor of the executor, the arbitrators were not authorized to award a portion of the land to the executor in payment of his debt, and such excess of authority is inseparable from the remainder of the award.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420, holding that where the several articles relate to the same subject-matter, being a partnership between the parties, and the different parts are so commingled and mutually dependent that it is impossible to separate them and hold one part operative and the other void, the award must be examined as a whole and, as such, stand or fall.

United States.— New York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246, 15 L. ed. 380; Lyle *v.* Rodgers, 5 Wheat. (U. S.) 394, 5 L. ed. 117.

England.— Marshall *v.* Dresser, 3 Q. B. 879, 3 G. & D. 253, 12 L. J. Q. B. 104, 43 E. C. L. 1018; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Tomlin *v.* Fordwich, 5 A. & E. 147, 5 L. J. K. B. 209, 6 N. & M. 594, 31 E. C. L. 559; Harris *v.* Curnow, 2 Chit. 594, 18 E. C. L. 803; Seckham *v.* Babb, 8 Dowl. P. C. 167, 4 Jur. 90, 9 L. J. Exch. 65, 6 M. & W. 129; Auriol *v.* Smith, Turn. & R. 128.

Canada.— Webster *v.* Black, 6 U. C. Q. B. O. S. 105; Guay *v.* Fradet, 5 Quebec 226; Bourgoin *v.* La Cie du Chemin de Fer de Montréal, 5 App. Cas. 381, 24 L. C. Jur. 193, 3 Montreal Leg. N. 178.

Improper items included in gross amount. — *Maryland.*— Bullock *v.* Bergman, 46 Md. 270.

Massachusetts.— Camp *v.* Sessions, 105 Mass. 236.

New Hampshire.— Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

New York.— Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398, 23 N. Y. St. 192.

England.— Falkingham *v.* Victorian R. Com'rs, [1900] App. Cas. 452, 62 L. J. C. P. 89, 82 L. T. Rep. N. S. 506.

Canada.— Turner *v.* Burt, 24 N. Brunsw. 547.

Designation of several items.— An award cannot be said to be for a gross sum, within the principle that, if the sum awarded is in gross and includes improper items, the whole award is void, because indivisible, when it names specifically the character and amount of each item of which the entire sum is composed. Hartland *v.* Henry, 44 Vt. 593.

98. Wright *v.* Wright, 5 Cow. (N. Y.) 197; Ross *v.* Boards, 8 A. & E. 290, 7 L. J. Q. B. 209, 35 E. C. L. 597; Randall *v.* Randall, 7 East 81, 3 Smith K. B. 90, 8 Rev. Rep. 601; Simmonds *v.* Swaine, 1 Taunt. 549; Bradford *v.* Bryan, Willes 268.

Ita quod, or ita quod de præmissis, is sometimes expressed "so as the same award be made and delivered by a particular day," which admits of the same construction, the "same" referring to everything before mentioned. Risdon *v.* Inglet, Cro. Eliz. 838; Lee *v.* Elkins, Lutw. 545, 12 Mod. 585.

99. Jones *v.* Welwood, 71 N. Y. 208; Baspole's Case, 8 Coke 98*a* [*cited* in Bacon Abr. tit. Arbitrament and Award, (E), 329]. In several cases it appears that the rule permitting a partial award to stand is with a proviso that the omission of other matters does not destroy the equipoise of the consideration, and that it is not a condition of the submission that the award shall be made upon all the points submitted. McNear *v.* Bailey, 18 Me. 251; Simmonds *v.* Swaine, 1 Taunt. 549; Hide *v.* Cooth, 2 Vern. 109.

has been modified both in England and in this country, and, while the conditional clause retains its full force when inserted, and renders an award void where only a part of the matters submitted are passed on, the omission of that clause will not justify a partial award.[1] The intention of the parties should control.[2]

(III) *Want of Mutuality of Remedy.* Each party must be in a position to compel the other to perform that which he is ordered to do. If the two parts of the award are thus interdependent, the party who cannot enforce it in the particulars in which it operates in his favor cannot be concluded by it in those particulars in which it operates against him.[3]

c. Performance of Void Part. It is not competent for a defendant to take advantage of an irregularity or obscurity in an award which has been performed by other parties who alone were affected by such defect, when, so far as the award respects defendant, it is mutual, certain, and final;[4] and, as a party may waive a part of that which is awarded to him and insist upon the balance,[5] so the rule,

1. Modification of rule.— Muldrow *v.* Norris, 12 Cal. 331 (holding that the doctrine that an award may be good in part applies only to instances where there has been an excess of power in the arbitrators by attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter, forming no consideration for other parts of the award, and a settlement of which could not have contributed to induce the arbitration); McNear *v.* Bailey, 18 Me. 251; Jones *v.* Welwood, 71 N. Y. 208; Wrightson *v.* Bywater, 6 Dowl. P. C. 359, 1 H. & H. 50, 7 L. J. Exch. 83, 3 M. & W. 199; Bradford *v.* Bryan, Willes 268. As far back as 1741 it was observed by Chief Justice Willis, in Bradford *v.* Bryan, Willes 268, that if it were not for the cases he would be of the opinion that, if all matters were submitted, though without the addition of the *ita quod* clause, all matters must be determined, assigning as the reason that it was plainly not the intention of the parties that some only should be determined, and that they should be left at liberty to go to law for the rest.

2. Jones *v.* Welwood, 71 N. Y. 208.

Power to make one or more awards.— If there be a clause in the submission empowering the arbitrator to make one or more awards at his discretion, the court will not make it a condition to the validity of the decision of one subject that all matters should be disposed of. Russell Arb. & Award (8th ed.) 182 [*citing* Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 565, 11 E. C. L. 20; Wrightson *v.* Bywater, 6 Dowl. P. C. 359, 1 H. &. H. 50, 7 L. J. Exch. 83, 3 M. & W. 199].

3. *Kentucky.*— Brown *v.* Warnock, 5 Dana (Ky.) 492.

Maine.— Littlefield *v.* Smith, 74 Me. 387; Clement *v.* Durgin, 1 Me. 300.

Massachusetts.— Harrington *v.* Brown, 9 Allen (Mass.) 579 (wherein an award of a sum of money authorized the defendant against whom it was made to deduct therefrom the costs of a criminal prosecution which the arbitrators had no right to consider, and it was held that the whole award was bad, because it did not appear whether or not so large a sum would have been awarded to the one party if the other had not been authorized to make the deduction, and that the party in whose favor the first sum was awarded should release the amount of such deduction before he could have the award confirmed as to the principal sum); Brown *v.* Evans, 6 Allen (Mass.) 333.

Mississippi.— Gibson *v.* Powell, 5 Sm. & M. (Miss.) 712.

New Jersey.— McKeen *v.* Allen, 17 N. J. L. 506.

New York.— Brazill *v.* Isham, 1 E. D. Smith (N. Y.) 437; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Brown *v.* Hankerson, 3 Cow. (N. Y.) 70; Schuyler *v.* Van der Veer, 2 Cai. (N. Y.) 235.

Pennsylvania.— Pennington *v.* Bowman, 10 Watts (Pa.) 283, holding that an award made pursuant to the statute in that state, must, as in the case of a verdict by a jury, be capable of execution; and, where mutual rights are determined which are incapable of execution on the one side, the award is, nevertheless, void as a whole if execution cannot be resorted to by the other party.

England.— Pope *v.* Brett, 2 Saund. 292.

Canada.— In Dalton *v.* McNider, 5 Grant Ch. (U. C.) 501, it was held that, under an award providing for the manner of payment, a creditor could not adopt the award in so far as it found the sum due and reject that part directing the mode of payment.

4. Netleton *v.* Buckingham, 1 Root (Conn.) 149.

5. See *supra*, VI, J, 10, a, (II).

Excess of award not binding complaining party.—Where the plaintiff sued on an award which was in his favor for a certain amount "over and above the board," under a submission to fix the value of certain carpenter-work performed by plaintiff for defendant, it was held that, if the item of board was not included in the submission, the award would not bar a recovery by defendant for such item, and, therefore, he could not object to the validity of the award for deducting such item from the amount due plaintiff, if plaintiff was satisfied with his recovery before the arbitrators; that the complaint setting up this

that an award is not severable if mutuality of remedy is destroyed as between the parties, does not apply where the party against whom the void part of an award operates, performs, or offers to perform, that part.[6]

VII. RATIFICATION AND REPUDIATION OF AWARD.

A. Ratification — 1. Of Valid Award. The validity of an award which has been completed according to law and the submission does not depend upon ratification.[7]

2. Of Void Award. An award which is void because in contravention of the mandatory provisions of a statute is incapable of being effectuated by ratification,[8] and, for the reason that parties cannot, by consent, confer upon courts jurisdiction of the subject-matter, the omission to observe such statutory requirements as are held to be jurisdictional cannot be cured by ratification, so as to enable the court to enforce the award under the statute.[9]

3. Of Voidable Award — a. In General. An award, which is not absolutely void but merely voidable because of some defect that does not go to the jurisdiction of the arbitrators or of the court having supervisory power over the proceedings, may be validated by such acts of the parties as indicate an intention to abide by it.[10] The question of what acts sufficiently show an intention to ratify is one of fact, under all of the circumstances,[11] and the burden of showing a ratification is upon the party claiming it.[12]

b. Consideration. No new consideration is necessary to uphold a ratification; the fact that the parties become mutually bound by the ratified award is sufficient.[13]

c. Knowledge of Defect. An act of ratification will not bind a party to the performance of an award which is not otherwise enforceable because of some fatal defect, if he did not, at the time, have knowledge of the defects, since it cannot be presumed that he intended to waive a defect of which he had no knowledge;[14] but a party who has received benefits under a defective award will

award was not demurrable, and that defendant should support his answer, setting up a set-off for the board item by evidence instead of relying upon a demurrer to a replication thereto which pleaded that, by agreement of both parties, the item of board was submitted to the arbitrators. Adams *v.* Harrold, 29 Ind. 198.

6. Galvin *v.* Thompson, 13 Me. 367; Smith *v.* Sweeny, 35 N. Y. 291 [*citing* Lee *v.* Elkins, 12 Mod. 585; Kyd Awards 529]. See also Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125.

7. Need not be ratified.— Sears *v.* Vincent, 8 Allen (Mass.) 507; Aspley *v.* Thomas, 17 Tex. 220; Akely *v.* Akely, 16 Vt. 450.

8. An award of real estate, prohibited by statute, cannot be given validity by ratification, although such acts as would be sufficient to pass the title or estop a party from claiming title may be available without reference to the award. Wiles *v.* Peck, 26 N. Y. 42. But see State *v.* Gurnee, 14 Kan. 111, where an award of real estate, in writing, but not signed in compliance with the statute, was subsequently drawn in question, and, it appearing that the parties had arranged their possession of land in accordance with the award, it was held proper for the trial court to refuse an instruction as to the insufficiency of the award, without any limitation of the rule arising from the ratification.

9. An award on matters not subject to submission under a statute cannot be ratified so as to give the court jurisdiction as if the submission had been of matters within its terms. Hubbell *v.* Bissell, 13 Gray (Mass.) 298.

Acknowledgment of the award has been held to be such a jurisdictional requirement. Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388.

10. See cases cited *infra*, note 17 *et seq.*

Parties claiming under the original parties cannot contest the validity of the award on the ground of irregularity in the arbitration proceedings, where the award has become unquestionable by acquiescence of the original parties. Kane County *v.* Herrington, 50 Ill. 232.

A stranger to an award may bind his interest in the subject-matter of it by subsequently consenting to it or accepting benefits under it. George *v.* Johnson, 45 N. H. 456; Evans *v.* Cogans, 2 P. Wms. 450.

11. Circumstances held not to amount to an expression of intention to ratify. Davis *v.* Dyer, 54 N. H. 146; Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Palmer *v.* Van Wyck, 92 Tenn. 397, 21 S. W. 761; Weeks *v.* Boynton, 37 Vt. 297.

12. Burden of proof.— Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724.

13. Ellison *v.* Weathers, 78 Mo. 115.

14. Payne *v.* Moore, 2 Bibb (Ky.) 163, 4 Am. Dec. 689; Darnley *v.* London, etc., R. Co., L. R. 2 H. L. 43, 36 L. J. Ch. 404, 16 L. T. Rep. N. S. 217, 15 Wkly. Rep. 817.

not be permitted to repudiate his ratification on the ground that, because of his ignorance of the defect, it was not intended, unless he can and does restore the other party to as good a situation as he was in before the ratification.[15]

d. Acts Showing Intention to Ratify — (I) *Express Ratification.* The simplest form of ratification of a defective award, which places the intention to waive the defect beyond any question, is an express promise to pay or perform the award after its publication.[16]

(II) *Implied Ratification* — (A) *Acting on Award* — (1) Performance. Payments which have been made in satisfaction of a voidable award cannot be recovered back,[17] and such payments, either in whole or in part, sufficiently show an intention to ratify the award, and will prevent the party paying from thereafter questioning its validity.[18] Giving a note or bond to secure the payment of an award stands, in respect of ratification, upon the same ground as payments,[19] and the same is true of the performance of things required by the award in whole or in part.[20]

A presumption of knowledge of errors in the award will be indulged to support a bond given to secure the award after a party has had full time and opportunity to examine it. Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679; Sharpe *v.* King, 38 N. C. 402.

15. Culver *v.* Ashley, 19 Pick. (Mass.) 300.

Ignorance of the law applicable to a defective award is not sufficient ground upon which to repudiate a ratification. Tyler *v.* Stephens, 7 Ga. 278.

16. Promise to pay or perform. — *Illinois.* — Godfrey *v.* Knodle, 44 Ill. App. 638, unauthorized majority award.

Kentucky. — McCullough *v.* Myers, Hard. (Ky.) 197, award not in conformity to the submission, uncertain, and not sealed as required by the submission.

Louisiana. — Lattier *v.* Rachal, 12 La. Ann. 695, submission of matters beyond the authority of administrators, and the heirs agreed to abide by the award.

Mississippi. — Williams *v.* Williams, 11 Sm. & M. (Miss.) 393, award rendered without a submission.

Oregon. — Belt *v.* Poppleton, 11 Oreg. 201, 3 Pac. 27, award beyond the submission.

Vermont. — Sargeant *v.* Butts, 21 Vt. 99, award on Sunday.

17. Payment not recoverable back. — Bulkley *v.* Stewart, 1 Day (Conn.) 130, 2 Am. Dec. 57; Burbank *v.* Norris, Smith (N. H.) 440, a mistake of arbitrators in failing to deduct a partial payment which had been made.

18. Implied from payment. — Reynolds *v.* Roebuck, 37 Ala. 408 (award not authorized by submission); Willingham *v.* Harrell, 36 Ala. 583; Wilson *v.* Wilson, 18 Colo. 615, 34 Pac. 175 (award not filed with the clerk of the district court as required by statute).

Payment by a minor, after majority, of money due from him under an award made during his minority, may be held a ratification of the authority to make the award. Barnaby *v.* Barnaby, 1 Pick. (Mass.) 221.

An alternative award of a right to rescind the original contract, which was the basis of the dispute submitted to arbitration, cannot be taken advantage of after acceptance of an amount awarded as the other alternative. Males *v.* Lowenstein, 10 Ohio St. 512.

19. Giving security for payment. — Forqueron *v.* Van Meter, 9 Ind. 270 (award not made in writing as required by statute); Miller *v.* Brumbaugh, 7 Kan. 343 (irregularities in the arbitration proceedings); Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679 (mistake in the award); Sharpe *v.* King, 38 N. C. 402 (errors in the award).

A promissory note, given before the award is made, to pay the amount of the award when made, is valid and binding for the amount of the award, although it is not a ratification of defects in the award; and, in an action on the note, any defense which would be competent in an action on the award itself is open to the promisor. Page *v.* Pendergast, 2 N. H. 233.

20. Implied from performance. — *Connecticut.* — Hamlin *v.* Norwich, 40 Conn. 13, where the award was beyond the submission.

Georgia. — Rich *v.* Turnbull, 95 Ga. 752, 22 S. E. 581, a case of a statutory award which had never been entered of record nor made a judgment of the court as required by the statute.

Louisiana. — Cobb *v.* Parham, 4 La. Ann. 148, where there had been an unauthorized extension of time for making the award.

New Hampshire. — Currier *v.* Basset, Smith (N. H.) 191, question of authority of selectmen of a town to submit to arbitration the location of a dividing line between towns.

New Jersey. — Leslie *v.* Leslie, 50 N. J. Eq. 155, 24 Atl. 1029 (award beyond the submission and uncertain); Cross *v.* Cross, 17 N. J. Eq. 288 (where there had been an omission to decide a matter expressly submitted); Johnson *v.* Ketchum, 4 N. J. Eq. 364 (omission to swear arbitrators).

New York. — Terry *v.* Moore, 3 Misc. (N. Y.) 285, 22 N. Y. Suppl. 785, 52 N. Y. St. 406, failure to swear arbitrators and to serve a copy of the award.

North Carolina. — Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167, irregularity in appointment of the umpire.

South Carolina. — Betsill *v.* Betsill, 30 S. C. 505, 9 S. E. 652, award beyond the submission.

England. — Kennard *v.* Harris, 2 B. & C. 801, 4 D. & R. 272, 9 E. C. L. 346.

A settlement based upon a voidable award,

(2) Accepting Benefits. Accepting payments in whole or in part satisfaction of a voidable award, or of things done by the other party in whole or part performance thereof, or otherwise receiving and enjoying the fruits of the award, shows an intention to ratify which will preclude such party from thereafter questioning the validity of the award or refusing to perform it on his part.[21]

(3) Proceeding in Court. Suing on an award affirms its validity as much as does a distinct expression of an intention to ratify.[22] The same result follows the pleading of an award in bar to an action on the original subject-matter,[23] and, generally, participation in any proceedings with reference to the award which are inconsistent with an intention to disaffirm it.[24]

made with full knowledge of all the facts, is a ratification of the award; the settlement will be upheld and the award deemed conclusive. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356 (question of mistake of arbitrators in method of calculation); Bentley *v.* Davis, 21 Nebr. 685, 33 N. W. 473; Chambers *v.* McKee, 42 Wkly. Notes Cas. (Pa.) 90, 39 Atl. 822 (unauthorized majority award).

21. *California.*— Hoogs *v.* Morse, 31 Cal. 128, error and misconduct of arbitrators.

Connecticut.— Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550, where the award determined the distribution of property under a will in a manner contrary to a statute.

Georgia.— Neel *v.* Field, 72 Ga. 201 (mistake of arbitrators in calculating interest); Pike *v.* Stallings, 71 Ga. 860 (irregularity of arbitration proceedings); Neal *v.* Field, 68 Ga. 534 (failure to make written award); Perry *v.* Mulligan, 58 Ga. 479 (question of authority of agent to make submission).

Illinois.— Grimmett *v.* Smith, 42 Ill. App. 577, award failing to embrace all matters submitted.

Iowa.— Skrable *v.* Pryne, 93 Iowa 691, 62 N. W. 21 (failure of arbitrators to consider all matters submitted); Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502 (errors of judgment on the part of the arbitrators).

Maryland.— Sisson *v.* Baltimore, 51 Md. 83, question of sufficiency of the amount awarded.

Missouri.— Phillips *v.* Couch, 66 Mo. 219, irregularity of arbitration proceedings.

New Hampshire.— Furber *v.* Chamberlain, 29 N. H. 405 (question of authority of agent to make submission); Tudor *v.* Scovell, 20 N. H. 171 (award not in writing as required by submission).

New York.— Viele *v.* Troy, etc., R. Co., 20 N. Y. 184 (improper method of estimating damages); Burhans *v.* Union Free School Dist. No. 1, 24 N. Y. App. Div. 429, 48 N. Y. Suppl. 702 (insufficiency of amount awarded).

Tennessee.— Johnson *v.* Stalcup, 4 Baxt. (Tenn.) 283 (an insufficient amount awarded); McDaniel *v.* Bell, 3 Hayw. (Tenn.) 257 (award in excess of authority).

Vermont.— Taylor *v.* St. Johnsbury, etc., R. Co., 57 Vt. 106, failure of arbitrators to follow the submission.

United States.— Frick *v.* Christian County, 1 Fed. 250, authority of county commissioners to submit to arbitration.

England.— Kennard *v.* Harris, 2 B. & C. 801, 4 D. & R. 272, 9 E. C. L. 346.

A minor receiving payment, after arriving at his majority, of money paid to his guardian, in satisfaction of an award pursuant to a submission to arbitration of the minor's claim, and failure to sue on the original claim for two years thereafter, have been held to constitute a ratification of the guardian's authority to submit. Jones *v.* Phœnix Bank, 8 N. Y. 228.

A minor who retains possession, after majority, of property awarded and delivered to him during minority will be held to have ratified the authority to make the award. Barnaby *v.* Barnaby, 1 Pick. (Mass.) 221.

Accepting benefits under protest will nevertheless constitute a ratification of irregularities of arbitrators, where the benefits are retained and enjoyed. Prentiss *v.* Farnham, 22 Barb. (N. Y.) 519; Lepine *v.* Fiset, 10 Rev. Lég. 153.

A conditional acceptance of payment may amount to a ratification of the award, binding on the payee so long as the condition remains unrealized. McDonald *v.* Reg., 16 Quebec 221.

Acceptance, by one partner, of the amount awarded in favor of a partnership has been held a sufficient ratification of authority of the partner to make the submission, so as to bind the partnership. Buchanan *v.* Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200.

22. Suing on award.— Anderson *v.* Miller, 108 Ala. 171, 19 So. 302 (as to delivery of copy of award as required by submission); McDaniel *v.* Bell, 3 Hayw. (Tenn.) 257 (where arbitrators exceeded their authority); Black *v.* Allan, 17 U. C. C. P. 240 (as to authority of arbitrators).

Joinder of partners on error to review a judgment upon an award affirms the authority of one partner to make the submission. Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629. *Aliter* where it was sought to bind the other party, in a suit by a partnership upon an award which was invalid because the submission was by one partner without authority. Tillinghast *v.* Gilmore, 17 R. I. 413, 22 Atl. 942.

23. Pleading award in bar.— Ogden *v.* Rowley, 15 Ind. 56 (mistake, fraud, and misconduct of arbitrators); Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 473 (invalidity of the submission).

24. Participation in any proceedings.— Hoogs *v.* Morse, 31 Cal. 128 (failure to serve notice of award); Burrows *v.* Guthrie, 61

(B) *Lapse of Time.* The lapse of such a period of time after the publication of the award as will afford the successful party sufficient reason to regard it as having been acquiesced in may amount to a ratification.[25]

B. Mutual Repudiation of the Award. A valid award may be abandoned or repudiated by mutual consent of the parties, and, thereafter, it cannot be enforced by either of them or relied upon as a bar to an action based upon the original controversy.[26] The same result is attained by a subsequent agreement, fairly and voluntarily entered into, whereby the parties resubmit to the same or other arbitrators the subject-matter of the first arbitration,[27] notwithstanding the resubmission may not result in the making of a valid award.[28]

VIII. COSTS OF ARBITRATION.

A. Authority to Award Costs — 1. Fees and Expenses of Arbitrators — a. Express Authority. In England and in some of the United States the rule has been established, with reference to the authority of arbitrators to determine

Ill. 70 (question of uncertainty of award); Duncan *v.* Fletcher, 1 Ill. 323 (failure to swear arbitrators).

25. Kane County *v.* Herrington, 50 Ill. 232 (irregularity in the arbitration proceedings); Barker *v.* Belknap, 27 Vt. 700 (mistake in estimates of arbitration). See also McRae *v.* Buck, 2 Stew. & P. (Ala.) 155.

A delay for several months in objecting to the validity of a second award, containing a correction on account of an accidental omission from the first award, has been held not to amount to an acquiescence in the validity of the second award, which should be treated as a nullity. Mordue *v.* Palmer, L. R. 6 Ch. 22, 40 L. J. Ch. 8, 23 L. T. Rep. N. S. 752, 19 Wkly. Rep. 36.

A delay of two weeks without objecting to an award, because of the failure of a special arbitrator to rehear the parties or give notice to them of the hearing after disagreement, has been held not a ratification of the award. Wheaton *v.* Crane, 27 N. J. Eq. 368.

Failure of a minor to sue on the original claim for two years after his majority has been held a sufficient ratification of the authority of the guardian to make the submission in his behalf. Jones *v.* Phœnix Bank, 8 N. Y. 228.

The lapse of fifteen years, without objection to an award fixing a boundary line which was made pursuant to a parol submission, has been held a sufficient ratification of such award. Mackenzie *v.* Brodie, 1 Nova Scotia Dec. 242.

26. Mutual consent.— *Arkansas.*— Blanton *v.* Littell, 65 Ark. 76, 44 S. W. 716.

Illinois.— Newlan *v.* Lombard University, 62 Ill. 195; Eastman *v.* Armstrong, 26 Ill. 216.

Kentucky.—Marshall *v.* Piles, 3 Bush (Ky.) 249.

Massachusetts.— Rollins *v.* Townsend, 118 Mass. 224.

Minnesota.— Georges *v.* Neiss, 70 Minn. 248, 73 N. W. 644, where the mutual repudiation agreement was oral.

Necessity for mutuality of repudiation.— A valid award will not be defeated by the refusal of both of the parties to abide by it, which refusals were made at different times and without any consideration, and not made by each party in view of the refusal of the other. Hynes *v.* Wright, 62 Conn. 323, 26 Atl. 642, 36 Am. St. Rep. 344.

A suit upon the original cause of action, by one of the parties after both of them had signified their dissatisfaction with the award, was held to be such a repudiation as would thereafter preclude him from insisting upon the validity of the award. Hamilton *v.* Hart, 125 Pa. St. 142, 23 Wkly. Notes Cas. (Pa.) 480, 17 Atl. 226, 473.

A contract containing a provision for arbitration will not be deemed to have been rescinded by a mutual repudiation of an award made pursuant thereto, but the parties will be remitted to their rights under the contract. Simplot *v.* Simplot, 14 Iowa 449.

Equitable enforcement of promise to set aside award.— It has been held that a bill in equity to set aside a judgment entered upon an award could not be maintained upon a mere promise of a party without consideration. Lillard *v.* Casey, 2 Bibb (Ky.) 459.

27. Subsequent agreement to resubmit.— Blanton *v.* Littell, 65 Ark. 76, 44 S. W. 716; Rawlinson *v.* Shaw, 117 Mich. 5, 75 N. W. 138.

The want of authority to resubmit may be cured by subsequent ratification of the second award. O'Bryan *v.* Reed, 2 Fla. 448; Sisson *v.* Baltimore, 51 Md. 83.

A threat to sue on the original claim, which threat does not contain the elements of duress, will not be sufficient ground upon which to invalidate a resubmission otherwise voluntarily entered into. Rogers *v.* Weaver, 5 Ohio 536.

28. Payne *v.* Crawford, 102 Ala. 387, 14 So. 854, 97 Ala. 604, 10 So. 911, 11 So. 725; Shafer *v.* Shafer, 6 Md. 518; Rollins *v.* Townsend, 118 Mass. 224; Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

Upon refusal of a party to arbitrate under a resubmission, an action will lie upon the subject-matter of the original submission, or, in a proper case, upon a breach of the new agreement to arbitrate. Burnside *v.* Potts, 23 Ill. 411.

the amount of their fees and expenses and to direct the manner of payment and the party liable therefor, that such authority does not exist unless it has been expressly conferred by the parties or by the statute under which the arbitration proceeds.[29] But the terms of the submission may be construed to confer such authority.[30]

b. Incidental Authority. In most of the United States the contrary rule has been established that such authority is, necessarily, incident to, and should be implied from, the general authority to finally determine the matters expressly submitted.[31]

c. Statutory Authority. Such authority may be given by statute, and, in

29. *Indiana.*—Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253.

Maine.— Porter *v.* Buckfield Branch R. Co., 32 Me. 539; Walker *v.* Merrill, 13 Me. 173, 177 (where the court, referring to the contrary doctrine, admitted: "There is much good sense in the ideas suggested . . . that costs may be awarded as a necessary incident to the authority"); Gordon *v.* Tucker, 6 Me. 247.

Massachusetts.— Harrington *v.* Brown, 9 Allen (Mass.) 579; Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Vose *v.* How, 13 Metc. (Mass.) 243; Peters *v.* Peirce, 8 Mass. 398.

North Carolina.—Griffin *v.* Hadley, 53 N. C. 82.

Wisconsin.—Dundon *v.* Starin, 19 Wis. 261; Gear *v.* Bracken, 1 Pinn. (Wis.) 249.

England.—Firth *v.* Robinson, 1 B. & C. 277, 1 L. J. K. B. O. S. 115, 8 E. C. L. 119; Bradley *v.* Tunstow, 1 B. & P. 34; Roberts *v.* Eberhardt, 3 C. B. N. S. 482, 4 Jur. N. S. 898, 28 L. J. C. P. 74, 6 Wkly. Rep. 793, 91 E. C. L. 482; Bell *v.* Belson, 2 Chit. 157, 18 E. C. L. 562; Busfield *v.* Busfield, Cro. Jac. 577; Browne *v.* Marsden, 1 H. Bl. 223; Strutt *v.* Rogers, 2 Marsh. 524, 7 Taunt. 213, 2 E. C. L. 331; Grove *v.* Cox, 1 Taunt. 165.

Canada.— McCulloch *v.* White, 33 U. C. Q. B. 331; McKenna *v.* Tabb, 2 L. C. Jur. 190; Smith *v.* Fleming, 12 Ont. Pr. 520.

The case of Roe v. Doe, 2 T. R. 644, 1 Rev. Rep. 566, which has been cited and relied upon as sustaining a contrary doctrine, especially in the case of Strang *v.* Ferguson, 14 Johns. (N. Y.) 161, which is the leading case in the United States in support of the contrary rule, was a case in which a cause pending in court was referred to arbitration, by rule of court, and the authority to award costs of the cause in court, not of the arbitration, was held to be "necessarily consequent on the authority conferred upon the arbitrator of determining the cause," and needed no express authorization for that purpose. But, though the authority to award costs of a suit which is referred to arbitration may, necessarily, be implied from the authority to make an award which shall determine the suit, the same reasons do not support the implication of authority in an ordinary common-law arbitration, where the determination of a pending suit has not been submitted. Questions concerning the fees and expenses of arbitrators arise after the time of the submission; whereas, the items of costs of a pending cause submitted to arbitration are incurred prior thereto. See the cases cited *supra* this note; also the cases cited *infra*, VIII, A, 2, a.

A subsequent agreement found by the trial court, whereby the parties to the arbitration enlarged the parol submission so as to confer authority upon the arbitrators to award concerning the expenses of the arbitration, will be taken as conclusive upon appeal, in the absence of sufficient objection to the admission of evidence tending to show such agreement. Hartland *v.* Henry, 44 Vt. 593.

30. A submission of "all matters relating thereto," inserted as a clause in a submission of all controversies between the parties, has been held to import authority to award the costs of the arbitration. Clement *v.* Comstock, 2 Mich. 359.

A provision that the award shall be "pursuant to law," contained in the submission of matters to arbitration, has been held to not, necessarily, imply an authority to award costs. Akely *v.* Akely, 17 How. Pr. (N. Y.) 21.

31. *California.*— Dudley *v.* Thomas, 23 Cal. 365.

Connecticut.— Alling *v.* Munson, 2 Conn. 691.

Delaware.—Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Georgia.— Wade *v.* Powell, 31 Ga. 1.

Indiana.— Bird *v.* Routh, 88 Ind. 47.

Missouri.—McClure *v.* Shroyer, 13 Mo. 104.

New Hampshire.— Chase *v.* Strain, 15 N. H. 535; Spofford *v.* Spofford, 10 N. H. 254; Brown *v.* Mathes, 5 N. H. 229; Joy *v.* Simpson, 2 N. H. 179.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; People *v.* Newell, 13 Barb. (N. Y.) 86; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Strang *v.* Ferguson, 14 Johns. (N. Y.) 161.

North Carolina.— Oakley *v.* Anderson, 93 N. C. 108.

Pennsylvania.— Young *v.* Shook, 4 Rawle (Pa.) 299.

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29.

Vermont.— Burnell *v.* Everson, 50 Vt. 449; Bowman *v.* Downer, 28 Vt. 532; Hawley *v.* Hodge, 7 Vt. 237.

West Virginia.— Henley *v.* Menefee, 10 W. Va. 771.

case of an arbitration proceeding under such a statute, the authority exists without having been expressly conferred in the submission.[32]

2. Costs of Court — a. In Causes Submitted to Arbitration. The costs of a cause pending in court, which has been withdrawn and submitted to the final determination of arbitrators, may be determined and awarded by the arbitrators without a special authorization therefor, because such authority is, necessarily, consequent on the authority conferred of finally determining the cause;[33] but in England, Canada, and some of the United States the implication of authority to determine and award the costs of a cause thus submitted does not extend to the fees and expenses of the arbitrators, or other costs of the arbitration,[34] although the contrary is true in the American jurisdictions where the rule that such authority will be incidentally implied has been established.[35]

b. References in Pending Suits. The reference of matters in a pending suit which does not involve a final determination of the suit does not, incidentally, confer authority to make an award upon the costs of such suit.[36]

3. Expenses of Parties. Irrespective of the question of whether or not arbitrators have incidental authority to determine and award concerning their own fees and expenses, the authority to award that one party shall pay the expenses incurred by the other party by reason of the arbitration proceedings does not exist unless it has been specially conferred.[37]

B. Exercise of Authority — 1. Sufficiency of Award as to Costs — a. Discretion of Arbitrators. An award of costs which has been confided to the discretion of the arbitrators will not be reviewed by the court upon the merits of the award or the propriety of the allowance of particular items which were within their authority,[38] unless supervisory power has been vested in the court by statute.[39]

b. Terms of the Submission. Restrictions, in the terms of the submission, upon the power of arbitrators to award costs must be observed.[40] Questions as to

32. Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253; Harden *v.* Harden, 11 Gray (Mass.) 435.

33. *Massachusetts.*— Nelson *v.* Andrews, 2 Mass. 164.

New York.— Amsterdam *v.* Vanderveer, 4 Den. (N. Y.) 249.

Vermont.— See Hartland *v.* Henry, 44 Vt. 593.

England.— Firth *v.* Robinson, 1 B. & C. 277, 1 L. J. K. B. O. S. 115, 8 E. C. L. 119; Roe *v.* Doe, 2 T. R. 644, 1 Rev. Rep. 566.

Canada.— Smith *v.* Fleming, 12 Ont. Pr. 520.

The fact that a cause is discontinued by the submission thereof to arbitration, so that the costs of court cannot thereafter be recovered in the cause, does not affect the power of the arbitrators to award such costs to the proper party. Boughton *v.* Seamans, 9 Hun (N. Y.) 392.

34. Extent and limits of authority.— Vose *v.* How, 13 Metc. (Mass.) 243; Amsterdam *v.* Vanderveer, 4 Den. (N. Y.) 249; Bracher *v.* Cotton, 1 Barnes Notes Cas. 97; Firth *v.* Robinson, 1 B. & C. 277, 1 L. J. K. B. O. S. 115, 8 E. C. L. 119; Strutt *v.* Rogers, 2 Marsh. 524, 7 Taunt. 213, 2 E. C. L. 331; Smith *v.* Fleming, 12 Ont. Pr. 520.

See *supra*, VIII, A, 1, a.

The submission of authority to award costs in the final arbitration of matters involved in a pending suit has, therefore, been held not to include the costs of the arbitration. Bradley *v.* Tunstow, 1 B. & P. 34. *Contra*, Lindsay *v.* McConnell, 11 Wkly. Notes Cas. (Pa.) 173.

35. See *supra*, VIII, A, 1, b.

36. The question in such cases is governed by the provisions of the agreement for reference, the order of reference, rules of court, and statutes of the particular jurisdiction, and will be fully treated under another title. See, generally, References.

37. Authority must be specially conferred. — Akely *v.* Akely, 17 How. Pr. (N. Y.) 21; Amsterdam *v.* Vanderveer, 4 Den. (N. Y.) 249; Dundon *v.* Starin, 19 Wis. 261.

Attorney's fees.— The authority to award costs of the arbitration does not, incidentally, include authority to award that one of the parties shall pay the attorney's fees of the other. Warner *v.* Collins, 135 Mass. 26; Jones *v.* Carter, 8 Allen (Mass.) 431; Republic of Colombia *v.* Cauca Co., 106 Fed. 337; Whitehead *v.* Firth, 12 East 165.

38. Little Sioux Dist. Tp. *v.* Little Sioux Independent Dist., 60 Iowa 141, 14 N. W. 201; Sides *v.* Brendlinger, 14 Nebr. 491, 17 N. W. 113; Fearon *v.* Flinn, L. R. 5 C. P. 34; Young *v.* Bulman, 13 C. B. 623, 22 L. J. C. P. 160, 76 E. C. L. 623; Anonymous, 1 Chit. 38, 18 E. C. L. 35.

39. James *v.* Southern Lumber Co., 153 Mass. 361, 26 N. E. 995.

40. Thus, if the parties, by their agreement, have fixed upon a rule to govern the costs, arbitrators have no power to make an

the extent of authority to award costs under the terms of the submission must be determined upon a construction of the language used in each particular case.[41]

c. Statutory Provisions. In arbitration proceedings under a statute only such costs as the statute allows may be awarded,[42] and provisions of the statute under which arbitrators proceed as to the manner of making and returning an award of costs must substantially be followed, else the award as to costs is of no avail.[43]

d. Certainty of Intent — (I) *Award of Gross Sum.* In the absence of a requirement in the submission, or in a statute under which the arbitration proceeds, requiring a statement of the items of costs, an award of costs in a gross sum is *prima facie* sufficient.[44]

(II) *Omission to Tax Any Sum* — (A) *Costs of the Arbitration.* An award of costs, in an arbitration at common law, in favor of one of the parties, which does not specify the sum awarded nor prescribe a mode by which the amount may be ascertained with certainty by a simple calculation, is void for uncertainty, because, in such case, there is no person authorized to tax the costs.[45]

(B) *Costs of Court* — (1) Reference to Taxing Officer. An award of costs in an arbitration of matters involved in a pending suit may be made in general terms without fixing the amount awarded as to such items of costs as are of record in court, and the fixing of the amount may be referred, by the arbitrators, to the clerk of court or other proper taxing officer.[46]

(2) Award Without Reference to Taxation. An award in such a case in general terms in favor of one of the parties, without fixing the amount, is valid as being sufficiently certain, although the fixing of the amount is not

award on the subject. Cones *v.* Vanosdol, 4 Ind. 248.

Award of costs of a pending suit according to law.— Where the parties to a submission withdraw a suit pending in court and agree that the costs of that suit are to be taxed, according to law, in favor of the successful party, this confers upon the arbitrators the authority to estimate and award the costs of the suit according to the same rules which govern the court in taxing costs and does not mean that the costs of the suit are to be taxed by the court. Averill *v.* Buckingham, 36 Conn. 359.

Costs of the award may properly be included within the authority to award "costs of the reference." Walker *v.* Brown, 9 Q. B. D. 434.

An award of costs by the umpire is within the authority of a submission which, in general terms, leaves the question of costs in the discretion of the arbitrators, with power to choose an umpire upon disagreement. Taylor *v.* Dutton, 1 L. J. K. B. O. S. 158.

41. Costs of a criminal prosecution, in the name of the state by one of the parties against the other, cannot be included in an award under a submission to arbitrate all matters in controversy, including costs of previous litigation, as such costs do not, in legal acceptation, constitute matters in controversy between the parties. Tyler *v.* Dyer, 13 Me. 41.

Costs of negotiating and settling the terms of the submission have been held properly to be included in the authority given to arbitrators concerning "costs of the reference." Autothreptic Steam Boiler Co. *v.* Townsend, 21 Q. B. D. 182, 57 L. J. Q. B. 488, 59 L. T. Rep. N. S. 632, 27 Wkly. Rep. 15.

42. Lindenburger *v.* Unruh, 1 Browne (Pa.) 194; Barnard *v.* Moss, 1 H. Bl. 107.

43. Statute must be substantially followed. — Estep *v.* Larsh, 16 Ind. 82; Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395; Harrington *v.* Hamblin, 12 Wend. (N. Y.) 212; Hewitt *v.* Furman, 16 Serg. & R. (Pa.) 135; Robinson *v.* Henderson, 6 M. & S. 276.

44. Thoreau *v.* Pallies, 5 Allen (Mass.) 354; Tallman *v.* Tallman, 5 Cush. (Mass.) 325.

A consolidation of several claims for damages against one defendant does not authorize a joint award of costs in a gross sum, where separate damages are awarded in several different amounts, because the interests of the parties are several, requiring a separate award as to the costs between defendant and each of the claimants. Springer *v.* Schultz, 64 Cal. 454, 2 Pac. 32.

45. Shurtleff *v.* Parker, 138 Mass. 86; Leominster *v.* Fitchburg, etc., R. Co., 7 Allen (Mass.) 38; School Dist. No. 3 *v.* Aldrich, 13 N. H. 139; Schuyler *v.* Van der Veer, 2 Cai. (N. Y.) 235; Roulstone *v.* Alliance Ins. Co., L. R. 4 Ir. C. L. 547. See also Roberts *v.* Eberhardt, 3 C. B. N. S. 482, 4 Jur. N. S. 898, 28 L. J. C. P. 74, 6 Wkly. Rep. 793, 91 E. C. L. 482.

An itemized statement of the costs of arbitration, taken in connection with a statement of the award that one of the parties recover, in addition to the damages assessed in his favor, the costs of the arbitration "as taxed and determined" by them, has been held sufficient. Jones *v.* Carter, 8 Allen (Mass.) 431.

46. Loud *v.* Hobart, 2 Cush. (Mass.) 325; Lingood *v.* Eade, 2 Atk. 501.

referred to any officer of the court for taxation, for, in such case, the court will order the proper officer to tax the amount.[47]

(3) REFERENCE TO PROPER OFFICER. Such an award will not, however, be upheld as sufficiently certain where the taxation of the items, in order to fix the amount, is referred to some person who has no legal authority to tax the costs involved, as this constitutes an unauthorized delegation of authority.[48]

(III) *OMISSION TO AWARD COSTS.* Neither the costs of an arbitration nor of a pending suit submitted to arbitration may be recovered by the party in whose favor an award is made if there has been no specific award of costs.[49] But the court costs may be included in a judgment, entered upon the award after having been taxed by the court, in a case where the court still retains jurisdiction of the cause and has authority to enter judgment on the award.[50]

2. EFFECT OF INVALIDITY ON PRINCIPAL AWARD — a. When Severable. When an award of costs is so made that it may be separated from the principal award without leaving the latter uncertain in amount or as to its requirements, the fact that the cost award is invalid because unauthorized or uncertain does not affect the validity of the principal award, or its enforcement according to its terms.[51]

47. *Iowa.*— Landreth *v.* Bass, 12 Iowa 606.

Kentucky.— Brown *v.* Warnock, 5 Dana (Ky.) 492; Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312; Short *v.* Kincaid, 1 Bibb (Ky.) 420.

New York.— Boughton *v.* Seamans, 9 Hun (N. Y.) 392; Van Alstyne *v.* Wimple, 4 Cow. (N. Y.) 547.

Virginia.— Macon *v.* Crump, 1 Call (Va.) 575.

United States.— Liverpool Packet, 2 Sprague (U. S.) 37, 15 Fed. Cas. No. 8,407.

England.— Furnis *v.* Hallom, 2 Barnes Notes Cas. 140; Stephenson *v.* Browning, 1 Barnes Notes Cas. 42; Dudley *v.* Nettleford, 2 Str. 737.

An award of the "taxable costs" of a pending suit is sufficiently certain as denoting such costs as the party may be entitled to have taxed by law. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Andrews *v.* Foster, 42 N. H. 376; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Wright *v.* Smith, 19 Vt. 110. But see Reynolds *v.* Reynolds, 15 Ala. 398.

48. Knott *v.* Long, 2 Str. 1025.

49. **The reason for this is that costs do** not follow the award as an incident thereof (Hamilton *v.* Wort, 7 Blackf. (Ind.) 348; Den *v.* Exton, 4 N. J. L. 201; Anonymous, 2 N. J. L. 213; Harralson *v.* Pleasants, 62 N. C. 365; Morrison *v.* Buchanan, 32 Vt. 289), unless specific provision to that effect has been agreed upon (Wood *v.* O'Kelly, 9 East 436) or is contained in a statute under which the arbitration proceeds (Bellas *v.* Levy, 2 Rawle (Pa.) 21).

A subsequent oral declaration, made by one of the arbitrators in the presence of the others, that it was the intention that the costs should follow the award, is not available as an award of costs. School Dist. No. 3 *v.* Aldrich, 13 N. H. 139.

50. **Court costs included in judgment entered upon award.**— Bond *v.* Fay, 1 Allen (Mass.) 212; Chicago, etc., R. Co. *v.* Hughes, 28 Mich. 186; Coupland *v.* Anderson, 2 Call (Va.) 106. See also, generally, REFERENCES.

51. *Indiana.*— Cones *v.* Vanosdol, 4 Ind. 248.

Kentucky.— Brown *v.* Warnock, 5 Dana (Ky.) 49 .

Maine.— Day *v.* Hooper, 51 Me. 178; Hanson *v.* Webber, 40 Me. 194; Porter *v.* Buckfield Branch R. Co., 32 Me. 539; Walker *v.* Merrill, 13 Me. 173; Tyler *v.* Dyer, 13 Me. 41; Gordon *v.* Tucker, 6 Me. 247.

Maryland.— Garitee *v.* Carter, 16 Md. 309.

Massachusetts.— Leominster *v.* Fitchburg, etc., R. Co., 7 Allen (Mass.) 38; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Peters *v.* Peirce, 8 Mass. 398.

Michigan.— Clement *v.* Comstock, 2 Mich. 359.

New Hampshire.—Chase *v.* Strain, 15 N. H. 535.

New York.— Gomez *v.* Garr, 6 Wend. (N. Y.) 583; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

North Carolina.— Stevens *v.* Brown, 82 N. C. 460; Griffin *v.* Hadley, 53 N. C. 82.

Ohio.— Prouse *v.* Painter, Tapp. (Ohio) 52.

Pennsylvania.— Heath *v.* Atkinson, 1 Browne (Pa.) 231. *Compare* Post *v.* Sweet, 8 Serg. & R. (Pa.) 391.

Vermont.— Hartland *v.* Henry, 44 Vt. 593; Rixford *v.* Nye, 20 Vt. 132.

England.— Marder *v.* Cox, Cowp. 127; Cockburn *v.* Newton, 9 Dowl. P. C. 671, 2 M. & G. 899, 3 Scott N. R. 261, 40 E. C. L. 912; Seckham *v.* Babb, 8 Dowl. P. C. 167, 4 Jur. 90, 9 L. J. Exch. 65, 6 M. & W. 129; Rees *v.* Waters, 4 Dowl. & L. 567, 16 M. & W. 263; Whitehead *v.* Firth, 12 East 165; Addison *v.* Gray, 2 Wils. C. P. 293; Fox *v.* Smith, 2 Wils. C. P. 267.

Canada.— Whitely *v.* MacMahon, 32 U. C. C. P. 453; Hibbert *v.* Scott, 24 U. C. Q. B. 581; Roddy *v.* Lester, 14 U. C. Q. B. 259; Laurie *v.* Russell, 1 Ont. Pr. 65; Faulkner *v.* Saulter, 1 Ont. Pr. 48; Savage *v.* Stevenson,

b. When Not Severable. When an invalid cost award has been included in the principal award without showing the amount of the items of cost with reasonable certainty, the amount of the principal award is left uncertain and cannot, therefore, have any validity.[52]

3. Objection to Unauthorized Cost Award. Objection cannot be taken to an award by the losing party because of an unauthorized award of costs against the other party;[53] and failure of a complaining party to object to an unauthorized award of costs against him until after the entry of judgment upon the award constitutes a waiver of the want of authority which will preclude him from thereafter having relief on that ground.[54]

C. Compensation of Arbitrators — 1. Recovery From Parties — a. Action Against Parties. Irrespective of the power of arbitrators to award the cost of the arbitration, when such costs have not been provided for, including compensation to the arbitrators for their services, the parties are liable, under an implied contract, to pay the arbitrators a reasonable compensation.[55]

b. Retention of Award Until Payment. Upon the completion of an award, if the parties neglect to pay to the arbitrators their reasonable compensation for services rendered, it is proper for the arbitrators to retain the award as security for such payment until the payment is made;[56] and such retention, after notice to the parties that the award is ready for delivery, beyond the time-limit within which the award is required to be delivered, does not affect its validity, because the requirement is sufficiently complied with when the award is ready for delivery.[57]

18 N. Brunsw. 150; Purdy *v.* Burbridge, 3 Nova Scotia 150.

52. Walker *v.* Merrill, 13 Me. 173; *In re* Coombs, 4 Exch. 839; Turner *v.* Burt, 24 N. Brunsw. 547.

53. Gudgell *v.* Pettigrew, 26 Ill. 305.

54. Waiver of objection.— Darst *v.* Collier, 86 Ill. 96; Post *v.* Sweet, 8 Serg. & R. (Pa.) 391; Bignall *v.* Gale, 1 Dowl. N. S. 497, 3 M. & G. 858, 4 Scott N. R. 570, 42 E. C. L. 447.

55. Implied assumpsit will lie.— Inasmuch as the arbitrators are to be regarded as acting for all of the parties, the liability is joint and several, and an action of implied assumpsit may be maintained, either jointly or severally, against one or all of the parties.

Connecticut.— Holdcomb *v.* Tiffany, 38 Conn. 271.

Massachusetts.—Russell *v.* Page, 147 Mass. 282, 17 N. E. 536.

New Hampshire.— Davis *v.* Bradford, 58 N. H. 476; Goodall *v.* Cooley, 29 N. H. 48.

New York.— Hinman *v.* Hapgood, 1 Den. (N. Y.) 188, 43 Am. Dec. 663.

England.— Crampton *v.* Ridley, 20 Q. B. D. 48, 57 L. T. Rep. N. S. 809, 36 Wkly. Rep. 554; Grove *v.* Cox, 1 Taunt. 165. Although, in an old English case, not now regarded as authoritative, it was held that such action could not be maintained. Virany *v.* Warne, 4 Esp. 416, 6 Rev. Rep. 839.

Canada.— Malo *v.* Land, etc., Co., 5 Quebec Super. Ct. 483.

Upon an agreement to pay costs awarded an action of assumpsit will lie in behalf of the arbitrators to recover such costs. Hoggins *v.* Gordon, 3 Q. B. 466, 2 G. & D. 656, 6 Jur. 895, 11 L. J. Q. B. 286, 43 E. C. L. 822.

An agreement between the parties as to the payment of compensation of arbitrators, such agreement being made without the knowledge of the arbitrators, cannot affect their right to enforce against both parties a joint and several liability. Young *v.* Starkey, 1 Cal. 426.

56. *Michigan.*— Clement *v.* Comstock, 2 Mich. 359.

New Hampshire.— Willard *v.* Bickford, 39 N. H. 536.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Ott *v.* Schroeppel, 3 Barb. (N. Y.) 56.

England.—Macarthur *v.* Campbell, 5 B. & Ad. 518, 4 L. J. K. B. 25, 2 N. & M. 444, 27 E. C. L. 221; Musselbrook *v.* Dunkin, 9 Bing. 605, 1 Dowl. P. C. 722, 2 L. J. C. P. 71, 2 Moore & S. 740, 23 E. C. L. 725; Jones *v.* Corry, 5 Bing. N. Cas. 187, 3 L. J. C. P. 89, 7 Scott 196, 35 E. C. L. 109; Hicks *v.* Richardson, 1 B. & P. 93, 4 Rev. Rep. 768; Moore *v.* Darley, 1 C. B. 445, 50 E. C. L. 444; Barnes *v.* Braithwaite, 2 H. & N. 569; Barnes *v.* Hayward, 1 H. & N. 742; Ponsford *v.* Swaine, Johns. & H. 433, 4 L. T. Rep. N. S. 15; Dossett *v.* Gingell, 2 M. & G. 870, 3 Scott N. R. 179, 40 E. C. L. 898; Brooke *v.* Mitchell, 6 M. & W. 473, 9 L. J. Exch. 269.

Canada.— Gee *v.* Atwood, Taylor (U. C.) 119.

57. Retention does not invalidate award. *Maine.*— Knowlton *v.* Homer, 30 Me. 552.

New Hampshire.— Willard *v.* Bickford, 39 N. H. 536.

New York.— Ott *v.* Schroeppel, 3 Barb. (N. Y.) 56.

England.— Musselbrook *v.* Dunkin, 9 Bing. 605, 1 Dowl. P. C. 722, 2 L. J. C. P. 71, 2 Moore & S. 740, 23 E. C. L. 725; Brown *v.* Vawser, 4 East 584.

If, in order to take up an award, a party is compelled to pay the arbitrators an exorbitant sum by way of compensation, he may maintain an action to recover the excess beyond the sum which is reasonable.[58]

2. Exoneration Against Co-Party. In the absence of a special provision, by agreement of parties, by the terms of an award under sufficient authority or by a statute under which the arbitration proceeds, determining the matter of compensation, the parties are equally liable each to pay his aliquot share, and, therefore, in case one of the parties has been compelled to pay the whole, in an action against him or in order to get the award out of the hands of the arbitrators, he is entitled to exoneration against the other parties to recover from each of them their proportionate share.[59]

3. Amount of Compensation — a. Reasonableness of Charge. The question of the amount of compensation to be charged by arbitrators depends upon the particular circumstances of each case, regard being had to the nature and importance of the matters in dispute, the amount involved, and time properly employed.[60]

b. Determined by Statute. In statutory arbitrations the *per diem* compensation of arbitrators is sometimes fixed by the statute,[61] or the reasonableness of the compensation to be included in the judgment on the award is left to the discretion of the court to which the award is returnable.[62]

c. Effect of Failure to Make Award. Arbitrators are entitled to reasonable compensation for services rendered in good faith in pursuance of the submission, although, within the time limited, they fail to make a valid award,[63] unless the delay is due to the neglect or fault of the arbitrators.[64]

Canada.— Gee *v.* Atwood, Taylor (U. C.) 119.

As to termination of authority by expiration of time limit see *supra*, III, G, 1, c.

If no time has been fixed for delivery the award takes effect when it is ready for delivery even though retained as security for compensation. New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596.

As to termination of authority by expiration of time when no time has been fixed see *supra*, III, G, 1, c, (IV).

58. Recovery of excess in exorbitant charge.— Barnes *v.* Braithwaite, 2 H. & N. 569.

59. Contribution between co-parties.— *Georgia.*— Miller *v.* Fisk, 47 Ga. 270.

Maine.— Stevens *v.* Record, 56 Me. 488.

Massachusetts.— Russell *v.* Page, 147 Mass. 282, 17 N. E. 536.

New Hampshire.— Davis *v.* Bradford, 58 N. H. 476.

England.— Hicks *v.* Richardson, 1 B. & P. 93, 4 Rev. Rep. 768; Marsack *v.* Webber, 6 H. & N. 1, 4 L. T. Rep. N. S. 553; Ellison *v.* Ackroyd, 20 L. J. Q. B. 193, 1 L. M. & P. 106.

See also, generally, CONTRIBUTION.

Mere liability to pay, by reason of an award against a party, does not entitle him to recover a moiety from the other party upon showing that the award was unauthorized, and certainly not without actual payment. Platt *v.* Smith, 14 Johns. (N. Y.) 368.

60. Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191; Miller *v.* Robe, 3 Taunt. 461; *In re* Dean, 2 N. Brunsw. Eq. 120, which holds that a charge of five dollars, for each attendance at meetings adjourned without the dispatch of any business, for which adjournment the parties, and not the arbitrators, were responsible, and ten dollars a day for each sitting at which evidence was taken, were not improper charges.

The business or profession of the arbitrator, and the value of his time when so occupied, is not a proper basis upon which to fix the value of his services in the arbitration. *In re* Sutton, 1 N. Brunsw. Eq. 568.

61. Per-diem compensation.—Rone *v.* Hines, 7 Ky. L. Rep. 93; Hassinger *v.* Diver, 2 Miles (Pa.) 411; Baker *v.* Hunter, 1 Miles (Pa.) 357; Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82.

62. Left to discretion of court.— James *v.* Southern Lumber Co., 153 Mass. 361, 26 N. E. 995.

63. Davis *v.* Bradford, 58 N. H. 476; Goodall *v.* Cooley, 29 N. H. 48.

64. Neglect or fault of arbitrator.—Hornet *v.* Godfried, 3 Kulp (Pa.) 10; Maynard *v.* Marin, 17 L. C. Jur. 140.

Costs of umpire acting without disagreement.— Where arbitrators, having power to award costs of the proceedings, appointed an umpire, who sat with them on the hearing, and it did not appear that an award including costs, composed, in part, of fees of the umpire, was made after disagreement, in which event alone the umpire could act with authority, it was held that the award was invalid as to such costs, and, for the reason that this portion was so confused with the total sum as not to be separable from it, that the award was wholly bad. Turner *v.* Burt, 24 N. Brunsw. 547. *Contra*, Rogers *v.* Corrothers, 26 W. Va. 238.

IX. EFFECT AND CONCLUSIVENESS OF AWARD.

A. When Unimpeached—1. As to Merits of Controversy. As between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort.[65] It is, in fact, a final adjudication by a court of the parties' own choice, and, until impeached upon sufficient grounds in an appropriate proceeding, an award which is regular on its face is conclusive upon the merits of the controversy submitted, and it is not for the courts to otherwise inquire whether the determination was right or wrong, for the purpose of interfering with it,[66] unless such power has been specially vested in them by stat-

65. As to what parties are bound by an award see *supra*, VI, J, 5.

Award similar to judgment.— *Alabama.*— Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367; Brewer *v.* Bain, 60 Ala. 153; Yeatman *v.* Mattison, 59 Ala. 382; Wolff *v.* Shelton, 51 Ala. 425.

Arkansas.— Harris *v.* Hanie, 37 Ark. 348.

Colorado.—Wilson *v.* Wilson, 18 Colo. 615, 34 Pac. 175.

Georgia.—Whitlock *v.* Crew, 28 Ga. 289.

Kentucky.—Allen-Bradley Co. *v.* Anderson, etc., Distilling Co., 16 Ky. L. Rep. 350.

Nebraska.— Tynan *v.* Tate, 3 Nebr. 388.

New York.— Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 26 N. Y. St. 445, 15 Am. St. Rep. 376; Fudickar *v.* Guardian Mut. L. Ins. Co., 45 How. Pr. (N. Y.) 462 [*affirmed* in 62 N. Y. 392]; Smith *v.* Lockwood, 7 Wend. (N. Y.) 241.

Pennsylvania.— Hostetter *v.* Pittsburgh, 107 Pa. St. 419; Lloyd *v.* Barr, 11 Pa. St. 41; Merrick's Estate, 5 Watts & S. (Pa.) 9; O'Donnell *v.* Lynch, 1 Watts & S. (Pa.) 283.

Rhode Island.— Harris *v.* Social Mfg. Co., 8 R. I. 133, 5 Am. Rep. 549.

Tennessee.— Collins *v.* Oliver, 4 Humphr. (Tenn.) 439.

Vermont.— Morse *v.* Bishop, 55 Vt. 231.

Virginia.— Corbin *v.* Adams, 76 Va. 58.

England.— Commings *v.* Heard, L. R. 4 Q. B. 669, 10 B. & S. 606, 39 L. J. Q. B. 9, 20 L. T. Rep. N. S. 975, 18 Wkly. Rep. 61.

66. Merits of valid award not reviewable by the courts.— *Alabama.*— Payne *v.* Crawford, 97 Ala. 604, 10 So. 911, 11 So. 725; Wolff *v.* Shelton, 51 Ala. 425; Bumpass *v.* Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274; Mendenhall *v.* Smith, Minor (Ala.) 380.

California.— Peachy *v.* Ritchie, 4 Cal. 205.

Connecticut.— *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Lewis *v.* Wildman, 1 Day (Conn.) 153.

Delaware.— Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Georgia.— McElreath *v.* Middleton, 89 Ga. 83, 14 S. E. 906; Wade *v.* Powell, 31 Ga. 1.

Illinois.— Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762; Sherfy *v.* Graham, 72 Ill. 158; Kimball *v.* Walker, 30 Ill. 482; Ross *v.* Watt, 16 Ill. 99; Van Winkle *v.* Beck, 3 Ill. 488.

Kansas.—Miller *v.* Brumbaugh, 7 Kan. 343.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422; Smith *v.* Mitchell, 9 Ky. L. Rep. 813.

Louisiana.— Amet *v.* Boyer, 36 La. Ann. 266; Graf *v.* Friedlander, 33 La. Ann. 188; Davis *v.* Leeds, 7 La. 471.

Maine.— Cushing *v.* Babcock, 38 Me. 452; Deane *v.* Coffin, 17 Me. 52.

Maryland.— Ing *v.* State, 8 Md. 287; Goldsmith *v.* Tilly, 1 Harr. & J. (Md.) 361.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Fairchild *v.* Adams, 11 Cush. (Mass.) 549; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Newburyport Mar. Ins. Co. *v.* Oliver, 8 Mass. 402.

Michigan.— Beam *v.* Macomber, 33 Mich. 127.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84.

Missouri.— Davenport *v.* Fulkerson, 70 Mo. 417; Mitchell *v.* Curran, 1 Mo. App. 453.

New Hampshire.— Straw *v.* Truesdale, 59 N. H. 109; Beattie *v.* Hilliard, 55 N. H. 428; Piersons *v.* Hobbes, 33 N. H. 27.

New Jersey.— Richardson *v.* Lanning, 26 N. J. L. 130; West Jersey R. Co. *v.* Thomas, 21 N. J. Eq. 205.

New York.— Bedell *v.* Kennedy, 109 N. Y. 153, 16 N. E. 326, 15 N. Y. St. 85; Lowenstein *v.* McIntosh, 37 Barb. (N. Y.) 251; Lowndes *v.* Campbell, 1 Hall (N. Y.) 659; Silverman *v.* Doran, 23 Misc. (N. Y.) 96, 51 N. Y. Suppl. 731; Gay *v.* Haskins, 8 Misc. (N. Y.) 626, 30 N. Y. Suppl. 191, 61 N. Y. St. 837; Phillips *v.* Rouss, 7 N. Y. St. 378; Smith *v.* Lockwood, 7 Wend. (N. Y.) 241; McKinney *v.* Newcomb, 5 Cow. (N. Y.) 425; De Long *v.* Stanton, 9 Johns. (N. Y.) 38.

North Carolina.—Walker *v.* Walker, 60 N. C. 255.

Ohio.— Corrigan *v.* Rockefeller, 10 Ohio S. & C. P. Dec. 494.

Pennsylvania.—Robinson *v.* Bickley, 30 Pa. St. 384; Merrick's Estate, 5 Watts & S. (Pa.) 9; Speer *v.* McChesney, 2 Watts & S. (Pa.) 233; Andrews *v.* Lee, 3 Penr. & W. (Pa.) 99; Zeigler *v.* Zeigler, 2 Serg. & R. (Pa.) 286; Taylor *v.* Brittain, 1 Leg. Chron. (Pa.) 188.

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29; Askew *v.* Kennedy, 1 Bailey (S. C.) 46; Alken *v.* Bolan, 1 Brev. (S. C.) 239, 2 Am. Dec. 660; Mulder *v.* Cravat, 2 Bay (S. C.) 370; Radcliffe *v.* Wightman, 1 McCord Eq. (S. C.) 408; Alwyn *v.* Perkins, 3 Desauss. (S. C.) 297.

Tennessee.—Vaughn *v.* Herndon, 91 Tenn. 64, 17 S. W. 793; Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

ute,[67] or unless the parties have intended that the award shall not be final and conclusive.[68]

2. As Merger and Bar of Original Demands — a. Valid Award — (I) *General Rule.* It is the general rule that a valid award operates to merge and extinguish all claims embraced in the submission. Thereafter the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand;[69] and the defendant can-

Texas.— Jones *v.* Frosh, 6 Tex. 202; Gilbert *v.* Knight, 3 Tex. App. Civ. Cas. § 316; Houston, etc., R. Co. *v.* Newman, 2 Tex. App. Civ. Cas. § 349.

Wisconsin.— McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668.

United States.— Denny *v.* Brown, 2 Betts (U. S.) 51, 7 Fed. Cas. No. 3,805.

England.— Commings *v.* Heard, L. R. 4 Q. B. 669, 10 B. & S. 606, 39 L. J. Q. B. 9, 20 L. T. Rep. N. S. 975, 18 Wkly. Rep. 61; Moseley *v.* Simpson, L. R. 16 Eq. 226, 42 L. J. Ch. 739, 28 L. T. Rep. N. S. 727, 21 Wkly. Rep. 694; Anonymous, 3 Atk. 644; Tittenson *v.* Peat, 3 Atk. 529; Lingood *v.* Croucher, 2 Atk. 395; Hill *v.* Ball, 2 Bligh N. S. 1, 1 Dowl. N. S. 164, 4 Eng. Reprint 1030; Brown *v.* Brown, 2 Ch. Cas. 140, 1 Vern. 157; Sumpter *v.* Life, Dick. 497.

67. Hamilton *v.* Wort, 3 Blackf. (Ind.) 68.

The statutory power to review awards upon specified grounds, which do not include objections based upon an incorrect determination of the merits, is confined to the grounds specified in the statute, and does not, by implication, involve an investigation of the merits or a reëxamination of the evidence heard by the arbitrator.

Alabama.— Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367; Davis *v.* Forshee, 34 Ala. 107; Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476; Wright *v.* Bolton, 8 Ala. 548.

California.— Carsley *v.* Lindsay, 14 Cal. 390; Peachy *v.* Ritchie, 4 Cal. 205.

Delaware.— Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Georgia.—Anderson *v.* Taylor, 41 Ga. 10.

Indiana.— Deford *v.* Deford, 116 Ind. 523, 19 N. E. 530.

Kansas.— Weir *v.* West, 27 Kan. 650.

Kentucky.—Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157.

Louisiana.—Amet *v.* Boyer, 36 La. Ann. 266; *In re* Wallace, 31 La. Ann. 335; Betterton *v.* Adams, 13 La. Ann. 334; St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202; Davis *v.* Leeds, 7 La. 471.

Massachusetts.— Brigham *v.* Burnham, 12 Allen (Mass.) 97.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84.

New Jersey.— Bell *v.* Price, 21 N. J. L. 32.

New York.— Matter of Wilkins, 48 N. Y. App. Div. 433, 62 N. Y. Suppl. 1068; Shrump *v.* Parfitt, 84 Hun (N. Y.) 341, 33 N. Y. Suppl. 409, 67 N. Y. St. 242; Ketcham *v.* Woodruff, 24 Barb. (N. Y.) 147; Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410; Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580.

Texas.— Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612.

Wisconsin.— McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668.

Canada.— La Cie du Chemin de Fer Ontario, etc., *v.* Curé et Marguilliers, 21 Rev. Lég. 180.

If the submission is of a matter not within the statute, it will not be subject to the statutory provisions permitting a review of the award upon the merits of the controversy, and the award will be conclusive under the rule at common law. Hays *v.* Miller, 12 Ind. 187; Speer *v.* Bidwell, 44 Pa. St. 23.

68. Jenkins *v.* Meagher, 46 Miss. 84.

Presumption of intention.— The law will presume that the parties intended that the award when made should be final and conclusive, in the absence of evidence of a contrary intention. Mickles *v.* Thayer, 14 Allen (Mass.) 114.

69. *Alabama.*— Callier *v.* Watley, 120 Ala. 38, 23 So. 796; Jesse *v.* Cater, 28 Ala. 475.

Arkansas.— Keeler *v.* Harding, 23 Ark. 697.

Colorado.— McClelland *v.* Hammond, 12 Colo. App. 82, 54 Pac. 538.

Connecticut.— Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

Illinois.— Rogers *v.* Holden, 13 Ill. 293; Merritt *v.* Merritt, 11 Ill. 565; Gerrish *v.* Ayres, 4 Ill. 245.

Indiana.— Baltes *v.* Bass Foundry, etc., Works, 129 Ind. 185, 28 N. E. 319; Indiana Ins. Co. *v.* Brehm, 88 Ind. 578; Wood *v.* Deutchman, 80 Ind. 524.

Iowa.—West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555; King *v.* Hampton, 4 Greene (Iowa) 401.

Kansas.— Groat *v.* Pracht, 31 Kan. 656, 3 Pac. 274.

Kentucky.— Tevis *v.* Tevis, 4 T. B. Mon. (Ky.) 46; Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262. And see Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312; Logsdon *v.* Roberts, 3 T. B. Mon. (Ky.) 255.

Maine.— Carter *v.* Shibles, 74 Me. 273.

Maryland.— Randall *v.* Glenn, 2 Gill (Md.) 430. And see Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502.

Massachusetts.— Sears *v.* Vincent, 8 Allen (Mass.) 507; Knowles *v.* Shapleigh, 8 Cush. (Mass.) 333; Warfield *v.* Holbrook, 20 Pick. (Mass.) 531; Homes *v.* Aery, 12 Mass. 134; Newburyport Mar. Ins. Co. *v.* Oliver, 8 Mass. 402.

Mississippi.— Jones *v.* Harris, 58 Miss. 293.

Missouri.— Searles *v.* Lum, 81 Mo. App. 607.

not, in an action to enforce the award, set up in defense thereto any matters embraced in the award.[70] From this it follows that an award is not prop-

Nebraska.— Bentley *v.* Davis, 21 Nebr. 685, 33 N. W. 473.

New Hampshire.— Burleigh *v.* Ford, 59 N. H. 536; Varney *v.* Brewster, 14 N. H. 49. And see Carey *v.* Wilcox, 6 N. H. 177.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Backus *v.* Fobes, 20 N. Y. 204; Brazill *v.* Isham, 12 N. Y. 9; Coleman *v.* Wade, 6 N. Y. 44; Box *v.* Costello, 6 Misc. (N. Y.) 415, 27 N. Y. Suppl. 293; Campbell *v.* Champlain, etc., R. Co., 18 How. Pr. (N. Y.) 412; West *v.* Stanley, 1 Hill (N. Y.) 69; Armstrong *v.* Masten, 11 Johns. (N. Y.) 189; Purdy *v.* Delavan, 1 Cai. (N. Y.) 304. And see Garr *v.* Gomez, 9 Wend. (N. Y.) 649.

Pennsylvania.— Muirhead *v.* Kirkpatrick, 2 Pa. St. 425; Speer *v.* McChesney, 2 Watts & S. (Pa.) 233; O'Donnell *v.* Lynch, 1 Watts & S. (Pa.) 283; Murray *v.* Paisley, 1 Yeates (Pa.) 197.

South Carolina.— Colcock *v.* Wainwright, 1 Bay (S. C.) 114.

Tennessee.— Hildebran *v.* Rowan, 11 Humphr. (Tenn.) 92.

Texas.— Hall *v.* Morris, 30 Tex. 280; Aspley *v.* Thomas, 17 Tex. 220; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10; Houston, etc., R. Co. *v.* Newman, 2 Tex. App. Civ. Cas. § 349.

Vermont.— Preston *v.* Whitcomb, 11 Vt. 47. And see Schoff *v.* Bloomfield, 8 Vt. 472.

Virginia.— Lunsford *v.* Smith, 12 Gratt. (Va.) 554; Turberville *v.* Self, 2 Wash. (Va.) 71.

West Virginia.— Tennant *v.* Divine, 24 W. Va. 387.

England.— Clegg *v.* Dearden, 12 Q. B. 576, 17 L. J. Q. B. 223, 64 E. C. L. 576.

To a bill for an account defendant may plead an award, averring that the matter in question was comprehended in the award. Burton *v.* Ellington, 3 Bro. Ch. 196; Farrington *v.* Chute, 1 Vern. 72. See ACCOUNTS AND ACCOUNTING [1 Cyc. 443 *et seq.*].

Where the subject-matter of a submission is a contract between the parties, the legal effect of the award is to extinguish it. Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Knowles *v.* Shapleigh, 8 Cush. (Mass.) 333; Varney *v.* Brewster, 14 N. H. 49.

Where particular questions are submitted by parties to a controversy, and they agree to be bound by the award, in a subsequent suit by one of the parties against the other in relation to the subject-matter of the submission the award will be the law of the case upon the questions submitted. Lunsford *v.* Smith, 12 Gratt. (Va.) 554.

Where one demand affects rights of stranger. —Where parties to a suit at law submit the subject-matter thereof to arbitrators, and include in the submission separate matters, one of which affects the rights of a third person, an award in favor of defendant will be a bar to the further prosecution of the action, though it may not be binding upon such third person. Sears *v.* Vincent, 8 Allen (Mass.) 507.

Instruction as to legal effect of award.—In an action of assumpsit for breach of a contract which had been submitted to arbitration, an instruction that the award is conclusive on all the facts submitted is right as far as it goes; but the jury should be further instructed that, if they find the award as a fact, the contract is defeated because it is merged and extinguished by the submission and award; otherwise the jury might believe that the effect of the award was merely to conclusively establish the contract and the right of action thereon. Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

Errors not prejudicial.— An award stating that the right of possession and ownership of certain property is in a specified party is conclusive upon those questions, and, in an action of trover based on the award, there is no prejudicial error in refusing to charge that plaintiff can recover only on the strength of the award and not on that of his previous ownership; and, where evidence of such ownership is immaterial, its admission cannot prejudice defendant. McArthur *v.* Oliver, 53 Mich. 299, 19 N. W. 5.

Effect of assignment of award.— In Lowenstein *v.* McIntosh, 37 Barb. (N. Y.) 251, it was held that where the assignee of an award recovered judgment in an action thereon, the assignor could not thereafter claim any rights that he had in the matters determined by the award.

70. Eaton *v.* Burns, 31 Ind. 390; Garr *v.* Gomez, 9 Wend. (N. Y.) 649; Johnson *v.* Worden, 47 Vt. 457; Schoff *v.* Bloomfield, 8 Vt. 472.

As to what may be set up in defense to an action on an award see *infra*, IX, B, 2, b, (I).

Evidence regarding a matter awarded on is not admissible in behalf of defendant in an action wherein plaintiff relies on the award. Cook *v.* Gardner, 130 Mass. 313.

Counter-claim passed on by arbitrator.— A counter-claim to an action on an award cannot be maintained, the cause of action set out therein having arisen before the agreement to arbitrate, which agreement provided that the findings of the arbitrators should "constitute a final settlement," and having been included in the matters the arbitrators were to determine. West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

Set-off not allowed by arbitrators.—A matter of set-off offered in arbitration proceedings and not allowed by the arbitrators is concluded by an award not appealed from where it does not appear that the set-off was withdrawn, but merely that the party and his counsel thereupon left the room, stating that they would dispense with further attendance on the arbitration. Muirhead *v.* Kirkpatrick, 2 Pa. St. 425.

erly admissible in evidence in support of an action brought on the original demand.[71]

(II) *Exceptions to Rule*—(A) *Where No New Rights or Duties Created.* In some cases it has been held that, where an award gives no new rights and creates no new duties, it does not merge the original cause of action and will not operate as a bar to an action thereon until performed.[72]

(B) *Where Submission by Parol.* It seems to have been held in some of the earlier cases that, where the submission to arbitration was by parol, the award did not merge the matters submitted until it had been performed.[73] But, at this day, an award under a parol submission operates as a merger of the original cause as fully as one by bond.[74]

(III) *Extent of Merger*—(A) *Matters Not Within Submission.* An award will not operate to merge and bar any matters except such as were comprehended within the scope of the submission.[75] Thus, an award on a submission of all

71. Wood *v.* Deutchman, 80 Ind. 524; Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502; Elliot *v.* Heath, 14 N. H. 131. But see Gannon *v.* Anderson, 2 Bailey (S. C.) 346.

Award pleaded in answer and admitted in reply.— In an action to compel the statement of an unsettled account between the joint owners of a steamboat, with a prayer for a judgment for the amount which might be found due to plaintiff, the defendant answered that the amount due plaintiff had been ascertained and fixed by an award upon submission to a third person. Plaintiff replied, admitting the submission and award, and asked judgment thereon. It was held that there was no such departure in pleading as would vitiate a judgment for the amount admitted to be due by the answer. Benson *v.* Stein, 34 Ohio St. 294.

Instructions.—Where an action was brought on the original cause and defendant set up the award, and plaintiff, in reply, alleged fraud therein, it was held erroneous for the court to charge the jury that, if they should find that the arbitrators acted in good faith, they should find for defendant, and leave plaintiff to his remedy on the agreement to submit, as the court should have instructed that, if the arbitrators acted in good faith, the jury should find for plaintiff the amount ascertained by the award to be due him. Blakenship *v.* Adkins, 12 Tex. 536.

72. Freeman *v.* Barnard, 1 Ld. Raym. 247.

Thus, in England, an award which merely ascertains the amount of a money demand, and directs payment, is not deemed a bar to an action for the original debt until after payment of the sum awarded. Russell Arb. & Award (8th ed.) 295; Allen *v.* Milner, 2 Cr. & J. 47, 1 L. J. Exch. 7, 2 Tyrw. 113; Roulstone *v.* Alliance Ins. Co., 4 Ir. C. L. 547.

But in the United States this doctrine has been disapproved (Brazill *v.* Isham, 12 N. Y. 9; Armstrong *v.* Masten, 11 Johns. (N. Y.) 189). And it is the general rule here that, where the acts to be performed by the parties are distinct and independent, performance is not necessary to give force to the award. As to the necessity for performance in general, see *infra*, X, A.

Award of same rent as provided in lease.— In an arbitration between a lessor and lessee as to the payment of rent under a certain indenture, an award that the lessee should pay the same rent and in the same manner as provided for in the lease was held not to supersede or merge the life of the lease so that no action for the rent reserved could be brought upon the covenant in the lease instead of upon the bond submitting to arbitration. Keeler *v.* Harding, 23 Ark. 697.

Distinction between award and valuation. — It would seem that, where the submission is a special one, and simply for the purpose of ascertaining the value of particular work, a suit may be brought either on the award or for work and labor, using the award merely as evidence of value. Efner *v.* Shaw, 2 Wend. (N. Y.) 567.

And as to the distinction in general between awards and mere valuations or appraisements see *supra*, I, A, 2.

73. Armstrong *v.* Masten, 11 Johns. (N. Y.) 189; U. S. *v.* Ames, 1 Woodb. & M. (U. S.) 76, 24 Fed. Cas. No. 14,441.

74. Better rule.— *Maryland.*— Randall *v.* Glenn, 2 Gill (Md.) 430.

Missouri.— Searles *v.* Lum, 81 Mo. App. 607.

New Hampshire.— Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68.

New York.— Armstrong *v.* Masten, 11 Johns. (N. Y.) 189.

Texas.—Aspley *v.* Thomas, 17 Tex. 220.

75. *Alabama.*— Callier *v.* Watley, 120 Ala. 38, 23 So. 796; Collier *v.* White, 97 Ala. 615, 12 So. 385; Burns *v.* Hendrix, 54 Ala. 78; Jesse *v.* Cater, 28 Ala. 475.

Connecticut.—Abel *v.* Fitch, 20 Conn. 90; Hopson *v.* Doolittle, 13 Conn. 236; Watrous *v.* Watrous, 3 Conn. 373.

Georgia.— Brady *v.* Pryor, 69 Ga. 691.

Illinois.—Woodward *v.* Woodward, 14 Ill. 370.

Maryland.—Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 395, 6 Am. Dec. 502, the court in this case saying: "The award does not destroy or annul the original contract between the parties further than the award pursues, and is conformable to the terms of the reference."

matters in difference is no bar to the recovery of a demand which, though it existed as a claim at the time of the submission, was not then a matter in difference.[76] And so, where the arbitrators refuse to consider a claim because they deem it not to be within their jurisdiction under the submission, such claim may properly be made the basis of an action.[77]

(B) *General Submission — Matters Not Considered.* The cases regarding the effect of an award made under a general submission, upon matters in difference which were not presented to the arbitrators, are far from being harmonious. It is the rule in England that a party to such a submission must come forward with his whole case, and all matters in difference become merged in the award whether

Massachusetts.— Munn *v.* Reed, 4 Allen (Mass.) 431; Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49; Hale *v.* Huse, 10 Gray (Mass.) 99; Hodges *v.* Hodges, 5 Metc. (Mass.) 205.

Missouri.— Squires *v.* Anderson, 54 Mo. 193.

Nebraska.— Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077.

New Hampshire.— Furber *v.* Chamberlain, 29 N. H. 405; Wheeler *v.* Bancroft, 18 N. H. 537.

New York.— See *v.* Partridge, 2 Duer (N. Y.) 463; Harris *v.* Wilson, 1 Wend. (N. Y.) 511.

Pennsylvania.— Roof *v.* Brubacker, 1 Rawle (Pa.) 304.

South Carolina.— Blakely *v.* Frazier, 11 S. C. 122.

Vermont.— Briggs *v.* Brewster, 23 Vt. 100.

Virginia.— Bierley *v.* Williams, 5 Leigh (Va.) 700; Dust *v.* Conrod, 5 Munf. (Va.) 411.

Question one of fact.— In Huckestein *v.* Kaufman, 173 Pa. St. 199, 33 Atl. 1028, it was said that the decision of the question whether or not a matter was within the submission was one of fact; and, where there was any evidence which would reasonably support the finding that a particular item in question was submitted, the award embracing such item would not be disturbed.

Parol evidence will generally be admitted to show whether a certain matter was submitted, where such fact is not apparent from the submission and award. See *infra*, XII, A, 4.

Award fixing amount of debt does not destroy security.— Under a submission of a controversy concerning the amount secured by a mortgage, an award which merely fixes the amount due does not destroy the mortgage security for the debt. Collier *v.* White, 97 Ala. 615, 12 So. 385.

Matter arising subsequent to award.— A judgment on an award, in favor of the builder and against the owner of a house, upon a submission of all demands between them, is no bar to an action against the builder by the owner to recover a sum which he is subsequently — though before paying the amount awarded — obliged to pay to discharge the mechanic's lien of a workman employed by the builder, which lien has been included in the award. Hale *v.* Huse, 10 Gray (Mass.) 99.

Award fixing amount in lieu of dower.— The widow of C recovered judgment for her dower against F in a certain farm which had been warranted to F by B; and subsequently the agent of the widow entered into a submission with B by which it was referred to arbitrators to determine what sum annually should be paid to the widow by B instead of dower being assigned to her. An award was made fixing the sum and a bond given by B to pay the same; but, after several payments, B became insolvent and neglected to pay further. The widow never discharged the judgment nor signed any release of her dower. It was held that she was bound by the award so long as payments were made, but, upon failure of payments, she might institute proceedings to obtain possession of the land; that the true meaning of the submission was that the annual payments should be received, not in discharge of her dower in the land, but in the nature of rent for its use. Furber *v.* Chamberlain, 29 N. H. 405. See also Lewis *v.* Burgess, 5 Gill (Md.) 129.

Action to vacate award and recover on original cause.— Where a party joins, in one action, a claim for a balance alleged to be due on a building contract for a certain sum for extra work and materials, and damages for being hindered and delayed in the performance of the contract, and asks to have an award of an arbitrator, to whom some of the matters in dispute have been submitted, set aside as fraudulent, he is entitled to judgment for such sums as may be due upon those causes of action not included in the submission, even though the award be held valid. See *v.* Partridge, 2 Duer (N. Y.) 463.

76. Trescott *v.* Baker, 29 Vt. 459; Robinson *v.* Morse, 29 Vt. 404; Upton *v.* Upton, 1 Dowl. P. C. 400; Golightly *v.* Jellicoe, 4 T. R. 147, note *a*; Ravee *v.* Farmer, 4 T. R. 146, 2 Rev. Rep. 347. And see Huckestein *v.* Kaufman, 173 Pa. St. 199, 33 Atl. 1028.

77. Bixby *v.* Whitney, 5 Me. 192; Pennsylvania Tack Works *v.* Sowers, 11 Wkly. Notes Cas. (Pa.) 83. In Pritchard *v.* Daly, 73 Ill. 523, where two neighbors submitted their respective claims for damages, growing out of depredations upon each other's crops by their cattle, to arbitration, and the arbitrators only considered the claims of one and awarded him damages, and refused to consider or hear evidence as to the claims of the other, it was held that the latter might pay the award and then maintain a suit upon his original claim.

actually brought before the arbitrator or not.[78] This rule has been adopted in Canada[79] and in a number of jurisdictions in the United States.[80] But, according to the more generally accepted doctrine in this country, it is permissible to show that a certain matter, though within the scope of the submission, was not in fact considered by the arbitrators, and the award will not bar an action on such demand.[81] It seems, however, that, where the matter not presented constitutes part of an entire demand, the award will bar any further action on the original claim, even in those jurisdictions where the latter rule prevails.[82] And

78. English rule.— Clegg *v.* Dearden, 12 Q. B. 576, 17 L. J. Q. B. 233, 64 E. C. L. 576; Dunn *v.* Murray, 9 B. & C. 780, 7 L. J. K. B. O. S. 390, 4 M. & R. 571, 17 E. C. L. 347; Dicas *v.* Jay, 6 Bing. 519, 8 L. J. C. P. O. S. 210, 4 M. & P. 285, 19 E. C. L. 237; Crofton *v.* Connor, 1 Bro. P. C. 530; Smith *v.* Johnson, 15 East 213, 13 Rev. Rep. 449; Smalley *v.* Blackburn R. Co., 2 H. & N. 158, 27 L. J. Exch. 65, 5 Wkly. Rep. 521; Shelling *v.* Farmer, 1 Str. 646; Collins *v.* Powell, 27 T. R. 756. But see Ravee *v.* Farmer, 4 T. R. 146, 2 Rev. Rep. 347.

Rule qualified in equity — Accidental omission.— In Brophy *v.* Holmes, 2 Molloy 1, it was held that, where there was a purely accidental omission by the party, the matter was not merged.

Party made to account for omitted item.— On a general reference by three persons, A, B, and C, of all matters in difference, the arbitrators, acting upon certain statements of the assets and debts from which it appeared that A was indebted to the partnership in more than his share apparently would come to, directed B to receive the outstanding debts and effects, to pay the debts owing the partnership, and the remainder was to be divided between B and C. The award was acted upon by all parties, but B subsequently received some debts which were omitted in the accounts laid before the arbitrators and on which their award proceeded, and he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A against his copartners, it was held that he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators, and to an account of the receipts in respect of dubious debts; and that any over-receipt in respect of good debts ought to follow the directions of the award with respect to the dubious debts. Spencer *v.* Spencer, 2 Y. & J. 249, 31 Rev. Rep. 583.

79. Canadian rule.— Watson *v.* Toronto Gas Light, etc., Co., 5 U. C. Q. B. 523. And see Crouse *v.* Parke, 6 U. C. Q. B. 362.

Matter not known at the time of submission.— On a general submission of all matters in dispute, a cause of action not known to one of the parties at the time of the submission, and, hence, not presented to the arbitrators, is not concluded by the award. Lusty *v.* Van Volkenburgh, 1 U. C. Q. B. 214.

80. *Alabama.*— McJimsey *v.* Traverse, 1 Stew. (Ala.) 244, 18 Am. Dec. 43.

Connecticut.— Bunnel *v.* Pinto, 2 Conn. 431; Park *v.* Halsey, 2 Root (Conn.) 100.

Indiana.— Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 473.

Mississippi.— Gardener *v.* Oden, 24 Miss. 382.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Ott *v.* Schroeppel, 5 N. Y. 482; Lowenstein *v.* McIntosh, 37 Barb. (N. Y.) 251; Fidler *v.* Cooper, 19 Wend. (N. Y.) 285; Wheeler *v.* Van Houten, 12 Johns. (N. Y.) 311; De Long *v.* Stanton, 9 Johns. (N. Y.) 38. And see Hawes *v.* Coombs, 34 Ind. 455; Patrick *v.* Batten, 123 Mich. 203, 81 N. W. 1081.

81. American rule.— *Delaware.*— Robinson *v.* Houston, 2 Houst. (Del.) 62; Stevens *v.* Gray, 2 Harr. (Del.) 347.

Maine.— Mt. Desert *v.* Tremont, 75 Me. 252; North Yarmouth *v.* Cumberland, 6 Me. 21; Bixby *v.* Whitney, 5 Me. 192.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Edwards *v.* Stevens, 1 Allen (Mass.) 315; King *v.* Savory, 8 Cush. (Mass.) 309; Hodges *v.* Hodges, 9 Mass. 320; Webster *v.* Lee, 5 Mass. 334.

Missouri.— Pearce *v.* McIntyre, 29 Mo. 423.

Nebraska.— Bentley *v.* Davis, 21 Nebr. 685, 33 N. W. 473.

New Hampshire.— Elliott *v.* Quimby, 13 N. H. 181; Cheshire Bank *v.* Robinson, 2 N. H. 126; Whittemore *v.* Whittemore, 2 N. H. 26.

New Jersey.— Lee *v.* Dolan, 39 N. J. Eq. 193 [*affirmed* in 40 N. J. Eq. 338]. And see Suydam *v.* Johnson, 16 N. J. Eq. 112.

North Carolina.—Walker *v.* Walker, 60 N. C. 255.

Tennessee.— Newman *v.* Wood, Mart. & Y. (Tenn.) 190.

But see, *contra*, cases cited *supra*, note 80.

As to the admissibility of evidence to show what matters were considered by the arbitrators see *infra*, XII, A, 4, c.

Rule in Vermont.— In Vermont, if a submission is by parol, the award will not merge matters not brought to the attention of the arbitrators. Ennos *v.* Pratt, 26 Vt. 630; Buck *v.* Buck, 2 Vt. 417. And see Briggs *v.* Brewster, 23 Vt. 100. But, where the submission is in writing, it seems that the award will bar a subsequent action on any demand within the scope of the submission, although it were not actually considered by the arbitrators. Barker *v.* Belknap, 39 Vt. 168; Robinson *v.* Morse, 26 Vt. 392.

82. Kendall *v.* Stokes, 3 How. (U. S.) 87, 11 L. ed. 506, 833, wherein the party sought

where a party intentionally withholds a claim though requested to bring it forward, the award will always bar a subsequent action thereon.[83]

(c) *Award Made Pending Suit.* An award made pending an action for the same cause, when properly set up,[84] constitutes a good bar thereto,[85] even though the award finds for plaintiff in a less sum than the amount claimed in the suit.[86]

b. Invalid Award. Where the award rendered by the arbitrators is void, it will not bar an action on the original demand,[87] and it seems that the party may join a count on the award with one on the original cause of action, and, if it be determined that the award is void, may recover on the latter count.[88]

c. Award Vacated or Repudiated by Parties. Where an award is set aside, the parties are relegated to their former rights and an action will lie on the original demand.[89] The same is true where the award has been repudiated by the parties.[90]

to recover on the ground that he had not proved before the arbitrator all the damages he had sustained. To same effect see Hoagland *v.* Veghte, 29 N. J. L. 125; English *v.* Wilmerding School Dist., 165 Pa. St. 21, 30 Atl. 506.

Items omitted from account.— If a submission, though not under seal, in terms embraces all the accounts arising from dealings of a particular character between the parties, the account upon each side in reference to that subject is an entire matter, and the whole will be merged in the award although every item be not presented before the arbitrators. Briggs *v.* Brewster, 23 Vt. 100.

83. Warfield *v.* Holbrook, 20 Pick. (Mass.) 531, wherein the party refused to produce a note held by him, although the other party called the attention of the arbitrators to it and claimed to have it laid before them.

Claim fraudulently withheld.—Where, upon a parol agreement to submit all demands to arbitration, one of the parties falsely represents to the other that he has presented all his claims, and the other, acting on the belief that such representation is true, performs the award, the party making such representation is estopped to recover a claim designedly and fraudulently withheld from the submission. Wyman *v.* Perkus, 39 N. H. 218.

Vermont — Note intentionally withheld.— Where notes and other claims are submitted under seal to arbitration, an award is a bar to a suit on any of the notes intentionally withheld from the examination and decision of the arbitrators. Robinson *v.* Morse, 26 Vt. 392.

84. As to pleading the award in bar see *infra*, XI, C.

85. McAlpin *v.* May, 1 Stew. (Ala.) 520; Bowen *v.* Lazalere, 44 Mo. 383; Moore *v.* Austin, 85 N. C. 179.

Where parties not identical.— An award under an agreement entered into after bill filed may be pleaded to the bill; but, where all parties to the suit were not parties to the award, although the plaintiff was a party, and where part of the prayer of the bill was for the execution of trust deeds under which some of the parties to the suit who were not parties to the award were interested, the plea of the award was ordered to stand for the answer, with liberty to except. Dryden *v.* Robinson, 2 Sim. & St. 529.

86. McAlpin *v.* May, 1 Stew. (Ala.) 520.

87. Smith *v.* Holcomb, 99 Mass. 552; Morton *v.* Cameron, 3 Rob. (N. Y.) 189; Moran *v.* Bogert, 16 Abb. Pr. N. S. (N. Y.) 303; Memphis, etc., R. Co. *v.* Pillow, 9 Heisk. (Tenn.) 248; Cauthorn *v.* Courtney, 6 Gratt. (Va.) 381.

Award on matters not proper subjects of arbitration.— Where a matter in suit is not the subject of arbitration, or is a covenant and the submission is by parol, the original demand is not affected by a submission and award. Logsdon *v.* Roberts, 3 T. B. Mon. (Ky.) 255.

Not conclusive as to amount of damages.— Where an award of arbitrators was void for want of notice to defendant, so that he would not be liable in an action brought thereon, he cannot, in an action by plaintiff involving the same matter, urge the award as determining the amount of damages. Cobb *v.* Wood, 32 Me. 455.

Award not affecting rights of parties in subsequent suit.— A wife joined her husband in conveying her land to one who immediately reconveyed to the husband. In view of a subsequent suit for divorce, certain persons were called in to fix a basis for a division of the property, and decided that the husband should retain the land and pay the wife in instalments one half of its estimated value. The divorce suit was thereafter withdrawn. It was held that the award, being a nullity, did not affect the rights of the parties in a subsequent suit for divorce. McAllister *v.* McAllister, 10 Heisk. (Tenn.) 345.

Performance of void award.— It seems that a void award may sometimes constitute a good bar if it has been performed. Hamlin *v.* Duke, 28 Mo. 166. And see Norton *v.* Mascall, 2 Vern. 24.

88. Morton *v.* Cameron, 3 Rob. (N. Y.) 189.

Award on note — Admissibility of note in evidence.— The fact that an award for the payment of a note is void for uncertainty does not render inadmissible in evidence the note itself in an action declaring upon both. Harris *v.* Whitmore, 66 Ill. 144.

89. Redmond *v.* Bedford, 40 Ill. 267; Burroughs *v.* Thorne, 5 N. J. L. 910; Smith *v.* Cooley, 5 Daly (N. Y.) 401; Bellows *v.* Ingham, 2 Vt. 575.

90. Burnside *v.* Potts, 23 Ill. 411.

d. Agreement to Submit. A mere agreement to submit matters in controversy to arbitration cannot be set up in bar of a suit or action for the same cause,[91] though, under peculiar circumstances, an equity court will sometimes refuse to act until the arbitrators have made their award.[92]

3. As Evidence of Fact in Issue. In addition to the effect to be given a valid award as merger and bar, it is also conclusive evidence of facts necessarily involved in the arbitration whenever, in a subsequent litigation between the same parties or their privies, the same facts are brought directly in issue;[93] and, if a fact subsequently in issue was but inferentially involved in the arbitration, the award is *prima facie* evidence upon it, though not conclusive;[94] but, where it appears that the fact in question could not rightfully have been determined under the submission, the award is inadmissible.[95]

4. As Lien on Property. An award, of itself, does not operate as a lien.[96] But it is otherwise in statutory arbitrations in judicial proceedings, and where the award is entered as the judgment of the court under statute.[97] The submission,

As to repudiation of the award by the parties see *supra*, VII, B.

91. *Illinois.*— Ross *v.* Nesbit, 7 Ill. 252; Frink *v.* Ryan, 4 Ill. 322.

Massachusetts.— Cavanagh *v.* Dooley, 6 Allen (Mass.) 66.

Michigan.— Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718 (holding that the question of the effect of arbitration proceedings upon a pending suit involving the same subject-matter was not a proper issue to be passed upon when the case was upon the general merits, and could not be pleaded or shown in bar of the action); McGunn *v.* Hanlin, 29 Mich. 476.

Missouri.— Bowen *v.* Lazalere, 44 Mo. 383.

England.— Harris *v.* Reynolds, 7 Q. B. 71, 9 Jur. 808, 14 L. J. Q. B. 241, 53 E. C. L. 77; Cooke *v.* Cooke, L. R. 4 Eq. 77, 30 L. J. Ch. 480, 15 Wkly. Rep. 981; Waters *v.* Taylor, 15 Ves. Jr. 10, 13 Rev. Rep. 91; Nichols *v.* Chalie, 14 Ves. Jr. 265; Street *v.* Rigby, 6 Ves. Jr. 815.

Refusal of arbitrators to make award.— Where a suit was discontinued upon an agreement of the parties to submit their difficulties to arbitration, and the arbitrators met and, after a hearing, refused to make an award, and no time was fixed within which their award should be made, it was held that thereupon an action could be maintained affecting the subject-matter of the submission. Small *v.* Thurlow, 37 Me. 504.

92. Waters *v.* Taylor, 15 Ves. Jr. 10, 13 Rev. Rep. 91.

93. *Alabama.*— Caldwell *v.* Caldwell, 121 Ala. 598, 25 So. 825, liability for advancements to a distributee.

Kentucky.— Allen-Bradley Co. *v.* Anderson, etc., Distilling Co., 16 Ky. L. Rep. 350, construction of contract.

Massachusetts.— Prentiss *v.* Wood, 132 Mass. 486, amount of damages for maintaining nuisance.

Minnesota.—Haubrick *v.* Johnston, 23 Minn. 237, determination of contingency upon which an agreement depends.

North Carolina.— Gaylord *v.* Gaylord, 48 N. C. 367, location of division line.

Rhode Island,— Tennessee Mfg. Co. *v.* Haines, 16 R. I. 204, 14 Atl. 853, determination of conditional liability upon note.

England.—Whitehead *v.* Tattersall, 1 A. & E. 491, 28 E. C. L. 239 (amount necessary to repair dilapidated buildings); Gueret *v.* Audouy, 62 L. J. Q. B. 633 (construction of contract).

94. Award as prima facie evidence.— An award that defendant, in an action for the use and occupation of buildings, was indebted to plaintiff for rent of the same buildings at a time prior to that involved in the action was held *prima facie*, but not conclusive, evidence that defendant, who was shown to have occupied the buildings since the award, so occupied them as the tenant of plaintiff. Withington *v.* Warren, 12 Metc. (Mass.) 114.

95. Hackett *v.* Sawyer, 14 N. H. 65 (action for trespass occurring before submission of boundary dispute); Gaylord *v.* Gaylord, 48 N. C. 367 (relating to authority of arbitrators to change boundary line).

96. Even though the submission provides that a mortgage is to be executed within a limited time, unless the party against whom the award was made should pay the amount thereof, or that the submission might be made a rule of court, the award gives no lien or claim on the land, but the successful party is simply in the position in which any other creditor at large of the debtor stands. Jones *v.* Winans, 20 N. J. Eq. 96.

97. In Georgia it is held that the lien of a judgment founded on an award under the code related back to the date of the award, so far as to take precedence of a lien of equal degree created on the property — by the party to whom it was awarded, and the foundation of whose title is the award — between the date of the award and the day it is made the judgment of the court. Miller *v.* Fisk, 47 Ga. 270.

In Pennsylvania.— *Under the Pennsylvania act of 1810* it was held that an award was a lien on the real estate of the judgment debtor which continued during the pendency of an appeal. Dietrich's Appeal, 4 Watts (Pa.) 208; Ramsey's Appeal, 4 Watts & S. (Pa.) 71.

Under a later statute it was held that an award could not become a lien until it was

however, may create a lien for the amount to be awarded so as to justify and require the enforcement of such lien by a court of equity.[98]

B. Impeachment of Award — 1. Grounds of Impeachment — a. Mistake of Arbitrators — (1) *Honest Mistake of Judgment* — (A) *In Final Conclusion.* An honest mistake of judgment in the conclusion of arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground of impeachment of the award, whether the alleged mistake be one of fact or of law. Although the court might have given a different decision, it will not substitute its judgment for that of the arbitrators.[99]

approved by the court and judgment rendered thereon. Stephens' Appeal, 38 Pa. St. 9. See also Christy *v.* Crawford, 8 Watts & S. (Pa.) 99.

Appeal by successful party.— A party who appeals from a judgment upon an award in his own favor cannot, at the same time, claim a judgment lien upon the real estate of defendant pending the appeal. Eaton's Appeal, 83 Pa. St. 152; Lentz *v.* Lamplugh, 12 Pa. St. 344.

98. Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

99. *Alabama.*— Elrod *v.* Simmons, 40 Ala. 274; Young *v.* Leaird, 30 Ala. 371.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Georgia.— Lester *v.* Callaway, 73 Ga. 730; Anderson *v.* Taylor, 41 Ga. 10.

Illinois.— Smith *v.* Douglass, 16 Ill. 34; Root *v.* Renwick, 15 Ill. 461; Merritt *v.* Merritt, 11 Ill. 565.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Goodwine *v.* Miller, 32 Ind. 419; Flatter *v.* McDermitt, 25 Ind. 326; Moore *v.* Barnett, 17 Ind. 349.

Iowa.— Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502.

Kentucky.— Rudd *v.* Jones, 4 Dana (Ky.) 229; Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935; Johnston *v.* Dulin, 10 Ky. L. Rep. 403; Whittaker *v.* Wallace, 1 Ky. L. Rep. 271.

Louisiana.— Cobb *v.* Parham, 4 La. Ann. 148.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718; Roloson *v.* Carson, 8 Md. 208; Ebert *v.* Ebert, 5 Md. 353; Cromwell *v.* Owings, 6 Harr. & J. (Md.) 10.

Massachusetts.— Robbins *v.* Clark, 129 Mass. 145; Spoor *v.* Tyzzer, 115 Mass. 40; Goodridge *v.* Dustin, 5 Metc. (Mass.) 363.

Michigan.— Chicago, etc., R. Co. *v.* Hughes, 28 Mich. 186.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84; Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286.

Missouri.— Valle *v.* North Missouri R. Co., 37 Mo. 445; Reily *v.* Russell, 34 Mo. 524; Price *v.* White, 27 Mo. 275; Bridgman *v.* Bridgman, 23 Mo. 272; Vaughn *v.* Graham, 11 Mo. 575; State *v.* Union Merchants' Exch., 2 Mo. App. 96; Mitchell *v.* Curran, 1 Mo. App. 453.

New Hampshire.— Piersons *v.* Hobbes, 33 N. H. 27.

New Jersey.— Bell *v.* Price, 22 N. J. L. 578; Veghte *v.* Hoagland, 10 N. J. Eq. 45; Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297.

New York.— Masury *v.* Whiton, 111 N. Y. 679, 13 N. E. 638, 19 N. Y. St. 141; Hoffman *v.* De Graaf, 109 N. Y. 638, 16 N. E. 357, 15 N. Y. St. 197; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; Morris Run Coal Co. *v.* Onondaga Salt Co., 58 N. Y. 667; Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342]; Backus *v.* Fobes, 20 N. Y. 204; McGregor *v.* Sprott, 13 N. Y. Suppl. 191, 35 N. Y. St. 907; De Castro *v.* Brett, 56 How. Pr. (N. Y.) 484; Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410.

North Carolina.— Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679.

Pennsylvania.— Wentz *v.* Bealor, 14 Pa. Co. Ct. 337.

Rhode Island.— Harris *v.* Social Mfg. Co., 8 R. I. 133, 5 Am. Rep. 549.

South Carolina.— Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714.

Texas.— Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612.

Vermont.— Morse *v.* Bishop, 55 Vt. 231.

Virginia.— Portsmouth *v.* Norfolk County, 31 Gratt. (Va.) 727; Bassett *v.* Cunningham, 9 Gratt. (Va.) 684.

Washington.— Snohomish County School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341.

West Virginia.— Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

Wisconsin.—McCord *v.* Flynn, (Wis. 1901) 86 N. W. 668; Consolidated Water Power Co. *v.* Nash, 109 Wis. 490, 85 N. W. 485.

United States.— New York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246, 15 L. ed. 380; Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96, 99 (where the court said: "A contrary course would be a substitution of the judgment of the *Chancellor* in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation"); Bispham *v.* Price, 15 How. (U. S.) 162, 14 L. ed. 644; Frick *v.* Christian County, 1 Fed. 250; Denny *v.* Brown, 2 Betts (U. S.) 51, 7 Fed. Cas. No. 3,805; Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869; Jolly *v.* Blanchard, 1 Wash. (U. S.) 252, 13 Fed. Cas. No. 7,438; Kennedy *v.* U. S., 24 Ct. Cl. 122.

England.— Medcalfe *v.* Ives, 1 Atk. 63; Chace *v.* Westmore, 13 East 357; Haigh *v.* Haigh, 8 Jur. N. S. 983, 31 L. J. Ch. 420, 5 L. T. Rep. N. S. 507; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163; Knox *v.* Symmonds, 3 Bro. Ch. 358, 1 Ves. Jr. 369.

Canada.— Lyons *v.* Donovan, 6 Nova Scotia 180.

(B) *In Admitting or Rejecting Evidence.* The admission by arbitrators of improper or illegal evidence as the result of an honest mistake of judgment as to its admissibility or probative force is not, ordinarily, a ground for impeachment of the award.[1] To constitute ground of impeachment, it must plainly appear that the award was so based upon the improper evidence that the decision would have been different but for its admission;[2] and it has been held that the same rule applies to the rejection of legal evidence under circumstances not amounting to a refusal to receive such evidence on the merits, but only showing a mistaken construction of the rules of evidence.[3]

(C) *Upon Weight or Effect of Evidence.* An honest mistake of arbitrators in the effect or weight given by them to certain portions of the evidence is not such an impropriety as may be shown to impeach the award.[4]

Parol evidence, offered to impeach an award, which has no bearing except upon a question that the arbitrators have committed an error of judgment is inadmissible. Hoffman *v.* De Graaf, 109 N. Y. 638, 16 N. E. 357, 15 N. Y. St. 197.

1. *Kentucky.*— Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Lillard *v.* Casey, 2 Bibb (Ky.) 459.

Maine.— Sanborn *v.* Paul, 60 Me. 325.

Massachusetts.— Fuller *v.* Wheelock, 10 Pick. (Mass.) 135.

Missouri.— Vaughn *v.* Graham, 11 Mo. 575.

New Hampshire.— Pike *v.* Gage, 29 N. H. 461; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485.

New Jersey.— Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297. But see Fennimore *v.* Childs, 6 N. J. L. 386; Eyre *v.* Fenimore, 3 N. J. L. 489.

New York.— Viele *v.* Troy, etc., R. Co., 21 Barb. (N. Y.) 381; Campbell *v.* Western, 3 Paige (N. Y.) 124.

Pennsylvania.— Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82.

South Carolina.— Mulder *v.* Cravat, 2 Bay (S. C.) 370.

Vermont.— Sabin *v.* Angell, 44 Vt. 523.

England.— Perriman *v.* Steggall, 9 Bing. 679, 2 Dowl. P. C. 726, 2 L. J. C. P. 154, 3 Moore & S. 93, 23 E. C. L. 757; Symes *v.* Goodfellow, 2 Bing. N. Cas. 532, 533, 4 Dowl. P. C. 642, 1 Hodges 400, 5 L. J. C. P. 153, 2 Scott 769, 29 E. C. L. 649 (wherein Tindal, C. J., referring to the examination by an arbitrator of an incompetent witness, said: "You must take his law for better and for worse"); Armstrong *v.* Marshall, 4 Dowl. P. C. 593, 1 Hurl. & W. 643; Hagger *v.* Baker, 2 Dowl. & L. 856, 14 L. J. Exch. 227, 14 M. & W. 9; Eastern Counties R. Co. *v.* Robertson, 1 Dowl. & L. 498, 6 M. & G. 38, 6 Scott N. R. 802, 46 E. C. L. 38; Lloyd *v.* Archbowle, 2 Taunt. 324, 11 Rev. Rep. 595.

2. Sanborn *v.* Paul, 60 Me. 325; Chesley *v.* Chesley, 10 N. H. 327; Bassett *v.* Cunningham, 9 Gratt. (Va.) 684; Sharman *v.* Bell, 5 M. & S. 504, 17 Rev. Rep. 419.

Evidence to contradict an admitted fact.— In an investigation by arbitrators of an amount to be allowed for certain extra work under a building contract, the party liable had admitted a certain amount and the arbitrators received evidence tending to show a smaller amount, and thereupon awarded to the contractor an amount smaller than that which had been admitted, and it was held that this was not sufficient to invalidate the award, upon the ground that the arbitrators were, necessarily, to be governed by the technical rules of evidence. Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714.

Acting upon evidence not intended to be admitted has been held not, of itself, a sufficient objection upon which to impeach an award. Jocelyn *v.* Donnel, Peck (Tenn.) 274, 14 Am. Dec. 753.

Parol evidence is inadmissible to show that an award which appears to be unobjectionable on its face should be impeached because the arbitrators, in calculating the amount of damages to be awarded, considered a matter which furnished no legal ground of claim therefor. Rundell *v.* La Fleur, 6 Allen (Mass.) 480.

3. Lester *v.* Callaway, 73 Ga. 730; Raymond *v.* Farmers' Mut. F. Ins. Co., 114 Mich. 386, 72 N. W. 254; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392; McKinney *v.* Newcomb, 5 Cow. (N. Y.) 425. But see Burroughs *v.* Thorne, 5 N. J. L. 910.

As to refusal to hear evidence see *supra*, IV, D, 5, 6.

4. *Connecticut.*— Brown *v.* Green, 7 Conn. 536; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Parker *v.* Avery, Kirby (Conn.) 353.

Iowa.— Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502.

Kansas.— Russell *v.* Seery, 52 Kan. 736, 35 Pac. 812.

Maryland.— Cromwell *v.* Owings, 6 Harr. & J. (Md.) 10.

Massachusetts.— Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Homes *v.* Aery, 12 Mass. 134; Newburyport Mar. Ins. Co. *v.* Oliver, 8 Mass. 402.

Minnesota.— Goddard *v.* King, 40 Minn. 164, 41 N. W. 659.

Missouri.— Reily *v.* Russell, 34 Mo. 524; Newman *v.* Labeaume, 9 Mo. 30; Mitchell *v.* Curran, 1 Mo. App. 453.

New Hampshire.— White Mountains R. Co. *v.* Beane, 39 N. H. 107.

North Carolina.—Pierce *v.* Perkins, 17 N. C. 250.

Pennsylvania.— Neal *v.* Shields, 2 Penr. & W. (Pa.) 300.

(II) *Mistake Producing Failure of Intent* — (A) *General Rule.* Whenever, in a proper proceeding, it is made plainly to appear, either by the face of the award or properly by matter extrinsic thereto, that the arbitrators have fallen into such an error, either of fact or law, as will make the award operate prejudicially against the complaining party, as to a material matter, in a manner in which they manifestly did not intend it to operate, the award will not conclude the parties as to such matter; and if the entire award is so infected by such a mistake or if the inoperative portion be not clearly severable from the remainder, it will be void *in toto*.[5]

(B) *Modifications of Rule — Mistake, How Shown.* It has also been held that such mistakes must appear on the face of the award or by documents properly a part thereof, as otherwise it cannot be ascertained that the intention of the arbitrators has miscarried,[6] unless the mistake is admitted by the arbitrators;[7] and, at

United States.— Davy *v.* Faw, 7 Cranch (U. S.) 171, 3 L. ed. 305; Jolly *v.* Blanchard, 1 Wash. (U. S.) 252, 13 Fed. Cas. No. 7,438.

Hence, evidence dehors the award is not admissible to show that it is not reasonably supported by the evidence before the arbitrators or is against the weight of such evidence. Bailey *v.* District of Columbia, 9 App. Cas. (D. C.) 360; Aldrich *v.* Jessiman, 8 N. H. 516; Carey *v.* Wilcox, 6 N. H. 177; Greenough *v.* Rolfe, 4 N. H. 357; May *v.* Miller, 59 Vt. 577, 7 Atl. 818.

5. Avoids award.— *Connecticut.*— Allen *v.* Ranney, 1 Conn. 569.

Iowa.— Thompson *v.* Blanchard, 2 Iowa 44.

Massachusetts.— Barrows *v.* Sweet, 143 Mass. 316, 9 N. E. 665; Carter *v.* Carter, 109 Mass. 306; Rundell *v.* La Fleur, 6 Allen (Mass.) 480.

New Hampshire.— Sanborn *v.* Murphy, 50 N. H. 65.

New Jersey.— Veghte *v.* Hoagland, 10 N. J. Eq. 45.

Pennsylvania.— Williams *v.* Paschall, 3 Yeates (Pa.) 564, 4 Dall. (Pa.) 284, 1 L. ed. 835.

South Carolina.—Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; Alken *v.* Bolan, 1 Brev. (S. C.) 239, 2 Am. Dec. 660.

Tennessee.— Conger *v.* James, 2 Swan (Tenn.) 213.

United States.—Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96; Frick *v.* Christian County, 1 Fed. 250.

Proof of mistake showing failure of intent. — It is not enough to show that the arbitrators have so mistaken the rights of the parties upon the facts before them under the law that the court would have decided the matter differently, for this is but a mere error of judgment; but it must satisfactorily appear that but for the mistake, plainly shown, the arbitrators would have rendered a different award.

Iowa.— Gorham *v.* Millard, 50 Iowa 554; Tomlinson *v.* Tomlinson, 3 Iowa 575.

Massachusetts.—Spoor *v.* Tyzzer, 115 Mass. 40.

New York.— Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 26 N. Y. St. 445, 15 Am. St. Rep. 376; De Castro *v.* Brett, 56 How. Pr. (N. Y.) 484.

Ohio.—Swasey *v.* Laycock, 1 Handy (Ohio) 334.

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29.

England.—Richardson *v.* Nourse, 3 B. & Ad. 237, 5 E. C. L. 142; Knox *v.* Symmonds, 3 Bro. Ch. 358, 1 Ves. Jr. 369.

Canada.— Lyons *v.* Donovan, 6 Nova Scotia 180.

6. Mistake must appear on face of award. — *California.*— Tyson *v.* Wells, 2 Cal. 122.

Colorado.— See Wilson *v.* Wilson, 18 Colo. 615, 34 Pac. 175.

Iowa.— See Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502.

Kentucky.—Ward *v.* Rhodes, 14 Ky. L. Rep. 80; Rone *v.* Hines, 7 Ky. L. Rep. 93.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718; Goldsmith *v.* Tilly, 1 Harr. & J. (Md.) 361.

Missouri.— Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854; Valle *v.* North Missouri R. Co., 37 Mo. 445; Reeves *v.* McGlochlin, 65 Mo. App. 537; Taylor *v.* Scott, 26 Mo. App. 249.

New York.— Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218, 43 N. Y. Suppl. 431. See Halstead *v.* Seaman, 52 How. Pr. (N. Y.) 415 [*reversed* in 82 N. Y. 27, 37 Am. Rep. 536].

Pennsylvania.— Cornogg *v.* Abraham, 1 Yeates (Pa.) 84.

Virginia.— Wheatley *v.* Martin, 6 Leigh (Va.) 62; Head *v.* Muir, 3 Rand. (Va.) 122; Taylor *v.* Nicolson, 1 Hen. & M. (Va.) 67; Pleasants *v.* Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449; Shermer *v.* Beale, 1 Wash. (Va.) 11.

England.— Hagger *v.* Baker, 2 Dowl. & L. 856, 14 L. J. Exch. 227, 14 M. & W. 9; Phillips *v.* Evans, 1 Dowl. & L. 463, 13 L. J. Exch. 80, 12 M. & W. 309; Hogge *v.* Burgess, 2 H. & N. 293, 4 Jur. N. S. 668, 27 L. J. Exch. 318, 6 Wkly. Rep. 504; Williams *v.* Jones, 5 M. & R. 3; Sharman *v.* Bell, 5 M. & S. 504, 17 Rev. Rep. 419.

7. Necessity for admission of mistake by arbitrators.— Richardson *v.* Lanning, 26 N. J. L. 130; Taylor *v.* Sayre, 24 N. J. L. 647; Bell *v.* Price, 21 N. J. L. 32; Veghte *v.* Hoagland, 10 N. J. Eq. 45; Ward *v.* Dean, 3 B. & Ad. 234, 23 E. C. L. 110; Knox *v.* Sym-

all events, an award is *prima facie* valid where there is nothing on its face to impeach it.[8]

(c) *Particular Applications of Rule* — (1) Misconception of Facts. Although an award cannot be avoided on account of a wrong conclusion, drawn by the arbitrators from the facts before them, which conclusion amounts to a mere mistake of judgment,[9] a plain misconception of the facts submitted, by reason of which it is made to appear that the arbitrators must have rendered a different decision had they proceeded in view of the true state of facts, about the existence of which there could be no reasonable question, may be held to be a ground for avoiding the award.[10] But if, upon any reasonable view of the matter relied on to establish such misconception, it should appear that the existence thereof is doubtful or that the conclusion of the arbitrators was not based upon it, the award will be upheld.[11] Thus, it has been held that the mistake which will be sufficient to avoid the award must be one that is plain and palpable[12] — as a mere erroneous computation or calculation of the amount, and the

monds, 3 Bro. Ch. 358, 1 Ves. Jr. 369; McRae *v.* Lemay, 18 Can. Supreme Ct. 280.

Admission of all the arbitrators.— It has been held that the admission, by arbitrators, of a mistake upon which relief against an award could be granted, must be by all of the arbitrators whose concurrence was necessary to make a binding award. Pulliam *v.* Pensoneau, 33 Ill. 375; Stone *v.* Atwood, 28 Ill. 30; Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388; Pollard *v.* Lumpkin, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

Admission of arbitrators held not sufficient. — It has been held that a mistake of fact, although admitted by the arbitrator and appearing to be gross and clear, is not sufficient ground upon which to avoid an award. Eaton *v.* Eaton, 43 N. C. 102, 106 (wherein the court, by way of criticism of this requirement, said: "It makes the right of relief depend not on the mistake, but on the fact, that the arbitrators have intelligence enough to see it when pointed out, and frankness enough to admit it; whereas, if there be a mistake, and this, under any circumstances, is a ground for relief, it is difficult to perceive a reason for refusing it, because it so happens, that the arbitrators are too dull to apprehend or too disingenuous to admit their mistake. This, so far from being a ground for refusing relief, would seem to be a good reason to induce the Court to interfere, because it furnishes an inference that the arbitrators are totally unfit or dishonest, or both unfit and dishonest"); Phillips *v.* Evans, 1 Dowl. & L. 463, 13 L. J. Exch. 80, 12 M. & W. 309.

Evidence of a declaration of an arbitrator that he would have rendered a different decision had he seen a letter, the contents of which had been proved by parol evidence on account of its having been mislaid at the time, has been held not sufficient to avoid an award on the ground of mistake. Anderson *v.* Darcy, 18 Ves. Jr. 447.

8. Award prima facie valid.— Ratliff *v.* Mann, 5 Iowa 423; Slocum *v.* Damon, 1 Pinn. (Wis.) 520. See also *infra*, XII, B.

9. As to the effect of an honest mistake of judgment see *supra*, IX, B, 1, a, (I).

10. *Illinois.*— Eisenmeyer *v.* Sauter, 77 Ill. 515; Williams *v.* Warren, 21 Ill. 541; Ballance *v.* Underhill, 4 Ill. 453.

Massachusetts.— Ward *v.* American Bank, 7 Metc. (Mass.) 486; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131.

Michigan.— Buys *v.* Eberhardt, 3 Mich. 524.

New York.— Bouck *v.* Wilber, 4 Johns. Ch. (N. Y.) 405.

Pennsylvania.—James *v.* Sterrett, 4 Pa. Co. Ct. 584.

Rhode Island.—American Screw Co. *v.* Sheldon, 12 R. I. 324; Arnold *v.* Mason, 11 R. I. 238.

Wisconsin.—Consolidated Water Power Co. *v.* Nash, 109 Wis. 490, 85 N. W. 485.

United States.— Frick *v.* Christian County, 1 Fed. 250.

11. Johnson *v.* Knowlton, 35 Me. 467.

12. Mistake must be plain and palpable.— *Georgia.*— Tomlinson *v.* Hardwick, 41 Ga. 547; Anderson *v.* Taylor, 41 Ga. 10.

Massachusetts.— Brown *v.* Bellows, 4 Pick. (Mass.) 179.

New York.— Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342].

Pennsylvania.— Govett *v.* Reed, 4 Yeates (Pa.) 456; Bond *v.* Olden, 4 Yeates (Pa.) 243.

South Carolina.— Sumpter *v.* Murrell, 2 Bay (S. C.) 450; Mulder *v.* Cravat, 2 Bay (S. C.) 370; Alwyn *v.* Perkins, 3 Desauss. (S. C.) 297.

Texas.— Moore *v.* Jones, (Tex. Civ. App. 1894) 25 S. W. 987.

England.— Hall *v.* Hinds, 10 L. J. C. P. 210, 2 M. & G. 847, 40 E. C. L. 886; Corneforth *v.* Geer, 2 Vern. 705.

Mere suspicion of error in matter of fact or of law, dependent upon conjecture as to the means employed in arriving at a conclusion, is not sufficient upon which to avoid an award. McCalmont *v.* Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102.

A doubt as to the existence or effect of a mistake should be resolved in favor of the award, so as to uphold it. Ross *v.* Overton, 3 Call (Va.) 309, 2 Am. Dec. 552.

A mistake that the arbitrators must admit, as having resulted in a miscarriage of their intentions in the conclusion at which

like[13] — but a mistaken conception or application of facts which is due to the negligence of a party in presenting his case is no ground of relief, upon the inference that the decision of the arbitrators would otherwise have been different.[14]

(2) Misconstruction of Law — (a) When Required to Follow the Law. Whenever the arbitrators are required, by the terms of the submission or by a statute or rule of court under which the arbitration proceeds, to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award.[15]

(b) When Not Required to Follow the Law — aa. *General Rule.* In the absence

they arrived, has been held to be the test as to what constitutes a voidable mistake. Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392 [*affirming* 37 N. Y. Super. Ct. 358, which case *affirmed* 45 How. Pr. (N. Y.) 462].

As to necessity for admission of mistake by arbitrators, and sufficiency thereof, see *supra*, IX, B, 1, a, (II), (B).

13. *Georgia.*— Thrasher *v.* Overby, 51 Ga. 91.

Iowa.— Algona Dist. Tp. *v.* Lotts' Creek Dist. Tp., 54 Iowa 286, 6 N. W. 295.

Kentucky.— Taylor *v.* Brown, 4 Ky. L. Rep. 628.

Massachusetts.—Carter *v.* Carter, 109 Mass. 306.

Missouri.— Mitchell *v.* Curran, 1 Mo. App. 453.

New York.— Newland *v.* Douglass, 2 Johns. (N. Y.) 62.

England.— Hall *v.* Hinds, 10 L. J. C. P. 210, 2 M. & G. 847, 40 E. C. L. 886.

Whenever there is room for a fair difference of opinion as to whether or not the award is the result of miscalculation the determination of the arbitrators is conclusive. Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

An inadequate or excessive amount, which may be made to appear only upon the hypothesis of a mistake of judgment of the arbitrators and which is not simply a miscalculation upon unquestioned facts, is not ground for avoiding an award in the absence of fraud or undue means shown in the procurement of it.

Georgia.— Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811.

Illinois.— Root *v.* Renwick, 15 Ill. 461.

Indiana.— Saunders *v.* Heaton, 12 Ind. 20.

Kentucky.— Rudd *v.* Jones, 4 Dana (Ky.) 229.

Maryland.— Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, 17 Atl. 394.

Massachusetts.— Brown *v.* Bellows, 4 Pick. (Mass.) 179.

Mississippi.—Atkinson *v.* Whitney, 67 Miss. 655, 7 So. 644.

New Jersey.—Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325; Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567.

United States.— Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524.

England.— But see Croydon's Case, 3 Ch. Rep. 76, Eq. Cas. Abr. 50 [*cited* in Earle *v.* Stocker, 2 Vern. 251], wherein a court of chancery set aside an award of four hundred and ninety-five pounds as damages to the butcher "to repair his honor" on account of the other party having called him a "bankrupt knave." It appeared, however, that one of the arbitrators was the butcher's cousin, and this may have influenced the court's decision.

Canada.— Benning *v.* Atlantic, etc., R. Co., 6 Montreal Q. B. 385, 5 Montreal Super. Ct. 136, 34 L. C. Jur. 301 [*affirmed* in 20 Can. Supreme Ct. 177].

A mistake in the amount which is not the result of fraud or undue means has been held not matter of avoidance of an award, and that evidence of an intention of the arbitrators to include or to exclude a particular item not in fact included or excluded is inadmissible. Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679; Eaton *v.* Eaton, 43 N. C. 102.

As to mistake amounting to misconduct see *infra*, note 18.

An amount vastly in excess of that claimed by the party in whose favor the award is made is so manifestly the result of a miscalculation or mistake, showing a miscarriage of intent, as to be ground of avoidance. South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778.

A mistake in the calculation of interest has been held not a sufficient ground upon which to set aside an award. Priestman *v.* McDougal, Taylor (U. C.) 451. But see Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388.

As to allowance of usurious interest see *infra*, IX, B, 1, a, (II), (C), (2), (H), aa.

14. *Georgia.*— Harper *v.* Pike County Road Com'rs, 52 Ga. 659.

Maine.— North Yarmouth *v.* Cumberland, 6 Me. 21.

Massachusetts.— Davis *v.* Henry, 121 Mass. 150.

Missouri.— Valle *v.* North Missouri R. Co., 37 Mo. 445; McClure *v.* Shroyer, 13 Mo. 104.

New York.— Backus *v.* Fobes, 20 N. Y. 204.

15. *Connecticut.*— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Massachusetts.— Mickles *v.* Thayer, 14 Allen (Mass.) 114; Estes *v.* Mansfield, 6 Allen (Mass.) 69.

New Hampshire.— Sanborn *v.* Murphy, 50 N. H. 65.

Washington.— Snohomish County School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341.

England.— Blennerhassett *v.* Day, 2 Ball & B. 116.

of a special requirement the arbitrators are not bound to decide according to law,[16] and, therefore, in such case, a mistaken construction of the law has been held not sufficient ground of avoidance of an award except it be made clearly to appear that the arbitrators intended to decide according to law,[17] or unless it is shown that the misconstruction of law is so perverse as to work manifest injustice.[18]

bb. *Intent to Follow the Law.* If it be clearly shown that the arbitrators intended to decide according to the law, and it also plainly appears that they mistook or misconstrued the law,[19] the award must be held to operate as a miscarriage of the intention of the arbitrators, and, on this ground, the award will be set

16. As to extent of authority to disregard the law, in the absence of special requirement, see *supra*, III, E, 2, b.

17. *Alabama.*— Young *v.* Leaird, 30 Ala. 371; Byrd *v.* Odem, 9 Ala. 755; Goodwin *v.* Yarbrough, 1 Stew. (Ala.) 152.

Georgia.— Forbes *v.* Turner, 54 Ga. 252; Anderson *v.* Taylor, 41 Ga. 10; Champneys *v.* Wilson, R. M. Charlt. (Ga.) 206.

Illinois.— Sherfy *v.* Graham, 72 Ill. 158; Ross *v.* Watt, 16 Ill. 99.

Indiana.— Conrad *v.* Johnson, 20 Ind. 421; Carson *v.* Earlywine, 14 Ind. 256.

Iowa.— McKinnis *v.* Freeman, 38 Iowa 364.

Kentucky.— Massie *v.* Spencer, 1 Litt. (Ky.) 320.

Maine.— Walker *v.* Sanborn, 8 Me. 288; Smith *v.* Thorndike, 8 Me. 119.

Massachusetts.— Davis *v.* Henry, 121 Mass. 150; Gardner *v.* Boston, 120 Mass. 266; Ellicott *v.* Coffin, 106 Mass. 365; Smith *v.* Boston, etc., R. Co., 16 Gray (Mass.) 521; Bigelow *v.* Newell, 10 Pick. (Mass.) 348; Jones *v.* Boston Mill Corp., 6 Pick. (Mass.) 148.

Minnesota.—Goddard *v.* King, 40 Minn. 164, 41 N. W. 659.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

Missouri.— Reily *v.* Russell, 34 Mo. 524; Newman *v.* Labeaume, 9 Mo. 30; Mitchell *v.* Curran, 1 Mo. App. 453.

New York.— Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392 [*affirming* 37 N. Y. Super. Ct. 358, which case *affirmed* 45 How. Pr. (N. Y.) 462].

North Carolina.— Allison *v.* Bryson, 65 N. C. 44.

Ohio.— Ormsby *v.* Bakewell, 7 Ohio 98.

Pennsylvania.— Speer *v.* Bidwell, 44 Pa. St. 23.

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29; Mitchell *v.* De Schamps, 13 Rich. Eq. (S. C.) 9.

Vermont.— Smith *v.* Brandon Kaolin, etc., Co., 52 Vt. 469; Cutting *v.* Stone, 23 Vt. 571; Howard *v.* Puffer, 23 Vt. 365.

Virginia.— Hollingsworth *v.* Lupton, 4 Munf. (Va.) 114.

United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869.

England.— Huntig *v.* Ralling, 8 Dowl. P. C. 879, 2 Hurl. & W. 2, 4 Jur. 1091; Faviell *v.* Eastern Counties R. Co., 6 Dowl. & L. 54, 2 Exch. 344, 17 L. J. Exch. 223, 297; Greenwood *v.* Brownhill, 44 L. T. Rep. N. S. 47; Allen *v.* Greenslade, 33 L. T. Rep. N. S. 567; Stiff *v.* Andrews, 2 Madd. 6; Wood *v.* Griffith, 1 Swanst. 52, 1 Wils. C. P. 34, 18 Rev. Rep. 18; Young *v.* Walter, 9 Ves. Jr. 364, 7 Rev. Rep. 224; Ching *v.* Ching, 6 Ves. Jr. 282; Price *v.* Williams, 1 Ves. Jr. 365.

18. Working manifest injustice.— Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140; Portsmouth *v.* Norfolk County, 31 Gratt. (Va.) 727; Mathews *v.* Miller, 25 W. Va. 817; Sharman *v.* Bell, 5 M. & S. 504, 17 Rev. Rep. 419.

As to mistake of law amounting to misconduct see *infra*, IX, B, 1, a, (III).

The allowance of usurious interest by arbitrators does not affect the validity of an award, unless it appears that the arbitrators intended only to allow legal interest, or that their authority was so limited by the terms of the submission. Radcliffe *v.* Wightman, 1 McCord Eq. (S. C.) 408; Edrington *v.* League, 1 Tex. 64; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163. *Contra*, Oliver *v.* Heap, 2 Harr. & M. (Md.) 477.

19. If, however, the point of law in question be doubtful, the award will be upheld.

Massachusetts.— Smith *v.* Boston, etc., R. Co., 16 Gray (Mass.) 521.

New York.— Phillips *v.* Rouss, 7 N. Y. St. 378; Roosevelt *v.* Thurman, 1 Johns. Ch. (N. Y.) 220.

South Carolina.— Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31, 50, where the court said: "The error of law, which will avoid an award must be very clear, and such as has plainly conducted the judgment of the arbitrator to a wrong conclusion, one but for which he must have made an award, different in its substantial results."

Washington.— Snohomish County School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341.

West Virginia.— Mathews *v.* Miller, 25 W. Va. 817.

United States.— Jolly *v.* Blanchard, 1 Wash. (U. S.) 252, 13 Fed. Cas. No. 7,438.

England.— Ridout *v.* Pain, 3 Atk. 486; Medcalfe *v.* Ives, 1 Atk. 63; Vivian *v.* Champion, 1 Ld. Raym. 1125; Campbell *v.* Twemlow, 1 Price 81.

A mistake in the application of a foreign law which should govern the claims of the parties has been held not sufficient ground upon which to decide that the arbitrators committed a plain mistake of law where the award was not objectionable under the law of the state of the award, and the peculiar law of the other state was not shown to have

aside.[20] In applying this rule it is essential that the intent of the arbitrators to decide according to law should plainly appear.[21] Thus, where the reasons of the award are not shown, there is no means of knowing whether or not the arbitrators intended to decide according to law;[22] and it has often been held that a mistake of law which would justify setting aside an award must appear on the face thereof;[23] and, conversely, where the reasons of the award and the rules of law by which the arbitrators profess to be governed are stated by them, this is proof of their intention to decide according to such law, in which event the court may set aside the award for mistake of the law;[24] therefore, it has, generally, been held that a mistake

been proved before the arbitrators. Backus *v.* Fobes, 20 N. Y. 204.

The decision of a question of mixed law and fact has been held to be of such a nature that a mistake of law sufficient to avoid an award could not be predicated upon it. U. S. *v.* Farragut, 22 Wall. (U. S.) 406, 22 L. ed. 879; *In re* Simpson, 17 L. T. Rep. N. S. 617; Wohlenberg *v.* Lageman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600.

20. *Georgia.*— Crabtree *v.* Green, 8 Ga. 8; Champneys *v.* Wilson, R. M. Charlt. (Ga.) 206.

New Hampshire.—White Mountains R. Co. *v.* Beane, 39 N. H. 107; Severance *v.* Hilton, 32 N. H. 289; Greenough *v.* Rolfe, 4 N. H. 357.

New Jersey.— Bell *v.* Price, 22 N. J. L. 578.

North Carolina.— Mayberry *v.* Mayberry, 121 N. C. 248, 28 S. E. 349.

Virginia.—Willoughby *v.* Thomas, 24 Gratt. (Va.) 521.

United States.— U. S. *v.* Ames, 1 Woodb. & M. (U. S.) 76, 24 Fed. Cas. No. 14,441.

England.— Jones *v.* Frazier, 1 Hawks. 379; Young *v.* Walter, 9 Ves. Jr. 364, 7 Rev. Rep. 224.

21. Intention to decide according to law must be plain, and, if there is any ground for the inference that they may have intended to decide according to their own notions of morals or equity, the award should be upheld although it may appear to have been decided contrary to law. It must appear to the satisfaction of the court that the award would not have been made had the arbitrators know what the law was. Alexanders *v.* Goodwin, 54 N. H. 423; Sanborn *v.* Murphy, 50 N. H. 65; Piersons *v.* Hobbes, 33 N. H. 27; Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679; Leach *v.* Harris, 69 N. C. 532; Smith *v.* Sprague, 40 Vt. 43; Park *v.* Pratt, 38 Vt. 545; Richardson *v.* Nourse, 3 B. & Ad. 237, 5 E. C. L. 142.

Although an erroneous view of the law is stated in the award, it has been held that the award will not be set aside on this ground where it was not clear that this view had been followed, and it appeared that the award might have been predicated upon another and a correct view. Willoughby *v.* Thomas, 24 Gratt. (Va.) 521.

22. *Illinois.*— Root *v.* Renwick, 15 Ill. 461.

Massachusetts.— Cowley *v.* Dobbins, 123 Mass. 587; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131.

New Hampshire.— Johnson *v.* Noble. 13 N. H. 286, 38 Am. Dec. 485.

North Carolina.— Mayberry *v.* Mayberry, 121 N. C. 248, 28 S. E. 349.

England.— Cramp *v.* Symons, 1 Bing. 104, 8 E. C. L. 423; Bouttilier *v.* Thick, 1 D. & R. 366, 24 Rev. Rep. 664; Armitage *v.* Walker, 2 Jur. N. S. 13, 2 Kay & J. 211; Payne *v.* Massey, 3 L. J. C. P. O. S. 34, 9 Moore C. P. 666, 17 E. C. L. 562.

23. *Arkansas.*— Kirten *v.* Spears, 44 Ark. 166.

Indiana.— *Aliter,* by provision of statute. Claypool *v.* Miller, 4 Blackf. (Ind.) 163.

Missouri.— Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854.

New York.— Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392 [*affirming* 37 N. Y. Super. Ct. 358, which case *affirmed* 45 How. Pr. (N. Y.) 462]; De Castro *v.* Brett, 56 How. Pr. (N. Y.) 484.

England.— Cramp *v.* Symons, 1 Bing. 104, 8 E. C. L. 423; Hodgkinson *v.* Fernie, 3 C. B. N. S. 189, 3 Jur. N. S. 818, 27 L. J. C. P. 66, 6 Wkly. Rep. 181, 91 E. C. L. 189; Chace *v.* Westmore, 13 East 357; Kent *v.* Elstob, 3 East 18, 6 Rev. Rep. 520; Grant *v.* Summers, 1 L. J. C. P. O. S. 4; *In re* London Dock Co., 32 L. J. Q. B. 30, 7 L. T. Rep. N. S. 381, 11 Wkly. Rep. 89; Delver *v.* Barnes, 1 Taunt. 48, 9 Rev. Rep. 707. But see Price *v.* Jones, 2 Y. & J. 114.

Canada.— Hall *v.* Ferguson, 4 U. C. Q. B. O. S. 392; Hotchkiss *v.* Hall, 5 Ont. Pr. 423; Kingston Tp. Municipal Corp. *v.* Day, 1 Ont. Pr. 142.

24. *California.*— Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

Maryland.— Heuitt *v.* State, 6 Harr. & J. (Md.) 95, 14 Am. Dec. 259.

Massachusetts.—Ellicott *v.* Coffin, 106 Mass. 365; Bigelow *v.* Newell, 10 Pick. (Mass.) 348.

Missouri.— Vaughn *v.* Graham, 11 Mo. 575.

New Hampshire.— Cushman *v.* Wooster, 45 N. H. 410; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485.

New Jersey.—Ruckman *v.* Ransom, 23 N. J. Eq. 118.

North Carolina.— Leach *v.* Harris, 69 N. C. 532.

Rhode Island.— Harris *v.* Social Mfg. Co., 8 R. I. 133, 5 Am. Rep. 549.

South Carolina.— Cohen *v.* Habenicht, 14 Rich. Eq. (S. C.) 31.

Tennessee.— Nance *v.* Thompson, 1 Sneed (Tenn.) 320.

England.— Kent *v.* Elstob, 3 East 18, 6 Rev. Rep. 520.

of law apparent on the face of the award renders the award inoperative and of no effect.[25]

(III) *Mistake Amounting to Misconduct.* Although a mistake which is properly to be considered as an honest error of judgment will not avoid an award,[26] a mistake of fact or law which is so gross and palpable as to be evidence of misconduct or undue partiality may be held ground of impeachment;[27] and it has been held that such mistakes only are impeachable mistakes.[28] Again, although the merits of the controversy cannot be reëxamined when the award has not been properly attacked on sufficient grounds,[29] nor for the purpose of ascertaining whether there has been an honest mistake of judgment in the final conclusion[30] or in considering the weight of evidence,[31] it has been held that the merits of the controversy and the evidence adduced before the arbitrators should be reëxamined in determining whether the award was the result of misconduct or undue means.[32]

25. *Georgia.*— South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778.

Kentucky.— But see Baker *v.* Crockett, Hard. (Ky.) 388, 403, where the court, upon an extensive review of the early English cases, said: "We are, therefore, of opinion, that either as at common law, or in equity; with or without the statute; this award cannot be set aside for mistake of law, apparent in the body or face of the award." See also Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251.

Maryland.—State *v.* Williams, 9 Gill (Md.) 172; Heuitt *v.* State, 6 Harr. & J. (Md.) 95, 14 Am. Dec. 259; Goldsmith *v.* Tilly, 1 Harr. & J. (Md.) 361; Tilliard *v.* Fisher, 3 Harr. & M. (Md.) 118; Oliver *v.* Heap, 2 Harr. & M. (Md.) 477.

Tennessee.—State *v.* Ward, 9 Heisk. (Tenn.) 100.

England.—Ames *v.* Milward, 2 Moore C. P. 713, 8 Taunt. 637, 4 E. C. L. 312.

26. As to effect of an honest mistake of judgment see *supra*, IX, B, 1, a, (I).

27. Brown *v.* Bellows, 4 Pick. (Mass.) 179; Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342]; Hall *v.* Hinds, 10 L. J. C. P. 210, 2 M. & G. 847, 40 E. C. L. 886; Widder *v.* Buffalo, etc., R. Co., 27 U. C. Q. B. 425.

The mistake must be gross and palpable.— A mere inference, attributable to other causes than intentional misconduct, is not sufficient to avoid the award.

Delaware.— Bailey *v.* England, 1 Pennew. (Del.) 12, 39 Atl. 455.

Illinois.— Root *v.* Renwick, 15 Ill. 461.

New Jersey.— Thomas *v.* West Jersey R. Co., 24 N. J. Eq. 567.

New York.— McGregor *v.* Sprott, 13 N. Y. Suppl. 191, 35 N. Y. St. 907.

North Carolina.— Gardner *v.* Masters, 56 N. C. 462.

A mistake as to extent of authority, showing that the arbitrators have exceeded their powers by assuming to decide matters not submitted to them, will be sufficient to impeach the award on the ground of misconduct. Walker *v.* Walker, 60 N. C. 255; Borrowe *v.* Milbank, 6 Duer (N. Y.) 680, 5 Abb. Pr. (N. Y.) 28; Hutchinson *v.* Shepperton, 13 Q. B. 955, 13 Jur. 1098, 66 E. C. L. 955; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221.

An erroneous assumption without exercising judgment is such misconduct as, when clearly shown, will avoid the award. Swasey *v.* Laycock, 1 Handy (Ohio) 334. See also Baker *v.* Crockett, Hard. (Ky.) 288.

28. **Mistake not ground of impeachment unless amounting to misconduct.**— Adams *v.* Ringo, 79 Ky. 211, 222, 1 Ky. L. Rep. 251, where the court said: "We will not say that the decision of arbitrators might not be so in conflict with a plain principle of law which, from its nature, must be supposed to be well understood by all intelligent laymen as to furnish evidence of partiality or corruption. But in that case we would set aside the award for corruption proved by the decision, and not because there was an honest mistake. If arbitrators should decide that the children of a deceased person, admitted to have been born in lawful wedlock, were not his heirs, we should not hesitate to set aside their award." See also, to the same effect, Bumpass *v.* Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274; Ewing *v.* Beauchamp, 2 Bibb (Ky.) 456; Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935; Rone *v.* Hines, 7 Ky. L. Rep. 93; Whittaker *v.* Wallace, 1 Ky. L. Rep. 271; Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Mayberry *v.* Mayberry, 121 N. C. 248, 28 S. E. 349; Swasey *v.* Laycock, 1 Handy (Ohio) 334; Oldfield *v.* Price, 6 C. B. N. S. 539, 95 E. C. L. 539.

29. See *supra*, IX, A, 1.

30. See *supra*, IX, B, 1, a, (I), (A).

31. See *supra*, IX, B, 1, a, (I), (C).

32. McCullough *v.* Mitchell, 42 Ga. 495; Tomlinson *v.* Hardwick, 41 Ga. 547; Cobb *v.* Morris, 40 Ga. 671; Tennant *v.* Divine, 24 W. Va. 387; Fluharty *v.* Beatty, 22 W. Va. 698; Boring *v.* Boring, 2 W. Va. 297; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112.

A portion of the evidence adduced before the arbitrators will not be examined for the purpose of ascertaining whether, in the conclusion reached by them, upon the whole evidence, they were guilty of misconduct. Bell *v.* Price, 21 N. J. L. 32; Arthur *v.* Owen, 9 Dowl. P. C. 341, 5 Jur. 340.

b. For Fraud or Misconduct — (i) *Of Party* — (a) *In General.* It is ground for setting aside an award that it was obtained by the fraud, imposition, or other undue means employed by a party to the arbitration,[33] and the fact that

If there is any evidence on which the award may reasonably be sustained there cannot be any inference of misconduct of the arbitrators because a different conclusion might reasonably have been reached. Osborn, etc., Mfg. Co. *v.* Blanton, 109 Ga. 196, 34 S. E. 306; Lester *v.* Callaway, 73 Ga. 730; Hardin *v.* Almand, 64 Ga. 582; Shaifer *v.* Baker, 38 Ga. 135.

Where the record does not contain the evidence an objection that the award is not sustained thereby cannot be considered. Fulmore *v.* McGeorge, 91 Cal. 611, 28 Pac. 92; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

33. *Alabama.*— Chambers *v.* Crook, 42 Ala. 171, 94 Am. Dec. 637.

Connecticut.—Brown *v.* Green, 7 Conn. 536; Allen *v.* Ranney, 1 Conn. 569; Bulkley *v.* Starr, 2 Day (Conn.) 552; Lankton *v.* Scott, Kirby (Conn.) 356.

Georgia.—Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761.

Illinois.— Catlett *v.* Dougherty, 114 Ill. 568, 2 N. E. 669; Spurck *v.* Crook, 19 Ill. 415.

Indiana.— Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713; Rice *v.* Loomis, 28 Ind. 399; Hamilton *v.* Wort, 3 Blackf. (Ind.) 68.

Iowa.— Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93; Thompson *v.* Blanchard, 2 Iowa 44.

Massachusetts.— Strong *v.* Strong, 9 Cush. (Mass.) 560.

Michigan.— Beam *v.* Macomber, 33 Mich. 127.

Nebraska.— McDowell *v.* Thomas, 4 Nebr. 542.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536.

North Carolina.— Herndon *v.* Imperial F. Ins. Co., 110 N. C. 279, 14 S. E. 742.

Ohio.— Conway *v.* Duncan, 28 Ohio St. 102.

Pennsylvania.—Hartupee *v.* Pittsburgh, 131 Pa. St. 535, 25 Wkly. Notes Cas. (Pa.) 485, 19 Atl. 507; Brandon *v.* Forest County, 59 Pa. St. 187; Neal *v.* Shields, 2 Penr. & W. (Pa.) 300; Trump *v.* Straw, 1 Pearson (Pa.) 29; Riding *v.* Burkert, 8 Pa. Co. Ct. 640.

Tennessee.— Brown *v.* Harklerode, 7 Humphr. (Tenn.) 18. In Mathews *v.* Mathews, 1 Heisk. (Tenn.) 669, a matter in litigation between two brothers and their father was referred to arbitrators. One of the brothers threatened the other that, if he did not strike out certain items from his account, he would prosecute his father for perjury. The threatened brother, believing his father liable to such a prosecution, though in fact he was not, struck out the items. It was held that the award should be set aside.

Vermont.— Cox *v.* Fay, 54 Vt. 446; Cutting *v.* Carter, 29 Vt. 72.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698.

England.— Gartside *v.* Gartside, 3 Anstr. 735; Medcalfe *v.* Ives, 1 Atk. 63; Mitchell *v.* Harris, 4 Bro. Ch. 311, 2 Ves. Jr. 129*a*; South-Sea Co. *v.* Bunistead, Eq. Cas. Abr. 77.

Canada.— Wilson *v.* Richardson, 2 Grant Ch. (U. C.) 448.

Acts of party defeating effect of award.— A court of equity will give relief against an award, the effect of which is defeated by acts of one of the parties after the award was made and before it could be put into execution, which would deprive the complaining party of benefits under the award, in consideration of which certain things were required of him. Hillyard *v.* Nichols, 1 Root (Conn.) 360.

Award prepared by one of the parties.— The mere fact that one of the parties writes an award in the absence of the other party is not, of itself, sufficient evidence of fraud upon which to set aside the award. But where it appears that the award as drawn and signed is erroneous and deceptive and in favor of the party drawing it — as where it recites that the arbitrator examined the premises after the submission, and that the valuation thereof was a money value, which recital is contrary to the facts — an award may be held invalid in equity. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

Consent obtained by fraudulent means.— An award made, not as a result of the judgment of the arbitrators, but on an agreement between one party and one of the arbitrators, representing himself as authorized to act for the other party, is not binding where the consent of the former was obtained by fraudulent means. Stockton Combined Harvester, etc., Works *v.* Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

What fraud available.— In some cases it has been held that the fraud which will justify the setting aside of the award must have been practised upon the arbitrators. Wilson *v.* Wilson, 18 Colo. 615, 34 Pac. 175. In Veghte *v.* Hoagland, 10 N. J. Eq. 45, it was said that fraud which would justify equity in interfering with an award "must amount to corruption, partiality, or gross misbehavior in the arbitrators."

Fraud not sufficiently shown.— A and B, each of whom held one half of the stock of a corporation, submitted to arbitration the question as to which should sell to the other his stock, and delivered their certificates, assigned in blank, to the arbitrators, who decided that B should sell to A, and delivered to A all such certificates. B's certificates were then transferred to A on the company's books. In an action by B to set aside an election of directors while his stock was in A's name on the books, it appeared that, after the award, A accepted the assignment of B's stock against the protest of the latter; that he had the assignment recorded on the company's books and had the company's affairs adjusted as if the

the fraud is not discovered until after judgment has been entered on the award will not affect the right to relief;[34] but where all the facts were known to the party at the time the motion to enter judgment on the award was made, and no objection was then raised, equity refused to set it aside on a subsequent application.[35]

(B) *Submission Procured by Fraud.* Where a party is induced by the fraud or false representations of the other party to submit to arbitration, the award may be set aside on that ground.[36]

(C) *Suppression of Material Facts.* It is ground for setting aside an award that a party suppressed material facts which affected the determination of the arbitrators.[37]

(D) *False Testimony.* An award will sometimes be set aside because obtained upon the false testimony of a party.[38]

(E) *Exertion of Improper Influence on Arbitrator* — (1) IN GENERAL. The exercise of undue influence, applied by one of the parties to one or more of the

award were valid; and that he resisted B's suit to set aside the award. It was held that such facts were insufficient to show that the arbitration was devised or carried out fraudulently by A to deprive B of his interest in the company. Matter of Leslie, 58 N. J. L. 609, 33 Atl. 954.

34. Waples *v.* Waples, 1 Harr. (Del.) 392.

35. See *infra*, note 80.

36. Rice *v.* Loomis, 28 Ind. 399; Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93; Fluharty *v.* Beatty, 22 W. Va. 698.

Unintentional misrepresentation.—The fact that the successful party to an arbitration honestly stated to the other party facts relating to the appointment of a third arbitrator, which statement was misconstrued, and the appointment was the result of such misconstruction, was held not of itself sufficient to show the necessary fraud or corruption to warrant the court in setting aside the award. Bridgeport *v.* Eisenman, 47 Conn. 34.

Misrepresentations of law.—In Indiana Ins. Co. *v.* Brehm, 88 Ind. 578, it was held that misrepresentations of law would not vitiate the award. In this case a party misrepresented the obligations imposed by a policy of insurance on an insurance company.

37. Lankton *v.* Scott, Kirby (Conn.) 356; Cutting *v.* Carter, 29 Vt. 72; Medcalfe *v.* Ives, 1 Atk. 63; Wilson *v.* Richardson, 2 Grant Ch. (U. C.) 448.

Party bound to disclose facts.— To an award under a contract for fattening cattle, in which it was provided that they should be of a certain average condition, to be ascertained by an arbitrator, it was objected that the arbitrator had been misled and was partial toward plaintiffs. It was held that the acts of the arbitrator could not be questioned unless he had been deceived by plaintiffs, who were bound, if they knew of any disease affecting the cattle, to disclose it. Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263.

Immaterial matters.— The fact that plaintiff failed to produce books of account bearing upon the subject-matter in controversy is not sufficient ground of objection to an award where the arbitrators find that the books were not necessary to their determination. Gardner *v.* Lincoln, 5 Phila. (Pa.) 24, 19 Leg. Int. (Pa.) 132.

38. *Alabama.*—Chambers *v.* Crook, 42 Ala. 171, 94 Am. Dec. 637.

Connecticut.— Bulkley *v.* Starr, 2 Day (Conn.) 552; Lankton *v.* Scott, Kirby (Conn.) 356.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536.

Texas.— Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895.

Vermont.— Cox *v.* Fay, 54 Vt. 446.

But see Williams *v.* Danziger, 91 Pa. St. 232; Pickering *v.* Pickering, 19 N. H. 389, 394, wherein an award pleaded in bar was attacked on the ground that it "was made upon false and corrupt testimony, procured and laid before the arbitrators by the defendant." The court said: "To try the issue presented by the replication would be to inquire whether the referees arrived at just conclusions upon the testimony. The question whether any portion of it was false, is involved in those passed upon and settled by the tribunal chosen by the parties, and to determine it now, would be to try the case over again. This cannot be done."

Representations not known to be false.— It is not a sufficient reason for vacating an award as to the division line between adjoining farms that one of the parties, without fraud, made representations to the witnesses and arbitrators, in respect to certain monuments involved in the controversy, which are proved to have been false, but which it does not appear the party then knew to be false and which at most could be but the suppression of an opinion derived from very recent acquaintance with the premises. Callant *v.* Downey, 2 J. J. Marsh. (Ky.) 346; Howard *v.* Puffer, 23 Vt. 365.

Obtaining the allowance of a groundless claim is not, of itself, ground for setting the award aside. The party must have knowingly presented to the arbitrators, either by suggestion, or falsehood, or suppression of truth, a false state of facts. Emerson *v.* Udall, 8 Vt. 357 [on subsequent appeal see 13 Vt. 477, 37 Am. Dec. 604].

arbitrators by separate conference or other means of approach, is good ground for setting the award aside,[39] and a party who admits such improper measures will not be heard to say that he was unable to accomplish his purpose.[40] But, if there appears to have been no corrupt motive and the award was not influenced thereby, the mere fact that a party talked with an arbitrator regarding the case will not always necessitate the vacation of the award.[41]

(2) ENTERTAINING ARBITRATOR. For a party to furnish refreshments or other entertainment to an arbitrator is highly improper, and will sometimes justify the setting aside of the award.[42]

(II) *OF ARBITRATORS*—(A) *In General.* Fraud, corruption, or misconduct of the arbitrators is ground for setting aside the award,[43] and, where improper

39. Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761; Catlett *v.* Dougherty, 114 Ill. 568, 2 N. E. 669; Strong *v.* Strong, 9 Cush. (Mass.) 560; Trump *v.* Straw, 1 Pearson (Pa.) 29. And see Chichester *v.* McIntire, 4 Bligh N. S. 78, 1 Dowl. N. S. 460, 5 Eng. Reprint 28, in which case equity refused to compel specific performance of an award, one of the arbitrators having been influenced by the entreaties of the wife of one of the parties. See also *supra*, IV, D, 5.

40. Catlett *v.* Dougherty, 114 Ill. 568, 2 N. E. 669.

41. Bridgeport *v.* Eisenman, 47 Conn. 34; Flatter *v.* McDermitt, 25 Ind. 326; Adams *v.* Bushey, 60 N. H. 290; Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160.

An act of a party before the submission which has an effect upon the decision of the arbitrator, but which was not done with the view of deceiving or misleading them, will not vitiate the award. Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72.

Letter received after decision.— The fact that one of three arbitrators, after the decision, received from one of the parties a letter as to the merits of the case was held not to invalidate the award, subsequently drawn up and signed in pursuance of such decision. Johnson *v.* Holyoke Water Power Co., 107 Mass. 472.

42. Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713; Riding *v.* Burkert, 8 Pa. Co. Ct. 640, wherein the treating of an arbitrator to a drink was held to be so grossly improper as to require the award to be set aside.

Where award not influenced.—But, in some cases, where it did not appear that there was any intention to influence the award, nor that it had been so influenced, the court refused to set it aside. Hopper *v.* Wrightson, L. R. 2 Q. B. 367, 8 B. & S. 100, 36 L. J. Q. B. 97, 15 L. T. Rep. N. S. 566, 15 Wkly. Rep. 443; Moseley *v.* Simpson, L. R. 16 Eq. 226, 42 L. J. Ch. 730, 28 L. T. Rep. N. S. 727, 21 Wkly. Rep. 694; Crossley *v.* Clay, 5 C. B. 581, 57 E. C. L. 581. And see Liverpool, etc., Ins. Co. *v.* Goehring, 11 Wkly. Notes Cas. (Pa.) 280.

43. *Arkansas.*— McFarland *v.* Mathis, 10 Ark. 560.

Delaware.— Meredith *v.* Sanborn, 5 Harr. (Del.) 249.

Georgia.— Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238; Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761.

Illinois.— Moshier *v.* Shear, 102 Ill. 169, 40 Am. Rep. 573.

Indiana.— Milner *v.* Noel, 43 Ind. 324; Carson *v.* Earlywine, 14 Ind. 256; Hamilton *v.* Wort, 3 Blackf. (Ind.) 68.

Iowa.— Sullivan *v.* Frink, 3 Iowa 66.

Kentucky.— Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935.

Louisiana.— Dreyfous *v.* Hart, 36 La. Ann. 929; Davis *v.* Leeds, 7 La. 471.

Maine.— McKinney *v.* Page, 32 Me. 513; North Yarmouth *v.* Cumberland, 6 Me. 21.

Maryland.— Wilson *v.* Boor, 40 Md. 483; Bushey *v.* Culler, 26 Md. 534.

Massachusetts.—Hills *v.* Home Ins. Co., 129 Mass. 345; Strong *v.* Strong, 9 Cush. (Mass.) 560; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131.

Michigan.— Hewitt *v.* Reed City, 124 Mich. 6, 82 N. W. 616, 50 L. R. A. 128.

Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Dewey *v.* Leonard, 14 Minn. 153.

New Hampshire.— Beattie *v.* Hilliard, 55 N. H. 428; Rand *v.* Redington, 13 N. H. 72, 38 Am. Dec. 475.

New Jersey.— Veghte *v.* Hoagland, 10 N. J. Eq. 45.

New York.— Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580; Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405.

North Carolina.— Herndon *v.* Imperial F. Ins. Co., 110 N. C. 279, 14 S. E. 742; Hurdle *v.* Stallings, 109 N. C. 6, 13 S. E. 720; Eaton *v.* Eaton, 43 N. C. 102.

Pennsylvania.— Speer *v.* Bidwell, 44 Pa. St. 23; Paul *v.* Cunningham, 9 Pa. St. 106; Neal *v.* Shields, 2 Penr. & W. (Pa.) 300.

Rhode Island.— David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544; Bowen *v.* Steere, 6 R. I. 251; Cleland *v.* Hedly, 5 R. I. 163.

South Carolina.— Shinnie *v.* Coile, 1 McCord Eq. (S. C.) 478.

Vermont.—Woodworth *v.* McGovern, 52 Vt. 318.

Virginia.—Shipman *v.* Fletcher, 82 Va. 601; Lee *v.* Patillo, 4 Leigh (Va.) 436.

Washington.—McDonald *v.* Lewis, 18 Wash. 300, 51 Pac. 387.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

conduct is shown, the fact that the arbitrators were not actuated by an evil or corrupt intent will not prevent the vacation of the award.[44] But an award will not, ordinarily, be disturbed on account of mere indiscretions or slight irregularities in the conduct of the arbitrators, where they evidently acted in good faith and no injustice appears to have been done.[45] And where a unanimous award is not essential, misconduct of one only of the arbitrators will not, necessarily, operate to vitiate the award.[46]

(B) *Partiality.* If an arbitrator conduct himself with bias or partiality, this amounts in law to misconduct which will warrant the setting aside of the award.[47]

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

United States.— U. S. *v.* Farragut, 22 Wall. (U. S.) 406, 22 L. ed. 879; Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623; Torrance *v.* Amsden, 3 McLean (U. S.) 509, 24 Fed. Cas. No. 14,103.

England.— Lingood *v.* Eade, 2 Atk. 501; Ashton *v.* Pointer, 2 Dowl. P. C. 651, 3 Dowl. P. C. 201, 4 L. J. Exch. 71; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163.

Canada.— Bull *v.* Bull, 6 U. C. Q. B. 357; *In re* McMullen, 2 U. C. Q. B. 175.

Drunkenness of arbitrator.— If a person acts as an arbitrator while he is in such a state of intoxication as not to be in possession of his reasoning faculties, the award should be set aside for his misbehavior and incompetency. Smith *v.* Smith, 28 Ill. 56.

Pennsylvania — Party must participate in fraud.— In Pennsylvania it has been held that, in order to set aside an award for the fraud or misconduct of an arbitrator, the party benefited thereby must have been implicated in it. Hartupee *v.* Pittsburgh, 131 Pa. St. 535, 25 Wkly. Notes Cas. (Pa.) 485, 19 Atl. 507; Hostetter *v.* Pittsburgh, 107 Pa. St. 419.

44. Catlett *v.* Dougherty, 114 Ill. 568, 2 N. E. 669; Sullivan *v.* Frink, 3 Iowa 66; Graham *v.* Pence, 6 Rand. (Va.) 529; Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

In Missouri, however, it has been held that the terms "misconduct" and "misbehavior," as used in the statutes of that state, imply a wrongful intent and not a mere error of judgment on the part of the arbitrators. Vaughn *v.* Graham, 11 Mo. 575; Mitchell *v.* Curran, 1 Mo. App. 453.

Need not show actual injury.— Where improper conduct on the part of the arbitrators is shown, the party complaining need not show that the conduct was actually injurious. Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238.

45. *Illinois.*— Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561; Shear *v.* Mosher, 8 Ill. App. 119.

Indiana.— Flatter *v.* McDermitt, 25 Ind. 326.

Louisiana.— Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191.

Maine.— Stewart *v.* Waldron, 41 Me. 486.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718; Roloson *v.* Carson, 8 Md. 208.

Massachusetts.— Brown *v.* Bellows, 4 Pick. (Mass.) 179.

Mississippi.— Jenkins *v.* Meagher, 46 Miss. 84.

Missouri.— Neely *v.* Buford, 65 Mo. 448; Newman *v.* Labeaume, 9 Mo. 30.

New Hampshire.— Plummer *v.* Sanders, 55 N. H. 23.

New Jersey.—Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

New York.— Herrick *v.* Blair, 1 Johns. Ch. (N. Y.) 101.

Vermont.— Cutting *v.* Carter, 29 Vt. 72.

Virginia.— Miller *v.* Miller, (Va. 1901) 37 S. E. 792.

England.— Lingood *v.* Eade, 2 Atk. 501; *In re* Errazquin, 2 L. M. & P. 151.

Canada.— *In re* Hotchkiss, 5 Ont. Pr. 423.

46. Shear *v.* Mosher, 8 Ill. App. 119. In Plummer *v.* Sanders, 55 N. H. 23, where one of three referees, the report of a major part of whom was to be conclusive, was guilty of fraudulent misconduct in the interest of one of the parties, and the other two referees, in good faith, made an award in which such referee refused to join, it was held that the award would not be set aside at the instance of the party in whose interest the misconduct had happened.

47. *Alabama.*—Strong *v.* Beroujon, 18 Ala. 168.

Georgia.— Orme *v.* Burney, 95 Ga. 418, 22 S. E. 633; Milnor *v.* Georgia R., etc., Co., 4 Ga. 385.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Bash *v.* Christian, 77 Ind. 290.

Kansas.— Downey *v.* Atchison, etc., R. Co., 60 Kan. 499, 57 Pac. 101.

Kentucky.— Stinson *v.* Davis, 20 Ky. L. Rep. 1942, 50 S. W. 550.

Massachusetts.— Strong *v.* Strong, 12 Cush. (Mass.) 135 [see also 9 Cush. (Mass.) 560].

Missouri.— Hyeronimus *v.* Allison, 52 Mo. 102.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536.

New York.—Smith *v.* Cooley, 5 Daly (N. Y.) 401.

South Carolina.—Cothran *v.* Knox, 13 S. C. 496.

Tennessee.— Stephenson *v.* Oatman, 3 Lea (Tenn.) 462.

Vermont.— Woodworth *v.* McGovern, 52 Vt. 318.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

United States.— Nolan *v.* Colorado, etc., Min. Co., 63 Fed. 930, 27 U. S. App. 427, 12

(c) *Irregularities in Proceedings.* While arbitrators are not bound by the strict and technical rules of law, they must, nevertheless, have due regard to natural justice and the rights of the parties; and irregularities in their proceedings, whereby these things are arbitrarily disregarded, constitute such misconduct as will necessitate the setting aside of the award.[48] For example, an award may be set aside because the arbitrators proceeded without notifying a party or giving him an opportunity to be heard,[49] refused to postpone the hearing when it was plainly their duty to do so,[50] refused to hear competent and material evidence,[51] received evidence in the absence of, and without the consent of, a party,[52] refused

C. C. A. 585; Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720.

England.— Tittenson *v.* Peat, 3 Atk. 529; Kemp *v.* Rose, 1 Giff. 258; Burton *v.* Knight, 2 Vern. 514, Eq. Cas. Abr. 51; Earle *v.* Stocker, 2 Vern. 251; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163.

As to who are competent to act as arbitrators see *supra*, III, A.

As to necessity for arbitrators to act impartially see *supra*, III, E, 1.

48. As to the proceedings of the arbitrators in general and the irregularities which will vitiate their award see *supra*, IV.

49. Want of notice or opportunity to be heard.— *Delaware.*— Meredith *v.* Sanborn, 5 Harr. (Del.) 249.

Georgia.— Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238; Walker *v.* Walker, 28 Ga. 140.

Indiana.— Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028.

Maine.— McKinney *v.* Page, 32 Me. 513.

Maryland.— Wilson *v.* Boor, 40 Md. 483; Bushey *v.* Culler, 26 Md. 534; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458.

Massachusetts.— Hills *v.* Home Ins. Co., 129 Mass. 345.

Virginia.—McCormick *v.* Blackford, 4 Gratt. (Va.) 133.

West Virginia.— Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

England.— Thorburn *v.* Barnes, L. R. 2 C. P. 384, 36 L. J. C. P. 184, 16 L. T. Rep. N. S. 10, 15 Wkly. Rep. 623; Spettigew *v.* Carpenter, Dick. 66, 3 P. Wms. 362; Gladwin *v.* Chilcote, 9 Dowl. P. C. 550, 5 Jur. 749; *In re* Maunder, 49 L. T. Rep. N. S. 535; Pepper *v.* Gorham, 4 Moore C. P. 148, 21 Rev. Rep. 736, 16 E. C. L. 365.

Canada.— *In re* McMullen, 2 U. C. Q. B. 175.

As to notice of hearing see *supra*, IV, D, 2, b.

50. Refusal to postpone.—Torrance *v.* Amsden, 3 McLean (U. S.) 509, 24 Fed. Cas. No. 14,103; Whatley *v.* Morland, 2 C. & M. 347, 2 Dowl. P. C. 249, 3 L. J. Exch. 58, 4 Tyrw. 255; Bull *v.* Bull, 6 U. C. Q. B. 357.

As to adjournment and extension of time see *supra*, IV, D, 6.

51. Refusal to hear proper evidence.— *Indiana.*— Milner *v.* Noel, 43 Ind. 324.

Louisiana.— Dreyfous *v.* Hart, 36 La. Ann. 929.

Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.

New Jersey.— Burroughs *v.* Thorne, 5 N. J. L. 910.

New York.— Halsfead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405.

North Carolina.— Herndon *v.* Imperial F. Ins. Co., 110 N. C. 279, 14 S. E. 742; Hurdle *v.* Stallings, 109 N. C. 6, 13 S. E. 720.

South Carolina.— Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478.

Virginia.— Ligon *v.* Ford, 5 Munf. (Va.) 10.

Washington.—McDonald *v.* Lewis, 18 Wash. 300, 51 Pac. 387.

West Virginia.— Fluharty *v.* Beatty, 22 W. Va. 698.

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

England.— Mickalls *v.* Warren, 6 Q. B. 615, 14 L. J. Q. B. 75, 51 E. C. L. 615; Samuel *v.* Cooper, 2 A. & E. 752, 1 Hurl. & W. 86, 29 E. C. L. 345; Spettigew *v.* Carpenter, Dick. 66, 3 P. Wms. 361; Phipps *v.* Ingram, 3 Dowl. P. C. 669; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163.

Canada.— *In re* McMullen, 2 U. C. Q. B. 175; Ostell *v.* Joseph, 9 L. C. Rep. 440, 6 R. J. R. Q. 58.

As to the powers and duties of the arbitrators in regard to the reception of evidence see *supra*, IV, D, 5, a.

52. Receiving evidence in absence of party. — *Arkansas.*— McFarland *v.* Mathis, 10 Ark. 560.

Georgia.— Jackson *v.* Roane, 90 Ga. 669, 16 S. E. 650, 35 Am. St. Rep. 238; Cameron *v.* Castleberry, 29 Ga. 495.

Illinois.— Moshier *v.* Shear, 102 Ill. 169, 40 Am. Rep. 573.

Kentucky.— Hickey *v.* Grooms, 4 J. J. Marsh. (Ky.) 124; Galbreath *v.* Galbreath, 10 Ky. L. Rep. 935.

Maryland.— Sisk *v.* Garey, 27 Md. 401.

Massachusetts.— Conrad *v.* Massasoit Ins. Co., 4 Allen (Mass.) 20.

Michigan.— Hewitt *v.* Reed City, 124 Mich. 6, 82 N. W. 616, 50 L. R. A. 128.

New York.— National Bank of Republic *v.* Darragh, 30 Hun (N. Y.) 29; Knowlton *v.* Mickles, 29 Barb. (N. Y.) 465.

Rhode Island.— Cleland *v.* Hedly, 5 R. I. 163.

South Carolina.— Shinnie *v.* Coil, 1 McCord Eq. (S. C.) 478.

Virginia.— Tate *v.* Vance, 27 Gratt. (Va.) 571; Jenkins *v.* Liston, 13 Gratt. (Va.) 535; Graham *v.* Pence, 6 Rand. (Va.) 529.

to allow one of the arbitrators to take part in their deliberations,[53] improperly delegated their authority,[54] or chose an umpire by lot.[55]

(D) *Inference From Excessive or Inadequate Award.* The mere fact that an award is different in amount from what the court would have given will not, of itself, necessitate setting it aside.[56] But, where the amount is so palpably excessive or inadequate as to produce a conviction that the arbitrators must have been biased or corrupt, the award will be set aside.[57]

(E) *Waiver of Objections.* Where a party having knowledge of the fraud, misconduct, or partiality allows the arbitrators to proceed without objecting on that account, he is deemed to have waived the objection.[58]

c. For Newly-Discovered Evidence. In an old case it was said that equity might grant relief against an award on the ground of an inevitable failure of proof, discovered after the making of the award.[59] But it is at least doubtful whether newly-discovered evidence, in the absence of any fraud or misconduct of either the parties or arbitrators, will ever furnish sufficient cause for setting aside an award,[60] and certainly it will not unless it appears that such evidence could not have been sooner procured by the exercise of due diligence.[61]

United States.— Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

England.— Plews *v.* Middleton, 6 Q. B. 845, 9 Jur. 160, 14 L. J. Q. B. 139, 51 E. C. L. 845; Dobson *v.* Groves, 6 Q. B. 637, 9 Jur. 86, 14 L. J. Q. B. 17, 51 E. C. L. 637; Crossley *v.* Clay, 5 C. B. 581, 57 E. C. L. 581; *In re* Tidswell, 33 Beav. 213, 10 Jur. N. S. 143; Harvey *v.* Shelton, 7 Beav. 455, 13 L. J. Ch. 466; Matter of Hick, 8 Taunt. 694, 21 Rev. Rep. 511, 4 E. C. L. 340; Burton *v.* Knight, 2 Vern. 514, Eq. Cas. Abr. 51; Walker *v.* Frobisher, 6 Ves. Jr. 70, 5 Rev. Rep. 223.

As to the right of the parties to be present at all meetings of the arbitrators see *supra*, IV, D, 5, b.

53. As to the necessity for participation of all the arbitrators see *supra*, IV, E, 2, b.

54. Improper delegation of authority.— David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544; Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 24 L. J. Ch. 531, 3 Wkly. Rep. 98, 53 Eng. Ch. 528; Little *v.* Newton, 9 Dowl. P. C. 437, 5 Jur. 246, 10 L. J. C. P. 88, 2 M. & G. 351, 2 Scott N. R. 159, 40 E. C. L. 637.

As to delegation of authority see *supra*, III, F.

55. Choosing umpire by lot.— Matter of Cassell, 9 B. & C. 624, 7 L. J. K. B. O. S. 329, 4 M. & R. 555, 17 E. C. L. 281; Harris *v.* Mitchell, 2 Vern. 485. And see, generally, *supra*, V, B, 3, c, (II).

56. Need not necessitate setting aside.— Bridgeport *v.* Eisenman, 47 Conn. 34; Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160; Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96.

57. Palpably excessive or inadequate.— Rand *v.* Redington, 13 N. H. 72, 38 Am. Dec. 475; Smith *v.* Cooley, 5 Daly (N. Y.) 401; Croydon's Case, 3 Ch. Rep. 76, Eq. Cas. Abr. 50 [*cited* in Earle *v.* Stocker, 2 Vern. 251]. And see Rowand *v.* Martin, 7 Manitoba 160.

Excess in connection with other circumstances.— Where the damages awarded are not so excessive as of themselves to show fraud or error, but are extraordinary in amount, this may, in connection with other circumstances tending to show improper conduct on the part of the arbitrators, be sufficient to set aside the award. Rand *v.* Redington, 13 N. H. 72, 38 Am. Dec. 475.

58. Failure to object.— Dunham Lumber Co. *v.* Holt, 124 Ala. 181, 26 So. 663, 27 So. 556; Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117, 15 Cinc. L. Bul. 397, 17 Cinc. L. Bul. 139; Bignall *v.* Gale, 9 Dowl. P. C. 631, 5 Jur. 701, 10 L. J. C. P. 169, 2 M. & G. 830, 3 Scott N. R. 108, 40 E. C. L. 878. And see Callaway *v.* Bridges, 79 Ga. 753, 4 S. E. 687.

59. Doty *v.* White, 2 Root (Conn.) 426.

Ground for recommittal.— Newly-discovered evidence is sometimes a ground for recommitting the award to the arbitrators. See *infra*, IX, B, 2, d, (III), (C), (4).

60. In absence of fraud or misconduct.— Allen *v.* Ranney, 1 Conn. 569. And see Sanborn *v.* Davis, 5 N. H. 389; Williams *v.* Danziger, 91 Pa. St. 232; Russell Arb. & Award (8th ed.) 360.

As to effect of false testimony by a party to the award see *supra*, IX, B, 1, b, (I), (D).

In Smith *v.* Sainsbury, 9 Bing. 31, 1 L. J. C. P. 150, 23 E. C. L. 472, the court refused to set aside an award on the ground that plaintiff had discovered since the award that defendant was a convicted felon and, therefore, incompetent as a witness. And in Glasgow, etc., R. Co. *v.* London, etc., R. Co., 52 J. P. 215, the court refused to set aside an award on the ground that the evidence of a material witness differed from evidence he had previously given in another arbitration, which fact was only discovered subsequently to the award.

61. Exercise of due diligence.— *Georgia.*— Dulin *v.* Caldwell, 29 Ga. 362.

Indiana.—Elliott *v.* Adams, 8 Blackf. (Ind.) 103.

Kentucky.— Cook *v.* McRoberts, 5 Ky. L. Rep. 764.

2. METHOD OF OBTAINING RELIEF — a. In General. Originally there was no way by which a court of law could give relief against an award regular on its face and within the jurisdiction of the arbitrators,[62] and for such relief resort must be had to equity.[63] In the reign of Charles II, however, the practice grew up of making submissions in pending suits rules of court and setting aside the awards on motion, which practice was afterward extended by statute to all arbitrations.[64] In modern times power to set aside awards on motion is, generally, given by statute to the courts to which such awards are returned.[65]

b. In Courts of Law — (I) *DEFENSES IN ACTION ON AWARD* — (A) *Matters Apparent on Face of Award.* In an action on an award defendant may, of course, avail himself of any defense apparent on the face of the award.[66]

(B) *Matters Extrinsic the Award* — (1) RULE AT COMMON LAW. At common law, matters extrinsic the award — such as fraud, mistake, or partiality in the arbitrator — cannot be set up in defense to an action on the award. Defendant's redress in such cases is a resort to a court of equity.[67]

New York.— Todd *v.* Barlow, 2 Johns. Ch. (N. Y.) 551.

Pennsylvania.— Anbel *v.* Ealer, 2 Binn. (Pa.) 582 note.

England.— Eardley *v.* Otley, 2 Chit. 42, 18 E. C. L. 493; Reynolds *v.* Askew, 5 Dowl. P. C. 682, W. W. & D. 366.

Canada.— Dean *v.* Peterborough, etc., R. Co., 2 Ont. Pr. 79.

Laches.— An unexplained delay of more than four years after the discovery of new evidence will defeat a suit in equity to set an award aside on that ground. Plymouth *v.* Russell Mills, 7 Allen (Mass.) 438.

62. As to what objections may be urged against an award at common law see *infra*, IX, B, 2, b.

No action to recover for mistake.— In Newland *v.* Douglass, 2 Johns. (N. Y.) 62, plaintiff brought an action of assumpsit to recover the amount of a mistake made by the arbitrators in drawing up their award. It was held that such an action was not maintainable.

63. As to relief in equity see *infra*, IX, B, 2, c.

64. 9 & 10 Wm. III, c. 15.

65. As to relief under statute see *infra*, IX. B, 2, d.

66. *Arkansas.*— Wilkes *v.* Cotter, 28 Ark. 519.

Kansas.— Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Massachusetts.— Bean *v.* Farnam, 6 Pick. (Mass.) 269.

New Hampshire.— Truesdale *v.* Straw, 58 N. H. 207.

New Jersey.— Ruckman *v.* Ransom, 35 N. J. L. 565.

New York.— Owen *v.* Boerum, 23 Barb. (N. Y.) 187; Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; Perkins *v.* Wing, 10 Johns. (N. Y.) 143.

North Carolina.—Bryant *v.* Fisher, 85 N. C. 69.

Rhode Island.— David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544. See also Peckham *v.* School Dist. No. 7, 7 R. I. 545; Parker *v.* Pawtucket Mut. F. Ins. Co., 3 R. I. 192.

Wisconsin.— Meloy *v.* Dougherty, 16 Wis. 269.

Award against law.— A submission to arbitrators, where no cause is pending and where there is no agreement to make the submission a rule of court, is the mere act of the parties; and, in an action to enforce the award, it is no defense to say that it is against law. Hays *v.* Miller, 12 Ind. 187; Bigelow *v.* Newell, 10 Pick. (Mass.) 348; Mitchell *v.* Bush, 7 Cow. (N. Y.) 185; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.

Estoppel.— If a defendant defeat a suit by relying upon a submission and award, he cannot afterward object, to a suit upon the award, that the submission was invalid. Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 473. See also Beam *v.* Macomber, 35 Mich. 455.

Review on appeal.— An award which exceeds the authority of the arbitrators by deciding a matter not submitted, which excess is apparent from the face of the award and the submission, and which cannot be separated from the remainder of the award without doing injustice, is void, and may be noticed as error on appeal from a judgment in an action to enforce the award, although the record discloses no assignment of error and no exceptions to the rulings of the court during the progress of the trial, or to the findings of fact or to the judgment rendered. Bryant *v.* Fisher, 85 N. C. 69.

67. *Alabama.*— In Georgia Home Ins. Co. *v.* Kline, 114 Ala. 366, 21 So. 958, the rule as stated in the text was held to apply. It is difficult, however, to reconcile this case with Graham *v.* Woodall, 86 Ala. 313, 314, 5 So. 687, wherein a plea was relied on "as constituting partiality and fraud in the award." The court said: "There has been contrariety of decision on the question, whether fraud or partiality in the arbitrators can be raised as a defense to an action at law founded on the award. Some decisions hold that the defense can be made only in equity. We think, however, that both principle and the sounder line of authorities, require us to hold, that when such abuse has been practiced as the pleas in this case assert, the award furnishes no just

(2) Rule Under Codes and Practice Acts. Under codes and practice acts which permit defendant to interpose by answer any defense he may have, whether legal or equitable, defendant, in an action at law on an award, may set up as a defense any matter which constitutes good grounds in equity for setting aside or cancelling the award.[68]

ground for a recovery in an action at law." See also Strong *v.* Beroujon, 18 Ala. 168.

Delaware.— Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Georgia.—See Hardin *v.* Brown, 27 Ga. 314, holding that, in an action on a note given under an award, evidence of fraud in the procurement of the award is competent.

Illinois.— Newlan *v.* Dunham, 60 Ill. 233; Pottle *v.* McWorter, 13 Ill. 454.

Indiana.— Shroyer *v.* Bash, 57 Ind. 349; Carson *v.* Earlywine, 14 Ind. 256; White Water Valley Canal Co. *v.* Henderson, 3 Ind. 3; Hough *v.* Beard, 8 Blackf. (Ind.) 158; Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028.

Kentucky.—Southard *v.* Steele, 3 T. B. Mon. (Ky.) 435. *Compare* Stinson *v.* Davis, 20 Ky. L. Rep. 1942, 50 S. W. 550.

Maine.— Parsons *v.* Hall, 3 Me. 60, which indicates the rule to be otherwise in Maine.

Maryland.— Sisk *v.* Garey, 27 Md. 401.

Massachusetts.— Strong *v.* Strong, 9 Cush. (Mass.) 560; Bean *v.* Farnam, 6 Pick. (Mass.) 269, which cases hold, however, that the Massachusetts rule is otherwise.

Mississippi.— See Robertson *v.* Wells, 28 Miss. 90, holding that, in an action upon a note given for an award, defendant may show that there was an error in computation.

Missouri.— Finley *v.* Finley, 11 Mo. 624.

New Hampshire.—Pierce *v.* Pierce, 60 N. H. 355; Truesdale *v.* Straw, 58 N. H. 207; Elkins *v.* Page, 45 N. H. 310; Fletcher *v.* Hubbard, 43 N. H. 58.

New Jersey.— Ruckman *v.* Ransom, 35 N. J. L. 565; Hoagland *v.* Veghte, 23 N. J. L. 92; Sherron *v.* Wood, 10 N. J. L. 7.

New York.— Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; Efner *v.* Shaw, 2 Wend. (N. Y.) 567; Mitchell *v.* Bush, 7 Cow. (N. Y.) 185; Perkins *v.* Wing, 10 Johns. (N. Y.) 143; De Long *v.* Stanton, 9 Johns. (N. Y.) 38; Barlow *v.* Todd, 3 Johns. (N. Y.) 367; Newland *v.* Douglass, 2 Johns. (N. Y.) 62; Shephard *v.* Watrous, 3 Cai. (N. Y.) 166; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 366.

North Carolina.— Masters *v.* Gardner, 50 N. C. 298. *Compare* Devereux *v.* Burgwin, 33 N. C. 490.

Pennsylvania.— Evidence of fraud in the procurement of the award is competent. Hartupee *v.* Pittsburgh, 131 Pa. St. 535, 25 Wkly. Notes Cas. (Pa.) 485, 19 Atl. 507. See also Frederic *v.* Margwarth, (Pa. 1901) 49 Atl. 881; Speer *v.* Bidwell, 44 Pa. St. 23; Neal *v.* Shields, 2 Penr. & W. (Pa.) 300; Williams *v.* Paschall, 3 Yeates (Pa.) 564, 4 Dall. (Pa.) 284, 1 L. ed. 825.

Vermont.— Woodrow *v.* O'Conner, 28 Vt. 776; Shepherd *v.* Briggs, 28 Vt. 81.

Virginia.— Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671; Miller *v.* Kennedy, 3 Rand. (Va.) 2. *Compare* Bierly *v.* Williams, 5 Leigh (Va.) 700, holding that, in assumpsit on an award under a parol submission, fraud in the procurement of the submission may be shown.

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

United States.—Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

England.— Thorburn *v.* Barnes, L. R. 2 C. P. 384, 36 L. J. C. P. 184, 16 L. J. C. P. 184, 16 L. T. Rep. N. S. 10, 15 Wkly. Rep. 623; Bucclench *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Johnson *v.* Durant, 2 B. & Ad. 925, 1 L. J. K. B. 47, 22 E. C. L. 387; Grazebrook *v.* Davis, 5 B. & C. 534, 8 D. & R. 295, 4 L. J. K. B. O. S. 321, 11 E. C. L. 572; Braddick *v.* Thompson, 8 East 344; Swinford *v.* Burn, Gow 5; Whitmore *v.* Smith, 7 H. & N. 509, 8 Jur. N. S. 514, 31 L. J. Exch. 107, 5 L. T. Rep. N. S. 618, 10 Wkly. Rep. 253; Riddel *v.* Sutton, 2 M. & P. 345, 30 Rev. Rep. 569; Veale *v.* Warner, 1 Saund. 326; Chicot *v.* Lequesne, 2 Ves. 315; Wills *v.* Maccarmick, 2 Wils. C. P. 148.

See 4 Cent. Dig. tit. "Arbitration and Award," § 490.

As to relief in equity see *infra*, IX, B, 2, c.

In Louisiana a direct action of nullity is the only remedy to correct an error in an award of arbitrators after having been acquiesced in by the parties. Peniston *v.* Somers, 15 La. Ann. 679.

Assignment for benefit of creditors.— It is no defense to an action upon an award, made in pursuance of an agreement to arbitrate partnership affairs, that the partnership had made a general assignment for the benefit of creditors, and that the assignee disclaims the bringing of the suit. Piersons *v.* Hobbes, 33 N. H. 27.

Promise to correct mistake.— It is no defense to an action on an award that plaintiff had promised to correct any mistakes which may have been made by the arbitrators. Efner *v.* Shaw, 2 Wend. (N. Y.) 567. See also Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679; Patrick *v.* Adams, 29 Vt. 376.

Want of notice of the hearing may be set up in defense in an action on the award. Curtis *v.* Sacramento, 64 Cal. 102, 28 Pac. 108; Shively *v.* Knoblock, 8 Ind. App. 433, 35 N. E. 1028; Wilson *v.* Boor, 40 Md. 483; Bushey *v.* Culler, 26 Md. 534; Maryland, etc., R. Co. *v.* Porter, 19 Md. 458; Elmendorf *v.* Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587. See also *supra*, IV, D. 2, b.

68. *Indiana.*—Carson *v.* Earlywine, 14 Ind. 256.

(c) *Failure of Arbitrator to Pursue Authority.* A party may, however, even at common law, set up, in defense to an action on an award, any matter which shows that the arbitrator has not pursued his authority, either in not determining some matter brought before him which he ought to determine, or in determining some matter which he had no authority to determine.[69]

(II) *Defenses to Award Pleaded in Bar.* Where an award is pleaded in bar, only such objection can be urged against it as might be set up in an action to enforce the award.[70] If it be proper on its face it is conclusive as to the merits of the case,[71] and plaintiff cannot attack it by evidence of extrinsic matters — such as fraud — which render it voidable only.[72] But it is open to plaintiff to show

Iowa.— Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502. See also Thompson *v.* Blanchard, 2 Iowa 44.

Kansas.— Downey *v.* Atchison, etc., R. Co., 60 Kan. 499, 57 Pac. 101.

Missouri.— Hyeronimus *v.* Allison, 52 Mo. 102 (partiality of arbitrator); Leitch *v.* Miller, 40 Mo. App. 180 (misconduct of arbitrator).

New York.— Hiscock *v.* Harris, 80 N. Y. 402; Knowlton *v.* Mickles, 29 Barb. (N. Y.) 465; Ryder *v.* Jenny, 2 Bosw. (N. Y.) 56; Garvey *v.* Carey, 7 Rob. (N. Y.) 286, 4 Abb. Pr. N. S. (N .Y.) 159, 35 How. Pr. (N. Y.) 282.

Ohio.— Brymer *v.* Clark, 20 Ohio St. 231.

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252; Ferson *v.* Drew, 19 Wis. 225.

United States.— Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

69. The ground on which these cases stand is, not that the award is bad for misbehavior of the arbitrator, but that there is no award within the terms of the submission.

Georgia.— Crane *v.* Barry, 54 Ga. 500.

Illinois.— Stearns *v.* Cope, 109 Ill. 340.

Iowa.— Amos *v.* Buck, 75 Iowa 651, 37 N. W. 118; Love *v.* Burns, 35 Iowa 150; Sharp *v.* Woodbury, 18 Iowa 195; Thompson *v.* Blanchard, 2 Iowa 44.

Kansas.— Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Maine.— McNear *v.* Bailey, 18 Me. 251.

Massachusetts.— Gaylord *v.* Norton, 130 Mass. 74.

Nebraska.— Hall *v.* Vanier, 6 Nebr. 85.

New Jersey.— Failure of arbitrator to pass on a matter submitted may be set up in defense; but parol evidence to show excess of authority by the arbitrator is not competent. Ruckman *v.* Ransom, 35 N. J. L. 565; Hoagland *v.* Veghte, 23 N. J. L. 92; Sherron *v.* Wood, 10 N. J. L. 7; Harker *v.* Hough, 7 N. J. L. 428.

New York.— Hiscock *v.* Harris, 80 N. Y. 402; Butler *v.* New York, 7 Hill (N. Y.) 329; Dater *v.* Wellington, 1 Hill (N. Y.) 319; Macomb *v.* Wilber, 16 Johns. (N. Y.) 227.

North Carolina.— Gardner *v.* Masters, 56 N. C. 462. See also Bryant *v.* Fisher, 85 N. C. 69.

Pennsylvania.—Roop *v.* Brubacker, 1 Rawle (Pa.) 304.

Vermont.— See Blood *v.* Bates, 31 Vt. 147.

Virginia.— Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671.

Wisconsin.— McCord *v.* McSpaden, 34 Wis. 541.

United States.— Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

England.— Buccleuch *v.* Metropolitan Water Works, L. R. 5 Exch. 221; Mitchell *v.* Staveley, 16 East 58, 14 Rev. Rep. 287.

As to conformity of award with submission see *supra*, VI, J, 1, a; VI, J, 6, c.

Want of authority.— If arbitrators resign their authority before making an award and such resignation is accepted by the parties, any award thereafter made is without authority, and the want of authority may be shown in bar of an action on the bond. Relyea *v.* Ramsay, 2 Wend. (N. Y.) 602. So, in an action upon an award, it is competent for defendant to prove by one of the arbitrators facts which go to show that the submission had been abandoned and that, therefore, the award subsequently made was without authority. Perit *v.* Cohen, 4 Whart. (Pa.) 81.

70. Hartwell *v.* Penn F. Ins. Co., 60 N. H. 293.

As to what may be set up in defense to an action on an award see *supra*, IX, B, 2, b.

71. Conclusion as to merits.— *Kentucky.*— Massie *v.* Spencer, 1 Litt. (Ky.) 320.

Maine.— Johnson *v.* Knowlton, 35 Me. 467.

New Hampshire.— Pickering *v.* Pickering, 19 N. H. 389.

New York.— Owen *v.* Boerum, 23 Barb. (N. Y.) 187.

Tennessee.— Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239.

And as to the conclusiveness of the award in general see *supra*, IX, A, 1.

72. Bulkley *v.* Stewart, 1 Day (Conn.) 130, 2 Am. Dec. 57; Thorburn *v.* Barnes, L. R. 2 C. P. 384, 36 L. J. C. P. 184, 16 L. T. Rep. N. S. 10, 15 Wkly. Rep. 623.

Question not raised by demurrer to plea.— Whether an award is infected with fraud, misconduct, or partiality is not a question that can be raised by demurrer to a plea setting up the award in bar where such objections do not plainly appear on the face of the award. Duren *v.* Getchell, 55 Me. 241.

Indiana — Fraud in procuring submission. — In Rice *v.* Loomis, 28 Ind. 399, it was held that an award pleaded in bar might be at-

that the subject-matter of the action was not included in the submission and award,[73] and jurisdictional defects — such as an excess of authority by the arbitrators or a failure to award on some of the matters submitted — which render the award a mere nullity, may always be relied on as a defense to an award so pleaded.[74]

c. In Equity — (I) *JURISDICTION* — (A) *In General.* A court of equity has jurisdiction over awards to restrain the enforcement thereof and to set them aside in the ordinary cases of fraud, corruption, and mistake, or for extraneous causes going to their validity.[75] Any facts which show it to be against conscience to

tacked for fraud in the procuring of the submission, the court taking the view that, under such a submission, the arbitrators acquired no jurisdiction. But Elliott, J., in a dissenting opinion, showed clearly the weakness of the majority arguments.

73. North Yarmouth *v.* Cumberland, 6 Me. 21; Robinson *v.* Morse, 26 Vt. 392.

As to the effect of an award on matters not actually presented to the arbitrators, although within the scope of the submission, see *supra*, IX, A, 2, a, (III), (B).

74. **Jurisdictional defects.**—Inslee *v.* Flagg, 26 N. J. L. 368, 69 Am. Dec. 580; Ingram *v.* Milnes, 8 East 445.

Question for jury.—Where an award, proper according to the submission and legal on its face, is pleaded in bar of an action involving matters embraced in the award, the question whether the arbitrators exceeded their authority by considering and determining upon certain matters of which the award bears no evidence, is for the jury to decide under proper instructions of the court; the court cannot determine such facts and refuse to receive the award as evidence, or exclude it after it has been admitted. Burns *v.* Hendrix, 54 Ala. 78.

75. *California.*— Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

Connecticut.— Bridgeport *v.* Eisenman, 47 Conn. 34 (as to jurisdiction before the Practice Act, abolishing the distinction between courts of law and equity); Doty *v.* White, 2 Root (Conn.) 426; Bulkley *v.* Starr, 2 Day (Conn.) 552.

Delaware.— Waples *v.* Waples, 1 Harr. (Del.) 392.

Illinois.— Catlett *v.* Dougherty, 114 Ill. 568, 2 N. E. 669; Spurck *v.* Crook, 19 Ill. 415.

Indiana.—Hough *v.* Beard, 8 Blackf. (Ind.) 158.

Kentucky.— Maysville, etc., Turnpike Road Co. *v.* Waters, 6 Dana (Ky.) 62; Southard *v.* Steele, 3 T. B. Mon. (Ky.) 435; Taylor *v.* Brown, 4 Ky. L. Rep. 628.

Michigan.— Beam *v.* Macomber, 33 Mich. 127.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536; Tracey *v.* Herrick, 25 N. H. 381; Rand *v.* Redington, 13 N. H. 72, 38 Am. Dec. 475.

New Jersey.— Young *v.* Young, 6 N. J. Eq. 450.

New York.— Bissell *v.* Morgan, 56 Barb. (N. Y.) 369; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516 [*overruled* in 23 Wend. (N. Y.) 628, 35 Am. Dec. 587, on the point as to the effect of a hearing without notice]; Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405.

Ohio.—Conway *v.* Duncan, 28 Ohio St. 102.

Pennsylvania.—Hartupee *v.* Pittsburgh, 131 Pa. St. 535, 25 Wkly. Notes Cas. (Pa.) 485, 19 Atl. 507.

Tennessee.— Bright *v.* Ford, 11 Heisk. (Tenn.) 252; State *v.* Ward, 9 Heisk. (Tenn.) 100; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

Vermont.— Howard *v.* Edgell, 17 Vt. 9; Emerson *v.* Udall, 8 Vt. 357 [on subsequent appeal see 13 Vt. 477, 37 Am. Dec. 604].

West Virginia.— Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

Wisconsin.— Pettibone *v.* Perkins, 6 Wis. 616.

United States.— Republic of Colombia *v.* Cauca Co., 106 Fed. 337.

England.— Medcalfe *v.* Ives, 1 Atk. 63; Croydon's Case, 3 Ch. Rep. 76, Eq. Cas. Abr. 50 [*cited* in Van Cortlandt *v.* Underhill, 17 Johns. (N. Y.) 405]; Spettigew *v.* Carpenter, Dick. 66, 3 P. Wms. 362; Smith *v.* Whitmore, 2 De G. J. & S. 297, 10 Jur. N. S. 1190, 33 L. J. Ch. 713, 11 L. T. Rep. N. S. 169, 13 Wkly. Rep. 2, 67 Eng. Ch. 232; Corneforth *v.* Geer, 2 Vern. 705; Earle *v.* Stocker, 2 Vern. 251; Walker *v.* Frobisher, 6 Ves. Jr. 70, 5 Rev. Rep. 223.

An agreement that the award shall be conclusive will not prevent its being opened in equity if impeached on equitable grounds. Mitchell *v.* Harris, 4 Bro. Ch. 311, 2 Ves. Jr. 129*a*.

Under the code an action to set aside an award is an equitable one, and the blending of the common-law and equitable powers in the same court does not alter the principle. Allen *v.* Blunt, 2 Edm. Sel. Cas. (N. Y.) 457.

Parol evidence is admissible in such cases to show the facts upon which the relief is sought. See *infra*, XII.

The case must be clearly made out before the power will be exercised, and the burden of proof is on complainant. Callant *v.* Downey, 2 J. J. Marsh. (Ky.) 346; Hardeman *v.* Burge, 10 Yerg. (Tenn.) 201.

The proof must conform to the allegations, and if the bill charges corruption and fraud, evidence of mere error of judgment in law or mistake of facts will not support it. Root *v.* Renwick, 15 Ill. 461.

enforce the award, or the judgment on it, and which could not have been taken advantage of at law, will authorize equitable interference.[76] These may go to the misconduct of the parties as well as of the arbitrators.[77]

(B) *Adequacy of Other Remedy*—(1) OBJECTIONS AVAILABLE AT LAW—(a) IN GENERAL. The general rule that the existence of an adequate remedy will prevent the invoking of equitable jurisdiction is applied here, and if the objections are such as may be pleaded at law or are such as would defeat the enforcement of the award whenever it should be set up against a party—as where the invalidity of the award appears upon its face,[78] or goes to the jurisdiction to show no award—equity will not interfere.[79]

(b) AFTER FAILURE TO PURSUE OTHER REMEDY. Objections which might have been available in an action on the award or in resisting a motion or rule at law for the enforcement of the award cannot be made the ground for a bill to set aside the award or judgment thereon unless good excuse is shown for omitting to raise the objections sooner.[80]

(2) UNDER RULE OF COURT OR UPON MOTION. Courts at law in which awards are to be returned are frequently given certain supervisory powers over the awards, and may set them aside upon grounds which were before cognizable only in equity.[81] If the arbitration is one in which this supervisory power may be exercised, it must be for the grounds enumerated; but for other grounds the party is not remediless, as he may still proceed in equity.[82] Courts of chancery have declined to exercise the general jurisdiction to set aside awards for fraud, mistake, and the like, where the submission provides for enforcing the award, or for the entry of a rule of court, or where other analogous relief is provided by statute.[83] Sometimes, however, the jurisdiction of equity is expressly

76. Craft *v.* Thompson, 51 N. H. 536; Gardner *v.* Masters, 56 N. C. 462.

Defeat attributable to a party's negligence before the arbitrator will not be relieved against at his instance. Craft *v.* Thompson, 51 N. H. 536.

77. **Misconduct of party or arbitrator.**—See *supra*, IX, B, 1, b.

78. *Connecticut.*—Miller *v.* Wetmore, 2 Root (Conn.) 488.

Massachusetts.—Mickles *v.* Thayer, 14 Allen (Mass.) 114.

New York.—Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342].

North Carolina.—Gardner *v.* Masters, 56 N. C. 462.

Rhode Island.—David Harley Co. *v.* Barnefield, (R. I. 1900) 47 Atl. 544.

Wisconsin.—Meloy *v.* Dougherty, 16 Wis. 269.

But see Hays *v.* Hays, 2 Ind. 28; Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319.

Entry of judgment on an award will not be restrained in equity where there was no agreement that the award was to be entered as a rule of court, so that complainant could successfully resist any application to have it so entered. Coxetter *v.* Huertas, 14 Fla. 270.

A separate action under code practice, and when equitable as well as legal defenses may be set up in the answer, will not be entertained to set aside an award for matters which might be thus set up in an answer to an action to enforce the award. Ferson *v.* Drew, 19 Wis. 225. See also *supra*, IX, B, 2, b, (I), (B), (2).

79. **Revocation of submission.**—Gardner *v.* Masters, 56 N. C. 462.

80. *Georgia.*—Thurmond *v.* Clark, 47 Ga. 500.

Illinois.—Hubbard *v.* Hubbard, 61 Ill. 228.

Indiana.—Elliott *v.* Adams, 8 Blackf. (Ind.) 103.

New Hampshire.—Craft *v.* Thompson, 51 N. H. 536.

North Carolina.—Gardner *v.* Masters, 56 N. C. 462.

Virginia.—Wheatley *v.* Martin, 6 Leigh (Va.) 62; Head *v.* Muir, 3 Rand. (Va.) 122. An award will not be set aside either in a court of law or in equity on the ground of mistake in the judgment of the arbitrator unless the mistake is very palpable and not a mere difference of opinion between the court and the arbitrators, and, after a party had been fully heard in a court of law, in a case in which the rule is the same in equity as at law, he cannot be permitted to come into a court of equity on the same controverted point. Morris *v.* Ross, 2 Hen. & M. (Va.) 408.

England.—Smith *v.* Whitmore, 2 De G. J. & S. 297, 10 Jur. N. S. 1190, 33 L. J. Ch. 713, 11 L. T. Rep. N. S. 169, 13 Wkly. Rep. 2, 67 Eng. Ch. 232; Davis *v.* Getty, 1 L. J. Ch. 209, 1 Sim. & St. 411; Gwinett *v.* Bannister, 14 Ves. Jr. 530.

81. See *infra*, IX, B, 2, d.

82. **Other than statutory grounds.**—Cranston *v.* Kenny, 9 Johns. (N. Y.) 212. See also Allen *v.* Blunt, 2 Edm. Sel. Cas. (N. Y.) 457.

83. **Refusal to oust summary jurisdiction of other courts.**—Beeson *v.* Elliott, 1 Harr. (Del.) 394, note *a*; West Jersey R. Co. *v.* Thomas, 21 N. J. Eq. 205 (as to want of jurisdiction, where the award, by agreement,

retained by the statute.[84] And a party may have relief against a judgment entered on the award where the ground of relief is not such as could have been made available upon the entry of the judgment at law.[85]

(c) *Acquiescence or Laches.* If, after full opportunity to make objections, a party ratifies an award by doing acts in performance and recognition of it, equity will not relieve him against errors committed in making the award,[86] especially after the lapse of an unreasonable time.[87]

is made a rule of court); Toppan *v.* Heath, 1 Paige (N. Y.) 293 (under a statute which was said to be the same as 9 & 10 Wm. III, c. 15, the chancellor remarking, however, that he was not prepared to say that the court of chancery would in no case take cognizance of the cause where the parties had agreed to make their submission a rule of some other court, but that, if he applies to be relieved from the effect of his agreement, he must at least show that injustice would probably be done were he compelled to submit his rights to the adjudication of the forum which he had selected for that purpose); Dawson *v.* Sadler, 2 L. J. Ch. O. S. 80, 172, 1 Sim. & St. 537; Davis *v.* Getty, 1 L. J. Ch. 209, 1 Sim. & St. 411; Gwinett *v.* Bannister, 14 Ves. Jr. 530. See also Hough *v.* Beard, 8 Blackf. (Ind.) 158; Maysville, etc., Turnpike Road Co. *v.* Waters, 6 Dana (Ky.) 62; Simmons *v.* Mullins, Bunh. 182; Nichols *v.* Chalie, 14 Ves. Jr. 265.

The provision of the English statute was for the enforcement of the award by process of contempt, which it expressly declared should not be "stopped or delayed its execution by any order, rule, command, or process of any other Court, either of Law or Equity, unless it shall be made appear on oath to such Court, that the arbitrators or umpire misbehaved themselves; and that such award, arbitration, or umpirage, was procured by corruption or other undue means." Gwinett *v.* Bannister, 14 Ves. Jr. 530, 533. In Lonsdale *v.* Littledale, 2 Ves. Jr. 451, it was held that the jurisdiction of the court of chancery was not barred by a reference under the statute; but this case and Steff *v.* Andrews, 2 Madd. 6, were *distinguished* in Toppan *v.* Heath, 1 Paige (N. Y.) 293, from the English cases above cited in that the question arose in a cause pending which was admitted not to be within the statute, and, therefore, the opinion was extrajudicial.

It is contempt to file a bill in equity to set aside an award after entering into the rule of the court of king's bench to abide by it. Rex *v.* Wheeler, 3 Burr. 1256.

The summary jurisdiction of chancery over awards under 9 & 10 Wm. III, c. 15, was held to exclude every other jurisdiction to interfere with the execution of awards made under the statute. Heming *v.* Swinnerton, 10 Jur. 907, 16 L. J. Ch. 90, 2 Phil. 79; Nichols *v.* Roe, 3 Myl. & K. 431, 10 Eng. Ch. 431.

Where the submission contains no agreement that it shall be made a rule of court and no rule has been entered, equity has power to set aside the award. Smith *v.* Whitmore, 2 De G. J. & S. 297, 10 Jur. N. S. 1190, 33 L. J. Ch. 713, 11 L. T. Rep. N. S. 169, 13 Wkly. Rep. 2, 67 Eng. Ch. 232.

Motion to vacate award.— In Johnston *v.* Paul, 23 Minn. 46, it was held that a separate action to set aside a judgment entered on an award could not be maintained on grounds available by motion to vacate the award before confirmation, or by application in the same suit, if the facts were discovered after judgment.

84. Equity jurisdiction retained by statute.— Kearney *v.* Washtenaw Mut. F. Ins. Co., (Mich. 1901) 85 N. W. 733; Burnside *v.* Whitney, 21 N. Y. 148; Bissell *v.* Morgan, 56 Barb. (N. Y.) 369 (under a statutory provision that nothing contained in its title should be construed to "impair, diminish, or affect the power or authority of the court of chancery over arbitrators' awards or the parties thereto" [*distinguishing* Toppan *v.* Heath, 1 Paige (N. Y.) 293, *supra*, note 83, upon the terms of the statute]); Wheeling Gas Co. *v.* Wheeling, 5 W. Va. 448.

If a court of law first obtains jurisdiction, its decision is binding in equity, unless new circumstances intervene to authorize the interference of the latter court, though the courts of equity and of law have concurrent jurisdiction to revise awards. Flournoy *v.* Halcomb, 2 Munf. (Va.) 34.

The filing of a bill without an injunction will not, of itself, stay the entry of judgment on the award. Seaton *v.* Kendall, 61 Ill. App. 289 [*affirmed* in 171 Ill. 410, 49 N. E. 561].

85. Relief not obtainable at law.— Chambers *v.* Crook, 42 Ala. 171, 94 Am. Dec. 637. See also Waples *v.* Waples, 1 Harr. (Del.) 392; Beeson *v.* Elliott, 1 Harr. (Del.) 394, note *a*; Bright *v.* Ford, 11 Heisk. (Tenn.) 252.

Fraud in entry of judgment.— See Jones *v.* Blalock, 31 Ala. 180, wherein the equity of the bill was that defendant in the bill had fraudulently concealed a part of the actual award in having it entered as the judgment of the court, and it was held that the two writings, alleged to have been signed by the arbitrators at the same time and in relation to the same subject-matter, must be construed and considered as constituting the award in determining the equity of the bill.

86. Willingham *v.* Harrell, 36 Ala. 583; Sharpe *v.* King, 38 N. C. 402; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112.

87. Laches.— McRae *v.* Buck, 2 Stew. & P. (Ala.) 155 (holding that, after the lapse of five or six years, and when the evidence of the facts upon which relief is sought becomes

(II) *Extent of Relief* — (A) *Enforcement of Award* — (1) Scope of Pleadings. Upon refusal to set aside an award under a bill filed for such relief, complainant will not be entitled to have judgment upon the award, the bill being filed only for an attack upon the award, and not for its enforcement.[88] And, conversely, under a bill seeking to enforce an award, complainant cannot, at the same time, question its validity.[89] But, on the other hand, if the whole matter is brought before the court by the pleadings, and the award is set aside, the court, having acquired jurisdiction for one purpose, will retain it for a complete settlement of the controversy.[90]

(2) Correction of Award. Where the arbitrators have, as a matter of fact, violated the terms of the submission in coming to their conclusion, though through an error or misapprehension on their part, and the mistake is of such a nature that it may be clearly pointed out, so that relief may be had without infringing upon the functions of the arbitrators, equity has jurisdiction to rectify the error, and will decree performance according to the truth of the fact.[91] Sometimes it

uncertain, a court of equity will not disturb an award, especially when the party seeking the relief has paid the amount awarded against him); Beeson *v.* Elliott, 1 Del. Ch. 368; Hite *v.* Hite, 1 B. Mon. (Ky.) 177. But a delay of four and a half months, after the award is signed, before bringing suit to set it aside is not so unreasonable as to deprive the party of the right to relief, where it has gained nothing and the other party has lost nothing thereby, and no other remedy is available. Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, 17 Atl. 394.

88. Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

89. **Multifariousness — Effect of answer attacking award.** — Emans *v.* Emans, 14 N. J. Eq. 114, holding that, in a suit to enforce an award, complainant cannot question its validity by asking for relief against matter submitted if the award cannot be enforced; that the fact that defendant, by his answer, contests the validity of the award is not material so long as complainant claims the benefit of it; and, further, that the bill is multifarious.

90. **Jurisdiction for complete relief.** — See Overby *v.* Thrasher, 47 Ga. 10.

Where an answer is filed as a cross-bill, defendant denying all the equity set up in the bill and detailing the transactions out of which the original controversy grew, concluding with a prayer that relief be afforded him in the event the court should be of the opinion that the award is, for any cause, invalid, it is held that, upon setting aside the award, the jurisdiction of the court having attached for this purpose, the court will decide the whole controversy and render a final decree, although the issues are legal in their nature and capable of being tried by a court of law. Coons *v.* Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804.

Under an answer setting up the award, in an action under the code to set aside the award, it seems that defendant may ask judgment for the amount awarded, and may obtain a judgment on such an answer and counter-claim where complainant cannot succeed in setting aside the award. Masury *v.* Whiton, 111 N. Y. 679, 18 N. E. 638, 19 N. Y. St. 141.

91. *Connecticut.* — Gregory *v.* Seamons, 1 Root (Conn.) 367.

Illinois. — Eisenmeyer *v.* Sauter, 77 Ill. 515; Ballance *v.* Underhill, 4 Ill. 453.

Michigan. — Buys *v.* Eberhardt, 3 Mich. 524.

New Hampshire. — Davis *v.* Cilley, 44 N. H. 448, 84 Am. Dec. 85; Bean *v.* Wendell, 20 N. H. 213.

New York. — Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342]; Bouck *v.* Wilber, 4 Johns. Ch. (N. Y.) 405.

South Carolina. — Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; Mitchell *v.* De Schamps, 13 Rich. Eq. (S. C.) 9, wherein the court sustained an award and, as to a particular item which had not been included, referred it to a commissioner to ascertain and report its value.

Tennessee. — Johnson *v.* Stalcup, 4 Baxt. (Tenn.) 283.

Virginia. — Moore *v.* Luckess, 23 Gratt. (Va.) 160.

England. — Anonymous, 3 Atk. 644.

Mistake not appearing on face of award. — In equity, although the means of distinguishing the good from the bad part of an award does not appear upon its face, if the evidence shows the character and precise extent of the mistake of law for which it is sought to set aside the award, so that the good may be separated from the bad, the award will be upheld in so far as it is correct. Davis *v.* Cilley, 44 N. H. 448, 84 Am. Dec. 85. But see Bullock *v.* Bergman, 46 Md. 270.

The award must be separable, for if the good and bad parts cannot be separated, it cannot be corrected. Bullock *v.* Bergman, 46 Md. 270. And it is held that if all the matters passed upon are within the submission, and the award is entire upon its face, it cannot be avoided in part and sustained in part. Auriol *v.* Smith, Turn. & R. 121. See also *supra*, VI, J, 10.

Correction by consent. — On a bill to set aside an award on the ground of an alleged mistake, defendant in the bill, by his answer, consented that the award be opened and an account taken, if complainants chose, from

may appear from the award — as where the arbitrators are required or are intended to decide according to the law, but did not do so[92] — while in other cases the fact of mistake depends upon the admission by the arbitrators of its commission.[93] But proof of the intention by the arbitrators must be clear and explicit.[94] And, although the court may set aside an award for a plain mistake or palpable error of judgment,[95] it cannot, in such a case, put itself in the place of the arbitrators and substitute its judgment for that of the arbitrators, but must set aside the award altogether.[96]

(B) *Set-Off.* Where a bill to annul a judgment on an award is without equity for this purpose, relief may be granted to prevent the enforcement of the judgment where complainant alleges that the judgment creditor is insolvent and owns no property subject to execution, and is indebted to complainant on account of matters extraneous to the judgment and in a sum in excess thereof. The court will set off the indebtedness to complainant so far as necessary in satisfaction of the judgment.[97]

(III) *PARTIES* — (A) *In General.* Ordinarily, only the real parties in interest are proper parties to a suit to set aside an award.[98] But any party who is a real party to the submission, and whose rights are determined by the award, may bring a suit in equity to impeach it.[99]

(B) *Arbitrators.* Arbitrators are not necessary parties to an action to annul

the beginning, but, at any rate, as to certain matters specified by him, and at the hearing before the commissioner, defendant gave no evidence in respect to the matters specified by him. It was held that defendant was bound by the report which corrected only the mistake suggested by complainants, there appearing no objection to the report except that the account was not opened from the beginning. Scott *v.* Trents, 4 Hen. & M. (Va.) 356.

Corruption or mistake induced by fraud.— Where the jurisdiction of equity is invoked for the purpose of setting aside the award on the ground of corruption, or partiality, or a mistake into which the arbitrators had been led by undue means, the court does not correct the award or revise the decision of the arbitrators, but holds it to be against conscience to take advantage of the award in seeking to enforce it, or by using it as a plea in bar of a bill for an accounting. Eaton *v.* Eaton, 43 N. C. 102.

92. Intention to decide according to law.— Davis *v.* Cilley, 44 N. H. 448, 84 Am. Dec. 85; Moore *v.* Luckess, 23 Gratt. (Va.) 160.

93. Admission of arbitrators.— Gregory *v.* Seamons, 1 Root (Conn.) 367; Johnson *v.* Stalcup, 4 Baxt. (Tenn.) 283. See also *supra*, IX, B, 1, a, notes 7–12.

94. Proof must be clear.—Williams *v.* Warren, 21 Ill. 541.

95. See *supra*, IX, B, 1, a.

96. Court cannot substitute its own judgment.— Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342]; Vernon *v.* Oliver, 11 Can. Supreme Ct. 156.

97. Dunham Lumber Co. *v.* Holt, 124 Ala. 181, 26 So. 663, 27 So. 556. See also EQUITY.

98. Attorney.— Where there is nothing to show that a party had ever done anything except as an attorney in the cause, the fact that he, in behalf of his client, made use of arguments before the arbitrator or the court which would not bear the test of legal scrutiny can form no ground for making him a party to a bill for setting aside the award and subjecting him to the expense of defending a chancery suit, and he cannot be made such a party where the only motive is to deprive his client of the benefit of his testimony if it should be needed. Campbell *v.* Western, 3 Paige (N. Y.) 124.

99. As the state may divest itself of its sovereignty, and, by act of legislature, agree to submit matters in dispute between it and a citizen to arbitration, the proceeding is to be governed by the same rules which are applicable to other cases of arbitration. The remedies between the parties are mutual, and the award may be impeached by either party, in equity, for the same causes for which it might be impeached if the submission had been between individuals. State *v.* Ward, 9 Heisk. (Tenn.) 100.

Principal and agent.— A suit to set aside an award cannot be maintained by an agent of one of the parties who entered into the submission, as such agent, naming his principal. The principal is the only proper party, although the rule is that an action at law may be maintained by an agent in his own name, upon a contract made by him, without disclosing his principal. In equity the real party in interest must sue. Sutton *v.* Mansfield, 47 Conn. 388.

Joinder of plaintiffs — Separate interests affecting jurisdiction.— Where several join in submitting to arbitration and a single award is made, a single bill may be brought by all the parties as parties plaintiff to set aside the award, and those whose proportions of the award are too small to give the court jurisdiction in an action against them to recover on the award are proper parties to the suit. Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623. See also 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524.

their award,[1] and they are not proper parties when they are not charged with fraud or corruption, and are joined only for the purpose of discovery.[2]

(IV) *PLEADING*—(A) *Allegation of Grounds For Setting Aside.* In order to invoke equitable jurisdiction to set aside an award, the grounds upon which the relief is asked should be specifically alleged.[3] And if the bill is based upon a demand which was included in an award and the award is pleaded in bar, complainant must amend his bill if he wishes to rely on matters in avoidance of the award.[4]

(B) *Offer to Restore.* After receiving payment under an award, in an action to set it aside and for judgment on the original demand, plaintiff should, in his complaint, offer to restore the amount received.[5]

(C) *Plea or Answer.* In a suit in equity to set aside an award, where the facts do not appear upon the face of the award, they may be ascertained by reference to the answer. But plaintiff is entitled to a full and sufficient answer upon the point upon which relief is invoked.[6] The award alone cannot be pleaded in bar,[7] but must be supported by an answer upon the matters charged in avoidance of the award.[8]

1. Knowlton *v.* Mickles, 29 Barb. (N. Y.) 465.

Award assimilated to judgment.— There is no more reason for making the arbitrators parties to such a suit than there would be in making a court a party to an action to set aside its judgment. Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623 [*affirmed* in 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524].

2. **Discovery.**— Shermer *v.* Beale, 1 Wash. (Va.) 11 (holding that if arbitrators are made parties to a suit to set aside an award, they may demur to the bill, and are not obliged to answer); Anonymous, 3 Atk. 644 (holding that the arbitrator is not liable to the party aggrieved for a mistake or miscalculation; that a bill would lie against the party in whose favor the award was made to have it rectified, and that the arbitrators might plead the award in bar to a bill seeking a discovery of the grounds on which they made their award); Lingood *v.* Croucher, 2 Atk. 395; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112; Hamilton *v.* Bankin, 3 De G. & Sm. 789, 15 Jur. 70, 19 L. J. Ch. 307.

When charged with fraud or corruption the arbitrator may be joined and must answer such charges. See *infra*, note 8.

3. **Specific allegation.**— Craft *v.* Thompson, 51 N. H. 536; Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Graham *v.* Bates, (Tenn. Ch. 1898) 45 S. W. 465.

Mere general allegations of fraud, partiality, or corruption are not sufficient. Willingham *v.* Harrell, 36 Ala. 583; Phillips *v.* Phillips, 81 Ky. 147, 4 Ky. L. Rep. 941; Chicot *v.* Lequesne, 2 Ves. 315.

Refusal to hear evidence.— A bill to set aside an award, on the ground that the arbitrators refused to hear material evidence, presents no question which can be tried by the court if it does not contain a statement of the rejected evidence, so that the court may determine as to its materiality. Leslie *v.* Leslie, 50 N. J. Eq. 103, 24 Atl. 319. See also Russell *v.* Smith, 87 Ind. 457.

Particulars of accident.—So, in order to set aside an award on the ground of accident, the pleading should state in what particular the accident occurred. Cantrell *v.* Cobb, 43 Ga. 193.

Where error not induced by fraud is not sufficient to justify the setting aside of an award, a complaint which charges that the award is partial and unjust in certain particulars mentioned is bad, because it does not charge that the arbitrator was guilty of corruption or fraud. Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342].

4. **Amendment of bill to impeach award pleaded.**— Brewer *v.* Bain, 60 Ala. 153. See also ACCOUNTS AND ACCOUNTING [1 Cyc. 470].

5. Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218, 43 N. Y. Suppl. 431, holding that it was not necessary to tender the money before bringing suit, because plaintiff did not proceed upon the theory that the award had been rescinded or set aside, but the action was brought for the rescission of the award and to procure it to be set aside, and in such a case it is only necessary to offer to restore in the pleadings, and to make the same offer on the trial.

6. **Full answer.**— Bean *v.* Wendell, 20 N. H. 213.

7. **Award no bar.**—Bridgeport *v.* Eisenman, 47 Conn. 34.

8. **Answer in support of plea.**— See Gartside *v.* Gartside, 3 Anstr. 735.

Plea by arbitrator.— Where a bill was filed against an arbitrator, charging fraud and collusion between him and one of the parties to the award, and alleging certain specific facts in support of this charge, it was held that the arbitrator could not, by a general denial of the fraud, protect himself from the obligation to answer the interrogatories as to the specific facts. Padley *v.* Lincoln Waterworks Co., 2 Hall. & T. 295, 14 Jur. 299, 19 L. J. Ch. 436, 2 Macn. & G. 68. See

d. Statutory Relief — (1) *Power to Set Aside Award* — (A) *In General.* The statutes giving courts of law summary jurisdiction to enforce awards made in accordance with the statutory requirements usually confer the further power to set such awards aside,[9] and it seems that the statutory authority to accept and enter judgment on the award implies the power to set it aside for sufficient reasons, even though the statute contains no specific provision to that effect.[10]

(B) *Extent of Jurisdiction* — (1) What Court Can Set Award Aside. An application to vacate an award can be made only in the court to which, in pursuance of the statute, the award is returnable.[11]

(2) Necessity For Award to Be Within Statute. The power to vacate extends only to awards falling within the terms of the statute.[12]

(3) Effect of Stipulation Against Exceptions. Where it is agreed by the parties that neither shall file exceptions to the award, the court will not consider exceptions going to the merits of the award.[13] But such a stipulation will not preclude objections on account of fraud, misconduct, corruption, or excess of authority on the part of the arbitrator.[14]

also Rybott *v.* Barrell, 2 Eden 131. And though the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill for a discovery, it is held that they must support their plea by showing themselves impartial, or the court will give the party a remedy by making the arbitrators pay costs. Lingood *v.* Croucher, 2 Atk. 395.

Answer without plea sufficient.— Where a bill sets out an award and charges that it is void, it is sufficient that the equities of the bill are denied in the answer, and it is not necessary that the award should be pleaded by plea. Tyler *v.* Stephens, 7 Ga. 278.

9. *Illinois.*— Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; Wiley *v.* Platter, 17 Ill. 538.

Iowa.— Love *v.* Burns, 35 Iowa 150; Thompson *v.* Blanchard, 2 Iowa 44.

Michigan.— Cooper *v.* Andrews, 44 Mich. 94, 6 N. W. 92.

New Hampshire.— Tracy *v.* Herrick, 25 N. H. 381; Bassett *v.* Harkness, 9 N. H. 164; Farwell's Petition, 2 N. H. 123.

New York.— Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410; Cranston *v.* Kenny, 9 Johns. (N. Y.) 212.

United States.— Nolan *v.* Colorado, etc., Min. Co., 63 Fed. 930, 27 U. S. App. 427, 12 C. C. A. 585.

Extent of discretion.— Whether or not an award which is made returnable to a court without suit shall be accepted, rejected, or recommitted by that court is a matter within the discretion of the court, but such discretion is to be exercised judicially, upon consideration of the facts and circumstances of the case, and the court would not be warranted in rejecting a report where no new evidence is offered and it does not appear that any prejudice, bias, or mistake in the proceedings existed; nor will the court be warranted in rejecting or recommitting an award merely because the party is dissatisfied with it, or because the arbitrators are willing that the matter shall be reopened for more full and mature consideration. Long *v.* Rhodes, 36 Me. 108. But, where any of the grounds specified in the statute are made to appear to the court, the award must be set aside. Herbst *v.* Hagenaers, 137 N. Y. 290, 33 N. E. 315, 50 N. Y. St. 687.

Conflicting affidavits.— Facts material to the determination of a motion to set aside an award of arbitrators were within the exclusive knowledge of two persons who made affidavits in direct opposition to each other. It was held that the facts must be deemed not proved and the motion denied. Tilton *v.* U. S. Life Ins. Co., 8 Daly (N. Y.) 84.

10. Implied authority.— *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200; Payne *v.* Metz, 14 Tex. 56.

11. Court to which award returnable.—Allen *v.* Blunt, 2 Edm. Sel. Cas. (N. Y.) 457; Plumley *v.* Isherwood, 12 M. & W. 190; Direct Cable Co. *v.* Dominion Tel. Co., 28 Grant Ch. (U. C.) 648.

12. *In re* Di Carlo, 59 Hun (N. Y.) 360, 13 N. Y. Suppl. 83, 36 N. Y. St. 550; Morewood *v.* Jewett, 2 Rob. (N. Y.) 496; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; Rathbone *v.* Lownsbury, 2 Wend. (N. Y.) 595; Cranston *v.* Kenny, 9 Johns. (N. Y.) 212; Harris *v.* Hayes, 6 Binn. (Pa.) 422.

Submission not made rule of court.— Where the statute provides that the submission shall be made a rule of court, the court cannot set aside the award until the submission has been made a rule thereof. Hazen *v.* Addis, 14 N. J. L. 333; Chicot *v.* Lequesne, 2 Ves. 315; Spettigue *v.* Carpenter, 3 P. Wms. 361.

13. Exceptions to merits.— Williams *v.* Danziger, 91 Pa. St. 232; McCahan *v.* Reamey, 33 Pa. St. 535; Skagit County *v.* Trowbridge, (Wash. 1901) 64 Pac. 901.

14. Exceptions for fraud, misconduct, or excess of authority.—Horton *v.* Stanley, 1 Miles (Pa.) 418, 420, wherein the court said: "A party acting under this law must recognize its injunctions, and when he demands the process of the court to enforce a judgment under it, he must submit to the preliminary requisition, without which the act expressly says the judgment shall not be entered. Parties, it is true, may waive many legal rights; but they cannot exact a surrender of juris-

(c) *Grounds on Which Relief Granted.* Where the statute specifies the the grounds on which the court may exercise its summary jurisdiction to vacate the award, no other grounds than those specified can be taken advantage of in such proceeding.[15] But where the statute does not specify the grounds for which the award may be vacated, it seems that the court will set it aside for any cause which would move a court of chancery to set it aside at common law.[16]

(d) *Manner of Raising Objections.* Under the English practice no objections could be urged against an award in answer to a motion for an attachment except such as were apparent on its face, and other objections were required to be raised by a distinct motion to set the award aside.[17] Following this practice, it is the

diction on the part of the court, nor compel judges to accept a release from a responsibility which the law of the land imposes upon them for public purposes. The approval by the court is not placed at the option of either or both of the parties. The requisition of the law looks to the general purity of the administration of justice, and is plainly designed, if that object demands it, to control the parties." See also Lalande *v.* Jenfreau, 6 La. 333; Shaw *v.* Hatch, 6 N. H. 162.

15. Statutory grounds exclusive.— *California.*— *In re* Connor, 128 Cal. 279, 60 Pac. 862.

Georgia.— Dulin *v.* Caldwell, 29 Ga. 362; Hardin *v.* Brown, 27 Ga. 314.

Illinois.— Howell *v.* Howell, 26 Ill. 460.

Indiana.— Deford *v.* Deford, 116 Ind. 523, 19 N. E. 530; Martin *v.* Bevan, 58 Ind. 282.

Kansas.— Russell *v.* Seery, 52 Kan. 736, 35 Pac. 812.

Maryland.— Dorsey *v.* Jeoffray, 3 Harr. & M. (Md.) 121.

Michigan.— Patrick *v.* Batten, 123 Mich. 203, 81 N. W. 1081; Phelps *v.* Wayne Cir. Judge, 117 Mich. 35, 75 N. W. 94.

Missouri.— Taylor *v.* Scott, 26 Mo. App. 249.

New Jersey.— Taylor *v.* Sayre, 24 N. J. L. 647.

New York.— Ketcham *v.* Woodruff, 24 Barb. (N. Y.) 147; Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410; Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580; Barlow *v.* Todd, 3 Johns. (N. Y.) 367; Allen *v.* Blunt, 2 Edm. Sel. Cas. (N. Y.) 457.

Pennsylvania.— Williams *v.* Danziger, 91 Pa. St. 232; Dickson *v.* Wilkesbarre Gas Co., 2 Walk. (Pa.) 522; Horton *v.* Stanley, 1 Miles (Pa.) 418.

As to the grounds on which an award may be impeached, generally, see *supra*, IX, B, 1.

Other grounds available in equity.— See *supra*, IX, B, 2, c, (I), (B), (2).

Matters occurring subsequent to award.— Matters which have occurred subsequent to the making of an award cannot be set up against the award by way of answer to a rule to show cause why judgment should not be entered on the award. Beeber *v.* Bevan, 80 Ind. 31.

Failure to pursue authority.— An award may be set aside on motion on the ground that some of the matters submitted were not determined (Muldrow *v.* Norris, 12 Cal. 331), or that the arbitrators awarded upon matters which were not submitted (Leach *v.* Weeks, 2 Abb. Pr. N. S. (N. Y.) 269).

Intent of parties controlling statute.— A rule of submission provided that the award should be final "except for fraud, accident, or mistake," and that the arbitrators should be guided by the Georgia act of March 5, 1856. The act in question specified no other ground but fraud for which the award might be set aside. It was held that it might nevertheless be set aside for accident or mistake, such being clearly the intention of the parties as evidenced by the submission. South Carolina R. Co. *v.* Moore, 28 Ga. 398, 417, 73 Am. Dec. 778.

Void award — When set aside.— Where an award is void and nothing can be done upon it without suit, the court will not interfere to set it aside, because such an award is not enforceable in any way. But where a cause is referred by order of *nisi prius* and the arbitrator has power to order a verdict to be entered for either party, and he makes an award ordering a verdict to be entered — although such award be void, the court will set it aside, for otherwise the party in whose favor the award is made will have judgment upon the verdict without any new proceeding to enforce the award. Doe *v.* Brown, 5 B. & C. 384, 8 D. & R. 100, 11 E. C. L. 507.

Motion made on slight grounds.— If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs. Snook *v.* Hellyer, 2 Chit. 43, 23 Rev. Rep. 741, 18 E. C. L. 493.

16. Grounds not fixed by statute.—Forshey *v.* Galveston, etc., R. Co., 16 Tex. 516; Payne *v.* Metz, 14 Tex. 56; Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895. And see Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328.

Conclusiveness as to merits.— See *supra*, IX, A, 1.

17. In England — Apparent objections on motion for attachment.— *In re* Butler, 13 Q. B. 341, 13 Jur. 869, 18 L. J. Q. B. 328, 66 E. C. L. 341; Brazier *v.* Bryant, 3 Bing. 167, 10 Moore C. P. 587, 28 Rev. Rep. 618, 11 E. C. L. 89; Dick *v.* Milligan, 4 Bro. Ch. 117, 2 Ves. Jr. 23; Paull *v.* Paull, 2 C. & M. 235, 2 Dowl. P. C. 340, 3 L. J. Exch. 11, 4 Tyrw. 72; Wright *v.* Graham, 3 Exch. 131, 18 L. J. Exch. 29; Bleecker *v.* Loyall, 2 Ont. Pr. 14. And see Mountnorris *v.* Phaire, 5 L. J. Ch. 2.

As to defenses to a motion for attachment see *infra*, XI, E, 1, f, (III), (D).

Rule nisi must contain grounds of objection.

rule in some of the United States that exceptions to entry of judgment on an award must be confined to matters apparent on its face, and objections *dehors* the award must be raised by motion to set aside, supported by affidavits.[18] But, under other statutes, the proper method of obtaining relief, whether the objection be apparent on the face of the award or not, is by objecting to the entry of judgment on the award.[19] Whatever be the method provided by the statute it must be followed in order to obtain relief.[20]

(E) *Time For Making Application.* Where the statute specifies the time within which a party may apply to have an award set aside, the application must be made within the prescribed time, else the right to such statutory relief is waived.[21] But a failure to move in time will not preclude the party, when motion

— A rule *nisi* to set aside an award must contain the grounds of objection on which the party moving intends to rely, and must also be drawn up on reading the award or a copy of it. Grant *v.* Hall, 6 Nova Scotia 72; McDonald *v.* Marmaud, 3 Nova Scotia 79.

In chancery practice an award on a general reference of all matters in dispute is not properly impeached by exceptions, but by cross-motions to confirm it and set it aside. Knox *v.* Symmonds, 3 Bro. Ch. 358, 1 Ves. Jr. 369.

18. United States — Objections not apparent on motion for judgment.— Ing *v.* State, 8 Md. 287; Ebert *v.* Ebert, 5 Md. 353; Cromwell *v.* Owings, 6 Harr. & J. (Md.) 10; Rigden *v.* Martin, 6 Harr. & J. 403; Oliver *v.* Heap, 2 Harr. & M. (Md.) 477; Boring *v.* Boring, 2 W. Va. 297; Lutz *v.* Linthicum, 8 Pet. (U. S.) 165, 8 L. ed. 904; Masterson *v.* Kidwell, 2 Cranch C. C. (U. S.) 669, 16 Fed. Cas. No. 9,269. And see King *v.* Jemison, 33 Ala. 499; Clark *v.* Goit, 1 Kan. App. 345, 41 Pac. 214.

Matters apparent on the face of the award may be objected to at any time before judgment is entered on the award. Montgomery County *v.* Carey, 1 Ohio St. 463; Stephenson *v.* Browning, 1 Barnes Notes Cas. 42; Pedley *v.* Goddard, 7 T. R. 73, 4 Rev. Rep. 382; Auriol *v.* Smith, Turn. & R. 121. And see Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516.

Request for time to prove objections.— If a party objects to an entry of judgment on an award upon facts *dehors* the award, and wishes time to make his objections good, he should, by affidavit, show that the facts are probably true and could be proved if reasonable time were given. Singleton *v.* Mason, 2 Bibb (Ky.) 165.

19. Objections apparent and dehors.—Thus, in Connecticut, it is held that since the passage of the Practice Act, combining equitable and legal jurisdiction, the proper practice in every case, except where the causes for objection do not become known until after the award has been accepted, is to grant relief only upon remonstrance to the acceptance. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200. In Indiana the only mode of attacking the award is by answer to the motion for entry of judgment, alleging some of the grounds of objection specified in the statute. Martin *v.* Bevan, 58 Ind. 282.

Exception to entry of award on minutes of court.— An exception allowed to an order entering an award on the minutes of the court does not suspend all proceedings, but the court may thereafter entertain a motion for entry of judgment on the award, as the two proceedings are distinct and dependent on different grounds. Walker *v.* Walker, 25 Ga. 257.

Effect of withdrawing exceptions.— In an action of ejectment, an award is admissible in evidence to support plaintiff's claim, though exceptions thereto have been filed but afterward withdrawn. Roe *v.* Doe, 46 Ga. 550.

Ex parte affidavits may be read against or in support of objections to the entry of an award as the judgment of the court, especially where they are not objected to in such court; but they are entitled to less weight than testimony taken in court or on notice. Tennant *v.* Divine, 24 W. Va. 387.

20. Statute controls.— Anderson *v.* Taylor, 41 Ga. 10.

Demurrer to the motion for entry of judgment is not a proper mode of raising objections to the award. Martin *v.* Bevan, 58 Ind. 282.

21. *Missouri.*— Shores *v.* Bowen, 44 Mo. 396.

New York.— Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516.

Ohio.— Montgomery County *v.* Carey, 1 Ohio St. 463.

England.— Rushworth *v.* Barron, 3 Dowl. P. C. 317, 1 Hurl. & W. 122; Lowndes *v.* Lowndes, 1 East 276.

Canada.—Taylor *v.* Bostwick, 1 Ch. Chamb. (Ont.) 53; Garson *v.* North Bay, 16 Ont. Pr. 179; Kean *v.* Edwards, 12 Ont. Pr. 625.

At what term motion to be made.—In Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580, it was held that a statute providing that the application should be made at the next term after publication of the award meant the next term provided by law, and not special motion-day. The motion should properly be made at some special term after the publication of the award and before the next regular term, but if made at such term it is in time to save its rights, though, by the practice of the court, it could not then be discussed.

When argument brought on.— In New Jersey it was held that the party had until the last day of the term succeeding the publication of an award to except to it, but that the

is made for judgment on the award, from urging such objections to the award as can properly be taken in such proceeding.[22] In England a motion to set aside an award must be made before the last day of the next term after the publication of the award,[23] and a motion to set aside made thereafter was refused, even though both parties consented to an extension of the time.[24] Under special circumstances, however, the court will sometimes entertain an application to set aside an award made after the time limited by statute for making such application;[25]

argument ought to be brought on at the second term. Den *v.* Curtis, 6 N. J. L. 415.

Notice served too late.— Notice of a motion to vacate an award served after the first term of the court following the publication of the award comes too late. Reeves *v.* McGlochlin, 65 Mo. App. 537.

Where objections too late after entry of judgment.— Where the statute requires objections to the award to be taken at the time application for judgment thereon is made, it is too late to object after judgment has been entered on the award. Gaines *v.* Clark, 23 Minn. 64; Brace *v.* Stacy, 56 Wis. 148, 14 N. W. 51. But, under Ind. Rev. Stat. (1838), p. 371, an award on which a justice of the peace had entered judgment could be impeached, before the justice, within ten days from the rendition of the judgment. Payne *v.* Miller, 6 Blackf. (Ind.) 178.

Motion concurrently with action to enforce. — In Canada it has been held that a proceeding to vacate an award may go on concurrently with an action to enforce it. Huyck *v.* Wilson, 18 Ont. Pr. 44. But, where an action on the award is pending, another court will refuse to vacate the award on grounds which could be set up in defense to such action. Smith *v.* George, 12 U. C. Q. B. 370.

Delay in filing affidavits.— The court to which an award is returned is not bound, on a motion to set it aside, to receive reasons filed, or affidavits taken at so late a period that they could not be answered and the witnesses could not be cross-examined, unless reasons for the delay are shown. Ford *v.* Potts, 6 N. J. L. 388.

22. Objections on motion for judgment.— Shores *v.* Bowen, 44 Mo. 396; Hinkle *v.* Harris, 34 Mo. App. 223; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; Montgomery County *v.* Carey, 1 Ohio St. 463.

Court may refuse to enforce award.— In England it has been held that, although an award cannot be set aside after the time limited by statute has elapsed, yet, where there is a palpable objection upon the face of the award, the court may refuse to enforce it. Pedley *v.* Goddard, 7 T. R. 73, 4 Rev. Rep. 382; Auriol *v.* Smith, Turn. & R. 121. And see Stephenson *v.* Browning, 1 Barnes Notes Cas. 42.

23. England — Term after publication.— Christ's College *v.* Martin, 3 Q. B. D. 16, 46 L. J. Q. B. 591, 36 L. T. Rep. N. S. 537, 25 Wkly. Rep. 637; Freame *v.* Pinneger, Cowp. 23; Reynolds *v.* Askew, 5 Dowl. P. C. 682, W. W. & D. 366; Dodd *v.* Platt, 6 Jur. N. S. 631, 1 L. T. Rep. N. S. 135; Stephenson *v.* Browning, 1 Barnes Notes Cas. 42. To the same effect see Nugent *v.* Barron, 7 N. Brunsw. 621.

Equity acting in analogy to common-law rule.— Smith *v.* Whitmore, 2 De G. J. & S. 297, 10 Jur. N. S. 1190, 33 L. J. Ch. 713, 11 L. T. Rep. N. S. 169, 13 Wkly. Rep. 2, 67 Eng. Ch. 232. See also Auriol *v.* Smith, Turn. & R. 121.

A motion on the last day of such term comes too late. *In re* Huddersfield, L. R. 17 Eq. 476, L. R. 10 Ch. 92, 44 L. J. Ch. 96, 31 L. T. Rep. N. S. 466, 23 Wkly. Rep. 100; *In re* Hughes, 3 L. J. K. B. O. S. 175; *In re* Evans, 4 M. & G. 767, 5 Scott N. R. 240, 43 E. C. L. 396.

Motion heard after the last day, if made before the last day of the term next after the award was made, is in time. *In re* Huddersfield, L. R. 17 Eq. 476, L. R. 10 Ch. 92, 44 L. J. Ch. 96, 31 L. T. Rep. N. S. 466, 23 Wkly. Rep. 100.

Where submission afterward made rule of court.— Where a rule *nisi* to set aside an award had been granted on the last day but one of the term, but was stayed in the office because the submission had not been made a rule of court, of which it appeared the parties were aware at the time of making the motion, the court refused in the following term — the submission having been meanwhile made a rule of court — to antedate the latter rule as of the day when the motion to set aside the award was made, and to draw up the rule to set aside the award, on reading the rule making the submission a rule of court, although it appeared that the party moving had no copy of the submission, which was in the hands of the opposite party, who had refused to make it a rule of court in time. Ross *v.* Ross, 4 Dowl. & L. 648, 16 L. J. Q. B. 138. See also *In re* Hughes, 3 L. J. K. B. O. S. 175.

Not applicable to awards under orders of nisi prius.— The time limited by 9 & 10 Wm. III, c. 15, for setting aside awards made under submissions by virtue of that statute, does not attach on awards made under orders of *nisi prius*. Synge *v.* Jervoise, 8 East 466.

24. Cannot consent to extension.— *In re* North British R. Co., L. R. 1 C. P. 401, 12 Jur. N. S. 786, 35 L. J. C. P. 262.

25. Court may extend time.—Cobbs *v.* Ferrars, 8 Dowl. 779; Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473; Rogers *v.* Dallimore, 1 Marsh. 471, 6 Taunt. 111, 1 E. C. L. 532. But see Smith *v.* Blake, 8 Dowl. P. C. 133, 2 Jur. 1015, 1 W. W. & H. 406.

Misconduct of party.— Where, from the misconduct of one of the parties, the submis-

but the party seeking such indulgence must present an ample excuse for his failure to apply sooner.[26]

(F) *Form and Sufficiency of Motion or Exception* — (1) In General. The manner in which objections to an award shall be taken is usually pointed out by statute, and the statutory requirements must be complied with.[27]

(2) Necessity For Specific Allegations. It is upon the party objecting to the award to show affirmatively why it should not be enforced against him,[28] and he must state specifically the facts on which his objections are based — general averments are insufficient.[29] Thus, it is not enough to allege generally that the

sion could not be made a rule of court so as to enable the opposite party to make it a rule of court before the last day but one of the term next after the award, the time for a motion to set it aside was enlarged until the following term. *In re* Perring, 3 Dowl. P. C. 98.

What operates as extension of time.— In Harvey *v.* Shelton, 7 Beav. 455, 13 L. J. Ch. 466, a motion was made to dismiss a bill in pursuance of an award. It came on upon the last day, to which, under the statute, an application could be made to set aside the award. Respondent then made objections to the award, and the motion was ordered to stand over, with liberty for respondent to give notice of motion to dispute the award. It was held that this operated as an extension of time.

26. Newly-discovered fraud.— Where, after the period for setting aside an award, a party applies to set it aside on the ground of newly-discovered fraud, he is bound to show that it is a new discovery, and that he could not, with due diligence, have made such discovery before. Auriol *v.* Smith, Turn. & R. 121. But see Reynolds *v.* Askew, 5 Dowl. P. C. 682, W. W. & D. 366.

Insufficient excuse.— The fact that during several months a party had been in bad health and passed one month abroad for that reason; and an affidavit of his physician stated that during another of the months he was unfit to attend to any business, does not furnish a sufficient excuse to take the case out of the rule requiring the application to be made before the last day of the next term. Guadinao *v.* Brown, 2 Jur. N. S. 358, 4 Wkly. Rep. 456. In Emet *v.* Ogden, 7 Bing. 258, 9 L. J. C. P. O. S. 83, 20 E. C. L. 121, it was held that it was not a sufficient excuse that plaintiff had been misled by a statement of defendant that the latter intended to move to set the award aside. Plaintiff ought not to have relied on defendant, but should have proceeded himself.

27. See the statutes.

What equivalent to motion.— Where the papers containing the submission and award were destroyed, and no opportunity apparently afforded defendant to move to vacate the award, it was held that defendant's answer to a suit on the award might well be treated as in the nature of such motion, or as objections upon a motion to confirm. Hyeronimus *v.* Allison, 52 Mo. 102.

What equivalent to "complaint."— Where a submission to arbitration has been made a rule of the chancery court, service of a notice of motion to set aside the award is a complaint, within the meaning of 9 & 10 Wm. III, c. 15. *In re* Huddersfield, L. R. 17 Eq. 476, L. R. 10 Ch. 92, 44 L. J. Ch. 96, 31 L. T. Rep. N. S. 466, 23 Wkly. Rep. 100.

Necessity for oath.— Where the statute provides that the objections shall be under oath, an objection not sworn to will be insufficient. Foster *v.* Collier, 76 Ga. 692; Chisolm *v.* Cothran, 40 Ga. 273; Montgomery County *v.* Carey, 1 Ohio St. 463.

Need not be signed by counsel.— Where the record shows that exceptions to an award were filed in the case "by the counsel for the defendant," it is sufficient to show that they were genuine though they were not signed by counsel or entitled as of the case. Johnston *v.* George, 6 Md. 452.

Demurrer to exceptions.— Exceptions to an award which are not well pleaded may be attacked by demurrer. Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811; Harper *v.* Pike County Road Com'rs, 52 Ga. 659; Chisolm *v.* Cothran, 40 Ga. 273.

28. Snodgrass *v.* Snodgrass, 32 Ind. 406, wherein it was held not to be sufficient merely to object to a motion for judgment on the award, and to except to the ruling sustaining such motion.

29. General averments insufficient.— McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505; Mitchell *v.* Brunswick, 41 Ga. 370; Sharp *v.* Loyless, 39 Ga. 678; Shaifer *v.* Baker, 38 Ga. 135; Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612; Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764; Boodle *v.* Davies, 3 A. & E. 200, 30 E. C. L. 109; Jones *v.* Powell, 7 Dowl. P. C. 483, 1 W. W. & H. 60; Craven *v.* Craven, 1 Moore C. P. 403, 7 Taunt. 644, 2 E. C. L. 529; Bedington *v.* Southall, 4 Price 232.

A notice of motion in the chancery division to set aside an award should specify the grounds of objection in analogy to the practice in the courts of law. An objection on "good grounds" is insufficient. Mercier *v.* Pepperell, 19 Ch. D. 58, 51 L. J. Ch. 63, 45 L. T. Rep. N. S. 609, 30 Wkly. Rep. 228.

Objections too general.— In Bradbee *v.* Christ's Hospital, 2 Dowl. N. S. 164, 11 L. J. C. P. 209, 4 M. & G. 714, 5 Scott N. R. 79, 43 E. C. L. 368, the following objections to an award were held to be too general: "That the facts stated by the arbitrator on the face of his award are not sufficient to enable the court to decide the points of law thereby in-

arbitrator was guilty of fraud, partiality, or misconduct,[30] that he failed to pursue his authority,[31] that the award was contrary to the evidence,[32] or was the result of a mistake.[33] But the fact that one ground of objection is not well pleaded will not preclude the party from relying on other grounds which are properly presented.[34]

(3) Necessity to Allege All Objections. All objections intended to be relied on must be presented,[35] and the party cannot renew his applicatiou on fresh grounds after his former objections have been overruled.[36]

(G) *Right to Jury Trial.* Ordinarily, neither party has a right to a jury trial

tended to be raised, or the several points of law which he was requested by the defendant to raise;" "that the arbitrator has not by his said award raised the points which, on the part of the plaintiff, he was requested to raise;" "that the award is not finally certain and mutually binding, because it raises points for the opinion of the court which the arbitrator was not requested by either party to raise or state on the face of his award."

Amendment.— It seems that a defective motion to set aside an award may be amended. Sharp *v.* Loyless, 39 Ga. 678; Whatley *v.* Morland, 2 C. & M. 347, 2 Dowl. P. C. 249, 3 L. J. Exch. 58, 4 Tyrw. 255.

30. Fraud, partiality, or misconduct.— Bash *v.* Christian, 77 Ind. 290; Conrad *v.* Johnson, 20 Ind. 421; *In re* Hotchkiss, 5 Ont. Pr. 423, 7 U. C. L. J. N. S. 320.

Refusal to compel production of evidence. — Where a party seeks to set aside an award because of misconduct of the arbitrators in refusing to compel production of certain books in evidence "as to be subject to his examination," but the books were actually produced, it is his duty to state plainly why he could not examine them. Newman *v.* Labeaume, 9 Mo. 30, 37.

An affidavit to set aside an award on the ground that the arbitrator had refused to examine a material witness should state what reason, if any, he gave for refusing to hear the witness. Bradley *v.* Ibbetson, 2 L. M. & P. 583.

Material averments.— Where an answer to a motion for entry of judgment on an award set forth, as particulars of partiality and misbehavior, that one arbitrator's whole course and manner was one of deep interest in the success of a party, that he argued his case during the hearing, that on his own motion he stopped witnesses of the other party from testifying, that he controlled and consulted alone with one arbitrator and ignored the other, contemptuously insinuating that he was attorney for the other party, it was held that these were material averments tending to show a valid reason for not entering judgment, and that it was error to strike them from the answer. Bash *v.* Christian, 77 Ind. 290.

31. Failure to pursue authority.— Spencer *v.* Curtis, 57 Ind. 221; Allenby *v.* Proudlock, 4 Dowl. P. C. 54, 1 Hurl. & W. 357. But see Dunn *v.* Walters, 1 Dowl. N. S. 626, 11 L. J. Exch. 188, 9 M. & W. 293, wherein it was held that an objection that the arbitrator has not awarded on a matter in difference submitted to him was sufficiently specific.

Affidavits showing excess of authority.— Where a rule is obtained to set aside an award on the ground "that the arbitrator has exceeded his authority," the affidavits should state specifically in what points the excess consists. Rawsthorn *v.* Arnold, 6 B. & C. 629, 9 D. & R. 556, 5 L. J. K. B. O. S. 270, 13 E. C. L. 284; Staple *v.* Hey, 1 Dowl. & L. 711, 8 Jur. 315, 13 L. J. Q. B. 60.

32. Georgia — Award contrary to evidence. —Exceptions to an award on the ground that it is contrary to the evidence must set forth all the evidence produced before the arbitrators, and allege that it is all correctly stated. Fowler *v.* Jackson, 86 Ga. 337, 12 S. E. 811; Foster *v.* Collier, 76 Ga. 692; Harper *v.* Pike County Road Com'rs, 52 Ga. 659; Overby *v.* Thrasher, 47 Ga. 10; Akridge *v.* Patillo, 44 Ga. 585; Tomlinson *v.* Hardwick, 41 Ga. 547; Anderson *v.* Taylor, 41 Ga. 10.

Brief filed by other party.— The brief of evidence filed with exceptions to an award being found by the jury to be incorrect, another brief, filed by the opposite party and admitted by him to be correct, will stand in lieu of the former for all purposes. Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761.

33. Hardin *v.* Almand, 64 Ga. 582.

34. Some objections properly presented, others not.— Wilkins *v.* Van Winkle, 78 Ga. 557, 3 S. E. 761; Boodle *v.* Davies, 3 A. & E. 200, 1 Hurl. & W. 420, 4 N. & M. 788, 30 E. C. L. 109; Gray *v.* Leaf, 8 Dowl. P. C. 654.

35. Grenfell *v.* Edgcome, 7 Q. B. 661, 14 L. J. Q. B. 322, 53 E. C. L. 661.

Matter not objected to taken as admitted. — A rule was granted by the circuit court upon plaintiffs to show cause why judgment should not be rendered on the award. They appeared to file reasons, not alleging as a defense the want of a notice of the award. It was held that notice was thereby admitted. Madison Ins. Co. *v.* Griffin, 3 Ind. 277.

36. Renewing application on fresh grounds. — Fay *v.* Bond, 3 Allen (Mass.) 433.

Right to amend.—Although a motion to set aside an award made at the proper term may be granted at a subsequent term, yet if the moving party does not ask to amend before proceeding with the motion as made, a judgment against him is final. Sharp *v.* Loyless, 39 Ga. 678.

on the issues raised on a motion to set aside an award, or on exceptions to entry of judgment thereon.[37] But it has been held that, where the party objects on the ground that he never authorized the arbitration, he is entitled to a jury trial on that issue.[38]

(H) *Effect of Vacating.* Where the award is set aside, the parties are remitted to their original rights.[39]

(I) *Appeals* — (1) FROM JUDGMENT ON AWARD — (a) RIGHT TO APPEAL — aa. *In General.* In the absence of statutory authority permitting such procedure, there can be no appellate review of an award.[40] Where, however, an award has been entered as the judgment of a court under statutory authority to that effect, an appeal or writ of error will usually lie to such a judgment.[41] But for such remedy

37. Beeber *v.* Bevan, 80 Ind. 31; Milner *v.* Noel, 43 Ind. 324; Koerner *v.* Leathe, 149 Mo. 361, 51 S. W. 96.

In Georgia the statute provided that the court shall order a special jury to try the issues in the manner provided for the trial of appeals. Ga. Code, §§ 4054, 4055. But questions as to whether the award is legal are for the court and not the jury. Harper *v.* Pike County Road Com'rs, 52 Ga. 659; Overby *v.* Thrasher, 47 Ga. 10; Cobb *v.* Morris, 40 Ga. 671.

In Texas, if it is sought to impeach an award made in a pending suit, on the ground of fraud or partiality in the arbitrators, these questions should be submitted to the jury under appropriate instructions from the court, as well as the questions involving the merits of the controversy, so that, if the jury find the award invalid, they may decide upon the merits. Bowden *v.* Crow, 2 Tex. Civ. App. 591, 21 S. W. 612.

38. Boyden *v.* Lamb, 152 Mass. 416, 419, 25 N. E. 609, wherein the court said: "A party by submitting to an arbitration waives his right to a trial by jury as to the matters in controversy, and cannot have the decision of the arbitrators reviewed and revised when they have lawfully proceeded to decide and pass upon them. This would be to defeat the very object of the statute. But when there is an inquiry whether he has ever assented to an agreement for a submission,— as where he contends that the alleged signature of his name is a forgery, or that the person assuming to act as his agent or attorney had no authority thus to act,— it by no means follows that this pure question of fact can be determined by the court without affording him an opportunity, if he so desires, of having it passed upon by a jury. Arbitration is a substitution, by consent of parties, of another tribunal for those provided by the ordinary processes of law; but that such a substitution should be established, the consent of parties thereto should be proved in the usual way."

39. See *supra*, IX, A, 2, c.

40. **In the absence of statute.**— Boyd *v.* Stubbs, 7 Watts (Pa.) 29; Wilson *v.* Colwell, 3 Watts (Pa.) 212. In Shirk *v.* Trainer, 20 Ill. 301, 302, where an award was not one over which a justice of the peace was given jurisdiction by statute, it was held that the circuit court could not obtain jurisdiction thereof by appeal merely because a justice had prepared the submission. The court said: "There is no authority given to appeal from the award of arbitrators; and the circuit court can derive jurisdiction to review a decision of an inferior court by appeal or certiorari, and has no power to review the decision of arbitrators by either of these modes."

Controversy submitted to judges as arbitrators.— See *supra*, I, A, 1, note 2.

In Iowa no appeal lies from a judgment of a justice on an award. Whitis *v.* Culver, 25 Iowa 30.

Louisiana — Constitutional provision not applicable to arbitrations.—La. Const. (1812), art. 4, § 2, giving the right of appeal, was held to refer only to inferior courts established for general purposes by the legislature, and not to apply where the parties chose their own judges under the law relative to arbitrations. Davis *v.* Leeds, 7 La. 471.

Michigan — When error does not lie.— Mich. Comp. Laws, § 6897, provides that any party complaining of an award may move the court designated in the submission to vacate the award upon certain grounds. Section 6903 provides that the record of a judgment on an award shall recite the submission and hearing before the arbitrators, their award, the proceedings of the court thereon in modifying or confirming the award, and the judgment of the court for the recovery of the debt or damages awarded. It was held that error did not lie on a judgment upon an award rendered by arbitrators under a statutory submission, where the same was in due form and the award was one that could have been lawfully made. Cooper *v.* Andrews, 44 Mich. 94, 6 N. W. 92.

Ohio — Not a "civil action."— Where the award was filed in the court of common pleas, exceptions thereto overruled and judgment entered thereon, it was held that the case was not appealable under a statute authorizing an appeal in a "civil action." Moore *v.* Boyer, 42 Ohio St. 312.

41. **From award entered as judgment of court.**— *California.*— Fairchild *v.* Doten, 42 Cal. 125.

Connecticut.— Waterbury Blank-Book Mfg. Co. *v.* Hurlburt, (Coun. 1901) 49 Atl. 198.

Illinois.— Rogers *v.* Holden, 13 Ill. 293.

to be available, the arbitration must conform substantially in all respects to the statutory requirements.[42]

bb. *Effect of Stipulation Not to Appeal.* The parties may stipulate in the submission that neither shall appeal, and such agreement is usually regarded as binding, so far as relates to the merits;[43] but courts cannot be ousted of their proper jurisdiction by agreement of the parties, and such a stipulation will not prevent the court appealed to from taking jurisdiction to prevent a miscarriage of justice.[44]

(b) WHAT CONSIDERED BY APPELLATE COURT — aa. *In General.* Where the statute provides for the review of the judgment on certain specified grounds only, the courts are precluded from reviewing the judgment except for the causes specified in the statute.[45]

bb. *Objections Not Apparent From Record.* Objections to an award which are not jurisdictional in their nature will not be considered by the appellate court unless they appear from the record,[46] and it will be presumed that the rulings and

Indiana.— Anderson *v.* Anderson, 65 Ind. 196.

Massachusetts.— Lyman *v.* Arms, 5 Pick. (Mass.) 213; Short *v.* Pratt, 6 Mass. 496.

Mississippi.— Person *v.* Leathers, (Miss. 1896) 19 So. 582.

Nebraska.— Holub *v.* Mitchel, 42 Nebr. 389, 60 N. W. 596.

United States.— Nolan *v.* Colorado, etc., Min. Co., 63 Fed. 930, 27 U. S. App. 427, 12 C. C. A. 585.

Indiana — Right to jury trial on appeal.— A defendant appealing from a judgment of a justice of the peace on an award cannot have the cause tried by a jury in the circuit court unless the award be first set aside for fraud, corruption, or other undue means. Rousan *v.* Moffett, 3 Blackf. (Ind.) 141.

Necessity to reserve right in submission. — Under some statutes an appeal will lie only where the right thereto has been reserved in the submission. Messick *v.* Ward, 1 Grant (Pa.) 437; Shainline's Appeal, 3 Kulp (Pa.) 301; King *v.* Grey, 31 Tex. 22; Offeciers *v.* Dirks, 2 Tex. 468.

Writ of error coram nobis.— A controversy was submitted to arbitration with the agreement that judgment be entered by the clerk of the district court in vacation. On writ of error coram nobis, it was held that, since the office of such writ in the district court was to review errors of fact in its own judgment, the writ would not lie to review an award before the entry of judgment. McKinney *v.* Western Stage Co., 4 Iowa 420.

Who not necessary parties to appeal.— Where an award, in pursuance of the submission, contained a provision that, out of the amount found for plaintiffs, their counsel fees should be deducted and paid directly to the attorneys by defendants, it was held that such attorneys were not necessary parties to an appeal from the judgment entered on the award. South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778.

42. Fairchild *v.* Doten, 42 Cal. 125.

Effect of appeal.— Where an award was made in the probate court by arbitrators, it was held that an appeal to the circuit court from the judgment entered thereon did not abrogate the award, but that the matter came up for trial *de novo*, and, if necessary, the circuit court might take evidence to determine the contents of the agreement for submission or to identify the order for submission. Blanton *v.* Littell, 65 Ark. 76, 44 S. W. 716.

43. **As to the merits.**— Struthers *v.* Clark, 40 Iowa 508; Daniels *v.* Willis, 7 Minn. 374; Hostetter's Appeal, 92 Pa. St. 132; Williams *v.* Danziger, 91 Pa. St. 232; McCahan *v.* Reamey, 33 Pa. St. 535; Bingham *v.* Guthrie, 19 Pa. St. 418; Keystone Bank *v.* Ashton, 12 Phila. (Pa.) 188, 34 Leg. Int. (Pa.) 115; Skagit County *v.* Trowbridge, (Wash. 1901) 64 Pac. 901.

44. **As to the jurisdiction.**— Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313; Aycock *v.* Doty, 1 Tex. App. Civ. Cas. § 221. And see Lalande *v.* Jenfreau, 6 La. 333.

Louisiana — Statute providing for appeal. — Under a statute providing that although the parties to an arbitration have, in the submission, renounced appeal from the award, either party being dissatisfied with the award may appeal, "but the appellant before being heard on his appeal, ought to pay the penalty stipulated in the submission, if any has been stipulated," it was held that the appeal referred to was an appeal to the court from the judgment or decision of the arbitrators, and not an appeal to the supreme court from the judgment of the lower court on an appeal from the award. Hunt *v.* Zuntz, 28 La. Ann. 500.

45. Dibble *v.* Camp, 10 Abb. Pr. N. S. (N. Y.) 92. And see Goldman *v.* Goldman, 50 La. Ann. 29, 22 So. 967.

In the absence of statutory authority, the merits of the award will not be inquired into. Dibble *v.* Camp, 60 Barb. (N. Y.) 150; Bellas *v.* Levy, 2 Rawle (Pa.) 21.

As to the conclusiveness of the award in general see *supra*, IX, A, 1.

46. **Objections not jurisdictional.**— *Kentucky.*— Shult *v.* Travis, Ky. Dec. 140.

Massachusetts.— Ward *v.* American Bank, 7 Metc. (Mass.) 486; Skeels *v.* Chickering, 7 Metc. (Mass.) 316; Lyman *v.* Arms, 5 Pick. (Mass.) 213.

proceedings of the lower court were correct if the record does not show the contrary.[47]

cc. *Objections Not Taken in Lower Court.* Objections to an award which are not of a jurisdictional nature will, generally, not be considered on appeal, unless made in the court below.[48] But where an objection goes to the jurisdiction of the arbitrators to make the award, it may be taken in the appellate court even though not raised below.[49]

(2) Appeal From Refusal to Enter Judgment. Under some statutes an appeal lies from an order refusing entry of judgment on an award.[50]

Mississippi.— Person *v.* Leathers, (Miss. 1896) 19 So. 582.

New York.— Poole *v.* Johnston, 32 Hun (N. Y.) 215.

Pennsylvania.— Shisler *v.* Keavy, 75 Pa. St. 79; Rogers *v.* Playford, 12 Pa. St. 181; Sands *v.* Rolshouse, 3 Pa. St. 456.

Necessity for bill of exceptions.— Objections to a submission and award which are not preserved by bill of exceptions cannot be considered. Forman Lumber Co. *v.* Ragsdale, 12 Ill. App. 441. See also Coulter *v.* Coulter, 81 Ind. 542.

Not reviewable on ex parte affidavit.— An award entered as an order of court by stipulation of the parties cannot be reviewed upon an *ex parte* affidavit of appellant, such affidavit not being permissible in the place of a bill of exceptions or of a statement of the case. *In re* Connor, 128 Cal. 279, 60 Pac. 862.

What need not be preserved by bill of exceptions.— A submission and award, filed in order that the award may be made a judgment, are a part of the record, and need not be preserved by bill of exceptions. Buntain *v.* Curtis, 27 Ill. 374.

Cases appended to writ of error.— The supreme court will not look into the transcripts of cases appended to a writ of error taken upon a judgment on the award of arbitrators, unless it appears from the submission that these particular cases were referred. Lamar *v.* Nicholson, 7 Port. (Ala.) 158.

Affidavits part of judgment-roll.— Where it is provided by statute that, on an appeal from a judgment entered on an award, certified copies of the original affidavit upon which any application in relation to such award was founded, and all other affidavits and papers relating to such application, shall form a part of the record of the judgment, such affidavits are a part of the judgment-roll. Dundon *v.* Starin, 19 Wis. 261.

Validity at common-law not considered.— On appeal from a judgment entered on a statutory award which is held to be invalid because of non-compliance with mandatory provisions of the statute, the question of the validity of the award at common law will not be considered, the only question before the court being whether the judgment was rightly entered. Marshall *v.* Bozorth, 17 Pa. St. 409.

47. No presumption as to correctness of rulings.— Elrod *v.* Simmons, 40 Ala. 274; Waring *v.* Gilbert, 25 Ala. 295; Coulter *v.* Coulter, 81 Ind. 542; Bash *v.* Christian, 77 Ind. 290; Walker *v.* Sanborn, 8 Me. 288; Shisler *v.* Keavy, 75 Pa. St. 79.

Presumption that law complied with.— The record of the judgment on an award need not show that the arbitrators were sworn, that the arbitration bond was proved, that the witnesses were sworn, nor that the award was proved: an appellate court will presume, the record not showing the contrary, that the law as to these matters was complied with. Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395.

Award presumed to be justified by evidence.— Where the evidence submitted to arbitrators is not in the record, it will be presumed that the award was justified by the evidence. Buxton *v.* Howard, 38 Ind. 109; Allen *v.* Hiller, 8 Ind. 310; Smith *v.* Stewart, 5 Ind. 220.

48. Non-jurisdictional objections.— *Alabama.*— Mobile Bay Road Co. *v.* Yeind, 29 Ala. 325; Callahan *v.* McAlexander, 1 Ala. 366; Price *v.* Kirby, 1 Ala. 184.

Illinois.— McMillan *v.* James, 105 Ill. 194; Burrows *v.* Guthrie, 61 Ill. 70.

Indiana.— Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 395.

Kentucky.— Hopkins *v.* Sodouskie, 1 Bibb (Ky.) 148.

Minnesota.— Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57.

Indiana — Judgment by justice.— Under Ind. Rev. Stat. (1838), p. 371, on appeal from a judgment entered on an award by a justice of the peace, objections might be urged against the award, though not taken before the justice. Payne *v.* Miller, 6 Blackf. (Ind.) 178.

49. Jurisdictional objections.— Callahan *v.* McAlexander, 1 Ala. 366; Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57; Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976.

50. King *v.* Grey, 31 Tex. 22, holding that where the court to which the award was returned improperly refused to enter judgment thereon, the supreme court, on reversing such decision, properly proceeded to enter the proper judgment on the award.

Massachusetts — Should present case by exceptions.— A party appealing from the denial of a motion for judgment on an award of arbitrators should present his case by exceptions, showing the ground on which the motion was denied. Giles *v.* Royal Ins. Co., (Mass. 1901) 60 N. E. 786.

But, in Alabama, such an order is regarded as interlocutory and not appealable. Dudley *v.* Farris, 79 Ala. 187.

(3) Appeal From Order Setting Award Aside. An order setting aside an award made upon a submission *in pais* is usually appealable,[51] but where, under the statute, an award is not so far a finality that it can be enforced in any way at all until judgment has been entered thereon by the court, an order setting it aside is not such a final order as will sustain an appeal.[52]

(4) Appeal From Refusal to Set Award Aside. In jurisdictions where an appeal lies from an order refusing to vacate an award,[53] the appellate court, on reversing such order, will set aside the award and remand the cause as in the case of a reversal of a final judgment.[54] The appellate court will consider only such questions as are brought before it by the record.[55]

51. **Usually appealable.**— Tennant *v.* Divine, 24 W. Va. 387, 389, wherein the court said: "When an award made in a pending case, is set aside, the action still remains in court for further proceedings, and a final judgment may be had therein without a new action. But where the submission is *in pais*, upon an agreement of the parties that the award shall be made the judgment of the court, if the court sets aside the award, nothing remains in court and no further proceedings can be had therein without resorting to a new action either on the original cause of action or the agreement for submission. The judgment of the court setting aside the award and discharging the rule in such case is final so far as that particular proceeding is concerned. I am, therefore, of opinion that the order complained of in this case is such a final judgment as entitles the plaintiff to a writ of error to this Court." See also Donovan *v.* Owen, 10 La. Ann. 463.

Facts must appear of record.—Where there is no showing by bill of exceptions or otherwise upon what facts the court acted in setting aside the award, the supreme court will not review its rulings. Hamble *v.* Owen, 20 Iowa 70; Taylor *v.* Smith, 93 Mich. 160, 52 N. W. 1118.

Ultimate facts.— An appellate court will not weigh or examine testimony adduced either to sustain or impeach the award, but will confine its rulings to questions of law arising upon the facts shown; hence, to obtain a review, the ultimate facts must be found and reported in the bill of exceptions, and merely to report the testimony and affidavits considered below is insufficient. Nolan *v.* Colorado, etc., Min. Co., 63 Fed. 930, 27 U. S. App. 427, 12 C. C. A. 585.

Massachusetts — Matter of law apparent of record.— An appeal from an order setting aside an award must be from a "matter of law apparent on the record;" and where, upon an appeal from a judgment of the superior court in the matter of an award of arbitrators, the record does not show the grounds on which the superior court acted in ordering an award to be set aside, it cannot be held that the grounds were insufficient in law. Bent *v.* Erie Tel., etc., Co., 144 Mass. 165, 10 N. E. 778.

Pennsylvania — Writ of error.— The supreme court, having no authority to review evidence on a writ of error, will not review an order of the court of common pleas setting aside an award under the Pennsylvania act of 1705, in which it was stated that judgment for the sum awarded would not be given "because it was admitted that there were errors which would reduce the award." From this it appeared that the decision of the lower court did not altogether rest on matters of law. Gratz *v.* Phillips, 14 Serg. & R. (Pa.) 144.

Entry of judgment in appellate court.— Where an order setting aside an award is reversed on appeal, the appellate court may itself enter judgment on the award. State *v.* Stewart, 12 Gill & J. (Md.) 456; Taylor *v.* Smith, 93 Mich. 160, 52 N. W. 1118; Bergh *v.* Pfeiffer, Lalor (N. Y.) 110.

52. Tacoma R., etc., Co. *v.* Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

53. **California — Time of taking appeal.**— Under the statute it was held that an appeal from an order refusing to vacate an award of arbitrators must be taken within sixty days from the time the order was made. Fairchild *v.* Doten, 38 Cal. 286.

Nebraska — Motion for new trial not necessary.— Where a motion to set aside an award is overruled, and judgment entered on the award over the objection and exception of the party attacking it, the decision of the district court on such motion may be reviewed upon error without a motion for a new trial having first been made in the district court. Graves *v.* Scoville, 17 Nebr. 593, 24 N. W. 222.

New Jersey — Right to bill of exceptions.— On the discharge of a motion to set aside an award, the party is entitled to a bill of exceptions to the decision of the court on the sufficiency of the objection to the award. It is not necessary that there should be a trial of a cause in order to entitle a party to a bill of exceptions. Ford *v.* Potts, 6 N. J. L. 388.

New York — Writ of error.— In New York, if the general term affirms the judgment of the special term refusing to grant an order vacating an award, an appeal will not lie to the court of appeals from the judgment of the special term, but the remedy, if any, is by writ of error. Freeman *v.* Kendall, 41 N. Y. 518.

54. Rand *v.* Peel, 74 Miss. 305, 21 So. 10.

55. **Only facts presented by record considered.**—Trustees Wabash, etc., Canal *v.* Huston, 12 Ind. 276; Patten *v.* Hunnewell, 8 Me. 19

(II) *Power to Correct or Modify Award.* In the absence of statutory authority, the court to which an award is returned has no power to modify or correct it.[56] By some statutes such power is given,[57] but extends only to the cases specified in the statute.[58]

(III) *Power to Recommit Award*— (A) *In General.* In the absence of any statute to the contrary, the authority of the arbitrators terminates with the execution of their award,[59] and the court has no power to recommit the matter to the arbitrators without the consent of the parties.[60] But such power is now very commonly given by statute.[61]

(B) *Discretion of Court.* The court having control of the award is, usually, given discretionary power over the question of recommittal;[62] but such discretion

Affidavits used to impeach an award must be incorporated in the bill of exceptions to be available on proceedings in error. Sides *v.* Brendlinger, 14 Nebr. 491, 17 N. W. 113.

Conflicting affidavits.— Where, on motion to set aside an award for alleged misconduct of the arbitrators, conflicting affidavits are filed, the decision of the court below will not be disturbed on appeal. Deford *v.* Deford, 116 Ind. 523, 19 N. E. 530.

Judge's memorandum not part of record.— The judge's memorandum of the ground of his holding on a motion to set aside the award is no part of the record. Standish *v.* Old Colony R. Co., 129 Mass. 158.

56. In the absence of statute.— St. Patrick's Church *v.* Dakin, 1 Rob. (La.) 202; Morewood *v.* Jewett, 2 Rob. (N. Y.) 496; Post *v.* Sweet, 8 Serg. & R. (Pa.) 391; Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5.

57. See the statutes, and the following cases:

Indiana.— Conrad *v.* Johnson, 20 Ind. 421; Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098.

Louisiana.— Davis *v.* Leeds, 7 La. 471.

Michigan.— Taylor *v.* Smith, 93 Mich. 160, 52 N. W. 1118; Cooper *v.* Andrews, 44 Mich. 94, 6 N. W. 92.

New York.— Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410.

Pennsylvania.— Shisler *v.* Keavy, 75 Pa. St. 79; Rogers *v.* Playford, 12 Pa. St. 181.

Remittitur of excess.— In some states where an award is excessive, the court may order a *remittitur* of the excess and render judgment for the residue. Farr *v.* Johnson, 25 Ill. 430; Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117, 15 Cinc. L. Bul. 397, 17 Cinc. L. Bul. 139. And see Silver *v.* Connecticut River Lumber Co., 40 Fed. 192.

Evidence to obtain alteration of award.— Evidence which, under an exception to an award based on the ground that the scope of the inquiry as indicated in the agreement was exceeded by the arbitrators, is introduced in order to obtain an alteration of the award by the court, as provided by Ind. Rev. Stat. (1894), § 858, can be heard only for the purpose of determining whether the alleged excess exists. Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098.

Error in computation of interest.— An award fixing the amount due upon a note cannot be modified for supposed error in the computation of interest, or in not computing it for a sufficient period of time, in the absence of the evidence given before the arbitrators in that regard. *In re* Connor, 128 Cal. 279, 60 Pac. 862.

58. Huss *v.* Turner, 2 Ind. 217.

59. As to the termination of the arbitrators' authority see *supra*, III, G.

60. In the absence of statute.— Evans *v.* Sheldon, 69 Ga. 100; Black *v.* Harper, 63 Ga. 752; Cleaveland *v.* Dixon, 4 J. J. Marsh. (Ky.) 226; Mitchell *v.* Curran, 1 Mo. App. 453. And see *Ex p.* Cuerton, 7 D. & R. 774, 16 E. C. L. 321.

61. See the statutes and the following cases:

Iowa.— Depew *v.* Davis, 2 Greene (Iowa) 260.

Maine.— North Yarmouth *v.* Cumberland, 6 Me. 21.

Massachusetts.— Boardman *v.* England, 6 Mass. 70; Whitney *v.* Cook, 5 Mass. 139.

Minnesota.— Johnston *v.* Paul, 22 Minn. 17.

New Hampshire.— Eastman *v.* Burleigh, 2 N. H. 484.

Washington.— Snohomish County School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341.

England.— Harland *v.* Newcastle-upon-Tyne, L. R. 5 Q. B. 47, 39 L. J. Q. B. 67, 18 Wkly. Rep. 165; Mills *v.* Bowyers Soc., 3 Kay & J. 66; Anning *v.* Hartley, 27 L. J. Exch. 145.

Affidavits in support of motion to recommit. — *Ex parte* affidavits are admissible in support of a motion to recommit an award, and, even if not admissible, if no objection was made at the time they were offered, it will be deemed to have been waived. Depew *v.* Davis, 2 Greene (Iowa) 260.

Refusal of arbitrator to receive the resubmission.—After an award has been made and set aside it is competent for one of the arbitrators to withdraw before there has been any resubmission, and, in such case, a second award made by the other arbitrators, against the objection of one of the parties, is invalid. Cary *v.* Bailey, 55 Iowa 60, 7 N. W. 410.

62. Walker *v.* Sanborn, 8 Me. 288; Cumberland *v.* North Yarmouth, 4 Me. 459. And see Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895.

is not arbitrary and must be exercised in accordance with fixed rules of law and upon consideration of the facts and circumstances of the case.[63]

(c) *Grounds For Recommittal* — (1) In General. The causes for which an award may be recommitted depend, to a considerable extent, upon the terms of the statutes.[64] In general, however, the award may be sent back for more specific findings,[65] to allow the arbitrators to reconsider and amend a defective part,[66] or to pass upon matters embraced in the submission, but omitted from the award.[67] But where an award was void because partly founded on matters outside the submission, the court refused to recommit it.[68] And where the ground of objection consisted in the partiality of one of the arbitrators, it was held that a recommittal to the same arbitrators was improper.[69]

(2) For Correction of Mistakes. The most frequent ground of recommit tal is for the correction of informalities or clerical mistakes.[70] But the mistake must be apparent on the face of the award or be admitted by the arbitrators,[71] and mere errors of judgment will not, ordinarily, furnish grounds for recommital.[72]

(3) For Revision of Whole Case. Under some statutes the award may be recommitted for reëxamination of the whole case.[73]

(4) Newly-Discovered Evidence. Under some statutes, newly-discovered evidence is a sufficient reason for recommitting the award.[74]

(d) *Practice After Recommittal.* Where an award is recommitted generally, the authority of the arbitrators is as extensive as it was under the original submission.[75] A rehearing need not be granted where not necessary to accomplish

63. Discretion not arbitrary.— Depew *v.* Davis, 2 Greene (Iowa) 260; Long *v.* Rhodes, 36 Me. 108.

64. Wishes of party — Willingness of arbitrators.— The wishes of one of the parties who is dissatisfied with the award, or the willingness of the arbitrators to have the case opened and more fully considered, furnish no ground for recommitting the award. Long *v.* Rhodes, 36 Me. 108.

In England the court cannot send back an award to the arbitrator except for a cause for which the award might be set aside. Oldfield *v.* Price, 6 C. B. N. S. 539, 95 E. C. L. 539.

65. For more specific findings.— Johnston *v.* Paul, 22 Minn. 17; Bowers *v.* Worrell, 1 Browne (Pa.) 170; Gore *v.* Baker, 4 E. & B. 470, 1 Jur. N. S. 425, 24 L. J. Q. B. 94, 82 E. C. L. 470.

66. To amend.— *In re* Aitken, 3 Jur. N. S. 1296.

67. To pass upon matters submitted but omitted from award.— Boardman *v.* England, 6 Mass. 70; Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869. In Paine *v.* Paine, 15 Gray (Mass.) 299, an award was recommitted to the arbitrator to take a required account and render such award final.

Matter not brought before arbitrator.— An application to remit an award upon a reference of all matters in difference, on the ground that the arbitrator had omitted to decide upon a cross-claim, was refused on the ground that it did not appear that the matter had been brought before the arbitrator. Erskine *v.* Wallace, 12 Wkly. Rep. 134.

68. Void award.— Adams *v.* Adams, 8 N. H. 82.

69. Partiality of one arbitrator.— Brown *v.* Harper, 54 Iowa 546, 551, 6 N. W. 747, wherein it was said: "The court should simply have rejected the award, and left the parties to resort to the ordinary tribunals for the settlement of their differences."

70. Informalities and clerical mistakes.— *Maine.*— Clement *v.* Foster, 69 Me. 318.

Minnesota.— Johnston *v.* Paul, 22 Minn. 17.

New Hampshire.— Yeaton *v.* Brown, 52 N. H. 14.

Pennsylvania.— Heslop *v.* Bush, 80 Pa. St. 70; Christmas *v.* Thompson, 3 Serg. & R. (Pa.) 133; Shaw *v.* Pearce, 4 Binn. (Pa.) 485; Snyder *v.* Hoffman, 1 Binn. (Pa.) 43.

West Virginia.— Henley *v.* Menefee, 10 W. Va. 771.

United States.— Kleine *v.* Catara, 2 Gall. (U. S.) 61, 14 Fed. Cas. No. 7,869.

England.— Mills *v.* Bowyers Soc., 3 Kay & J. 66.

71. Mistake admitted or appearing on face of award.— Snohomish County School Dist. No. 5 *v.* Sage, 13 Wash. 352, 43 Pac. 341; Lockwood *v.* Smith, 10 Wkly. Rep. 628. See also Wordsell *v.* Holder, 1 L. T. Rep. N. S. 14; Walton *v.* Swanage Pier Co., 10 Wkly. Rep. 629.

72. Mere errors of judgment.— Harris *v.* Seal, 23 Me. 435.

73. Cumberland *v.* North Yarmouth, 4 Me. 459; Boardman *v.* England, 6 Mass. 70.

74. Depew *v.* Davis, 2 Greene (Iowa) 260; *In re* Keighley, [1893] 1 Q. B. 405, 7 Aspin. 268, 62 L. J. Q. B. 105, 68 L. T. Rep. N. S. 61, 4 Reports 136, 41 Wkly. Rep. 437; Burnard *v.* Wainwright, 1 L. M. & P. 455, 19 L. J. Q. B. 423. *Contra,* Sanborn *v.* Davis, 5 N. H. 389.

75. French *v.* Richardson, 5 Cush. (Mass.) 450.

the purpose for which the award was recommitted.[76] Having made their new award,[77] the arbitrators may return it to the term during which they agree upon it,[78] and it seems to be no objection that the time of such return is outside the time originally limited in the submission.[79]

(E) *Appeal From Order of Recommittal.* In some jurisdictions it is held that the exercise of discretion by the court in recommitting, or refusing to recommit, the award, will not be reviewed;[80] but in Iowa an appeal lies from such order.[81]

X. PERFORMANCE OF AWARD.

A. Necessity For, as Condition Precedent to Enforcement — 1. Award Directing Concurrent or Dependent Acts. Where the duties imposed upon one party by an award are to be performed simultaneously with, or as a condition precedent to, those required of the other party,[82] the former cannot enforce the award against the latter until he has performed or offered to perform on his own part.[83] Thus, a performance or offer to perform is a condition precedent to

76. Rehearing.—Blood *v.* Robinson, 1 Cush. (Mass.) 389; Bird *v.* Penrice, 9 L. J. Exch. 257, 6 M. & W. 754.

Need not give notice.— Where the attorneys of the parties agreed verbally that the arbitrator should amend a defect in his award, and thereafter one of the attorneys obtained an order for a remission to the arbitrator, it was held that the arbitrator was not bound to give notice to the parties before altering his award, or to recite therein the order of court. Baker *v.* Hunter, 4 Dowl. & L. 696, 16 L. J. Exch. 203, 16 M. & W. 672.

77. Sufficiency of new award.— Where an award was sent back on one point only, it was held that the arbitrator adopted the proper course in making a new award, repeating the old adjudication as to the matters not referred back, and adjudicating on the matters remitted for consideration. Johnson *v.* Latham, 20 L. J. Q. B. 236, 2 L. M. & P. 205.

Annexing evidence and stating grounds on which award made.— Where an award was recommitted generally, and the arbitrator, understanding from the counsel of the respective parties that the object of the recommitment was to ascertain the exact claims made by one of the parties, for that purpose annexed to his award the original papers constituting the evidence of the only claims which were made and insisted on by the plaintiffs' counsel in his closing argument, and also stated the grounds upon which he had made the award; it was held that the arbitrator had not thereby exceeded his authority. French *v.* Richardson, 5 Cush. (Mass.) 450.

78. Whitney *v.* Cook, 5 Mass. 139.

79. Sperry *v.* Ricker, 4 Allen (Mass.) 17. And see Henley *v.* Menefee, 10 W. Va. 771.

Implied power.— The power to recommit the award necessarily implies the power to return the new award after the time originally limited. Hickey *v.* Veazie, 59 Me. 282.

May enlarge time.— On recommitting an award a justice may enlarge the time for reporting. Eastman *v.* Burleigh, 2 N. H. 484.

80. Walker *v.* Sanborn, 8 Me. 288; Cumberland *v.* North Yarmouth, 4 Me. 459.

In Louisiana, where the court refused to homologate an award and referred it back to the arbitrators, it was held that the judgment recommitting the award was not final, and no appeal would lie. Bird *v.* Laycock, 7 La. Ann. 171.

81. Brown *v.* Harper, 54 Iowa 546, 6 N. W. 747; Depew *v.* Davis, 2 Greene (Iowa) 260.

Second award after appeal taken.— Where an order of recommittal is superseded upon appeal, of which the arbitrators have notice, and after service on them of a writ of injunction, a second award is a nullity which can hurt or injure no one, and cannot be made the basis of an action for damages against the arbitrators. Jones *v.* Brown, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185.

82. Whether the acts are dependent or not is to be ascertained by the intention of the arbitrators as it appears upon the face of their award. Hoffman *v.* Hoffman, 26 N. J. L. 175.

83. Performance or offer to perform necessary.— *Alabama.*— Comer *v.* Thompson, 54 Ala. 265; Jesse *v.* Cater, 28 Ala. 475; Burns *v.* Hindman, 7 Ala. 531.

California.— Dudley *v.* Thomas, 23 Cal. 365.

Illinois.— Leitch *v.* Beaty, 23 Ill. 594.

Kentucky.— Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312; Fleming *v.* Chinowith, Ky. Dec. 17; Hart *v.* Scheible, 15 Ky. L. Rep. 782.

Maine.— Comery *v.* Howard, 81 Me. 421, 17 Atl. 318; Littlefield *v.* Smith, 74 Me. 387.

Massachusetts.— Pomroy *v.* Gold, 2 Metc. (Mass.) 500; Shearer *v.* Handy, 22 Pick. (Mass.) 417; Com. *v.* Pejepscut, 7 Mass. 399.

New Jersey.— Hoffman *v.* Hoffman, 26 N. J. L. 175; Hugg *v.* Collins, 18 N. J. L. 294; Bishop *v.* Woodruff, 3 N. J. L. 110; Runyon *v.* Brokaw, 5 N. J. Eq. 340.

enforcement where the award directs an exchange of lots by conveyances between the parties[84] or the execution of mutual releases.[85] But where performance is prevented by the refusal of the other party to abide by the award, this is sufficient to justify enforcement even though the party seeking it has not himself performed his part.[86]

New York.— Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Huy *v.* Brown, 12 Wend. (N. Y.) 591.

Oregon.— Parrish *v.* Higinbotham, (Oreg. 1901) 65 Pac. 984.

Vermont.— Gray *v.* Reed, 65 Vt. 178, 26 Atl. 526; Soper *v.* Frank, 47 Vt. 368. See also Lamphire *v.* Cowan, 39 Vt. 420.

United States.— Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288; McNeil *v.* Magee, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915.

England.— Doe *v.* Stillwell, 8 A. & E. 645, 2 Jur. 591, 3 N. & P. 701, 35 E. C. L. 773; Standley *v.* Hemmington, 2 Marsh. 277, 6 Taunt. 561, 1 E. C. L. 754.

As to averring performance in pleading the award see *infra*, XI, B, 6; XI, C, 3.

Performance of condition precedent.— In Gray *v.* Reed, 65 Vt. 178, 26 Atl. 526, it was held that where an award directed that, after one party had done certain acts, then the other party should deliver to him certain property, the latter was not obliged to do anything until the former had performed on his part; that title to the property to be delivered did not pass until after such performance, and that the neglect or refusal of the former to perform left the latter free to dispose of such property as he might see fit. See also Com. *v.* Pejepscut, 7 Mass. 399.

Payment made in consideration of a release.— An award, pursuant to a submission to ascertain the price to be paid for land of one party upon which the other had a claim — the submission being made in consideration of an agreement to release — was held not enforceable by action until a tender of the release had been made, the submission being construed to mean that defendant would pay the award upon that consideration, and not merely in consideration of an agreement to release. Portland *v.* Brown, 43 Me. 223.

Prospective award.— If, under the award, a benefit is to accrue, or a right be made to depend upon the performance of a condition, the party is not entitled to such benefit or right unless he has performed the award on his part. Skillings *v.* Coolidge, 14 Mass. 43.

Damages to be paid within specified time.— Where an award requires certain damages to be paid within a specified time, if the party fail to pay or offer to pay such damages within the time specified, he cannot rely upon the award. Brigham *v.* Holmes, 14 Allen (Mass.) 184.

Void condition — Performance not necessary.— Where the award of the arbitrators contained a void condition, it was held that a party was entitled to recover notwithstanding such condition had not been performed. Foster *v.* Durant, 2 Cush. (Mass.) 544; New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446. But see Com. *v.* Pejepscut, 7 Mass. 399.

84. Exchange of lots.— Jesse *v.* Cater, 25 Ala. 351.

85. Mutual releases.— Dudley *v.* Thomas, 23 Cal. 365; Hugg *v.* Collins, 18 N. J. L. 294; McNeil *v.* Magee, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915.

86. Refusal to abide award.— Jesse *v.* Cater, 28 Ala. 475; Giles Lithographic, etc., Co. *v.* Recamier Mfg. Co., 14 Daly (N. Y.) 475; Jones *v.* Pennsylvania R. Co., 143 Pa. St. 374, 22 Atl. 883. And see Preston *v.* Whitcomb, 11 Vt. 47.

Refusal to perform one of several orders.— In Bayne *v.* Morris, 1 Wall. (U. S.) 97, 17 L. ed. 495, it was held that where an award declared that one party should pay to the other a certain sum on one day specified, another sum on another day specified, and that to secure the payment he should give a bond in a penal sum, and he refused to do any of the things awarded, an action of debt would lie against him, even though the time when both sums of money were awarded to be paid had not yet arrived. The right of action became perfect on the party's refusal to give the bond.

Performance excused in part.— Where a party is directed by the award to do several independent acts as a condition precedent to performance by the other, the fact that the latter prevents the doing of one of the specified acts will excuse performance to that extent, but not as to the other acts. Gray *v.* Reed, 65 Vt. 178, 26 Atl. 526.

What not a refusal to abide.— Plaintiff and defendant covenanted with each other that certain arbitrators should fix the value of defendant's land, as a consideration for a conveyance to plaintiff. The arbitrators reported their appraisement, and defendant immediately declared in their hearing and in the hearing of plaintiff that he would "never let the land go for that price." It was held that such declaration did not authorize plaintiff to maintain an action against defendant on his covenant without first tendering the appraised value of the land and demanding conveyance thereof. Pomroy *v.* Gold, 2 Metc. (Mass.) 500.

Time to consider.— Where a landowner enters into an agreement for arbitration for the assessment of damages for a railroad right of way, and, after the award has been made, the company tenders a deed for his signature, he is entitled to a reasonable time to advise himself as to whether the deed is in accordance with the decision of the arbitrators; and his refusal to sign it, accompanied, however, by the statement that he will sign it if it is

2. Where Distinct and Independent Acts Directed. Where the acts to be performed by the parties are distinct and independent, the one not being a condition precedent to the other, the failure of a party to perform the duties required of him will not prevent the enforcement of the award in his favor.[87] In such case the parties have mutual remedies upon the promise to perform the award.[88] In former times a distinction was drawn between parol submissions and submissions under seal, requiring performance as a condition precedent in the former case, but not in the latter;[89] and a distinction was also made between awards which merged the original cause of action and those which did not;[90] but these distinctions are no longer of any importance.[91]

in accordance with the said decision, cannot be construed into a refusal to abide by the award. Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222.

87. *Connecticut.*— Hopson *v.* Doolittle, 13 Conn. 236.

Indiana.— Baltes *v.* Bass Foundry, etc., Works, 129 Ind. 185, 28 N. E. 319; Terre Haute, etc., R. Co. *v.* Harris, 126 Ind. 7, 25 N. E. 831; Hawes *v.* Coombs, 34 Ind. 455; Walters *v.* Hutchins, 29 Ind. 136; Smith *v.* Stewart, 5 Ind. 220.

Kansas.— Groat *v.* Pracht, 31 Kan. 656, 3 Pac. 274.

Kentucky.— Hart *v.* Scheible, 15 Ky. L. Rep. 782.

Maine.— Duren *v.* Getchell, 55 Me. 241; Barrett *v.* Twombly, 23 Me. 333.

Massachusetts.— Loring *v.* Whittemore, 13 Gray (Mass.) 228.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

Missouri.— Hamlin *v.* Duke, 28 Mo. 166.

New Hampshire.— Girdler *v.* Carter, 47 N. H. 305; Pickering *v.* Pickering, 19 N. H. 389; Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68.

New Jersey.— Hoffman *v.* Hoffman, 26 N. J. L. 175.

New York.— Brazill *v.* Isham, 12 N. Y. 9; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Armstrong *v.* Masten, 11 Johns. (N. Y.) 189.

North Carolina.— Moore *v.* Austin, 85 N. C. 179.

Vermont.— Schoff *v.* Bloomfield, 8 Vt. 472.

Wisconsin.— McCourt *v.* McCabe, 46 Wis. 596, 1 N. W. 192.

England.— Gascoyne *v.* Edwards, 1 Y. & J. 19, 30 Rev. Rep. 756.

Canada.— Hassell *v.* Wilson, 6 N. Brunsw. 618.

As to averments of performance see *infra*, XI, B, 6; XI, C, 3.

Award of sum of money and mutual releases.— Arbitrators having awarded a sum of money and mutual releases between the parties, a tender of a release is not necessary before bringing action for the money. Dudley *v.* Thomas, 23 Cal. 365.

Failure to perform stipulation to dismiss suit.— Where parties entered into an agreement of submission to arbitration for the purpose of settling matters involved in a pending suit, with an agreement that the suit should be dismissed immediately, it was held that the failure to dismiss the suit was no objection to an action by plaintiff therein to recover on the award, because the stipulation as to the dismissal of the suit was not a condition precedent which affected the validity of the award; the award or the performance of it was not made by the terms of the submission to depend upon the prior dismissal of the suit, but the submission itself was absolute and unconditional. It was held that the party's remedy was for the breach of his promise or covenant, and it was not proper, after defendant had agreed to submit and had gone into the arbitration, and when the award was against him, to turn around and say he was not bound by it, because his adversary had not performed some other stipulation which he had undertaken to do before the award was made. Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Failure to redeliver property.— An award providing that the vendor retain the property sold and pay to the vendee a specified sum of money does not make redelivery of the property in the hands of the vendee a condition precedent to recovering the amount awarded to him. The value of property retained by the vendee would be a proper deduction from the amount awarded in a suit therefor. Mulligan *v.* Perry, 64 Ga. 567.

88. Mutual remedies on promise to perform.— Duren *v.* Getchell, 55 Me. 241; Hamlin *v.* Duke, 28 Mo. 166; Gascoyne *v.* Edwards, 1 Y. & J. 19, 30 Rev. Rep. 756.

89. Submissions parol and under seal.— See Armstrong *v.* Masten, 11 Johns. (N. Y.) 189; U. S. *v.* Ames, 1 Woodb. & M. (U. S.) 76, 24 Fed. Cas. No. 14,441.

90. As to awards operating as merger.— Allen *v.* Milner, 2 Cr. & J. 47, 1 L. J. Exch. 7, 2 Tyrw. 113; Roulstone *v.* Alliance Ins. Co., 4 Ir. R. C. L. 547. In Freeman *v.* Bernard, 1 Ld. Raym. 247, Lord Holt said: "Where an award creates a new duty instead of that which was in controversy, the party has a remedy for it upon the award; therefore, if a party resort to demand that which was referred and submitted, the arbitrament is a good bar against such action. *Contra*, Where an award does not create a new duty but only extinguishes the old duty by a release of the action."

91. No distinction between parol and sealed submission.— An award under a parol submission constitutes as perfect a bar, though

B. Necessity For Demand.[92] Where no demand is required by the submission, and the award is for the payment of money unconditionally, it becomes payable without demand upon the taking effect of the award,[93] and an action on the bond may be brought immediately.[94] But it has also been held that, in order to obtain a judgment on the award, performance must be demanded;[95] and it seems that a demand was always necessary before an attachment for non-performance would be granted.[96]

C. Time of Performance. Where an award ordering the doing of a certain act does not specify the time of performance, it seems that a reasonable time will be implied,[97] though it is at least questionable whether such an award should not be held void for uncertainty.[98]

D. Sufficiency of Performance — 1. In General. To constitute a valid performance, the party must comply with the directions of the award as far as possible and in the manner provided,[99] and a refusal to perform any part of the

not performed, as an award under a submission by bond. Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68; Armstrong *v.* Masten, 11 Johns. (N. Y.) 189.

Award as merger of original debt.— In Brazill *v.* Isham, 12 N. Y. 9, the court considered the theory on which the English cases were founded, and decided that at the present day every valid award substituted new rights and corresponding obligations in place of those arising out of the subject submitted; and, consequently, an award of a sum of money in discharge of a debt merges the original cause of action as effectually as any other award. To same effect see Armstrong *v.* Masten, 11 Johns. (N. Y.) 189. And for a full discussion of the effect of an award as a merger see *supra*, IX, A, 2.

92. See, generally, Actions, I, N, 3 [1 Cyc. 694].

93. **Demand unnecessary.**—*Florida.*—Blood *v.* Shine, 2 Fla. 127.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Scearce *v.* Scearce, 7 Ind. 286.

Kentucky.— Slack *v.* Price, 1 Bibb (Ky.) 272.

Maine.— Plummer *v.* Morrill, 48 Me. 184; Thompson *v.* Mitchell, 35 Me. 281. And see Barrett *v.* Twombly, 23 Me. 333.

New Hampshire.— Parsons *v.* Aldrich, 6 N. H. 264.

England.— Furser *v.* Prowd, Cro. Jac. 423; Rodham *v.* Stroher, 3 Keb. 830.

Award for payment of costs.— If there is an award that one of the parties pay the costs of suit in five days, the party awarded to pay the costs is not to wait until the taxed bill is presented to him. Bishop *v.* Woodruff, 3 N. J. L. 110. See also Candler *v.* Fuller, Willes 62.

Where the time and place of payment are specified, it is the duty of the party who is to make the payment to be present ready to tender the amount. Doyley *v.* Burton, 1 Ld. Raym. 533.

Penalty stipulated.—The mere delay to make payment of the amount of an award when the debtor has taken no steps to set it aside and has not denied its obligatory force, and when no formal demand upon him to enforce it has been made, will not subject the debtor to the payment of the stipulated penalty in addition to the amount of the award. Bodett *v.* Lees, 12 La. Ann. 761.

94. **Immediate action on bond.**— Plummer *v.* Morrill, 48 Me. 184.

95. **Demand before judgment on award.**— *Ex p.* Wallis, 6 Cow. (N. Y.) 581; Knight *v.* Carey, 1 Cow. (N. Y.) 39. So, in Connecticut, it has been held that where an award of damages does not specify any time for payment, nor make the payment thereof conditional upon the performance of any act, the amount is payable on demand; that in such case there is no distinction between an award and a note of hand which does not specify when the money is payable. Parmelee *v.* Allen, 32 Conn. 115.

96. **Demand before attachment.**— See *infra*, XI, E, 1, f, (I).

97. **Reasonable time implied.**— Freeman *v.* Bernard, 1 Salk. 69. Russell Arb. & Award (8th ed.) 304. In Blackett *v.* Bates, L. R. 1 Ch. 117, 2 H. & N. 610, it was held that, where it was directed in an award that an act should be done within a limited time, which was less than the time within which a motion to set aside the award might be made, the party directed to do such act need not do it until the expiration of a reasonable time after the time limited for such motion.

98. See Carnochan *v.* Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516. And as to certainty of time of performance see *supra*, VI, J, 8, h, (VI).

99. Bird *v.* Routh, 88 Ind. 47; Parsons *v.* Parsons, Cro. Eliz. 211; Dodington *v.* Bailward, 5 Bing. N. Cas. 591, 7 Dowl. P. C. 640, 8 L. J. C. P. 331, 7 Scott 733, 35 E. C. L. 318; Watt *v.* Watt, 7 Ir. Eq. 334; Dalton *v.* McNider, 5 Grant Ch. (U. C.) 501.

Sufficient performance.— An award that A "shall make and well execute a good and authentic deed of conveyance" of certain lands to B by a given day, refers merely to the validity and sufficiency of the deed in point of law, and not to the title to be conveyed thereby, and is satisfied by the execution of such a deed as is effectual to convey all the right and title A had in the premises at the date of the award. Preston *v.* Whitcomb, 11 Vt. 47.

award constitutes a breach of the obligation to perform, even though the time for performing the residue has not arrived.[1]

2. OFFER TO PERFORM. If there be an offer of performance and a refusal of the tender, this is equivalent in effect to actual performance.[2] But, where a party

Payment to husband is not a sufficient performance, such payment being clearly collusive, under an award directing a certain sum to be paid to a married woman. Wynne *v.* Wynne, 1 Dowl. N. S. 723, 11 L. J. C. P. 206, 4 M. & G. 253, 3 Scott N. R. 442, 43 E. C. L. 137.

Continuance of action contrary to award.— Continuance of an action from term to term is a breach of an award forbidding the party to continue the action; but not of an award directing that the party should not continue or proceed in the action at the same term. Gray *v.* Gray, Cro. Jac. 525. So, under an award directing a cessation of all suits between the parties, it was held that the prosecution by one party of a suit in which the other was one of several defendants was not a breach. Barnardiston *v.* Fowler, 10 Mod. 204.

The mere filing of a fresh bill in chancery is not a breach of an award directing the cessation of a suit, for, until a subpœna issues on the bill, the other party is not injured. Freeman *v.* Sheen, 2 Bulst. 93, Cro. Jac. 339; Russell Arb. & Award (8th ed.) 306.

Alternative performance.—Where an award is in the alternative, a performance of either alternative is sufficient (Hanson *v.* Webber, 40 Me. 194); but if one of the alternatives be uncertain or impossible, it is incumbent on the party to perform the other (Wharton *v.* King, 2 B. & Ad. 528, 9 L. J. K. B. O. S. 271, 22 E. C. L. 223; Simmonds *v.* Swain, 1 Taunt. 549. See also Oldfield *v.* Wilmer, 1 Leon. 140, 304; Lee *v.* Elkins, 12 Mod. 585). And as to partial invalidity of award see *supra*, VI, J, 10.

Duty to prepare conveyances.— Where arbitrators award a conveyance by one party to the other without directing which shall prepare the instrument, it seems to be the duty of the party conveying to do so. Doe *v.* Stillwell, 8 A. & E. 645, 2 Jur. 591, 3 N. & P. 701, 35 E. C. L. 773; Standley *v.* Hemmington, 2 Marsh. 277, 6 Taunt. 561, 1 E. C. L. 754; Candler *v.* Fuller, Willes 62. See, generally, VENDOR AND PURCHASER.

Discharge by release or by accord and satisfaction.— It is competent for the parties to agree that a less sum than the amount of the award shall be received in full payment thereof, if the residue be released under seal or by way of accord and satisfaction. Wood *v.* Bangs, 2 Pennew. (Del.) 435, 48 Atl. 189.

1. Failure to perform in part.— Bayne *v.* Morris, 1 Wall. (U. S.) 97, 17 L. ed. 495.

What is not breach.— *Failure to do illegal or impossible acts.*— But it is not a breach that the party fails to perform illegal or impossible acts. Dodington *v.* Bailward, 5 Bing. N. Cas. 591, 7 Dowl. P. C. 640, 8 L. J. C. P. 331, 7 Scott 733, 35 E. C. L. 318; Hanson *v.* Boothman, 13 East 22, 26, wherein Lord Ellenborough said: "No person can be bound to do impossibilities."

As to the power of arbitrators to award the doing of illegal or impossible acts see *supra*, VI, J, 3, d, (v), (vi).

Acts not required by award.— Nor is it a breach to fail to do acts not required by the award. Young *v.* Leaird, 30 Ala. 371 (holding that, where the award directs one of the parties to give the other a conveyance of certain import, the former is not required to sign a conveyance tendered to him containing a provision which is beyond the requirements of the award. His refusal to sign will not preclude him from relying on the award as a defense); Webb *v.* Fish, 4 N. J. L. 431; Anonymous, 2 N. J. L. 213 (holding that where costs are not awarded they cannot be recovered, and the party cannot be in contempt for refusing to pay such costs); Sharpe *v.* Hancock, 8 Jur. 382, 13 L. J. C. P. 138, 7 M. & G. 354, 8 Scott N. R. 46, 49 E. C. L. 354.

Institution of proceedings to set aside the award on account of its non-conformity to the submission, is not a breach. Ross *v.* Linder, 17 S. C. 593.

Omission to give notice of the meeting of the arbitrators, according to a stipulation in the submission, is not a breach. Hoag *v.* McGinnis, 22 Wend. (N. Y.) 163.

Tortious act on property after it has vested in the other party by virtue of the award is not a breach. Bridgeman *v.* Eaton, 3 Vt. 166.

2. Smith *v.* Stewart, 5 Ind. 220.

Refusal to accept deed.— Under an award, A was to give B a good, authentic deed by a given day, and at the same time was to give him possession of the premises. It was held that, upon a refusal by B to accept the deed when tendered, A was excused from going further and tendering the possession, if that would otherwise have been necessary. Preston *v.* Whitcomb, 11 Vt. 47.

Tender of amount in bank-notes.— A tender of the amount due under an award in current bank-bills or United States certificates, though not a legal tender, is sufficient unless specifically objected to at the time. Wood *v.* Bangs, 2 Pennew. (Del.) 435, 48 Atl. 189.

See, generally, PAYMENT.

Tender of release containing condition.— Where an award provided that one party should give the other a release, and he tendered one containing a condition, which release the other party refused to accept, objecting, not to the condition, but on the ground that the award was not binding, it was held that this tender was sufficient as evidence of an offer to perform the award, but would not have been, if the condition had been objected to, without an offer to furnish

is directed to do several independent acts, a refusal of an offer to perform one of them will not excuse him from performance of the residue.[3]

XI. ENFORCEMENT OF AWARD.

A. In General. Originally, at common law, an award could be enforced only by action[4] or by way of a bar to another action for the same cause,[5] or, in a proper case, specific performance could be sought in equity.[6] In the time of Charles II, however, a practice grew up of making the award a rule of court, and enforcing it by attachment, and this practice was subsequently affirmed and fixed by statute.[7] At the present time, the usual method of enforcement is by entering judgment on the award,[8] though the common-law remedies are still available.[9]

B. Actions at Law — 1. Right of Action — a. Award Not Made Rule of Court. At common law the only way to enforce an award not made a rule of court is by an action on it or on the bond of submission.[10]

a release conformable to the award. Lincoln *v.* Cook, 3 Ill. 61.

Tender of performance of co-parties.— In an action upon a policy of insurance, where defendant pleaded an award made pursuant to a submission of the question of the amount of loss by itself and other companies who had insured the same property, it was held that a tender of the amount of the award by all of the companies in one sum, without showing a part tender by defendant of its portion, was sufficient. Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

3. Offer to partially perform.— Gray *v.* Reed, 65 Vt. 178, 26 Atl. 526.

4. Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221. And see Smith *v.* Compton, 20 Barb. (N. Y.) 262.

And as to actions on awards, generally, see *infra*, XI, B.

5. See *infra*, XI, C.

6. See *infra*, XI, D.

7. 9 & 10 Wm. III, c. 15. In Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221, 230, Blackburn, J., said: "A practice arose first in the time of Charles II. of making submission a rule of court, so as to render any misconduct under that submission, or any refusal to act on the award, a contempt of that court, and so give that court jurisdiction over the award and the parties to the submission; and this practice gave rise to the various enactments under which a court of law now has extensive power over the reference. Those powers, however, must be exercised by the court in a summary way; and the statutes neither take away any defence given by common law, nor enable any defendant in an action to set up any defence which he could not have so set up before." See also Graham *v.* Pence, 6 Rand. (Va.) 529.

As to attachment for non-performance see *infra*, XI, E, 1.

8. See *infra*, XI, E, 2.

9. See *infra*, XI, E, 2, c.

10. At common law.— *Illinois.*—Weinz *v.* Dopler, 17 Ill. 111.

Indiana.— Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Maine.— Gerry *v.* Eppes, 62 Me. 49; North Yarmouth *v.* Cumberland, 6 Me. 21.

Nebraska.— Tynan *v.* Tate, 3 Nebr. 388.

New Jersey.— State *v.* Jersey City Board Finance and Taxation, 39 N. J. L. 629.

New York.— Smith *v.* Compton, 20 Barb. (N. Y.) 262; *Ex p.* Wallis, 7 Cow. (N. Y.) 522; Martin *v.* Williams, 13 Johns. (N. Y.) 264.

Pennsylvania.— Rank *v.* Hill, 2 Watts & S. (Pa.) 56, 37 Am. Dec. 483.

Tennessee.— Collins *v.* Oliver, 4 Humphr. (Tenn.) 438.

United States.— Banert *v.* Eckert, 4 Wash. (U. S.) 325, 2 Fed. Cas. No. 837.

England.— 1 Bacon Abr. 306; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Purslow *v.* Bailey, 2 Ld. Raym. 1039; Hodsden *v.* Harridge, 2 Saund. 61*h*.

See 4 Cent. Dig. tit. "Arbitration and Award," § 485.

Election of remedies.— Where a bond is given to abide by an award, a party, on the rendition of the award in his favor, may sue on the award or on the bond.

Arkansas.—Wilkes *v.* Cotter, 28 Ark. 519.

Illinois.— Nolte *v.* Lowe, 18 Ill. 437.

Indiana.— Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

New York.— *Ex p.* Wallis, 7 Cow. (N. Y.) 522; Martin *v.* Williams, 13 Johns. (N. Y.) 264.

North Carolina.— Thompson *v.* Childs, 29 N. C. 435.

Canada.— Baby *v.* Davenport, 3 U. C. Q. B. 13.

Remedies on bond.— In cases of bonds to perform awards there are two remedies: (1) at law upon the bond; (2) if any act awarded to be done for which a complete remedy cannot be had at law — such as to make a conveyance, a bill in equity for a specific performance of the award. Smallwood *v.* Mercer, 1 Wash. (Va.) 290.

Suit between joint obligors in bond.— Six

b. Award Made Rule of Court. An award may be enforced by action, even though made a rule of court, and, consequently, capable of enforcement in a summary manner.[11]

c. Amendment or Modification of Bond. An agreement, indorsed on a submission bond, enlarging the time for making the award includes all the terms of the original submission to which it had reference the same as if the original terms had been formally set forth and repeated in the new agreement. Consequently, in case of an award made within the enlarged time, plaintiff is not bound to resort to his action upon the submission implied in the agreement to enlarge the time, but may sue directly upon the bond as carried along with and incorporated in that agreement.[12]

d. Part of Award. It is competent for a party to declare upon a single article of an award, and, if that article is of itself so complete and independent of the rest of the award that its separate enforcement would work no injustice to the

partners submitted to arbitration differences which had arisen between them. A, B, and C gave a joint and several bond to D, E, and F, conditioned for the performance of the award; and D, E, and F gave a similar bond to A, B, and C. The arbitrator awarded, among other things, that B should pay a sum of money to A. It was held that, while A could not sue B on the bond, they being joint obligors, yet the submission was in effect a submission of all matters in dispute between the six partners, and, therefore, A could sue B on the award. Winter *v.* White, 1 Ball & B. 350, 3 Moore C. P. 674, 21 Rev. Rep. 636.

11. *Arkansas.*—Wilkes *v.* Cotter, 28 Ark. 519.

Illinois.— Smith *v.* Douglass, 16 Ill. 34.

Indiana.— Goodwine *v.* Miller, 32 Ind. 419; Griggs *v.* Seeley, 8 Ind. 264; Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253; Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Iowa.— *Compare* Older *v.* Quinn, 89 Iowa 445, 56 N. W. 660.

Maine.— Duren *v.* Getchell, 55 Me. 241; Day *v.* Hooper, 51 Me. 178.

Missouri.— Koerner *v.* Leathe, 149 Mo. 361, 51 S. W. 96.

New York.— Erie County *v.* Buffalo, 63 Hun (N. Y.) 565, 18 N. Y. Suppl. 635, 45 N. Y. St. 365; Burnside *v.* Whitney, 24 Barb. (N. Y.) 632; Matter of Schafer, 3 Abb. Pr. N. S. (N. Y.) 234; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516.

Ohio.— Swasey *v.* Laycock, 1 Handy (Ohio) 334.

England.— Hodsden *v.* Harridge, 2 Saund. 61*h*.

As to cumulative character of statutory remedy see *infra*, XI, E, 2, c.

Mandamus.— Where a statute providing for arbitration by a city is of doubtful construction, and the legal rights thereunder are not clear, an award pursuant to such statute cannot be enforced by mandamus, the remedy being an ordinary action on the award. State *v.* Jersey City Board Finance and Taxation, 39 N. J. L. 629. See also People *v.* Haws, 15 Abb. Pr. (N. Y.) 115.

Obtaining possession of award by improper means.— The fact that plaintiff obtained possession of an award by misrepresentation will not prevent him from bringing an action thereon if, previously, the award had become final and had been published according to the submission agreement. Thompson *v.* Mitchell, 35 Me. 281.

12. Springer *v.* Spooner, 6 Blackf. (Ind.) 545; Bryer *v.* Stewart, 3 N. C. 269; Brookins *v.* Shumway, 18 Wis. 98; Greig *v.* Talbot, 2 B. & C. 179, 3 D. & R. 446, 9 E. C. L. 85; Evans *v.* Thomson, 5 East 189, 1 Smith K. B. 380.

In Maryland and New York it has been held that an action of debt cannot be sustained on the arbitration bond when the award is not made within the time specified in the bond, though the parties have extended the time by new agreement. In such case the action must be on the submission implied in the new agreement. Peters *v.* Johnson, 3 Harr. & J. (Md.) 291; Myers *v.* Dixon, 2 Hall (N. Y.) 491; Freeman *v.* Adams, 9 Johns. (N. Y.) 115; Bloomer *v.* Sherman, 5 Paige (N. Y.) 575. *Compare* Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125.

Alteration of bond.— A bond of a particular date for the performance of an award, conditioned that the award should be made on or before a fixed date, was afterward, by the consent of the parties, changed by erasure and interlineations, so as to extend the time for the award. It was held that plaintiff might either declare on the bond as both dated and made on its original date, or as dated on that day and made afterward, according to the last date as changed by consent. Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255. See, generally, ALTERATIONS OF INSTRUMENTS [2 Cyc. 137].

Award not pursuing submission in bond.— An action upon a bond to perform an award cannot be maintained if the award does not pursue the submission in the bond, although it does pursue a submission contained in a written agreement not under seal which was substituted by the parties. George *v.* Farr, 46 N. H. 171. See also Hull *v.* Alway, 4 U. C. Q. B. O. S. 375.

other party, he may recover even though the other portions of the award are void.[13]

2. ACCRUAL OF CAUSE OF ACTION.[14] An award, as a cause or ground of action, is so only from the date of its publication.[15]

3. LIMITATION OF ACTION. In the absence of a particular limitation by statute, an action on an award is an action on a specialty within the meaning of a statute fixing the limitation of actions on specialties,[16] and this is true even though the submission was by parol.[17]

4. FORM OF ACTION — a. Assumpsit. Assumpsit may be maintained upon an award,[18] and, if the submission is by parol, it is the most suitable remedy.[19]

b. Debt or Covenant. If the submission is by a bond with a penalty, debt will lie either on the submission or on the award.[20] If the submission is by

13. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Lamphire *v.* Cowan, 39 Vt. 420; Hill *v.* Thorn, 2 Mod. 309; Bond *v.* Bond, 16 U. C. C. P. 327.

As to award good in part and bad in part see *supra*, VI, J, 10.

If an award order two things in favor of one party, one of which orders is uncertain, or for other reasons cannot be enforced, he may waive this and sue upon the breach of the other. Simmonds *v.* Swaine, 1 Taunt. 549. So, an award which gives a sum of money and damages for the diversion of a stream, and requires defendant to restore the stream to its original channel, may be enforced as to the damages by an action without reference to the other portion, requiring restoration. Averill *v.* Buckingham, 36 Conn. 359.

14. As to demand before action see *supra*, X, B.

15. Varney *v.* Brewster, 14 N. H. 49. See also Ehrman *v.* Stanfield, 80 Ala. 118, wherein it was held that where a sum of money is awarded, and no day of payment is fixed, it is payable instanter, and an action may be brought on the award if not paid on delivery of a copy.

As to publication of award see *supra*, VI, G.

Failure to comply with conditions.—Where an award declares that one party shall pay to the other a certain sum on a day specified, another sum on another day specified, and that to secure the payments he shall give a bond, and he refuses to do any of the things awarded, an action will lie against him although the time when both sums of money were awarded to be paid has not yet arrived. The right of action is perfect on the party's refusal to give the bond. Bayne *v.* Morris, 1 Wall. (U. S.) 97, 17 L. ed. 495.

16. **Follows rule as to specialties.**— Smith *v.* Lockwood, 7 Wend. (N. Y.) 241; Green, etc., Streets Pass. R. Co. *v.* Moore, 64 Pa. St. 79; Rank *v.* Hill, 2 Watts & S. (Pa.) 56, 37 Am. Dec. 483; Halnon *v.* Halnon, 55 Vt. 321; Hodsden *v.* Harridge, 2 Saund. 61*h*.

As to effect of submission on running of statute of limitations see *supra*, II, G, 4.

17. Halnon *v.* Halnon, 55 Vt. 321.

18. *Connecticut.*—Averill *v.* Buckingham, 36 Conn. 359.

Delaware.— Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Illinois.— Shawneetown *v.* Baker, 85 Ill. 563.

Maine.— Gerry *v.* Eppes, 62 Me. 49; Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214, which cases hold assumpsit is proper under a parol submission.

Massachusetts.— Bates *v.* Curtis, 21 Pick. (Mass.) 247.

New Hampshire.—Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Piersons *v.* Hobbes, 33 N. H. 27; Parsons *v.* Aldrich, 6 N. H. 264. *Compare* Little *v.* Morgan, 31 N. H. 499.

North Carolina.— Parrish *v.* Strickland, 52 N. C. 504.

Vermont.— Taylor *v.* St. Johnsbury, etc., R. Co., 57 Vt. 106; Dalrymple *v.* Whitingham, 26 Vt. 345.

England.— Cooke *v.* Whorwood, 2 Keb. 767, 1 Lev. 6, 2 Saund. 337; 2 Petersdorff Abr. 219 note.

Canada.— Hull *v.* Alway, 4 U. C. Q. B. O. S. 375.

See, generally, ASSUMPSIT, ACTION OF.

Instrument under seal.— In some jurisdictions it has been held that assumpsit cannot be maintained on an award made in pursuance of a submission by covenant under seal (McCargo *v.* Crutcher, 23 Ala. 575; Horton *v.* Ronalds, 2 Port. (Ala.) 79; Knight *v.* Trim, 89 Me. 469, 36 Atl. 912; Holmes *v.* Smith, 49 Me. 242; Bowes *v.* French, 11 Me. 182; Tullis *v.* Sewell, 3 Ohio 510) unless some new consideration apart from the written instrument can be proved (Tait *v.* Atkinson, 3 U. C. Q. B. 152).

Under the common counts it is no objection that plaintiff declares generally for a larger sum of money than the specific sum awarded. Such a count will sustain the evidence of the specific award. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486. See also Waite *v.* Barry, 12 Wend. (N. Y.) 377.

19. Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Piersons *v.* Hobbes, 33 N. H. 27.

20. **Submission by bond with penalty.**— *Alabama.*— McCargo *v.* Crutcher, 23 Ala. 575.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Maine.—Gerry *v.* Eppes, 62 Me. 49; Holmes *v.* Smith, 49 Me. 242; Bowes *v.* French, 11 Me. 182.

other deed, as distinguished from a parol submission, covenant will lie on the submission or debt on the award.[21]

5. PARTIES — a. In General. In an action on an award or on a bond to abide by an award, all the parties to the submission or the bond should be joined.[22] And where an award directs the parties to pay each a certain sum of money, and one of them is obliged to pay the whole, he may bring his action against the other to compel contribution.[23]

b. Persons in Representative Capacity. If a covenant in a submission runs to a party personally, he may sue in his own name even though the submission provides for the arbitration of matters in which such party was acting in a representative capacity.[24]

Mississippi.— Williams *v.* Williams, 11 Sm. & M. (Miss.) 393.

New York.— *Ex p.* Wallis, 7 Cow. (N. Y.) 522.

Ohio.— Tullis *v.* Sewell, 3 Ohio 510.

Tennessee.— Collins *v.* Oliver, 4 Humphr. (Tenn.) 438.

Vermont.— Wright *v.* Smith, 19 Vt. 110.

United States.— Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

England.— Purslow *v.* Bailey, 2 Ld. Raym. 1039.

Canada.— Tait *v.* Atkinson, 3 U. C. Q. B. 152; Baby *v.* Davenport, 3 U. C. Q. B. 13.

See, generally, DEBT, ACTION OF.

In New Jersey it has been held that an action on a parol award must, under the statute, be in debt. Riker *v.* Jacobus, 2 N. J. L. 309.

An action of debt lies for two sums, distinctly awarded, the one for damages, and the other for costs; and the omission to add them together, and go for the sum of both as a sum single, is bad only on special demurrer. Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

21. McCargo *v.* Crutcher, 23 Ala. 575; Holmes *v.* Smith, 49 Me. 242.

22. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412; Emery *v.* Hitchcock, 12 Wend. (N. Y.) 156.

See, generally, PARTIES; and 4 Cent. Dig. tit. "Arbitration and Award," § 491.

Agent of parties.— On an action to recover damages for alleged breach of covenant to perform an award, the person who acted as agent of the parties in whose favor the award was rendered is not a necessary party plaintiff. Smith *v.* Morse, 9 Wall. (U. S.) 76, 19 L. ed. 597.

Intervention.— Where an action is brought against a city to recover an award made as damages for taking property for a public use, a third party, who claims to have been the owner of the property taken, or of a part of it, and hence entitled to the award, or part of it, may come in as a party to the action and assert his claim. Smith *v.* St. Paul, 65 Minn. 295, 68 N. W. 32.

Joinder of parties.— Where certain of the heirs at law of an intestate, entitled to different proportions of the personal property, joined with the administrators in a submission of their claim to an arbitrator, who awarded a gross sum against the administrators, which he further proceeded to apportion among the heirs, it was held that they all might join in an action on the award. Stetson *v.* Healey, 7 Me. 452.

Subsequent agreement.— If A and B have submitted matters in dispute between them to arbitration, and an additional agreement is executed, viz.: "Whereas A. and B. have entered into the foregoing submission, now I, A., and C. as his surety, and I, B., and D. as his surety, hereby agree and bind ourselves each to the other to pay all such sums of money each to the other as the said arbitrators shall award," B may maintain an action in his own name alone against A and C for a failure of A to comply with the award. Hubbell *v.* Bissell, 2 Allen (Mass.) 196.

Third persons.— An award, on a general submission in writing, whether under seal or not, of all disputes between A and B, that A shall pay certain debts of B to third persons, although made on the express condition that A shall receive certain property of B, will not support an action against A by one of such creditors to recover a debt specified in the award. Millard *v.* Baldwin, 3 Gray (Mass.) 484.

Liability under joint and several promise to perform.— Two several tenants of a farm agreed, with the succeeding tenant, to refer certain matters in dispute respecting the farm to arbitration, and jointly and severally promised to perform the award. The arbitrator awarded that each of the two pay a certain sum to the third. It was held that they were jointly responsible for the sum awarded to be paid by each. Mansell *v.* Burredge, 7 T. R. 352.

23. Contribution.— Allen *v.* Coy, 7 U. C. Q. B. 419. See also, generally, CONTRIBUTION.

24. Macon *v.* Crump, 1 Call (Va.) 575. But see Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622, wherein it was held that a conservator cannot maintain an action, in his own name, on an award, where the submission was made by him, and the award was to him, in his representative character; but it should be brought in the name of the ward.

Action by administrator.— An administrator may submit a claim of his intestate to arbitration, and may, in that capacity, maintain a suit on the award. Alling *v.* Munson, 2 Conn. 691.

Action against administrator.— In an action on an award against an administrator, a declaration which seeks to charge him indi-

6. Pleading — a. Declaration or Complaint — (i) *Action on Award.* As against a general demurrer, a declaration, complaint, or petition in an action on an award is sufficient which alleges the existence of differences between plaintiff and defendant; an agreement to submit the matters in dispute to arbitration;[25] that the submission was mutual,[26] setting forth the substance of the same;[27] that the award was made in pursuance of the submission and conformed to the same in all material respects,[28] was made within the time limited, if there was such time, and with the formality required by the submission,[29] and that defendant

vidually, and not as administrator, is demurrable. James *v.* Lawrence, 7 Harr. & J. (Md.) 73.

Setting out character.— Where plaintiff in an action on an award declares in a special character, beginning his declaration by showing his character, he may, in all the subsequent parts of his declaration, refer to himself as the "said plaintiff," without adding his special character. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235.

25. Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755; Shockey *v.* Glasford, 6 Dana (Ky.) 9; Onion *v.* Robinson, 15 Vt. 510; Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

See 4 Cent. Dig. tit. "Arbitration and Award," § 493.

Evidence on which award based.— In an action on an award it is not necessary to set forth the evidence on which the award was based. Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755. See also Crane *v.* Barry, 54 Ga. 500.

Form of declaration or complaint in action on award is set out in whole, in part, or in substance in Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Ehrman *v.* Stanfield, 80 Ala. 118; Toole *v.* Urquhart, 44 Ala. 646; Johnson *v.* Maxey, 43 Ala. 521; Roundtree *v.* Turner, 36 Ala. 555; Gomez *v.* Garr, 9 Wend. (N. Y.) 649; Keep *v.* Goodrich, 12 Johns. (N. Y.) 397; James *v.* Walruth, 8 Johns. (N. Y.) 410; Blanchard *v.* Murray, 15 Vt. 548; Onion *v.* Robinson, 15 Vt. 510; Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

26. Mutuality of submission.— *Georgia.*— Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755.

Illinois.— Cole *v.* Chapman, 3 Ill. 34; Miller *v.* Buckeye Mut. F. Ins. Co., 2 Ill. App. 125.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Maryland.— Ogle *v.* Tayloe, 49 Md. 158.

New York.— Keep *v.* Goodrich, 12 Johns. (N. Y.) 397.

England.— Brazier *v.* Jones, 8 B. & C. 124, 15 E. C. L. 69; Ferrer *v.* Oven, 7 B. & C. 427, 6 L. J. K. B. O. S. 28, 1 M. & R. 222, 14 E. C. L. 195; Dilley *v.* Polhill, 2 Str. 923.

Canada.— Skinner *v.* Holcomb, 6 U. C. Q. B. O. S. 336.

As to necessity of submission see *supra*, II, A.

As to proof of submission see *infra*, XI, B, 7, b.

27. Substance of submission.— Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755; Shockey *v.* Glasford, 6 Dana (Ky.) 9. See also Brown *v.* Warnock, 5 Dana (Ky.) 492; Hodsden *v.* Harridge, 2 Saund. 61*h*.

Terms of submission.— It is not necessary to set out in the declaration the terms of the reference. It is enough to state that there were matters in difference between the parties, and that the reference was of and concerning those matters. Smith *v.* Hartley, 10 C. B. 800, 15 Jur. 755, 20 L. J. C. P. 169, 2 L. M. & P. 340, 70 E. C. L. 800.

28. Award conforming to submission.— Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755; Wilson *v.* Constable, 1 Lutw. 536; Henderson *v.* Williamson, 1 Str. 116.

Award under hand of arbitrator.— Where a submission is "so that the award be in writing under the hand of the arbitrator," in an action on the award it must be shown in pleading that the award is under hand, as well as in writing. Everard *v.* Paterson, 2 Marsh. 304, 6 Taunt. 625, 16 Rev. Rep. 701, 1 E. C. L. 784.

Setting out award.— The declaration or complaint need not set out all the award, but such part only as is essential to plaintiff's case.

Illinois.— Haywood *v.* Harmon, 17 Ill. 477.

Indiana.— A copy of the award must be filed with the pleading. Sanford *v.* Wood, 49 Ind. 165; Hays *v.* Miller, 12 Ind. 187. *Compare* Boots *v.* Canine, 58 Ind. 450.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9; Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312.

Missouri.— Finley *v.* Finley, 11 Mo. 624.

New York.— McKinstry *v.* Solomons, 2 Johns. (N. Y.) 57.

Vermont.— Blanchard *v.* Murray, 15 Vt. 548.

Virginia.— Doolittle *v.* Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671.

England.— Perry *v.* Nicholson, 1 Burr. 278; Smith *v.* Kirfoot, 1 Leon. 72; Foreland *v.* Marygold, 1 Ld. Raym. 715, 12 Mod. 534, 1 Salk. 72; Tilford *v.* French, 1 Sid. 160.

Canada.— Bond *v.* Bond, 16 U. C. C. P. 327; McCallum *v.* McKinnon, 15 U. C. C. P. 561.

29. Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755; McCreary *v.* Taggart, 2 S. C. 418; Bissex *v.* Bissex, 3 Burr. 1729; Skinner *v.* Andrews, 1 Saund. 169.

Acting of all arbitrators.— In an action to recover the amount of an award, while the rule of law is that all the arbitrators must have acted though only a majority of them sign the award, the declaration is sufficient if it avers that all the arbitrators took upon themselves the burden of the arbitrament,

has failed to perform it either in whole or as to that part only of which the plaintiff may require performance.[30]

(II) *Action on Bond.* In an action on an arbitration bond the declaration need only allege, generally, the differences agreed to be arbitrated as recited in the conditions of the bond; the submission; that the arbitrators, in pursuance of such submission, made out and published their award, setting it out; and that defendant, on request, refused to abide by and perform it.[31]

and that the third arbitrator refused to sign the award. Hoffman *v.* Hoffman, 26 N. J. L. 175.

Costs and fees.— An award which provides for the payment by a party of the taxable costs of the suit is sufficiently certain; but, in order to recover upon such an award, plaintiff must aver in his declaration that the taxable costs amounted to a sum certain, of which defendant had notice before suit. Wright *v.* Smith, 19 Vt. 110. After a verdict for plaintiff, in an action upon an award, embracing the fees of the arbitrators, judgment will not be arrested because the declaration does not contain an averment that plaintiff has paid the arbitrators' fees. Blanchard *v.* Murray, 15 Vt. 548.

Notice of award need not be averred unless it is provided in the submission that notice shall be given to the parties. Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288; Hodsden *v.* Harridge, 2 Saund. 61*h*. *Compare* Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214.

Swearing of arbitrator.— Conceding that the statute requiring arbitrators to be sworn reaches the case of a mere common-law arbitration, still, in an action on an award, it is not necessary to allege that the arbitrators were sworn, because it is not a jurisdictional fact. Browning *v.* Wheeler, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617.

Umpire's award.— Where the action is founded on an award, its true character, as the act of an umpire or of arbitrators, must be set forth in the complaint in order that a defense adapted to its true character may be set up in the answer. Lyon *v.* Blossom, 4 Duer (N. Y.) 318. See also Bates *v.* Cooke, 9 B. & C. 407, 17 E. C. L. 186.

Where the submission was to arbitrators, and if they disagree to an umpire, and the time limited for the arbitration and the umpirage was the same, it was held that, in an action on the umpire's award, the declaration must allege the cause why the arbitrators could not make their award. Coppin *v.* Hurnard, 2 Saund. 129.

As to the difference between umpirage and decision of arbitrators see *supra*, V, A.

30. Defendant's failure to perform.— Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755.

Breach of valid part.— Where an award is in the alternative, but is void as to one of the alternatives, it is sufficient, in an action of debt on the award, to allege non-performance of the valid alternative, without noticing the other. Oldfield *v.* Wilmer, 1 Leon. 140, 304.

Promise to perform.— In an action on an award, it is not necessary to allege that defendant expressly promised to perform the award, for the law implies a promise to perform from the fact of the submission. Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 98 Cal. 577, 33 Pac. 633; Haywood *v.* Harmon, 17 Ill. 477; Kingsley *v.* Bill, 9 Mass. 198. *Compare* Swicard *v.* Wilson, 2 Mill (S. C.) 218; Lupart *v.* Welson, 11 Mod. 171.

As to necessity of agreement to abide by award see *supra*, II, F, 2.

Performance by plaintiff.— Where the award requires the performance of dependent acts on the part of both parties, plaintiff, in an action on the award, must allege performance or readiness to perform his part.

Kentucky.—Fleming *v.* Chinowith, Ky. Dec. 17.

Missouri.— Finley *v.* Finley, 11 Mo. 624.

New Jersey.— Hoffman *v.* Hoffman, 26 N. J. L. 175; Hugg *v.* Collins, 18 N. J. L. 294.

New York.—Cole *v.* Blunt, 2 Bosw. (N. Y.) 116; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Huy *v.* Brown, 12 Wend. (N. Y.) 591.

Oregon.— Parrish *v.* Higinbotham, (Oreg. 1901) 65 Pac. 984.

United States.— Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288.

Canada.— Baker *v.* Booth, Draper (U. C.) 65.

But where the acts to be performed by the parties are distinct and independent, the one not being a condition precedent to the other, the rule is otherwise.

Kentucky.—Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312.

Maine.— Duren *v.* Getchell, 55 Me. 241.

Massachusetts.— Loring *v.* Whittemore, 13 Gray (Mass.) 228.

Missouri.— Finley *v.* Finley, 11 Mo. 624.

New Hampshire.— Girdler *v.* Carter, 47 N. H. 305.

New York.— Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125.

Canada.— Hassell *v.* Wilson, 6 N. Brunsw. 618.

31. Stearns *v.* Cope, 109 Ill. 340; Henrickson *v.* Reinback, 33 Ill. 299; Chadsey *v.* Brooks, 7 Ill. 378; Cole *v.* Chapman, 3 Ill. 34; Sleeper *v.* Pickering, 17 N. H. 461; Horrel *v.* McAlexander, 3 Rand. (Va.) 94. See also Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121; Birks *v.* Trippet, 1 Saund. 32.

In Indiana, in an action on a statutory arbitration bond, it must be alleged that, in a proper proceeding for that purpose, the award

(III) *Joinder of Counts.* A count in debt on simple contract may be joined with a count on the award.[32]

b. Demurrer. Advantage may be taken by demurrer of an objection to an award apparent on the face of the declaration.[33]

c. Plea or Answer[34]— (1) *In General.* In debt on an award, the plea of *nil debet* is an appropriate plea. It is the general issue and puts in issue every allegation in the declaration.[35] In assumpsit on an award, *non assumpsit* puts

had been confirmed by the judgment of the proper court. Bash *v.* Van Osdol, 75 Ind. 186; Healy *v.* Isaacs, 73 Ind. 226; Shroyer *v.* Bash, 57 Ind. 349.

Conformity to submission.— In an action of debt on an arbitration bond founded on an agreement of submission, the declaration must aver that the arbitrators conformed in every material respect to the agreement of submission. To aver generally that the arbitration and award was "in proper manner and form" is not sufficient. Gear *v.* Bracken, 1 Pinn. (Wis.) 249.

Delivery of award.— Under a submission stipulating that the award shall be ready by a specified day for delivery to the parties or such of them as may desire it, plaintiff need not allege readiness to deliver, for it is upon defendant to plead specially that he "desired" it and was denied. Rowsby *v.* Manning, 3 Mod. 330. See also Houghton *v.* Burroughs, 18 N. H. 499.

Revocation of submission.— In an action on a bond conditioned to perform an award, if plaintiff wishes to recover for the breach in revoking the submission he should assign this breach, and not the non-performance of the award. Frets *v.* Frets, 1 Cow. (N. Y.) 335.

Setting out bond.— In declaring, on an arbitration bond, it is not necessary to set out the bond *in hæc verba*. It is sufficient if it is stated according to its true legal effect and meaning. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412.

Setting out award.— In debt on a submission bond, the whole award must be set out, either in the declaration or replication. Byars *v.* Thompson, 12 Leigh (Va.) 550, 37 Am. Dec. 680; Baker *v.* Booth, Draper (U. C.) 65. See also Perry *v.* Nicholson, 1 Burr. 278. The declaration need not be according to the letter of the award. Macon *v.* Crump, 1 Call (Va.) 575. See also Dale *v.* Dean, 16 Conn. 579.

Variance between bond and award.— In an action on a bond for the performance of an award, a variance between the bond and the award as to the personnel of the board of arbitrators is waived where defendant's rejoinder to a replication setting out the award alleges performance thereof. Gardener *v.* Oden, 24 Miss. 382. See also Noyes *v.* McLaflin, 62 Ill. 474; Winter *v.* White, 1 Ball & B. 350, 3 Moore C. P. 674, 21 Rev. Rep. 636; Bentley *v.* West, 4 U. C. Q. B. 98.

Form of declaration or complaint in action on bond is set out in whole, in part, or in substance in:

Alabama.— Dodge *v.* McKay, 4 Ala. 346.

New Jersey.— Webb *v.* Fish, 4 N. J. L. 431.

New York.— Smith *v.* Lockwood, 7 Wend. (N. Y.) 241; Bacon *v.* Wilber, 1 Cow. (N. Y.) 117; McKinstry *v.* Solomons, 2 Johns. (N. Y.) 57.

England.— Roberts *v.* Mariett, 2 Keb. 614, 702, 1 Lev. 300, 1 Mod. 289, 2 Saund. 183; Hodsden *v.* Harridge, 2 Saund. 61*h*.

Canada.— McCallum *v.* McKinnon, 15 U. C. C. P. 561.

32. Brown *v.* Warnock, 5 Dana (Ky.) 492. See also Brown *v.* Tanner, 1 C. & P. 651, M'Clel. & Y. 464, 29 Rev. Rep. 823, 12 E. C. L. 369, holding that counts on an award may be joined with counts for a breach of an agreement to stand by, perform, and not revoke an award to be made.

Waiver of award.— Where, in an action for the price of certain hay, plaintiffs declare upon the award of an arbitrator, they do not waive such award by declaring in another count on the contract under which the hay was sold. Sadler *v.* Olmstead, 79 Iowa 121, 44 N. W. 292.

33. Hoffman *v.* Hoffman, 26 N. J. L. 175; Gisborne *v.* Hart, 7 Dowl. P. C. 402, 5 M. & W. 50, 3 Jur. 536, 8 L. J. Exch. 197; Lossing *v.* Horned, Taylor (U. C.) 219. See also Fidler *v.* Cooper, 19 Wend. (N. Y.) 285; Price *v.* Via, 8 Gratt. (Va.) 79.

Demurrer to plea.— In an action to enforce an award, the award being an estoppel as to all matters properly embraced in the decision of the arbitrator, and the declaration showing the estoppel upon its face, an objection to a plea setting up matters thus concluded by the award is properly taken by demurrer. Garr *v.* Gomez, 9 Wend. (N. Y.) 649.

Failure of arbitrator to determine matters. — An objection to an award — that the arbitrator had left undetermined matters submitted to him — cannot be taken advantage of upon demurrer to a declaration in an action on the award, unless it appears on the face of the submission and award. Aitcheson *v.* Cargey, 2 Bing. 199, 9 Moore C. P. 381, M'Clel. 367, 13 Price 639, 26 Rev. Rep. 298, 9 E. C. L. 544.

General or special demurrer.— In an action on an arbitration bond, an objection that the arbitrator had no authority to make the award should be taken by general demurrer; but if he has some authority, and the objection is that it is not sufficiently comprehensive, such objection should be made on special demurrer. Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 565, 11 E. C. L. 20.

34. As to what matters may be pleaded in action on award see *supra*, IX, B, 2, b.

35. Nil debit.— Bean *v.* Farnam, 6 Pick. (Mass.) 269; Ott *v.* Schroeppel, 3 Barb.

every material averment in issue, and, as in other cases, renders it necessary for the plaintiff to prove them.[36]

(II) *Equitable Defenses.* In jurisdictions permitting an award to be questioned on equitable grounds, the plea attacking it should allege facts as distinguished from legal conclusions.[37]

d. Affidavit of Defense. It has been held that an action on an award pursuant to a verbal submission does not come within a rule of court which permits

(N. Y.) 56; Wills *v.* Maccarmick, 2 Wils. C. P. 148.

As to evidence admissible under the general issue see *infra*, note 42.

Plea of nul tiel award to an action upon an award puts in issue, not merely the fact of the making of the award set out in the declaration, but the making of a good and valid award of and concerning the premises referred. Roberts *v.* Eberhardt, 3 C. B. N. S. 482, 4 Jur. N. S. 898, 28 L. J. C. P. 74, 6 Wkly. Rep. 793, 91 E. C. L. 482; Skinner *v.* Andrews, 1 Lev. 245; Dresser *v.* Stansfield, 15 L. J. Exch. 274, 14 M. & W. 822. But see Hartley *v.* Huntley, 4 U. C. C. P. 276, wherein it was held that where plaintiff proves such an award as is stated in his declaration, its legal effect or validity is not involved under a plea of *nul tiel award*. See also Adcock *v.* Wood, 6 Exch. 814, 20 L. J. Exch. 435, 2 L. M. & P. 501; Whitmore *v.* Smith, 7 H. & N. 509, 8 Jur. N. S. 514, 31 L. J. Exch. 107, 5 L. T. Rep. N. S. 618, 10 Wkly. Rep. 253.

Plea of alteration of award.— A plea in an action on an award, setting up that the award was altered after it was made, is bad if it does not aver that the alteration was made in a material part nor show in what part it was altered, so as to enable the court to judge whether it was in a material part. Brown *v.* Warnock, 5 Dana (Ky.) 492. See also Alterations of Instruments, VIII, C, 7, b, (II) [2 Cyc. 231].

Plea of performance.— In an action on an award, defendant may set forth the award and plead performance of it; and such plea will bar the action unless avoided by plaintiff's replication. Peters *v.* Peirce, 8 Mass. 398. See also Wooden *v.* Little, 3 McCord (S. C.) 487. But, in a suit upon an arbitration bond, the validity of the award is not put in issue by the pleas of "conditions performed and not broken." Kesler *v.* Kerns, 50 N. C. 191.

Plea to part of award.— In debt on a bond conditioned to perform an award consisting of two separate parts, defendant cannot plead in bar of the whole any matter which answers only one part. Boyd *v.* Durand, 5 U. C. Q. B. O. S. 122. See also Marsh *v.* Curtis, 71 Ind. 377.

Special pleas.— Defenses on the ground of the invalidity of the award in law should be specially pleaded. Lord *v.* Lee, L. R. 3 Q. B. 404, 9 B. & S. 269, 37 L. J. Q. B. 121; Beckett *v.* Midland R. Co., L. R. 1 C. P. 241, 35 L. J. C. P. 163; Mitchell *v.* Staveley, 16 East 58, 14 Rev. Rep. 287; Wade *v.* Dowling, 2 C. L. R. 1642, 4 E. & B. 44, 18 Jur. 728, 23 L. J. Q. B. 302, 2 Wkly. Rep. 567, 82 E. C. L. 44; Adcock *v.* Wood, 6 Exch. 814, 20 L. J. Exch. 435, 2 L. M. & P. 501; Whitmore *v.* Smith, 7 H. & N. 509, 8 Jur. N. S. 514, 31 L. J. Exch. 107, 5 L. T. Rep. N. S. 618, 10 Wkly. Rep. 253. But a special plea, amounting to the general issue, in debt on an award is bad. Ott *v.* Schroeppel, 3 Barb. (N. Y.) 56; Matthews *v.* Matthews, 2 Curt. (U. S.) 105, 16 Fed. Cas. No. 9,288; 2 Chitty Pl. 208. See also Whitcomb *v.* Preston, 13 Vt. 53.

36. Non assumpsit.—*Maine.*—Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214.

New Hampshire.—Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

Ohio.—Tullis *v.* Sewell, 3 Ohio 510, holding that the fact of submission was put in issue by a plea of the general issue.

Virginia.— Bierly *v.* Williams, 5 Leigh (Va.) 700.

Canada.—Hodson *v.* Whitby Tp. Municipality, 17 U. C. Q. B. 230; Abbott *v.* Skinner, 11 U. C. C. P. 309.

As to evidence admissible under the general issue see *infra*, note 42.

A general plea to an action upon an award, charging mistakes generally, without stating the particulars, is bad. Williams *v.* Paschall, 3 Yeates (Pa.) 564, 4 Dall. (Pa.) 284, 1 L. ed. 825. See also Bash *v.* Christian, 77 Ind. 290; Burroughs *v.* David, 7 Iowa 155; Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Morewood *v.* Jewett, 2 Bosw. (N. Y.) 496.

Failure of arbitrators to pursue authority. — Where the declaration upon an award averred a submission of matters involved in a suit at law to arbitration, a plea that the arbitrators failed to pass upon and allow matters embraced in the submission, but which does not aver that the arbitrators had notice of such matters or that defendant presented and offered to prove them, is bad. Seely *v.* Pelton, 63 Ill. 101; Whetstone *v.* Thomas, 25 Ill. 319. So, a plea to a declaration upon an award, that the arbitrators heard and determined matters not embraced in the submission, in general terms, is defective in not stating in what particular they exceeded their jurisdiction. Seely *v.* Pelton, 63 Ill. 101.

Verification.— In Indiana it has been held that a plea that there was no such award as alleged in the declaration should be sworn to. Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253.

Form of answer in action on award, alleging that the award was made without notice to the parties and was the result of clerical error, is set out in Garvey *v.* Carey, 7 Rob. (N. Y.) 286, 4 Abb. Pr. N. S. (N. Y.) 159, 35 How. Pr. (N. Y.) 282.

37. Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502.

judgment to be taken upon certain instruments in writing for the payment of money in the absence of a sufficient affidavit of defense.[38]

e. Replication. To a plea of no award in debt on a submission bond a replication must show an award according to the submission.[39]

f. Rejoinder. After a plea of no award, and a replication setting out an award and assigning a breach, defendant cannot rejoin that the award is void, as such a rejoinder is a departure from the plea.[40]

g. Amendment. The court may, in a proper case, permit an amendment of the pleadings.[41]

h. Variance. In actions to enforce awards, as well as in defending such

As to equitable defenses to action on award see *supra*, IX, B, 2, b, (I), (B), (2).

38. Fox *v.* Philadelphia, etc., R. Co., 1 Pearson (Pa.) 156; Karthans *v.* State Mut. F. Ins. Co., 1 Pearson (Pa.) 104. *Compare* Bayard *v.* Gillasspy, 1 Miles (Pa.) 256.

39. Bissex *v.* Bissex, 3 Burr. 1729; Lee *v.* Elkins, 12 Mod. 585; Hayman *v.* Gerrard, 1 Saund. 102; Roddy *v.* Lester, 14 U. C. Q. B. 259. See also Gillet *v.* Bristow, 1 Root (Conn.) 355; Judge *v.* Judge, 5 U. C. Q. B. O. S. 692.

Assignment of breach.—In Genne *v.* Tinker, 3 Lev. 24, it was held that where, in debt on an award, the award was ill pleaded by defendant, it was not necessary for plaintiff to assign a breach in replication. But see Gillet *v.* Bristow, 1 Root (Conn.) 355; Green *v.* Bailey, 5 Munf. (Va.) 246.

Departure.—If plaintiff, in replying, alleges a different breach from that set up in the declaration, it is a departure, and the replication is bad on special demurrer. Henries *v.* Stiers, 8 N. J. L. 364. See also Tewsley *v.* Dunlop, 1 U. C. Q. B. 138, 139, which was an action on an arbitration bond. Defendants set out the bond and condition on oyer. The condition was that defendants perform the award of "Joseph Kimble Gooding." Plaintiff replied that "the said Jasper K. Gooding, the arbitrator in the condition of the said writing obligatory mentioned, did, within the time limited, make his award." It was held that the replication was bad for repugnancy.

Setting forth award.—The whole award should be set forth in a replication to a plea of no award. Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312; Diblee *v.* Best, 11 Johns. (N. Y.) 103; Green *v.* Bailey, 5 Munf. (Va.) 246; Perry *v.* Nicholson, 1 Burr. 278; Foreland *v.* Marygold, 1 Ld. Raym. 715, 12 Mod. 534, 1 Salk. 72. It is not, however, necessary that it be set out *in hæc verba*. Diblee *v.* Best, 11 Johns. (N. Y.) 103. See also Veale *v.* Warner, 1 Saund. 326, wherein it was said that, in debt on a bond conditioned for the performance of an award, if defendant showed an award imperfectly in his plea, plaintiff in his replication must show so much thereof as would make an award good.

Form of replication to plea of no award in action on bond for performance of award is set out in Roberts *v.* Mariett, 2 Keb. 614, 702, 1 Lev. 300, 1 Mod. 289, 2 Saund. 183.

40. Joy *v.* Simpson, 2 N. H. 179; Allen *v.* Watson, 16 Johns. (N. Y.) 205; Barlow *v.* Todd, 3 Johns. (N. Y.) 367; Munro *v.* Alaire, 2 Cai. (N. Y.) 320; Roberts *v.* Mariett, 2 Keb. 614, 702, 1 Lev. 300, 1 Mod. 289, 2 Saund. 183; Skinner *v.* Andrews, 1 Lev. 245; Garrett *v.* Weeden, 1 Lev. 133; Morgan *v.* Man, 1 Lev. 127; House *v.* Launder, 1 Lev. 85; Praed *v.* Cumberland, 4 T. R. 585; Harding *v.* Holmes, 1 Wils. C. P. 122; Maxwell *v.* Ransom, 1 U. C. Q. B. 219. But see Fisher *v.* Pimbley, 11 East 187, which was debt on bond conditioned to perform an award. Plea no award. Replication setting out an award and breach, and rejoinder stating the whole award, in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission. It was held that the rejoinder was not a departure, or inconsistent with the plea. See also Benedict *v.* Parks, 1 U. C. C. P. 370, wherein defendant set out the condition on oyer, which was for the performance of the award of arbitrators, and pleaded "No award made." Plaintiff replied showing an award made at the proper time and with the proper formalities, and setting it out; and then averred notice by defendant of the award, and assigned two breaches. Defendant rejoined, setting out the award *verbatim*, and then demurred separately to each breach. It was held that defendant could not, by thus setting out the award in his rejoinder by suggestion, make it a part of plaintiff's profert, and that defendant's demurrer should have been to the replication, and not to the several breaches assigned in the replication. But, upon the whole record, judgment was given for defendant on demurrer because the award as set out by plaintiff himself in his replication was void.

A rejoinder setting up a revocation of the submission is not a departure from or inconsistent with the plea of no award, but, rather, fortifies it as showing that the instrument purporting to be an award is, in fact, no award. Allen *v.* Watson, 16 Johns. (N. Y.) 205.

41. Trescott *v.* Baker, 29 Vt. 459. In this case the declaration contained only general *indebitatus assumpsit* counts. The court allowed it to be amended by adding a count upon a parol submission and award.

As to amendment of pleadings, generally, see PLEADING.

actions, the rule applies that a material variance between the pleading and the proof is fatal.[42]

7. Evidence[43]— **a. In General.** In an action on an award the submission and award, if not inconsistent with the declaration, are admissible in evidence without regard to their validity in point of law.[44]

b. Proof of Submission and Award. In order to support an action on an award, it is not only essential that the plaintiff should make proof of the submission,[45]

42. Lyon *v.* Blossom, 4 Duer (N. Y.) 318 (holding that a variance between a complaint setting up an award by arbitrators and proof showing an umpirage is fatal); Smith *v.* Crosswhite, 5 Humphr. (Tenn.) 59.

See 4 Cent. Dig. tit. "Arbitration and Award," § 495.

Matters not alleged in pleadings.— An award cannot be impeached, in an action thereon, by evidence of facts not alleged in the answer — as neglect or refusal of the arbitrator to hear defendant's witnesses. Morewood *v.* Jewett, 2 Rob. (N. Y.) 496.

Under the general issue, in debt on an award, it may be shown that the arbitrators had no power to make and publish their award at the time and in the manner they did; and, therefore, under that plea, the question may be raised whether an award is valid which was made on Sunday morning after a hearing completed just before twelve o'clock on Saturday night. Blood *v.* Bates, 31 Vt. 147. See also Bierly *v.* Williams, 5 Leigh (Va.) 700, holding that, in assumpsit on an award under a parol submission, defendant may show under the general issue fraud in the procurement of the submission. But evidence tending to impeach an award actually made and published in accordance with the agreement of submission is inadmissible under a general denial. Connecticut F. Ins. Co. *v.* O'Fallon, 49 Nebr. 740, 69 N. W. 118.

Under a plea of nil debet defendant may show any payment made by him. Turner *v.* Alway, 5 U. C. Q. B. O. S. 45.

Under a plea of no award defendant cannot deny the submission (Hodson *v.* Whitby Tp. Municipality, 17 U. C. Q. B. 230), show non-delivery of the award (Perkins *v.* Wing, 10 Johns. (N. Y.) 143; Marks *v.* Marryott, 1 Lutw. 524; Oates *v.* Bromhill, 6 Mod. 176; Rowsby *v.* Manning, 3 Mod. 330), or performance (Richards *v.* Drinker, 6 N. J. L. 307). He may, however, show that the arbitrators awarded on a matter not submitted to them. Macomb *v.* Wilber, 16 Johns. (N. Y.) 227.

What constitutes variance.— In an action of debt on an award, the declaration set out a submission to A, B, and C. The proof showed a submission to A and B and a third person to be selected by A and B as the third arbitrator, and that C was selected in accordance with this provision. It was held that there was no variance between the pleading and proof. Chase *v.* Jefts, 51 N. H. 494.

In an action on an award, a plea alleging want of finality in the award in two respects is sustained by proof that one of the respects alleged is well founded. Stewart *v.* Webster, 20 U. C. Q. B. 469.

43. As to presumptions in favor of award see *supra*, VI, 1.

Presumption of authority to submit.— After an award and submission have been permitted to come to the jury in an action on the award, after verdict it will be presumed that there was sufficient evidence of the authority of the president of one party, which was a railroad corporation, to enter into the submission in the absence of specific objection at the proper time. Maryland, etc., R. Co. *v.* Porter, 19 Md. 458.

44. Submission and award as evidence.— Burns *v.* Hendrix, 54 Ala. 78; Richards *v.* Drinker, 6 N. J. L. 307; Lobb *v.* Lobb, 26 Pa. St. 327; Hume *v.* Hume, 3 Pa. St. 144; Onion *v.* Robinson, 15 Vt. 510.

45. *Delaware.*— Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Indiana.— Boots *v.* Canine, 58 Ind. 450.

Michigan.— Chicago, etc., R. Co. *v.* Peters, 45 Mich. 636, 8 N. W. 584.

Mississippi.— Williams *v.* Williams, 11 Sm. & M. (Miss.) 393; Hand *v.* Columbus, 4 Sm. & M. (Miss.) 203.

Pennsylvania.— Collins *v.* Freas, 77 Pa. St. 493; Lobb *v.* Lobb, 26 Pa. St. 327; Perit *v.* Cohen, 4 Whart. (Pa.) 81.

England.— Ferrer *v.* Oven, 7 B. & C. 427, 6 L. J. K. B. O. S. 28, 1 M. & R. 222, 14 E. C. L. 195; Antram *v.* Chace, 15 East 209.

As to necessity of submission see *supra*, II, A.

Proof of submission.— In an action on an award under bonds of submission, it is sufficient to produce the submission bond executed by defendant, without that of plaintiff. Towsley *v.* Wythes, 16 U. C. Q. B. 139. The indenture of submission may be received upon proof of the handwriting of the subscribing witness, where it is shown that repeated attempts had been made to find such witness, who was the son of defendant, in order to serve him with subpœna, by calling at his father's house and at several other places where he had resided, and also at an hospital at which he was, as a student, in the habit of attending lectures; and that, these attempts failing, a summons had been taken out, calling on defendant to admit the execution of the indenture, on which the judge indorsed "No order; defendant refusing to give any information." Spooner *v.* Payne, 4 C. B. 328, 16 L. J. C. P. 225, 56 E. C. L. 328. If the submission is by parol no special form of words is necessary in the proof of the agreement to submit. Nor is it necessary that such agreement should be proved by express language of the parties to it, uttered at the very time of making it. Fooks *v.*

but he must also prove that the arbitrators made an award in conformity with the terms of that submission.[46]

c. Proof of Demand. Where no demand is required by the submission, and by the award one of the parties is required to pay money unconditionally, a demand need not be proved in an action on the award.[47]

8. Set-Off. A set-off is allowed against an award, in an action on the arbitration bond.[48]

9. Instructions. In an action on an award, where the only issue is upon the impartiality of one of the arbitrators, an instruction that the award is void if the jury believe, upon all the evidence, that such arbitrator was not impartial is sufficient.[49]

10. Judgment. Where an award directs one party to pay money and property to the other, in an action of covenant on the award, the court cannot render judgment for the specific property in kind.[50]

11. Measure of Recovery — a. In General. In an action on a bond conditioned in a certain sum to perform an award, the amount designated by the award,

Lawson, 1 Marv. (Del.) 115, 40 Atl. 661. An admission of an award in the answer is, in effect, an admission of the agreement to submit. Sadler *v.* Olmstead, 79 Iowa 121, 44 N. W. 292. If the action is upon the arbitration bond, and the execution of the bond and submission are not put in issue by the pleas, there is no occasion for introducing them in evidence. Stearns *v.* Cope, 109 Ill. 340. See also Lossing *v.* Horned, Taylor (U. C.) 219. The recital in an award of a submission is not proof of a submission. Collins *v.* Freas, 77 Pa. St. 493; Stokely *v.* Robinson, 34 Pa. St. 315. The docket entry of an agreement to arbitrate is evidence of its having been entered by consent. Herman *v.* Freeman, 8 Serg. & R. (Pa.) 9.

46. Anderson *v.* Miller, 108 Ala. 171, 19 So. 302; Fooks *v.* Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; Hoffman *v.* Hoffman, 26 N. J. L. 175. See also Miller *v.* Kennedy, 3 Rand. (Va.) 2; Peterson *v.* Ayre, 15 C. B. 724, 2 C. L. R. 722, 23 L. J. C. P. 129, 2 Wkly. Rep. 373, 80 E. C. L. 724; Wade *v.* Dowling, 4 E. & B. 44, 2 C. L. R. 1642, 18 Jur. 728, 23 L. J. Q. B. 302, 2 Wkly. Rep. 567, 82 E. C. L. 44.

Proof of award.— In an action on an award against an administrator, evidence of admissions of the administrator appointed prior to the award is competent as corroborative of the existence of the award, although not to prove the original liability of the estate. Lobb *v.* Lobb, 26 Pa. St. 327. Plaintiff cannot give parol evidence of the contents of a written award on which he sues, without accounting for the absence of the award. Burke *v.* Voyles, 5 Blackf. (Ind.) 190. The production of the award and the rule of court is sufficient *prima facie* to support the issue on the part of plaintiff, without producing the record of the cause, until the validity of the award is impeached by evidence *dehors* on the part of defendant. Gisborne *v.* Hart, 7 Dowl. P. C. 402, 3 Jur. 536, 8 L. J. Exch. 197, 5 M. & W. 50. See also Still *v.* Halford, 4 Campb. 17.

Lost award.— Parol proof is admissible to show the contents of a lost award and submission. Callier *v.* Watley, 120 Ala. 38, 23 So. 796; Brown *v.* East, 5 T. B. Mon. (Ky.) 405. See also Boots *v.* Canine, 58 Ind. 450; Adams *v.* Harrold, 29 Ind. 198.

Award of costs.— In an action of covenant to enforce an award, proof of the amount of costs of the suit by the calculations of the clerk, sworn to by him in court, is as good evidence as could be produced. Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312.

47. Russell *v.* Smith, 87 Ind. 457; Scearce *v.* Scearce, 7 Ind. 286.

As to demand of performance, generally, see *supra*, X, B.

48. Burgess *v.* Tucker, 5 Johns. (N. Y.) 105; Lindford *v.* Mosgrave, 6 U. C. Q. B. O. S. 642.

As to set-off, generally, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

49. Strong *v.* Strong, 12 Cush. (Mass.) 135. See also Amos *v.* Buck, 75 Iowa 651, 37 N. W. 118, which was an action on an award. The agreement to submit and the award were admitted in the answer and the court instructed the jury to that effect. In introducing another instruction the court said: "If you find from the evidence that plaintiff and defendant agreed to submit their differences to arbitration, and if you find such an award was made as agreed," etc. It was held that the jury could not have understood that the execution of the agreement and the making of the award were in issue.

As to instructions, generally, see TRIAL.

50. Gentry *v.* Barnet, 2 J. J. Marsh. (Ky.) 312, holding that it was necessary to ascertain its value in money, and then pronounce judgment for the aggregate amount in specie.

Judgment by default.— Final judgment by default may be rendered in a suit on an award for a liquidated sum, without the aid of a jury. Swift *v.* Faris, 11 Tex. 18.

Limitation by award.— Where plaintiff brought an action to recover a certain sum which arbitrators had found due him on a contract for making staves for defendant, and plaintiff had the staves in his possession and made no demand for them or their value, a judgment for the amount of the arbitrators' award and the staves will be modified, on appeal, to include the award only. Couch *v.* Harrison, 68 Ark. 580, 60 S. W. 957.

if not in excess of the penalty of the bond, is the limit of recovery.[51] In case of a revocation of a submission, the person revoking is liable to the damages which the other party has sustained by reason of the submission.[52]

b. Interest. On an award directing payment of money at a certain time, interest from that time till payment may be allowed.[53]

C. Pleading Award in Bar — 1. In General. As has been seen hitherto, a valid award constitutes a bar to any action on the original claims submitted to the arbitrators.[54] Where an award is pleaded in bar, it is for the court to determine what facts were requisite to constitute a valid award, and to declare the legal effect of the award when made.[55]

51. Action on bond.— Stewart *v.* Grier, 7 Houst. (Del.) 378, 32 Atl. 328; Shroyer *v.* Bash, 57 Ind. 349; Spear *v.* Smith, 1 Den. (N. Y.) 464. See also Miller *v.* Hays, 26 Ind. 380; McArthur *v.* Oliver, 53 Mich. 299, 19 N. W. 5, 8.

Action on award.— Where parties submit to arbitration, and agree that each will perform the award or pay a certain sum, if the award be to pay a sum of money, the sum awarded is the measure of damages in an action on the award. Whitcomb *v.* Preston, 13 Vt. 53. An award of arbitrators required defendants to make to plaintiffs a written relinquishment of a timber-culture claim on public land which was liable to become forfeited within a certain time. It was held that, on defendants' failure to make and deliver such relinquishment within that time, plaintiff was entitled to recover as damages the expenses which he was compelled to pay to effect a settlement of a contest with a subsequent claimant, which contest was the result of defendants' default. Palmer *v.* March, 34 Minn. 127, 24 N. W. 374. A failure, on demand, to furnish certificates of stock awarded upon a contract to build a railroad, in a certain amount, at its par value, renders the party liable for the market value of the stock in an action on the award — not for an amount equal to its par value. Porter *v.* Buckfield Branch R. Co., 32 Me. 539.

52. Revocation of submission.— *Connecticut.*— Rowley *v.* Young, 3 Day (Conn.) 118; Wetmore *v.* Lyman, 2 Root (Conn.) 484.

Maine.— Call *v.* Hagar, 69 Me. 521.

Massachusetts.— Pond *v.* Harris, 113 Mass. 114.

New Hampshire.— Blaisdell *v.* Blaisdell, 14 N. H. 78.

New York.— Miller *v.* Junction Canal Co., 41 N. Y. 98 [*affirming* 53 Barb. (N. Y.) 590]; Curtis *v.* Barnes, 30 Barb. (N. Y.) 225; Kent *v.* Crouse, 5 N. Y. St. 141.

Vermont.— Hawley *v.* Hodge, 7 Vt. 237.

See 4 Cent. Dig. tit. "Arbitration and Award," § 130.

53. *Illinois.*— Tucker *v.* Page, 69 Ill. 179; Seely *v.* Pelton, 63 Ill. 101.

Indiana.— Russell *v.* Smith, 87 Ind. 457; Shroyer *v.* Bash, 57 Ind. 349; Kintner *v.* State, 3 Ind. 86; Hamilton *v.* Wort, 7 Blackf. (Ind.) 348.

Kentucky.— Shockey *v.* Glasford, 6 Dana (Ky.) 9.

Louisiana.— Interest cannot be allowed on an award that does not grant it. James *v.* Richard, 3 La. 486.

Maine.— Interest is allowable upon the reports of referees under Me. Rev. Stat. (1857), c. 77, § 29. Cary *v.* Whitney, 50 Me. 337. Otherwise in the absence of a statute. Kendall *v.* Lewiston Water Power Co., 36 Me. 19; Southard *v.* Smyth, 19 Me. 458.

Massachusetts.— See Ellis *v.* Ridgway, 1 Allen (Mass.) 501.

North Carolina.— A party who sues to recover stipulated damages for failure to perform an award is not entitled to interest thereon, even from the date of institution of the suit. Deverenx *v.* Burgwin, 33 N. C. 490.

Pennsylvania.— See Buckman *v.* Davis, 28 Pa. St. 211; Rouse *v.* Zeigle, 1 Browne (Pa.) 329.

Vermont.— Whitcomb *v.* Preston, 13 Vt. 53.

England.— Churcher *v.* Stringer, 2 B. & Ad. 777, 9 L. J. K. B. O. S. 318, 22 E. C. L. 325; Pinhorn *v.* Tuckington, 3 Camp. 468; Johnson *v.* Durant, 4 C. & P. 327, 19 E. C. L. 537.

Canada.—Towsley *v.* Wythes, 16 U. C. Q. B. 139.

See 4 Cent. Dig. tit. "Arbitration and Award," § 248.

As to interest, generally, see Interest.

Rate of interest.— An award found a certain sum to be due from one of the parties to the other, and directed its payment as follows: "One thousand dollars to be paid within five days from this date, and the balance . . . to be paid within sixty days from this date, together with ten per cent. interest per annum thereon from this date until paid." It was held that no interest was to be paid on the one thousand dollars, if paid within five days; and that, as the award made no provision for any rate of interest if not so paid, the rate of interest must be governed by the statute. Noyes *v.* McLaflin, 62 Ill. 474.

When interest begins to run.— Interest upon the amount of an award does not begin to run until notice of the award has been given to defendant. Huyck *v.* Wilson, 18 Ont. Pr. 44.

Where an award fixes no day for the payment of money, a party suing for the sum awarded is not entitled as of right to interest. Bentley *v.* West, 4 U. C. Q. B. 98.

54. See *supra*, IX, A. 2.

55. Valid award — Province of court.— Tucker *v.* Allen, 47 Mo. 488.

Questions for jury.— Where the evidence was conflicting as to whether the account sued

2. Necessity For Special Plea — a. In General. In some cases it has been held that, under the general issue, defendant may introduce an award embracing the claim sued on.[56] But, as a general rule, a party relying on an award in bar of an action must plead it specially.[57]

b. Where Award Made Pending Suit. An award made pending an action on the same cause must be set up by a plea *puis darrein continuance*.[58]

3. Form and Sufficiency of Plea. The rules controlling a plea setting up an award in bar of a claim relied on by the plaintiff are substantially the same as those governing the declaration or complaint in an action on an award.[59] The pleading should set forth the submission, or enough of it to show that the matter

on was included in the submission, it was held that the question was properly submitted to the jury. Madden *v.* Blain, 66 Ga. 49. The question whether or not the arbitrators denied one of the parties a proper hearing is one for the determination of the jury where the award is pleaded in bar of an action on the original demand. Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173.

56. General issue held sufficient.— *In assumpsit* it may be shown, under the general issue, that there has been a submission of the subject-matter of the suit to arbitration. May *v.* Miller, 59 Vt. 577, 7 Atl. 818; Winne *v.* Elderkin, 2 Pinn. (Wis.) 248, 52 Am. Dec. 159. And see Massie *v.* Spencer, 1 Litt. (Ky.) 320; Morse *v.* Bishop, 55 Vt. 231, in which last case the trial was before a referee.

In replevin defendant may, under the general issue, introduce in evidence an award settling the title and right of possession to the property in dispute. Newell *v.* Newell, 34 Miss. 385; Turberville *v.* Self, 2 Wash. (Va.) 71.

In ejectment an award is admissible, under the general issue, as evidence of title or the right to possession. Moore *v.* Helms, 74 Ala. 368.

57. Must be pleaded.— *Indiana.*—Brown *v.* Perry, 14 Ind. 32.

Iowa.— Dougherty *v.* Stewart, 43 Iowa 648.

Maryland.— Yingling *v.* Kohlhass, 18 Md. 148.

New York.— Brazill *v.* Isham, 12 N. Y. 9; Lobdell *v.* Stowell, 37 How. Pr. (N. Y.) 88.

Texas.— Harrell *v.* Merridith, 36 Tex. 255.

West Virginia.— Martin *v.* Rexroad, 15 W. Va. 512.

England.— Commings *v.* Heard, L. R. 4 Q. B. 669, 20 L. T. Rep. N. S. 975, 18 Wkly. Rep. 61.

Canada.— Lake *v.* Briley, 5 U. C. Q. B. 136.

Motion to dismiss is not a proper mode of setting up an award as a defense to an action. Hynes *v.* Sabula, etc., R. Co., 38 Iowa 258. And see Moore *v.* Helms, 74 Ala. 368.

58. Plea puis darrein continuance.—Moore *v.* Austin, 85 N. C. 179; Harrison *v.* Brock, 1 Munf. (Va.) 22. And see Bowen *v.* Lazalere, 44 Mo. 383; Abatement and Revival [1 Cyc. 129 note].

As to the effect of an award made pending suit as a bar to the cause of action see *supra*, IX, A, 2, a, (III), (C).

For form of plea held good over the objection that it professed in its commencement to be an answer to the whole declaration, although it showed that the sum awarded was less than that claimed in the action, see McAlpin *v.* May, 1 Stew. (Ala.) 520.

Plea must be sworn to.— A plea in bar *puis darrein continuance*, setting up an award as concluding plaintiff upon the matters in suit, must be sworn to. McAlpin *v.* May, 1 Stew. (Ala.) 520.

59. As to declaration or complaint in action on award see *supra*, XI, B, 6. a.

For forms of pleas see Burns *v.* Hendrix, 54 Ala. 78; Jesse *v.* Cater, 28 Ala. 475; Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262.

Plea in form of estoppel.— The fact that an award is pleaded in the form of an estoppel does not render the plea invalid. Commings *v.* Heard, L. R. 4 Q. B. 669, 20 L. T. Rep. N. S. 975, 18 Wkly. Rep. 61.

Not necessary to aver notice of award.—In a plea of an award it is not necessary to aver notice of the award to plaintiff. Adams *v.* Ham, 5 U. C. Q. B. 292.

Sufficient averment of notice of meeting.— An allegation that the arbitrators appointed time and place of hearing, and, "having given due notice thereof," met, is a sufficient averment of notice. Pickering *v.* Pickering, 19 N. H. 389.

Sufficient averment of making the award. — To a plea of an award objection was made that it did not appear that an arbitrator whose name was not signed to the award was present at the meeting of the arbitrators, participated in their deliberations, or had notice of their meeting. It was averred in the plea that, the arbitrators having taken upon themselves the burden of the arbitration and having been duly affirmed, did duly examine and consider the matters in difference between the parties, and that afterward two of them made the award. It was held that the averment in the plea was sufficient, and that it was not necessary that the presence of the third arbitrator at the time the award was made should appear on its face. Rogers *v.* Tatum, 25 N. J. L. 281.

Time within which award made.—In a plea of an award it is not necessary to aver that the award was made within a reasonable time after submission, if the submission does not require the award to be made within a time certain. Adams *v.* Ham, 5 U. C. Q. B. 292.

sought to be barred was embraced in it,[60] and state the award in substance so that the court may see that, if valid, it will bar the action.[61] But no averment of a promise to perform or abide the award is necessary,[62] nor need the pleader, ordinarily, allege performance, or an offer to perform, on his part.[63]

4. Proof of Submission. As in the case of an action on an award, a party setting up an award in bar must prove the submission.[64]

5. Demurrer to Plea. If, on a plea setting up a submission and award, plaintiff wishes to deny the submission or award, he must tender a direct issue upon that fact alone; if the question which he wishes to present is upon the legal effect of the submission, he should set it out and demur, and if he wishes to try the legal effect of the award he should crave oyer, set it out, and demur.[65]

6. Replication. Where an award is pleaded in bar the replication must either traverse or avoid the bar.[66] Fraud, or any other matter which does not appear on

60. Submission.— Armstrong *v.* Webster, 30 Ill. 333; Milner *v.* Turner, 4 T. B. Mon. (Ky.) 240; Young *v.* Shook, 4 Rawle (Pa.) 299; Henderson *v.* Williamson, 1 Str. 116; Cleal *v.* Elliott, 1 U. C. C. P. 252. And see Suydam *v.* Johnson, 16 N. J. Eq. 112.

Sufficient averment.— Under a submission of "all demands" the parties and referees may or may not investigate and settle the damages which will afterward probably accrue on an indemnifying bond. Hence a plea in bar to an action for such damages is good if it aver that they were actually investigated and settled by the referees, and judgment rendered on their report. Cheshire Bank *v.* Robinson, 2 N. H. 126.

Authority of agent to make submission.— A plea of arbitration by an agent is defective which fails to allege the agent's authority to make the submission. Wright *v.* Evans, 53 Ala. 103.

61. Statement of award.— Gihon *v.* Levy, 2 Duer (N. Y.) 176.

Need not set out whole award.— In a plea of an award, it is not necessary to set out the whole of the award, if there are parts of it which have no bearing upon the defense set up. Kennedy *v.* Burness, 15 U. C. Q. B. 473.

Insufficient plea.— Where an award must be pleaded as a defense, it is not sufficient to plead in these words only: "Arbitrament and award." Harrison *v.* Brock, 1 Munf. (Va.) 22.

Copies of submission and award attached to plea.— Where a plea to an action at law sets up an arbitration and award in bar of the action, it is improper to attach thereto, as exhibits, copies of the submission, and the award. Jones *v.* Harris, 58 Miss. 293.

A replication to a plea of set-off that the causes of action set up in the plea, as well as those in the declaration, had been submitted to arbitration, and an award thereon delivered to the parties, is bad in that it does not disclose the nature of the award nor in whose favor it was made. Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

62. Promise to perform.— Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262.

63. Performance, or offer to perform.— *Indiana.*— Smith *v.* Stewart, 5 Ind. 220.

New Hampshire.— Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68.

New York.— Armstrong *v.* Masten, 11 Johns. (N. Y.) 189.

North Carolina.— Moore *v.* Austin, 85 N. C. 179.

England.— Gascoyne *v.* Edwards, 1 Y. & J. 19, 30 Rev. Rep. 756. But it has been held that, in an action to recover a debt, an award of a sum of money cannot be pleaded in bar without averring payment of the sum awarded. Allen *v.* Milner, 2 Cr. & J. 47, 1 L. J. Exch. 7, 2 Tyrw. 113; Roulstone *v.* Alliance Ins. Co., 4 Ir. R. C. L. 547.

Exception.— The above rule is subject to exception where the duties imposed on the pleader by the award are to be performed simultaneously with, or as a condition precedent to, those imposed on the other party. Jesse *v.* Cater, 25 Ala. 351; Littlefield *v.* Smith, 74 Me. 387. See *supra*, X, A, 1, 2.

64. As to proof of the submission in an action on an award see *supra*, XI, B, 7, b.

A certificate of a county clerk that a controversy relative to the ownership of a chattel was submitted to him by the parties, and that he decided it in favor of one of them, is not evidence of such submission. Howard *v.* Sherwood, 1 Colo. 117.

When not part of record.— In an arbitration not made by order of court, the submission and award do not constitute part of the record unless made so by order of court, and identified. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

Evidence that submission made rule of court.— The submission is not sufficiently proved by evidence of a rule making the agreement a rule of court, such proceeding being *ex parte*. Berney *v.* Read, 7 Q. B. 79, 9 Jur. 620, 14 L. J. Q. B. 247, 53 E. C. L. 79.

65. Fidler *v.* Cooper, 19 Wend. (N. Y.) 285.

Plea omitting portions of award.— If, in a plea of an award, portions of it are improperly left out which materially qualify those parts on which the party is proceeding, the other party should take advantage of it by setting out the parts omitted, and demurring. Kennedy *v.* Burness, 15 U. C. Q. B. 473.

66. Must either traverse or avoid the bar.—A replication which sets forth a submission and award in substantially the same terms as it is set forth in the plea in bar, alleging that the award is invalid because not

the face of the award and which renders it voidable, cannot ordinarily be set up in this collateral fashion.[67]

D. Enforcement in Equity — 1. In General. Although a mere agreement to submit to arbitration cannot be specifically enforced,[68] yet it is well settled that an award made in pursuance of such submission may be specifically enforced in equity where the thing awarded to be done is such that a court of equity would compel its specific performance if agreed on by the parties themselves.[69]

within the terms of the submission, is bad. Clement *v.* Durgin, 1 Me. 300.

Denial of submission.— Where an award under submission by a mutual bond is pleaded in bar, a replication denying the submission properly tenders issue upon the execution of the bond. Pickering *v.* Pickering, 19 N. H. 389. Where defendant pleaded a submission and award, and the replication, after protesting against the submission, traversed the award, it was held that the submission was admitted. Stipp *v.* Washington Hall Co., 5 Blackf. (Ind.) 16.

Allegation of no award.— A replication denying the allegations of the plea, and alleging that there never was any award made that had any binding force or validity, is sufficient. Fassett *v.* Fassett, 41 Mo. 516. But it has been held that, under a replication of "No such award" it cannot be shown that the award has been set aside. See Roper *v.* Levi, 7 Exch. 55, 21 L. J. Exch. 29, 2 L. M. & P. 621.

Averment of legal conclusion.— Where a submission and award are pleaded in bar, a replication that the arbitrators did not award any relief whereby the causes of action mentioned in the declaration were released, is bad, because it attempts to put in issue a matter of law. Fidler *v.* Cooper, 19 Wend. (N. Y.) 285.

67. As to what may be urged against an award when pleaded in bar see *supra*, IX, B, 2, b, (II).

Where fraud available as defense — Objection anticipated.— Defendant, relying upon an award, anticipated plaintiff's objection, and alleged in the answer that the arbitration and award were fair, just, and honest. The whole question of fraud was gone into by the introduction of evidence to which no objection was made. It was held that defendant's substantial rights were not prejudiced by the court's refusal to sustain his demurrer to, and motion to make more specific, that paragraph of the reply alleging fraud, although the facts constituting the fraud were not stated. Home Ins. Co. *v.* Brownlee, 13 Ky. L. Rep. 173.

68. See *supra*, II, D.

69. Assimilated to enforcement of contract. —*Alabama.*— Jones *v.* Blalock, 31 Ala. 180; Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768.

California.—Whitney *v.* Stone, 23 Cal. 275.

Connecticut.— Story *v.* Norwich, etc., R. Co., 24 Conn. 94.

Illinois.— Ballance *v.* Underhill, 4 Ill. 453.

Kentucky.—Brown *v.* Burkenmeyer, 9 Dana (Ky.) 159, 33 Am. Dec. 541; Pawling *v.* Jackman, Litt. Sel. Cas. (Ky.) 1.

Maine.— McNear *v.* Bailey, 18 Me. 251.

Maryland.—Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

Massachusetts.— Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Penniman *v.* Rodman, 13 Metc. (Mass.) 382; Hodges *v.* Saunders, 17 Pick. (Mass.) 470; Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358, 6 Pick. (Mass.) 148. And see Stearns *v.* Bedford First Parish, 21 Pick. (Mass.) 114.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284; Cook *v.* Vick, 2 How. (Miss.) 882.

New Hampshire.— Page *v.* Foster, 7 N. H. 392.

New York.—Perkins *v.* Giles, 50 N. Y. 228 [*affirming* 53 Barb. (N. Y.) 342]; Maury *v.* Post, 55 Hun (N. Y.) 454, 8 N. Y. Suppl. 714, 29 N. Y. St. 827; Bouck *v.* Wilber, 4 Johns. Ch. (N. Y.) 405.

North Carolina.— Thompson *v.* Deans, 59 N. C. 22. And see Crawford *v.* Orr, 84 N. C. 246.

Pennsylvania.— Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537.

Vermont.— See Akely *v.* Akely, 16 Vt. 450.

Virginia.— Smith *v.* Smith, 4 Rand. (Va.) 95; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Smallwood *v.* Mercer, 1 Wash. (Va.) 290.

West Virginia.— See Burke *v.* Parke, 5 W. Va. 122.

United States.— McNeil *v.* Magee, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915.

England.—Walters *v.* Morgan, 2 Cox Ch. 369; Gervais *v.* Edwards, 2 Drury & Warr. 80; Hawksworth *v.* Brammall, 5 Myl. & C. 281, 46 Eng. Ch. 281; Wood *v.* Griffith, 1 Swanst. 43, 1 Wils. C. P. 34, 18 Rev. Rep. 18; Hall *v.* Hardy, 3 P. Wms. 187; Norton *v.* Mascall, 2 Vern. 24.

Canada.— Bell *v.* Miller, 9 Grant Ch. (U. C.) 385; Norvall *v.* Canada Southern R. Co., 5 Ont. App. 13.

Where submission made rule of common-law court.— In Hawksworth *v.* Brammall, 5 Myl. & C. 281, 46 Eng. Ch. 281, it was held that an award of arbitrators might be enforced in equity although the submission to arbitration was to be made a rule of the common-law court.

Part performance.— Equity will usually compel specific performance of an award where the parties seeking relief have performed the award in whole or in part. Pawling *v.* Jackman, Litt. Sel. Cas. (Ky.) 1; Church *v.*

2. What Awards Enforceable Specifically — a. In General. An award being looked upon as a contract of the parties, so far as relates to specific enforcement, reference should be had to the general treatment of that subject in determining the right to specific performance.[70] A void award, like a void contract, will not be specifically enforced;[71] nor will specific performance of part of an award be compelled where the whole cannot be so enforced.[72] And, in general, equity will not exercise its power of specific enforcement where the right thereto is doubtful,[73] or the party has long delayed to seek relief.[74]

b. Necessity For Acquiescence in Award. It was formerly held in England that equity would not enforce an award unless the parties had acquiesced in it, or agreed afterward to have it executed;[75] but this distinction was afterward over-

Roper, 1 Ch. Rep. 75, 141; Hall *v.* Hardy, 3 P. Wms. 187. And in Norton *v.* Mascall, 2 Vern. 24, the lord chancellor decreed specific performance of an award which had been partly performed by the parties seeking relief, although such award was considered extrajudicial and not good in strictness of law.

For acts not considered as a part performance see Nickels *v.* Hancock, 7 De G. M. & G. 300, 56 Eng. Ch. 232.

Award made lien on property.— Where, by the terms of the submission, the amount fixed by the award was to be a lien on land, it was held that such lien, being enforceable only in equity, furnished an element of equitable jurisdiction, and the award should be specifically enforced. Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

Award establishes legal right.— An award is equivalent to the verdict of a jury as establishing the right at law so as to justify the granting of an injunction to protect the rights of a party under the award. Imperial, etc., Co. *v.* Broadbent, 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377 [*affirming* 7 De G. M. & G. 436, 56 Eng. Ch. 337].

70. See Specific Performance.

71. Void award.— Mobile *v.* Wood, 95 Fed. 537; Hopcraft *v.* Hickman, 3 L. J. Ch. O. S. 43, 2 Sim. & St. 130. And see Cox *v.* Smyth, Hard. (Ky.) 411. But see Norton *v.* Mascall, 2 Vern. 24, in which case there had been a part performance.

Statute of frauds.— An award under an agreement, which is invalid by the statute of frauds, will not be specifically enforced. Walters *v.* Morgan, 2 Cox Ch. 369.

Death of arbitrator before execution of award.— Where one of the arbitrators died after the award had been agreed on, but before it had been executed, equity refused to enforce it. Blundell *v.* Brettargh, 17 Ves. Jr. 232.

As to death of arbitrator as revocation of submission see *supra*, II, I, 1, b, (I).

72. Not of part.— Nickels *v.* Hancock, 7 De G. M. & G. 300, 56 Eng. Ch. 232. And see Hide *v.* Petit, 1 Ch. Cas. 185, wherein it was held that an award as to a part only of the matters referred would not be enforced.

Provisions on one side not enforceable immediately.— Specific performance will not be decreed where the provisions in favor of one of the parties cannot be enforced at once, to give such party a right to have certain duties continuously performed by the other for a number of years. The court cannot undertake to see to such performance. Blackett *v.* Bates, L. R. 1 Ch. 117, 12 Jur. N. S. 151, 35 L. J. Ch. 324, 13 L. T. Rep. N. S. 656, 14 Wkly. Rep. 319.

Qualification of rule.— The rule that the court will not specifically perform an award unless it can perform the whole of it must be taken with this qualification — that the plaintiff is at liberty, as in the case of any other agreement, to forego any parts of it if they are for his own benefit. Bell *v.* Miller, 9 Grant Ch. (U. C.) 385.

73. Doubtful right.— Nickels *v.* Hancock, 7 De G. M. & G. 300, 56 Eng. Ch. 232, in which it was held that, where the submission and award, taken together, constituted an unwise and unreasonable agreement which could not be worked out consistently with the terms of the submission, specific performance should be refused.

Where arbitrator influenced by party.— Where there had been a disagreement among the arbitrators in regard to the amount of a certain rent, and one of them had been influenced by the entreaty of the wife of one of the parties to concur with the others, it was held that, under the circumstances, a specific performance was not to be enforced. Chichester *v.* McIntire, 4 Bligh N. S. 78, 1 Dowl. N. S. 460, 5 Eng. Reprint 28.

Where some of the persons to be bound were married women, of whom also one had not executed, the chancery court refused a specific performance and dismissed the bill, leaving plaintiff to his remedy at law. Emery *v.* Wase, 5 Ves. Jr. 846, 7 Rev. Rep. 109.

74. Laches.— Specific performance of an award will not be decreed where there has been long delay and laches, a material change of circumstances, and injury to the other party. McNeil *v.* Magee, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915; Eads *v.* Williams, 4 De G. M. & G. 674, 1 Jur. N. S. 193, 24 L. J. Ch. 531, 3 Wkly. Rep. 98, 53 Eng. Ch. 528, wherein it was said that the party must seek relief as promptly as the nature of the case will permit. But see Sweet *v.* Hole, Finch 384.

75. Thompson *v.* Noel, 1 Atk. 60. In Webster *v.* Bishop, Eq. Cas. Abr. 51, 2 Vern. 444, the court refused to order specific performance of an award which had been performed

ruled in England,[76] and has never been recognized as prevailing in the United States.[77]

c. Adequacy of Remedy at Law. Equity will not interfere where the party has a complete and adequate remedy at law.[78] But it is not enough to say that the party has a right of action upon the award or the promise to abide by it, for such remedy is often very inadequate to the ends of justice, and, if it appears that he could not thereby obtain all that the award intended to give him, then equity will compel a specific performance.[79]

3. The Bill. A bill which makes out a case for a specific execution of the award is sufficient, although it does not pray for general or special relief, if defendant makes no objection thereto and submits himself to the jurisdiction of the court by answering to the merits.[80] If the award set forth in the bill be void on its face, the objection may be taken by demurrer.[81]

4. Plea or Answer. The principles governing the answer and plea are practically the same as in other suits for the specific performance of contracts.[82] If defendant answers and asks the intervention of the court, he submits to the juris-

by neither party. See also Eyre *v.* Good, 2 Ch. Rep. 18, 34; Bishop *v.* Bishop, 1 Ch. Rep. 75, 141.

76. Wood *v.* Griffith, 1 Swanst. 43, 1 Wils. C. P. 34, 18 Rev. Rep. 18.

77. Never necessary in United States.— Brown *v.* Burkenmeyer, 9 Dana (Ky.) 159, 33 Am. Dec. 541; Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358, 6 Pick. (Mass.) 148; Smith *v.* Smith, 4 Rand. (Va.) 95. And see Pawling *v.* Jackman, Litt. Sel. Cas. (Ky.) 1.

78. Award for payment of money.— A bill will not lie to compel a specific performance of an award merely for the payment of a sum of money, the remedy at law being adequate in that case. Turpin *v.* Banton, Hard. (Ky.) 312; Cannady *v.* Roberts, 41 N. C. 422; Walters *v.* Morgan, 2 Cox Ch. 369; Hall *v.* Hardy, 3 P. Wms. 187.

Award payable in gold.— A bill in equity will not lie to enforce specific performance of an award to pay a certain number of dollars in gold. Howe *v.* Nickerson, 14 Allen (Mass.) 400.

Payment of money and conveyance of land. — But a court of equity has jurisdiction to enforce specific performance of an award concerning real estate, or of an agreement for the purchase or sale of real estate, notwithstanding it involves the enforcement of an award to pay money. The jurisdiction of the court of equity will not be ousted and the ends of justice defeated because of an obligation in the award to pay money. Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442.

Allegations of fraud.— A suit will not lie in equity to obtain a decree against one for a debt evidenced by an award, and then for a decree for the satisfaction of the debt from the grantee of the debtor, upon the allegation that the debtor's property had been fraudulently conveyed to the other defendant. The complainant ought first to recover his demand at law upon the award and proceed as far as he can in the collection of it, and then if, owing to the fraudulent conveyances, he cannot obtain satisfaction, and not before, he may go into equity. Duberry *v.* Clifton, Cooke (Tenn.) 328. So, in a suit for a specific performance of an award made in an arbitration between partners, wherein their respective rights and liabilities were determined, allegations of failure to comply with the bond given for the performance of the award, that defendant neglected to apply the assets to the liabilities of the firm, and had fraudulently applied a part of the assets to the payment of his individual debts, is no ground for equitable interference, it not appearing that the obligor in the bond was insolvent, or likely to become so. Burke *v.* Parke, 5 W. Va. 122.

79. Mere right of action will not defeat jurisdiction.— Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768; Whitney *v.* Stone, 23 Cal. 275; Brown *v.* Burkenmeyer, 9 Dana (Ky.) 159, 33 Am. Dec. 541; Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537. And see Smith *v.* Smith, 4 Rand. (Va.) 95.

Award directing release of realty.— An award that a party shall execute a release of real estate is a proper subject for a bill for specific performance, there being, in such case, no adequate and complete remedy at law. Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358, 6 Pick. (Mass.) 148; Thompson *v.* Deans, 59 N. C. 22.

80. Appearance without objection to want of prayer.— Smith *v.* Smith, 4 Rand. (Va.) 95.

As to the bill, generally, see Specific Performance. And see also *supra*, IX, B, 2, c, (II), (A), (1).

81. Void award — Demurrer to bill.— Bishop *v.* Bishop, 1 Ch. Rep. 75, 141; Hopcraft *v.* Hickman, 3 L. J. Ch. O. S. 43, 2 Sim. & St. 130.

82. See, generally, Specific Performance. And as to the methods of obtaining relief against an award see *supra*, IX, B, 2.

diction,[83] and his answer must fully set up the matter relied upon to defeat the relief sought.[84] If he sets up new matter it must be proved.[85]

E. Statutory Methods of Enforcement — 1. Attachment — a. In General. The method of enforcement of an award by attachment formerly prevailed to some extent in the United States,[86] and appears to be still available,[87] though the usual method now is by entry of judgment on the award.[88]

b. When Granted. In order that an award might be enforceable by attachment, it was required to come within the terms of the statute.[89] The court would not grant such a summary remedy where there was any doubt as to the appli-

83. Waiver of objections to jurisdiction.— Moore *v.* Buckner, 28 Grant Ch. (U. C.) 606.

84. Materiality of rejected evidence.— If the answer attacks the award by allegations that the arbitrators refused to hear evidence, it is insufficient, unless it show what the evidence was and that it was material. Elder *v.* McLane, 60 Tex. 383, wherein it was further held that an allegation in the answer, under oath, that the arbitrator had not examined into the correctness of a boundary line, as required by the submission, was not overcome by a recital in the award that this duty had been performed. As to effect of refusal to hear evidence see *supra*, IX, B, 1, b, (II), (C).

Statute of frauds as defense.— Where defendant to a bill to enforce an award admitted the agreement to submit to arbitration, the actual submission, and the award, and failed to set up the statute of frauds as a defense in his answer, he cannot insist on it at the hearing. Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

Motion to strike out answer — Presumption.— In a suit to enforce an award upon motion to strike out part of an answer which sets up that a third arbitrator was chosen by the first two by chance instead of by the exercise of their judgment, the court cannot presume, for the purpose of striking out the answer, that defendant consented that a third arbitrator should be selected by chance. Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

Georgia — Questions for jury.— A question made by the pleadings as to what evidence was introduced before the arbitrators is a question of fact for the jury. Thrasher *v.* Overby, 51 Ga. 91.

85. New matter — Performance.—An averment that performance by plaintiff was made a condition precedent constitutes new matter and must be proved as such. Pawling *v.* Jackman, Litt. Sel. Cas. (Ky.) 1.

As to performance as a condition precedent see *supra*, X, A.

86. Formerly method in United States.— See Chandler *v.* Gay, 1 Ill. 88; Skillings *v.* Coolidge, 14 Mass. 43; McClure *v.* Gulick, 17 N. J. L. 340; Anonymous, 2 N. J. L. 213; Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; *Ex p.* Wallis, 7 Cow. (N. Y.) 522.

In the time of Charles II a practice arose of making submissions to arbitration rules of court, where the matter referred was involved in a pending suit (Russell Arb. & Award (8th ed.) 323; Veale *v.* Warner, 1 Saund. 326), and this practice was subsequently confirmed by statute, which extended the summary remedy by attachment to every award which had been made a rule of court, whether in a pending suit or not (9 & 10 Wm. III, c. 15, which statute is no longer in force, having been repealed by the Arbitration Act of 1889 [52 & 53 Vict. p. 49]).

In Canada the court may enforce the performance of an award by attachment, if it is not an award for the payment of money. McPherson *v.* Walker, 1 Ont. Pr. 30.

87. Modern remedy.— Burrows *v.* Guthrie, 61 Ill. 70; Shriver *v.* State, 9 Gill & J. (Md.) 1.

88. Entry of judgment.— See *infra*, XI, E, 2.

89. Reade *v.* Dutton, 2 Gale 228, 6 L. J. Exch. 16, 2 M. & W. 62.

Controversy, suit, or quarrel must exist.— Under 9 & 10 Wm. III, c. 15, in order for an award to be enforceable by attachment there must have been a controversy, suit, or quarrel existing at the time of the submission. *In re* Lee, 3 L. J. K. B. 124, 3 N. & M. 860.

Must be made rule of court.— To warrant a motion for an attachment against a party for non-performance of an award, the submission must appear to have previously been made a rule of court. Salmon *v.* Osborn, 3 L. J. Ch. 237, 3 Myl. & K. 429; Jemmett *v.* Lattimer, 2 L. J. K. B. O. S. 78; Bath *v.* Pinch, 4 Scott 299, 36 E. C. L. 587. See also Elmendorf *v.* Harris, 5 Wend. (N. Y.) 516; Clarke *v.* Baker, 1 Hurl. & W. 215; Ansell *v.* Evans, 7 T. R. 1; Owen *v.* Hurd, 2 T. R. 643; ——— *v.* Mills, 17 Ves. Jr. 419.

Necessity for order.— There must be an order of the court to authorize issuing an attachment for not paying an award which had been made a rule of court. McDermot *v.* Butler, 10 N. J. L. 158.

Order made before award.—Where an equity court had ordered a party to comply with the terms of an award thereafter to be made, but when the award was made such party refused to do so, it was held that the proper course was not to attach him for contempt of the order, but to make another order directing him to comply with the terms of the award before a certain day, otherwise he should be attached. Birdsall *v.* Bradley, 9 L. T. Rep. N. S. 436.

cant's right to it.[90] And it seems that a long and unexplained delay in seeking relief would preclude enforcement by attachment.[91]

c. To Whom Granted. An attachment would not be granted to a stranger to the submission,[92] nor to the personal representative of a deceased party if the death avoided the rule of court.[93]

d. Against Whom Granted. Attachments lay against a party to the submission even though he were beyond the jurisdiction, the process being of a civil nature.[94] But it would not be granted against the personal representative of a deceased party,[95] against a public officer acting officially,[96] nor against a corporation.[97]

e. No Proceeding by Action and Attachment at Same Time. A party could not enforce the award by action and attachment at the same time.[98]

f. Procedure to Obtain — (i) *Demand of Performance.* A demand of performance was always necessary before the party could be entitled to an attachment.[99] Where the payment of money was awarded, the demand of such pay-

90. Not granted when right doubtful.— Thornton *v.* Hornby, 8 Bing. 13, 1 L. J. C. P. 6, 1 M. & S. 48, 21 E. C. L. 424; Mackenzie *v.* Sligo, etc., R. Co., 9 C. B. 250, 67 E. C. L. 250; Heatherington *v.* Robinson, 7 Dowl. P. C. 192, 8 L. J. Exch. 148, 4 M. & W. 608; Robertson *v.* Hatton, 26 L. J. Exch. 293; Cock *v.* Gent, 3 Dowl. & L. 271, 15 L. J. Exch. 33, 14 M. & W. 680; Stalworth *v.* Inns, 2 Dowl. & L. 428, 9 Jur. 285, 14 L. J. Exch. 81, 13 M. & W. 466; Lord *v.* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404; Smith *v.* Reeves, 2 Hurl. & W. 306; Rees *v.* Rees, 25 L. J. Q. B. 352; *In re* Cardigan, 22 L. J. Q. B. 83, 1 L. & M. 98; Hales *v.* Taylor, 1 Str. 695; Thompson *v.* Macklem, 1 Ont. Pr. 293.

Doubt as to duties imposed by award.— Graham *v.* Darcey, 6 C. B. 537, 6 Dowl. & L. 385, 18 L. J. C. P. 61, 60 E. C. L. 537; Lawrence *v.* Hodgson, 1 Y. & J. 16, 30 Rev. Rep. 754. Thus, where an award finds a certain sum to be due, but does not order that sum to be paid, an attachment cannot be obtained for non-payment. Edgell *v.* Dallimore, 3 Bing. 634, 4 L. J. C. P. O. S. 193, 11 Moore C. P. 541, 11 E. C. L. 309; Seward *v.* Howey, 7 Dowl. P. C. 318, 3 Jur. 9, 1 W. W. & H. 410.

Doubt as to non-performance.— Poyner *v.* Hatton, 8 Dowl. P. C. 891, 10 L. J. Exch. 64, 7 M. & W. 211.

Mistake in name of party.— Where an arbitrator made a mistake in his award in the christian name of one of the parties, the court refused to enforce it by attachment. Davies *v.* Pratt, 16 C. B. 586, 81 E. C. L. 586; Lee *v.* Hartley, 8 Dowl. P. C. 883.

91. Delay in seeking relief.— Storey *v.* Garry, 8 Dowl. 299; Dexter *v.* Fitzgibbon, 4 U. C. L. J. 43. But see Baily *v.* Curling, 20 L. J. Q. B. 235, 2 L. M. & P. 161, in which an attachment was granted after a delay of more than two years.

92. Not to stranger.—*In re* Skeete, 7 Dowl. P. C. 618, 3 Jur. 870, 2 W. W. & & H. 49.

93. Not to personal representative.— Rex *v.* Maffey, 1 Dowl. P. C. 538. See also Rogers *v.* Stanton, 7 Taunt. 575 note, 2 E. C. L. 499.

94. Against party beyond jurisdiction.— Hopcraft *v.* Fermor, 1 Bing. 378, 2 L. J. C. P. O. S. 29, 8 Moore C. P. 424, 25 Rev. Rep. 654, 8 E. C. L. 556.

95. Personal representative.— Tyler *v.* Jones, 3 B. & C. 144, 4 D. & R. 740, 10 E. C. L. 74; Doe *v.* Grundy, 1 B. & C. 284, 8 E. C. L. 122; Webster *v.* Bishop, Prec. Ch. 223; Houlditch *v.* Houlditch, 1 Swanst. 58, 1 Wils. Ch. 17; Newton *v.* Walker, Willes 315.

96. Public officer.— Corpe *v.* Glyn, 3 B. & Ad. 801, 1 L. J. K. B. 272, 23 E. C. L. 350.

97. Corporation.—Guildford *v.* Mills, 2 Keb. 1; Anonymous, T. Raym. 152; London *v.* Lenne Regis, 1 H. Bl. 206.

98. Badley *v.* Loveday, 1 B. & P. 81; Stock *v.* De Smith, Cas. t. Hardw. 106; Paull *v.* Paull, 2 C. & M. 235, 2 Dowl. P. C. 340, 3 L. J. N. S. Exch. 11, 4 Tyrw. 72.

An application to make a submission a rule of court was refused where an action was pending on the award and there was a dispute as to its validity. *In re* Palmer, 24 N. Brunsw. 240.

Discontinuance of action.— An attachment would be granted after an action commenced on the award had been discontinued. Higgins *v.* Willes, 7 L. J. K. B. O. S. 90, 3 M. & R. 382.

Discharge from custody.— If an action were brought after attachment executed, defendant would be discharged from custody on bail being given. Lousdale *v.* Whinney, 3 Dowl. P. C. 263, 4 L. J. Exch. 7.

99. Demand necessary.— Knight *v.* Carey, 1 Cow. (N. Y.) 39; Dodington *v.* Hudson, 1 Bing. 410, 1 L. J. C. P. O. S. 53, 8 Moore C. P. 510, 8 E. C. L. 571; Brandon *v.* Brandon, 1 B. & P. 394; Standley *v.* Hemmington, 2 Marsh. 277, 6 Taunt. 561, 1 E. C. L. 754.

Not to be made pending proceedings to vacate.— The demand could not be made during the pendency of a rule to set aside the award. Morris *v.* Reynolds, 1 Salk. 73; Dalling *v.* Matchett, Willes 215. And see Moore *v.* Buckner, 28 Grant Ch. (U. C.) 606.

ment was required to be made either by the party in person, or by one duly authorized by power of attorney or otherwise.[1]

(II) *Service of Papers.* In order to bring a party into contempt, it was necessary that he should be personally served with a copy of the papers upon which the liability depended.[2]

(III) *Motion For Attachment* — (A) *In General.* It seems that an appli-

Reduction of amount — Fresh demand required.— Though a party is at one time in contempt for not paying costs which have been duly demanded, yet if, before motion for attachment, the sum due become reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. Spivy *v.* Webster, 1 Dowl. P. C. 696, 2 L. J. Exch. 38.

Demand after day set for payment.— An attachment for non-payment of a sum of money pursuant to an award might be granted notwithstanding a demand therefor was not made until some months after the day on which it was directed to be paid. *In re* Craik, 7 Dowl. P. C. 603, 2 W. W. & H. 52.

The demand should be for the precise thing awarded.— Hemsworth *v.* Brian, 1 C. B. 131, 2 Dowl. & L. 844, 14 L. J. C. P. 134, 50 E. C. L. 131.

Performance of condition.— An award ordered a defendant to pay to the arbitrator the costs of the award, and, in case plaintiff should pay them, ordered defendant to repay to him such amount. On making a demand for these costs, in order to entitle plaintiff to move for an attachment, notice should be given defendant that plaintiff had paid them. Kendrick *v.* Davis, W. W. & D. 587.

As to the necessity for a party to perform conditions precedent to compelling performance by the other party see *supra*, X, A.

Demand confined to part well awarded.—It seems that where part of the award was outside the arbitrators' authority, the demand had to be confined to what was well awarded. Whitehead *v.* Firth, 12 East 165; Strutt *v.* Rogers, 2 Marsh. 524, 7 Taunt. 213, 2 E. C. L. 331. But see *In re* Smith, 5 Dowl. P. C. 513, 2 Hurl. & W. 306.

1. In person or through power of attorney. — Mason *v.* Whitehouse, 1 Arn. 261, 4 Bing. N. Cas. 692, 6 Dowl. P. C. 602, 2 Jur. 545, 7 L. J. C. P. 295, 33 E. C. L. 927; Hartley *v.* Barlow, 1 Chit. 229, 18 E. C. L. 133; Laugher *v.* Laugher, 1 Cr. & J. 398, 1 Dowl. P. C. 284, 1 Tyrw. 352.

Necessity to produce power.— Where a demand for payment of money, pursuant to an award, was made under a power of attorney, it must appear that the power was produced to the party at the time the demand was made. Laugher *v.* Laugher, 1 Cr. & J. 398, 1 Dowl. P. C. 284, 1 Tyrw. 352; Boyes *v.* Hewetson, 2 Scott 837.

Proof of demand.— Where a demand was made under power of attorney for payment of money pursuant to an award, it was sufficient to found a rule for an attachment if the attorney swore to the demand and refusal, and that the sum remained unpaid; and it was not necessary that the party himself should swear that the money was not paid. Reg. *v.* Paget, 9 Dowl. P. C. 946, 5 Jur. 872.

Where there were several parties, the demand must be by all or under power of attorney from all. Sykes *v.* Haigh, 4 Dowl. P. C. 114, 1 Hodges 197, 2 Scott 193, 30 E. C. L. 632. But see Baily *v.* Curling, 20 L. J. Q. B. 235, 2 L. M. & P. 161.

On demanding the execution of a deed directed by an arbitrator, where such demand was made by a third person, it was not necessary that such person should be empowered by deed or power of attorney in order to enable the party to have an attachment. Tebbutt *v.* Ambler, 2 Dowl. N. S. 677, 7 Jur. 304, 13 L. J. Q. B. 220; Lodge *v.* Porthouse, Lofft 388; Kenyon *v.* Grayson, 2 Smith K. B. 61. But see Humphries' Case, 2 L. J. K. B. O. S. 78.

2. Copy of award.— Stunwell *v.* Tower, 1 C. M. & R. 88, 2 Dowl. P. C. 673, 4 Tyrw. 862; Wilson *v.* Foster, 1 Dowl. & L. 496, 1 L. J. C. P. 330, 6 M. & G. 149, 6 Scott N. R. 936; Doe *v.* Bradley, 1 Dowl. N. S. 259. But see Matter of Bower, 1 B. & C. 264, 8 E. C. L. 113.

Copy of power of attorney.— If the demand were made under power of attorney, service of a copy of such power was required. Russell Arb. & Award (8th ed.) 330.

The original submission was not required to be served, as it was the disobedience of the rule of court which was the foundation of the contempt. Greenwood *v.* Dyer, 5 Dowl. P. C. 255; Russell Arb. & Award (8th ed.) 330.

The court would not infer personal service of an award to bring a party into contempt. Brander *v.* Penleaze, 5 Taunt. 813, 1 E. C. L. 415.

Necessity to show originals.— The originals of the papers served were required to be shown at the time of service. Russell Arb. & Award (8th ed.) 330; Lloyd *v.* Harris, 8 C. B. 63, 7 Dowl. & L. 118, 18 L. J. C. P. 346, 65 E. C. L. 63; Reid *v.* Deer, 7 D. & R. 612, 16 E. C. L. 302; Rex *v.* Sloman, 1 Dowl. 618; Jackson *v.* Clarke, M'Clel. & Y. 72, 13 Price 208. But it was sufficient if the originals were shown to the party, so that he could read them, without delivering them into his hands. Calvert *v.* Redfearn, 2 Dowl. P. C. 505.

The copies served must be correct.— Rex *v.* Calvert, 2 C. & M. 189.

Copies tendered and left.— It was sufficient service if the copies were tendered to the

cation for an attachment has always to be made by motion in open court, upon due notice to the party to be charged.[3]

(B) *Affidavits.* The party applying for an attachment was required to present an affidavit verifying the award,[4] and showing that the preliminary steps to bring the other party into contempt had been taken.[5] So, where the time for making the award had been enlarged, the affidavit was required to state such enlargement, that the award had been made within the enlarged time, and that defendant had been notified of such facts.[6]

(C) *Producing Original Award to Court.* On an application for a rule for an attachment the original award must be produced to the court.[7]

(D) *Showing Cause Against Motion.* In defense to a motion for an attachment, defendant could prove that he had performed the duties imposed on him by the award,[8] or that the proper steps had not been taken to bring him into contempt.[9] Objections to the validity of the award, apparent on its face, could be taken advantage of,[10] and, so, anything which rendered the award absolutely void

party and left by him, though he refused to take them up. Ellis *v.* Giles, 5 Dowl. 255, 2 Hurl. & W. 329.

3. Russell Arb. & Award (8th ed.) 333–335.

Time of taking proceeding.—A proceeding to enforce an award by summary application cannot be taken until after the time for moving against it has elapsed. Moore *v.* Buckner, 28 Grant Ch. (U. C.) 606.

As to time for moving against award see *supra*, IX, B, 2, d, (I), (E).

Could not move on last day of term.— A motion could not be made on the last day of the term nor could cause be shown against the rule *nisi* for it on that day. Kerr *v.* Jeston, 1 Dowl. N. S. 538, 6 Jur. 1110; Watkins *v.* Phillpotts, M'Clel. & Y. 393, 29 Rev. Rep. 809; Anonymous, 3 Smith K. B. 118.

4. **Verifying award.**— Russell Arb. & Award (8th ed.) 332; Higgins *v.* Street, 25 L. J. Exch. 285.

A mistake as to the umpire's name in the affidavit was held to be immaterial, where a true copy of the award had been served on defendant and the original shown him. *In re* Smith, 5 Dowl. P. C. 513, 2 Hurl. & W. 306.

5. **Showing preliminary steps taken.**— Laugher *v.* Laugher, 1 Cr. & J. 398, 1 Dowl. P. C. 284, 1 Tyrw. 352.

Performance of condition.— Such affidavit must show that the moving party had performed, or offered to perform, the duties imposed upon him. *In re* Smith, 5 Dowl. P. C. 513, 2 Hurl. & W. 306. But see Lindsay *v.* Direct London, etc., R. Co., 15 Jur. 224, 19 L. J. Q. B. 417, 1 L. M. & P. 529.

Refusal to perform.— Such affidavit must show also that the other party had refused to comply with a demand of performance. Reg. *v.* Paget, 9 Dowl. P. C. 946, 5 Jur. 872. The court would not grant an attachment for non-payment of money pursuant to an award, where payment had been demanded under a power of attorney, unless the affidavit of demand showed that it had been made after the time appointed for paying the money. Barnes *v.* McMartin, 5 U. C. Q. B. O. S. 143.

6. **Enlargement of time.**— Davis *v.* Vass, 15 East 97; Moule *v.* Stawell, 15 East 99 note; George *v.* Lousley, 8 East 13, 9 Rev. Rep. 366; Wohlenberg *v.* Lageman, 1 Marsh. 579, 6 Taunt. 251, 16 Rev. Rep. 616, 1 E. C. L. 600.

When time of making award need not be stated.— Where it clearly appeared from the submission and award that the award was made within the time limited, such fact need not be stated in the affidavit. Barton *v.* Ransom, 6 Dowl. P. C. 384, H. & H. 11, 7 L. J. Exch. 86, 3 M. & W. 322; *In re* Smith, 5 Dowl. P. C. 513, 2 Hurl. & W. 306; Higgins *v.* Street, 25 L. J. Exch. 285. And see Dickins *v.* Jarvis, 5 B. & C. 528, 8 D. & R. 285, 11 E. C. L. 569.

7. **Original award.**— Davis *v.* Potter, 21 L. J. Q. B. 134, 1 L. & M. 11; McLean *v.* Kezar, 1 Ont. Pr. 125. And see Marks *v.* Marks, 3 N. Brunsw. 486.

But upon proof of loss of the award, the rule might be granted upon a copy. Robinson *v.* Davis, 1 Str. 526.

8. **Performance.**— Russell *v.* Yorke, 4 Scott 422, 36 E. C. L. 597.

As to performance, generally, see *supra*, X.

9. **Preliminary steps not taken.**— Russell Arb. & Award (8th ed.) 335.

Right of objecting party to enter into merits.— Where, on cause shown against a rule for an attachment, the court discharged the rule without costs, on a preliminary objection to the insufficiency of the affidavit, the objecting party had a right to enter into the merits in order to have the rule discharged with costs, and did not thereby waive his right to the discharge of the rule without costs. *In re* Chamberlain, 8 Dowl. P. C. 686.

10. **Apparent invalidity of award.**— Randall *v.* Randall, 7 East 81, 3 Smith K. B. 90, 8 Rev. Rep. 601.

As to the methods of obtaining relief against awards in general see *supra*, IX, B, 2.

After expiration of time for motion.— Such

could be set up in answer.[11] But no extrinsic objections merely rendering the award voidable could be taken in this way.[12]

(IV) *THE RULE.* Under an award directing that several defendants should each pay a certain sum, separate attachments had to be issued against them;[13] but an attachment could issue against one alone of several defendants.[14] The rule would sometimes be molded to suit the facts,[15] and, if there were reasons for giving indulgence to a party in contempt, the court could direct the attachment to be stayed for a certain period, or impose such terms as seemed equitable.[16]

2. ENTRY OF JUDGMENT ON AWARD — a. In General. Provision is now generally made by statute for the entry of judgments on awards, and an award in compliance with such a statute is entitled to be entered as the judgment of the court, and enforced in the same manner as any other judgment.[17]

objection could be raised even though the time for moving to set the award aside had expired. Macarthur *v.* Campbell, 2 A. & E. 52, 4 L. J. K. B. 25, 4 N. & M. 208, 29 E. C. L. 45; Pedley *v.* Goddard, 7 T. R. 73, 4 Rev. Rep. 382; Auriol *v.* Smith, Turn. & R. 121, 12 Eng. Ch. 121.

11. Matters rendering award void.—Doe *v.* Brown, 5 B. & C. 384, 8 D. & R. 100, 29 Rev. Rep. 275, 11 E. C. L. 507; Worrall *v.* Deane, 2 Dowl. 263; Milne *v.* Gratrix, 7 East 608; Lord *v.* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404; King *v.* Joseph, 5 Taunt. 452, 1 E. C. L. 236.

12. Extrinsic matters making award voidable.— Butler *v.* Masters, 13 Q. B. 341, 66 E. C. L. 341; Brazier *v.* Bryant, 3 Bing. 167, 10 Moore C. P. 587, 28 Rev. Rep. 618, 11 E. C. L. 89; Dick *v.* Milligan, 4 Bro. Ch. 117, 2 Ves. Jr. 23; Paull *v.* Paull, 2 C. & M. 235, 2 Dowl. P. C. 340, 3 L. J. Exch. 11, 4 Tyrw. 72; Wright *v.* Graham, 3 Exch. 131, 18 L. J. Exch. 29; Bleecker *v.* Loyall, 2 Ont. Pr. 14.

Failure to prepare deeds.— It was held to be no objection in answer to a motion for attachment for disobedience of an award directing the execution of certain deeds that it was the duty of the arbitrator to have prepared such deeds. Tebbutt *v.* Ambler, 2 Dowl. N. S. 677, 7 Jur. 304, 12 L. J. Q. B. 220.

13. Separate attachments against several. — Doe *v.* Summerfield, 2 Hurl. & W. 291.

14. Attachment against one of several.— Richmond *v.* Parkinson, 3 Dowl. 703.

15. Rule molded to facts.— *In re* Cardigan, 22 L. J. Q. B. 83, 1 L. & M. 98, in which case, when the application failed as to one sum, in not showing the fulfilment of a condition precedent to his right to demand it, the court allowed the attachment to issue in respect of other sums not open to the same objection.

16. Staying attachment.— Tyler *v.* Campbell, 1 Arn. 465, 5 Bing. N. C. 192, 7 Scott 116, 35 E. C. L. 112; *In re* Smith, 5 Dowl. P. C. 513, 2 Hurl. & W. 306; Caila *v.* Elgood, 2 D. & R. 193, 16 E. C. L. 78.

17. Entry of judgment.—*Alabama.*—Crook *v.* Chambers, 40 Ala. 239; Mobile Bay Road Co. *v.* Yeind, 29 Ala. 325.

California.— Williams *v.* Walton, 9 Cal. 142.

Colorado.— Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651.

Indiana.— Davis *v.* Bond, 14 Ind. 7.

Kansas.— Anderson *v.* Beebe, 22 Kan. 768.

Louisiana.— Donovan *v.* Owen, 10 La. Ann. 463.

Maryland.— Shriver *v.* State, 9 Gill & J. (Md.) 1.

Michigan.— Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

Minnesota.— Johnston *v.* Paul, 23 Minn. 46.

Mississippi.— Where the parties to a suit, without any formal submission, order, or rule of court, agree to refer to arbitrators all the matters in difference between them, and it appears that it was the intention to defer to the decision of the arbitrators as the decision of the court, the "award when returned and approved by the court" will have the same effect as if made under a regular order or rule of submission, as the final judgment or decree of the court. Handy *v.* Cobb, 44 Miss. 699, 700; Wear *v.* Ragan, 30 Miss. 83.

Missouri.— Sweeney *v.* Vaudry, 2 Mo. App. 352.

Ohio.— Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117, 15 Cinc. L. Bul. 397, 17 Cinc. L. Bul. 139.

Virginia.— Graham *v.* Pence, 6 Rand. (Va.) 529.

See also the statutes, and as to the power of the court to set aside, modify, or recommit the award see *supra*, IX, B, 2, d.

In England it is now provided by statute that awards may be enforced in the same manner as judgments. See Arbitration Act (1889), § 12.

In Canada an order to pay an award, to be followed by execution, will be granted whenever an action at law would lie upon the award. Armstrong *v.* Cayley, 2 Ch. Chamb. (U. C.) 163.

Two awards between same parties.— An award absolute and unconditional in its terms may be accepted independently of another award made by the same arbitrators and returned at the same time respecting other matters in dispute between the same parties, no mutual dependence between the

b. Extent of Authority to Enter Judgment — (1) *In General.* The jurisdiction to enter judgments upon awards is special and statutory, and, therefore, can be exercised only where it is conferred by statute.[18] Such jurisdiction extends only to awards which fall within the scope of the statute,[19] and, in order that an award may be enforced in this manner, it is necessary that the statutory requirements shall have been complied with.[20]

two being shown. Fay *v.* Bond, 1 Allen (Mass.) 211.

Waiver of exemptions follows judgment.— Where an agreement to submit and abide by the award of arbitrators is accompanied by a bond, under seal, providing a waiver of exemptions, the waiver follows and attaches to a judgment obtained in default of abiding by the award. Quick *v.* Gritman, 3 Pa. Co. Ct. 610.

18. Authority special.—Cromwell *v.* March, 1 Ill. 295; Chandler *v.* Gay, 1 Ill. 88; Martine *v.* Harvey, 12 Ill. App. 587; Love *v.* Burns, 35 Iowa 150; Steel *v.* Steel, 1 Nev. 27; Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895. In Fortune *v.* Killebrew, 86 Tex. 172, 177, 23 S. W. 976, the court said: "In cases in which an extraordinary power of this character — a power simply to enter judgment in a case not brought before it by petition, complaint, or suit, in accordance with the essential principles of the common law, and upon the finding of a distinct tribunal of the parties' own selection — is conferred by statute upon a court of general jurisdiction, we are of the opinion that the jurisdiction should be treated as special; that the statutory authority should be substantially pursued; and that if that authority be exceeded, the judgment entered upon the award should be held void."

Where attachment appropriate at common law.— In the absence of any statutory provision on the subject, it was held that an award which was made a rule of court would be enforced by entering judgment thereon, in cases where, at common law, attachments would have been granted for non-performance. Gibbs *v.* Berry, 35 N. C. 388; Simpson *v.* McBee, 14 N. C. 454. See also Jackson *v.* McLean, 96 N. C. 474, 1 S. E. 785; Lusk *v.* Clayton, 70 N. C. 184.

Repeal of statute after submission.— After the parties have entered into a submission under a statute which permits judgment to be entered on the award, a repeal of the statute does not prevent a subsequent entry of judgment, because the parties are deemed to have made the law at the time of the submission a part of the contract, and to have acquired a vested right to the remedies then in force, or others equivalent thereto, which could not be destroyed by the legislative action. Tennant *v.* Divine, 24 W. Va. 387.

19. Award must be within scope of statute. — *Alabama.*— Halsill *v.* Massey, 2 Ala. 300; Lamar *v.* Nicholson, 7 Port. (Ala.) 158; Davis *v.* McConnell, 3 Stew. (Ala.) 492.

Florida.— Coxetter *v.* Huertas, 14 Fla. 270.

Georgia.— Halloran *v.* Bray, 29 Ga. 422.

Illinois.— Weinz *v.* Dopler, 17 Ill. 111; Smith *v.* Douglass, 16 Ill. 34.

Maine.— Stanwood *v.* Mitchell, 59 Me. 121.

Massachusetts.— Eaton *v.* Arnold, 9 Mass. 519.

New York.— Camp *v.* Root, 18 Johns. (N. Y.) 22.

North Carolina.— Knight *v.* Holden, 104 N. C. 107, 10 S. E. 90; Jackson *v.* McLean, 96 N. C. 474, 1 S. E. 785; Metcalf *v.* Guthrie, 94 N. C. 447.

Pennsylvania.— Climenson *v.* Climenson, 163 Pa. St. 451, 35 Wkly. Notes Cas. (Pa.) 471, 30 Atl. 148; Brendlinger *v.* Yeagley, 53 Pa. St. 464; Marshall *v.* Bozorth, 17 Pa. St. 409.

Texas.— Owens *v.* Withee, 3 Tex. 161.

United States.— Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

Award partly within statute.— Where some of the matters submitted and passed on by the arbitrators are outside the scope of the statute, judgment can be entered only on such portion as comes within the statute, leaving the rest to be enforced at common law. Dorr *v.* Hill, 62 N. H. 506; Kincaid *v.* Smith, 4 Humphr. (Tenn.) 150. See also Coulter *v.* Hitchens, 3 Harr. (Del.) 70.

Judgment by consent.— Where matters in a pending suit are referred to arbitrators, judgment may be entered on the award by consent of the parties, solemnly given *in judicio*, although the award be not within the statute. Dudley *v.* Farris, 79 Ala. 187; Wilson *v.* Williams, 66 Barb. (N. Y.) 209; Townsend *v.* Moore, 13 Tex. 36. See also Thompson *v.* Greene, 85 Ala. 240, 4 So. 735. But jurisdiction to enter judgment on the award cannot be given by consent where no action is pending. Sargent *v.* Hampden, 29 Me. 70. And see Hay *v.* Cole, 11 B. Mon. (Ky.) 70. See also *supra*, II, J, 2.

20. Compliance with statutory requirements.— *Alabama.*— Ehrman *v.* Stanfield, 80 Ala. 118; Dudley *v.* Farris, 79 Ala. 187.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

California.— Kreiss *v.* Hotaling, 96 Cal. 617, 31 Pac. 740; Fairchild *v.* Doten, 42 Cal. 125; Ryan *v.* Dougherty, 30 Cal. 218; Heslep *v.* San Francisco, 4 Cal. 1.

Georgia.— Osborn, etc., Mfg. Co. *v.* Blanton, 109 Ga. 196, 34 S. E. 306; Crane *v.* Barry, 47 Ga. 476.

Illinois.— Moody *v.* Nelson, 60 Ill. 229; Low *v.* Nolte, 15 Ill. 368; Martine *v.* Harvey, 12 Ill. App. 587; Forman Lumber Co. *v.* Ragsdale, 12 Ill. App. 441.

(II) *What Courts Can Enter Judgment.* No courts can enter judgment on an award except such as are authorized to do so by statute.[21] Where the parties are allowed to name the court to which the award shall be returned, the court named is the only one authorized to enter the judgment.[22]

Indiana.—Coffin *v.* Woody, 5 Blackf. (Ind.) 423.

Iowa.— Foust *v.* Hastings, 66 Iowa 522, 24 N. W. 22; Love *v.* Burns, 35 Iowa 150; McKnight *v.* McCullough, 21 Iowa 111; Fink *v.* Fink, 8 Iowa 312; Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93.

Kansas.— Morgan *v.* Smith, 33 Kan. 438, 6 Pac. 569.

Kentucky.— Carson *v.* Carson, 1 Metc. (Ky.) 434; Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126.

Maine.— Field *v.* Bissell, 36 Me. 593.

Massachusetts.— Franklin Min. Co. *v.* Pratt, 101 Mass. 359; Deerfield *v.* Arms, 20 Pick. (Mass.) 480, 32 Am. Dec. 228; Shearer *v.* Mooers, 19 Pick. (Mass.) 308; Short *v.* Pratt, 6 Mass. 496; Jones *v.* Hacker, 5 Mass. 264; Monosiet *v.* Post, 4 Mass. 532.

Michigan.— Gibson *v.* Burrows, 41 Mich. 713, 3 N. W. 200; McGunn *v.* Hanlin, 29 Mich. 476.

Minnesota.— Minneapolis, etc., R. Co. *v.* Cooper, 59 Minn. 290, 61 N. W. 143; Barney *v.* Flower, 27 Minn. 403, 7 N. W. 823.

Nebraska.— Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388.

Nevada.— Steel *v.* Steel, 1 Nev. 27.

New Hampshire.— Atwood *v.* York, 4 N. H. 50.

New York.— Ocean House Corp. *v.* Chippu, 5 Hun (N. Y.) 419; Goodsell *v.* Phillips, 49 Barb. (N. Y.) 353, 3 Abb. Pr. N. S. (N. Y.) 147; Matter of Schafer, 3 Abb. Pr. N. S. (N. Y.) 234; Hollenback *v.* Fleming, 6 Hill (N. Y.) 303. And see French *v.* New, 20 Barb. (N. Y.) 481; Jones *v.* Cuyler, 16 Barb. (N. Y.) 576.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.—Henneigh *v.* Kramer, 50 Pa. St. 530; Stokely *v.* Robinson, 34 Pa. St. 315; Marshall *v.* Bozorth, 17 Pa. St. 409; Benjamin *v.* Benjamin, 5 Watts & S. (Pa.) 562; Okison *v.* Flickinger, 1 Watts & S. (Pa.) 257; Richardson *v.* Cassily, 3 Watts (Pa.) 320; Coleman *v.* Lukens, 4 Whart. (Pa.) 347; White *v.* Shriver, 2 Watts (Pa.) 471.

Texas.— Anderson *v.* Ft. Worth, 83 Tex. 107, 18 S. W. 483; Thompson *v.* Seay, (Tex. Civ. App. 1894) 26 S. W. 895.

Vermont.— Lazell *v.* Houghton, 32 Vt. 579.

Wisconsin.— Darling *v.* Darling, 16 Wis. 644.

United States.— Banert *v.* Eckert, 4 Wash. (U. S.) 325, 2 Fed. Cas. No. 837.

England.— Clarke *v.* Baker, 1 Hurl. & W. 215.

Substantial compliance.— But usually a substantial compliance with the statute is regarded as sufficient, and mere technical irregularities will not defeat the judgment.

Alabama.—Crook *v.* Chambers, 40 Ala. 239; Tuskaloosa Bridge Co. *v.* Jemison, 33 Ala. 476.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

California.—Kreiss *v.* Hotaling, 96 Cal. 617, 31 Pac. 740.

Kentucky.— Sims *v.* Banta, 9 Ky. L. Rep. 286.

Ohio.— Western Female Seminary *v.* Blair, 1 Disn. (Ohio) 370.

Pennsylvania.— Woelfel *v.* Hammer, 159 Pa. St. 448, 28 Atl. 147; Wilson *v.* Brown, 82 Pa. St. 437. In Wall *v.* Fife, 37 Pa. St. 394, it was held that, in the absence of any jurisdictional defect, a judgment entered on an award was not absolutely void because of technical irregularities in the proceedings, but voidable only.

Texas.— Forshey *v.* Galveston, etc., R. Co., 16 Tex. 516. Failure to comply with a mere directory provision will not prevent entry of a binding judgment on the award. Hall *v.* Morris, 30 Tex. 280.

Washington.—Bachelder *v.* Wallace, 1 Wash. Terr. 107.

But see Monosiet *v.* Post, 4 Mass. 532; Hollenback *v.* Fleming, 6 Hill (N. Y.) 303.

21. Statute controls.— Gunter *v.* Sanchez, 1 Cal. 45; Marshall *v.* Hicks, 61 Ga. 72.

Justice of the peace.— Under some statutes, justices are given such authority. Whitis *v.* Culver, 25 Iowa 30; Van Horn *v.* Bellar, 20 Iowa 255; King *v.* Hampton, 4 Greene (Iowa) 401. In Illinois it was held that a justice of the peace could render judgment on an award only in cases pending before him upon a reference by the parties. Shirk *v.* Trainer, 20 Ill. 301; Weinz *v.* Dopler, 17 Ill. 111. And in New Hampshire it was held that a statute authorizing justices of the peace to render judgment on the report of referees, whenever the subject submitted before them was under two hundred dollars in amount, was not in violation of a constitutional provision limiting the jurisdiction of justices in civil causes, to cases where the damages demanded should not exceed four pounds, and in which title to real estate was not involved. Hayes *v.* Bennett, 2 N. H. 422.

But, where the statute does not confer such authority on justices of the peace, a judgment rendered on an award by a justice of the peace is void. Van Winkle *v.* Beck, 3 Ill. 488; Worthen *v.* Stevens, 4 Mass. 448. And a statute authorizing "courts of record" to enter judgment on awards does not confer such authority on a justice of the peace. Hollingsworth *v.* Stone, 90 Ind. 244; Richards *v.* Reed, 39 Ind. 330; Hubbel *v.* Baldwin, Wright (Ohio) 86.

22. Named by parties.— Morgan *v.* Smith, 33 Kan. 438, 6 Pac. 569.

Alternative designation.— Where a submission to arbitration, by parties residing in

c. Effect of Statutes on Right to Common-Law Remedies. A statute providing for arbitration proceedings does not, in the absence of an express provision to that effect, abrogate the common law. The methods are cumulative, and the parties may still proceed in accordance with the common law.[23] Consequently, it is the general rule that an award not enforceable in the manner provided by statute, because of failure to comply with the statutory requirements, may, neverthe-

the same county, provided that a justice of the peace should enter judgment for the amount of the award in case such award did not exceed five hundred dollars, and that if it exceeded the jurisdiction of a justice "judgment shall be entered in any court having jurisdiction of the same," it was held that it was competent for the district court of that county to enter judgment, the amount awarded being seven hundred and forty-one dollars. McKnight *v.* McCullough, 21 Iowa 111, 112.

Submission by residents of another county. — Where the agreement of the parties designates the court to which the award is to be returned, such agreement will control in that respect, and if, in fact, the losing party do not reside in the county, to the superior court of which the award is made returnable, such party will be held to admit a residence in such county, in so far as may be necessary, as between the parties themselves, to uphold the jurisdiction of such court to enter judgment on the award. McMillan *v.* Allen, 98 Ga. 405, 25 S. E. 505. To the same effect see Sperry *v.* Ricker, 4 Allen (Mass.) 17.

23. Cumulative methods.—*Alabama.*—Shaw *v.* State, 125 Ala. 80, 28 So. 390; Graham *v.* Woodall, 86 Ala. 313, 5 So. 687; Ehrman *v.* Stanfield, 80 Ala. 118; Byrd *v.* Odem, 9 Ala. 755; Martin *v.* Chapman, 1 Ala. 278.

Arkansas.— Wilkes *v.* Cotter, 28 Ark. 519.

California.— Peachy *v.* Ritchie, 4 Cal. 205.

Colorado.— McClelland *v.* Hammond, 12 Colo. App. 82, 54 Pac. 538.

Indiana.— Webb *v.* Zeller, 70 Ind. 408; Boots *v.* Canine, 58 Ind. 450; Hawes *v.* Coombs, 34 Ind. 455; Miller *v.* Goodwine, 29 Ind. 46; Carson *v.* Earlywine, 14 Ind. 256; Francis *v.* Ames, 14 Ind. 251; Saunders *v.* Heaton, 12 Ind. 20; Griggs *v.* Seeley, 8 Ind. 264; Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253; Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Iowa.— Foust *v.* Hastings, 66 Iowa 522, 24 N. W. 22.

Kentucky.— Thomasson *v.* Risk, 11 Bush (Ky.) 619; Royse *v.* McCall, 5 Bush (Ky.) 695; Overly *v.* Overly, 1 Metc. (Ky.) 117; Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126; Logsdon *v.* Roberts, 3 T. B. Mon. (Ky.) 255; Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262.

Maine.—Day *v.* Hooper, 51 Me. 178; Bowes *v.* French, 11 Me. 182.

Michigan.— Galloway *v.* Gibson, 51 Mich. 135, 16 N. W. 310.

Missouri.— Williams *v.* Perkins, 83 Mo. 379.

Nebraska.— Burkland *v.* Johnson, 50 Nebr. 858, 70 N. W. 388; Connecticut F. Ins. Co. *v.* O'Fallon, 49 Nebr. 740, 69 N. W. 118.

New Hampshire.— Dorr *v.* Hill, 62 N. H. 506.

New York.— New York Lumber, etc., Co. *v.* Schnieder, 119 N. Y. 475, 24 N. E. 4, 29 N. Y. St. 596; Wood *v.* Tunnicliff, 74 N. Y. 38; Howard *v.* Sexton, 4 N. Y. 157; Burhans *v.* Union Free School Dist. No. 1, 24 N. Y. App. Div. 429, 48 N. Y. Suppl. 702 [*affirmed* in 59 N. E. 1119]; Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470; Giles Lithographic, etc., Co. *v.* Recamier Mfg. Co., 14 Daly (N. Y.) 475; Britton *v.* Hooper, 25 Misc. (N. Y.) 388, 55 N. Y. Suppl. 493; Box *v.* Costello, 6 Misc. (N. Y.) 415, 27 N. Y. Suppl. 293; Cope *v.* Gilbert, 4 Den. (N. Y.) 347; Wells *v.* Lain, 15 Wend. (N. Y.) 99.

Ohio.— State *v.* Jackson, 36 Ohio St. 281; Brown *v.* Kincaid, Wright (Ohio) 37; Hassenpflug *v.* Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200.

Pennsylvania.— McCune *v.* Lytle, 197 Pa. St. 404, 47 Atl. 190; Babb *v.* Stromberg, 14 Pa. St. 397; Richardson *v.* Cassily, 3 Watts (Pa.) 320.

Texas.— Dockery *v.* Randolph, (Tex. Civ. App. 1895) 30 S. W. 270; Taggard *v.* Williamson, 4 Tex. Civ. App. 337, 23 S. W. 557.

Vermont.— Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699.

Wisconsin.— Allen *v.* Chase, 3 Wis. 249; Winne *v.* Elderkin, 2 Pinn. (Wis.) 248, 52 Am. Dec. 159.

United States.—Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623; Erie Tel., etc., Co. *v.* Bent, 39 Fed. 409.

No judicial sanction is required to give force and effect to a common-law award. Sheffield *v.* Clark, 73 Ga. 92; North Yarmouth *v.* Cumberland, 6 Me. 21.

Oral submission collateral to submission under rule of court.— A parol agreement, to submit the determination of a boundary line, made at the time of the meeting of the arbitrators, on a submission under a rule of court to determine the issues in regard to a trespass, is binding as a common-law arbitration, distinct from the statutory arbitration, upon sufficient proof of the submission and award. Babb *v.* Stromberg, 14 Pa. St. 397.

Presumption as to intention.— Where the submission did not provide that a judgment might be rendered upon the award, and, pending the proceedings before the arbitrators, the parties changed the terms of the submission without the formalities required by the statute, it was held that it would be considered that the parties did not intend to arbitrate their differences under the statute, but according to the common-law rules. Foust *v.* Hastings, 66 Iowa 522, 24 N. W. 22.

less, be enforced at common law,[24] and some courts have gone to the length of holding that a party may elect to rely upon his common-law remedy even where the award might be enforced under the statute.[25] In a number of jurisdictions, however, an exception is drawn to this rule to the effect that, where it clearly appears, either by express stipulation or otherwise, that the parties intended to be bound by the award only in case it should conform to the statute, then, if it fails to comply with the statute, it cannot be enforced at common law, because to do so would change the contract entered into by the parties.[26]

24. Failure to comply with statute.— *Alabama.*— Lamar *v.* Nicholson, 7 Port. (Ala.) 158.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

California.— Kreiss *v.* Hotaling, 96 Cal. 617, 31 Pac. 740.

Georgia.— Osborn, etc., Mfg. Co. *v.* Blanton, 109 Ga. 196, 34 S. E. 306.

Illinois.—Eisenmeyer *v.* Sauter, 77 Ill. 515; Smith *v.* Douglas, 16 Ill. 34; Low *v.* Nolte, 15 Ill. 368, 16 Ill. 475.

Iowa.— Fink *v.* Fink, 8 Iowa 312; Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93; King *v.* Hampton, 4 Greene (Iowa) 401.

Kentucky.— See Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126.

Maine.— Day *v.* Hooper, 51 Me. 178; Tyler *v.* Dyer, 13 Me. 41. See also Bowes *v.* French, 11 Me. 182.

Massachusetts.—Shearer *v.* Mooers, 19 Pick. (Mass.) 308.

Michigan.— Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292; Galloway *v.* Gibson, 51 Mich. 135, 16 N. W. 310.

Nebraska.— Tynan *v.* Tate, 3 Nebr. 388.

New York.— Burnside *v.* Whitney, 21 N. Y. 148; Matter of Schafer, 3 Abb. Pr. N. S. (N. Y.) 234. See also French *v.* New, 20 Barb. (N. Y.) 481.

North Carolina.— Gibbs *v.* Berry, 35 N. C. 388.

Ohio.— Estes *v.* Phillips, 2 Cinc. Super. Ct. (Ohio) 3.

Pennsylvania.— Climenson *v.* Climenson, 163 Pa. St. 451, 35 Wkly. Notes Cas. (Pa.) 471, 30 Atl. 148; Hume *v.* Hume, 3 Pa. St. 144; White *v.* Shriver, 2 Watts (Pa.) 471.

Texas.— Myers *v.* Easterwood, 60 Tex. 107; Dockery *v.* Randolph, (Tex. Civ. App. 1895) 30 S. W. 270.

Wisconsin.— Darling *v.* Darling, 16 Wis. 644 [*overruling* Allen *v.* Chase, 3 Wis. 249].

United States.— See Banert *v.* Eckert, 4 Wash. (U. S.) 325, 2 Fed. Cas. No. 837.

Award partially within statute.— In Dorr *v.* Hill, 62 N. H. 506, it was held that, where an award contained matters which could be submitted under the statute and other matters which could be submitted only at common law, that portion of the award which was within the statute might be enforced by statutory judgment, and the rest by an action as at common law. To same effect see Coulter *v.* Hitchens, 3 Harr. (Del.) 70; Kincaid *v.* Smith, 4 Humphr. (Tenn.) 150.

25. Common-law remedy where statutory remedy available.— Griggs *v.* Seeley, 8 Ind. 264; Dickerson *v.* Tyner, 4 Blackf. (Ind.) 253; Burnside *v.* Whitney, 21 N. Y. 148; McCune *v.* Lytle, 197 Pa. St. 404, 47 Atl. 190.

Contra, under the Iowa statute, where a submission and award are made in conformity with the statute, the person in whose favor it is entered, after the award has been rendered and placed in the hands of the clerk, cannot sue thereon, but must enter up judgment as provided by the statute. Older *v.* Quinn, 89 Iowa 445, 56 N. W. 660.

Party must elect his remedy.— One, of course, will not be allowed to resort to both remedies at the same time. See Hume *v.* Hume, 3 Pa. St. 144. In England, under 9 & 10 Wm. III, c. 15, a party could not enforce an award by action and attachment at the same time. See *supra*, XI, E, 1, e.

26. Intention of parties — Statutory remedy exclusive.— *California.*—Williams *v.* Walton, 9 Cal. 142, wherein the court said: "We cannot undertake to decide that the parties in this case would ever have agreed to a common-law submission."

Colorado.— Hepburn *v.* Jones, 4 Colo. 98.

Indiana.— Bash *v.* Van Osdol, 75 Ind. 186; Healy *v.* Isaacs, 73 Ind. 226; Anderson *v.* Anderson, 65 Ind. 196; Boots *v.* Canine, 58 Ind. 450; Shroyer *v.* Bash, 57 Ind. 349; Estep *v.* Larsh, 16 Ind. 82; Francis *v.* Ames, 14 Ind. 251; Coats *v.* Kiger, 14 Ind. 179.

Kentucky.— Sims *v.* Banta, 9 Ky. L. Rep. 286.

Maine.— Sargent *v.* Hampden, 32 Me. 78.

Massachusetts.—Deerfield *v.* Arms, 20 Pick. (Mass.) 480, 32 Am. Dec. 228. And see Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49.

Minnesota.— Holdridge *v.* Stowell, 39 Minn. 360, 40 N. W. 259.

Pennsylvania.— Benjamin *v.* Benjamin, 5 Watts & S. (Pa.) 562, 564 (wherein the court said: "To consider the award made here, as under a submission at common law, would go to deprive the defendant of the benefit, which he plainly intended to secure to himself, of excepting to it and having it set aside, if the arbitrators should commit a plain mistake, either in matter of fact, or in matter of law, or in both, by having it expressly declared in the submission, that it was under the Act of 1836"); McKillip *v.* McKillip, 2 Serg. & R. (Pa.) 489. And see Williams *v.* Craig, 1 Dall. (Pa.) 313, 1 L. ed. 153.

Washington.— Under the Washington statute it is held that a statutory award cannot be enforced in any way until judgment has been rendered thereon by the court. Tacoma R., etc., Co. *v.* Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

d. Procedure to Obtain Entry of Judgment — (I) *In General.* The method of proceeding to have judgment entered on an award varies somewhat under the different statutes.[27] The jurisdiction to enter such judgment is summary in its nature, and the general statutes regulating the procedure in ordinary suits and actions are not applicable thereto.[28] Under some statutes a motion for entry of judgment is necessary,[29] but, under others, the judgment is entered, as a matter of course, upon compliance with the preliminary requirements.[30]

(II) *Notice.* Generally, notice to the opposite party is required before a judgment can be entered on the award.[31]

United States.— Erie Tel., etc., Co. *v.* Bent, 39 Fed. 409.

In many of the other cases cited to sustain the general rule the circumstances were such as to make them necessarily in conflict with this exception. See *supra*, note 24.

27. As to objections to entry of judgment upon the award see *supra*, IX, B, 2, d.

Kansas — Amendment of statement of facts.— Upon the hearing of a motion to make the award of arbitrators a rule of the district court, the court may permit an amendment of plaintiff's written statement of facts, so that it will correspond with the award. Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

Louisiana.— The practice in this state was to rule the other party to show cause why judgment should not be entered according to the award when the award was brought in. McMaster *v.* Duncan, 2 Mart. (La.) 264.

Minnesota — Entry in vacation.— After an award has been filed, the court may enter judgment thereon in vacation. Heglund *v.* Allen, 30 Minn. 38, 14 N. W. 57 [*following* Lovell *v.* Wheaton, 11 Minn. 92].

Lost award — Judgment on copy.— When an award made under a rule of court has been lost, judgment may be rendered upon a copy thereof. Little *v.* Gardner, 5 N. H. 415, 22 Am. Dec. 468 [*citing* Hill *v.* Townsend, 3 Taunt. 45, 12 Rev. Rep. 595; Robinson *v.* Davis, 1 Str. 526].

Lost submission.— In Eaton *v.* Hall, 5 Metc. (Mass.) 287, it was held that the court ought to take cognizance of an award upon satisfactory evidence that an agreement of submission was signed, acknowledged, and certified according to the statute, and had been lost, and on proof of a copy thereof, or of its contents so full and complete as to be substantially a copy.

Waiver of proof of submission.— In Montgomery County *v.* Carey, 1 Ohio St. 463, it was held that, on a motion for judgment, the execution of the submission need not be shown if the requirement was waived by the adverse party.

28. Jurisdiction summary.— Janes *v.* Richard, 3 La. 486.

Proceeding not a suit or action.— A motion to enter judgment on an award was held not to be a suit within the meaning of the Alabama "stay-law" of Feb. 20, 1866, and, consequently, the court properly refused to withhold judgment until after the time prescribed in that act. Crook *v.* Chambers, 40 Ala. 239. So it was held that, in case of the death of a party to a proceeding, upon an arbitration and judgment entered thereon under the statute, the court could not revive the proceeding or substitute another person in place of the deceased; that the provisions of the code of procedure relating to the revival and continuance of actions did not apply to arbitration proceedings under the statute, and that the equitable power of the court did not authorize such a revival. Manning *v.* Pratt, 18 Abb. Pr. (N. Y.) 344.

No formal pleadings are necessary to the rendition of a decree in pursuance of a statutory award, and a decree is not erroneous because the award is not brought before the court in a supplemental bill. Elrod *v.* Simmons, 40 Ala. 274; Mendenhall *v.* Smith, Minor (Ala.) 380.

29. Motion necessary.— Brace *v.* Stacy, 56 Wis. 148, 14 N. W. 51.

Motion oral or written.— A motion to make an award a rule or order of the circuit court may be made either orally or in writing, and is not subject to demurrer. Martin *v.* Bevan, 58 Ind. 282.

Judgment by consent.— In Hughes *v.* Bywater, 4 Hill (N. Y.) 551, where a bond of submission to arbitrators contained a stipulation that, in case the award was not paid or fulfilled, judgment for the penalty of the bond might be forthwith entered up in the supreme court, it was held that the prevailing party was at liberty to perfect judgment in vacation immediately after the award, without a special motion to the court. And in Lovell *v.* Wheaton, 11 Minn. 92, it was held that when an award of arbitrators was filed with the clerk of the district court as provided by the statute, the court had jurisdiction thereof, and the parties might waive all objections to the award on account of formal errors and irregularities, and authorize the clerk to enter judgment without confirmation by the court.

30. Judgment as matter of course.— Carsley *v.* Lindsay, 14 Cal. 390; Anderson *v.* Beebe, 22 Kan. 768; Laine *v.* Shrock, Walk. (Miss.) 316.

31. Notice necessary.— *Illinois.*— Forman Lumber Co. *v.* Ragsdale, 12 Ill. App. 441.

Missouri.— Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

New York.—Anonymous, 5 Wend. (N. Y.) 102; *Ex p.* Wallis, 6 Cow. (N. Y.) 581; Knight *v.* Carey, 1 Cow. (N. Y.) 39. But see Anonymous, 6 Wend. (N. Y.) 520, wherein it

(III) *TIME OF ENTRY.* Where the statute prescribes that the judgment shall not be entered until certain things have been done, or a specified time has elapsed, it is error to enter judgment sooner.[32] And, on the other hand, if the statute specifies that the judgment shall be entered within a certain time, no valid judgment can be entered after the expiration of such period.[33]

(IV) *COMPELLING ENTRY OF JUDGMENT BY MANDAMUS.* Where a court

was held that notice was not necessary where a term had intervened since the publication of the award.

Ohio.— Hubbel *v.* Baldwin, Wright (Ohio) 86.

Wisconsin.— Brace *v.* Stacy, 56 Wis. 148, 14 N. W. 51.

As to publication and service of the award see *supra*, VI, G.

Kentucky — Sufficiency of notice.— Under the statute requiring immediate delivery of a copy of an award, and that the court cannot enter judgment thereon until fifteen days after such delivery to the party, it is held that if the copy be not delivered at the time the award is made, but the party has the benefit of it fifteen days before the court meets, the object of the law is satisfied, and the court ought to enter judgment on the award. Wrigglesworth *v.* Morton, 2 Bibb (Ky.) 157.

Change of time of holding court.— Where a notice was given that a motion would be presented to the court on the first Monday of May for entry of judgment on an award, and the legislature subsequently changed the time of holding such court from the first until the second Monday, the notice was held to be sufficient. Price *v.* White, 27 Mo. 275.

Judgment at adjourned term.— Where an award was made the judgment of the court at an adjourned term, after notice given to defendant between the regular and the adjourned term, such notice was held to be sufficient. Green *v.* Shields, 37 Ga. 35.

Waiver by appearance.— Appearance on a motion to confirm an award, without objecting to the want of notice, is a waiver of such notice. Brace *v.* Stacy, 56 Wis. 148, 14 N. W. 51.

Agreement for judgment at term of submission.— If parties agree that the award shall be returned and entered as the judgment of the court, at the same term at which the submission is entered, it is no objection to the judgment of that term that one of the parties was not present at the return and judgment. Keans *v.* Rankin, 2 Bibb (Ky.) 88.

Notice not necessary.— Under some statutes, notice is not essential. Hart *v.* Stewart, 13 La. Ann. 37; Kelly *v.* Morse, 3 Nebr. 224.

32. Premature entry erroneous.— Nelson *v.* Hinesley, 3 Blackf. (Ind.) 432; Middleton *v.* Hume, 3 J. J. Marsh. (Ky.) 221; Alexander *v.* Witherspoon, 30 Tex. 291; Brulay *v.* Brooks, (Tex. Civ. App. 1899) 50 S. W. 647; Williams *v.* McPherson, 2 Ont. Pr. 49.

Waiver of provision.— Premature entry of judgment is erroneous unless the provision as to time of entry is waived. Middleton *v.* Hume, 3 J. J. Marsh. (Ky.) 221. Thus, where plaintiff had moved to set aside an award against him at the next term after it was returned, it was held that final judgment thereon might be entered, on overruling the motion, before the end of the term, though the statute provided that the award might be vacated on complaint made "before the end of the term of the court next after such award be made and returned to such court," as the motion invited action on the award, and plaintiff could not complain that judgment could not be entered until the end of the term. Hollingsworth *v.* Willis, 64 Miss. 152, 8 So. 170.

Judgment not void.— Under a statute allowing submissions and awards to be filed in court, and directing the court, if proper, to enter judgment thereon at the next term after filing, it was held that a due filing gave the court jurisdiction, and that an entry of judgment at the same term, though erroneous, was not void, and was, therefore, good in a collateral proceeding. Gibbon *v.* Dougherty, 10 Ohio St. 365.

33. Entry after expiration of time.— *In re* Taylor, 9 Mo. App. 589, wherein it was held that, where judgment was entered more than one year after publication of the award, a motion to set it aside for irregularity saved the point, though no motion in arrest or for a new trial was filed.

No validity imparted by recommittal.—Under a statute in Maine, permitting parties to enter into a voluntary arbitration and have the award returned to the district court for acceptance within one year, it was held that if the award is not returned within the year it has no validity, and no force can be imparted to it, nor any jurisdiction subsequently vested in the arbitrators, by recommitting the award which has been returned after such time. Field *v.* Bissell, 36 Me. 593.

Texas — Object of statute.— The Texas arbitration statute which provided for the filing of the submission with the clerk of the district court and the entry of judgment thereon at the first term of court thereafter, was held to be intended, as to the entry of judgment, to prevent it from being entered before the losing party should have an opportunity of filing his objections to the award, and, therefore, the fact that the judgment was not entered until the second succeeding term, allowing six months' additional time within which to make objections, was held not to furnish such losing party any ground for impeachment of the award and judgment when thereafter drawn in question in an action upon the same subject-matter. Hall *v.* Morris, 30 Tex. 280.

improperly refuses to enter judgment on an award, it may be compelled to do so by mandamus.[34]

e. The Judgment. The judgment must conform to the award,[35] and if the award be conditional, so must be the judgment.[36]

f. Enforcement of Judgment. A judgment entered on an award may be enforced by execution as in the case of any other judgment.[37]

XII. PAROL EVIDENCE TO VARY OR EXPLAIN AWARD.

A. Admissibility — 1. In General. Where an award is in writing and expressed in unambiguous terms, and is not attacked on any of the grounds on which awards may be set aside, it is itself the best evidence of what the arbitrators intended and decided, and parol evidence is not admissible to vary or control its terms;[38] and

34. Dudley *v.* Farris, 79 Ala. 187; Dorr *v.* Hill, 62 N. H. 506. But see Farwell's Petition, 2 N. H. 123. See also, generally, MANDAMUS.

Notice to losing parties.— In mandamus to compel entry of judgment on an award, notice must be given to the losing parties; but, they having been fully heard on the petition, a continuance for formal notice is unnecessary. Dorr *v.* Hill, 62 N. H. 506.

35. **Conformity to award.**—Lamar *v.* Nicholson, 7 Port. (Ala.) 158; Nelson *v.* Andrews, 2 Mass. 164; Bouck *v.* Bouck, 57 Minn. 490, 59 N. W. 547.

Award directing mutual payments.— In entering judgment upon an award which determines that each party is entitled to recover of the other certain sums, judgment should be entered merely for the difference in favor of the party entitled to recover the greater sum. Rone *v.* Hines, 7 Ky. L. Rep. 93.

Release of part of award.— Judgment may be rendered on an award for a less sum than is awarded therein, if the prevailing party will release the difference. Phelps *v.* Goodman, 14 Mass. 252.

As to the power of the court to modify the award see *supra*, IX, B, 2, d, (II).

36. **Conditional judgment.**— Com. *v.* Pejepscut, 7 Mass. 399.

Award payable in instalments.— Where arbitrators awarded a sum of money payable in several annual instalments, it is error to order judgment for the whole amount payable immediately. Bouck *v.* Bouck, 57 Minn. 490, 59 N. W. 547.

37. **By execution.**—King *v.* Jemison, 33 Ala. 499; Com. *v.* Pejepscut, 7 Mass. 399. See also, generally, EXECUTIONS.

Necessity for judgment before execution.— An award, under the Pennsylvania act of 1705, cannot be executed until a judgment is entered upon it, and an execution issued before judgment in such case is void. Book *v.* Edgard, 3 Watts (Pa.) 29. But where the arbitration was not under that act, and the submission provided for the immediate issuance of execution, it was held that judgment on the award was not necessary to entitle the prevailing party to execution. Gallup *v.* Reynolds, 8 Watts (Pa.) 424.

Attachment when execution not adequate. —Where the writ of execution is not adequate, the court may grant a rule against the losing party to comply with the award, and, on his failure to do so, may attach him for the contempt. Burrows *v.* Guthrie, 61 Ill. 70; Shriver *v.* State, 9 Gill & J. (Md.) 1.

As to attachment in general see *supra*, XI, E, 1.

38. **Award best evidence of decision.**— *Alabama.*— Collier *v.* White, 97 Ala. 615, 12 So. 385; King *v.* Jemison, 33 Ala. 499. Where a settlement was based upon an arbitration and award in writing, it was held that evidence could not be given of the terms of the settlement without producing the award. Smith *v.* McGehee, 14 Ala. 404.

Georgia.— Mulligan *v.* Perry, 64 Ga. 567; Cobb *v.* Dortch, 52 Ga. 548.

Illinois.— Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762.

Maine.— Comery *v.* Howard, 81 Me. 421, 17 Atl. 318; Buck *v.* Spofford, 35 Me. 526.

Massachusetts.—Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Parker *v.* Parker, 103 Mass. 167; Fuller *v.* Wheelock, 10 Pick. (Mass.) 135; Ward *v.* Gould, 5 Pick. (Mass.) 291; Wiswall *v.* Hall, Quincy (Mass.) 27. The admissions of one of the parties to an award, as to the meaning and intention of the arbitrators, are inadmissible in evidence to control its terms. Clark *v.* Burt, 4 Cush. (Mass.) 396.

New Hampshire.— Aldrich *v.* Jessiman, 8 N. H. 516.

New York.— Doke *v.* James, 4 N. Y. 568; Barlow *v.* Todd, 3 Johns. (N. Y.) 367, 2 Johns. Ch. (N. Y.) 551.

North Carolina.— Scott *v.* Green, 89 N. C. 278; Patton *v.* Baird, 42 N. C. 255.

Vermont.— May *v.* Miller, 59 Vt. 577, 7 Atl. 818.

United States.— Kingston *v.* Kincaid, 1 Wash. (U. S.) 448, 14 Fed. Cas. No. 7,821.

England.— Holgate *v.* Killick, 7 H. & N. 418, 31 L. J. Exch. 7; Gordon *v.* Mitchell, 3 Moore C. P. 241, 4 E. C. L. 548; Doe *v.* Preston, 1 Saund. & C. 77.

Canada.— Keep *v.* Hammond, 9 U. C. L. J. 157; Smith *v.* Forbes, 8 U. C. L. J. 72.

Mental reservations of arbitrators.— The arbitrators have no right to make mental reservations whereby to qualify their written award (Campbell *v.* Western, 3 Paige (N. Y.) 124); and so an arbitrator is not permitted

so, where a written submission is couched in clear terms, parol evidence is not admissible to explain the intent and meaning of the parties.[39] However, it often becomes necessary in determining what questions are concluded by the award, or whether the award is in itself binding on the parties, to show by parol evidence what took place before the arbitrators, what was in controversy, and what matters entered into the decision.[40] And where the award is attacked in a proper proceeding for an extrinsic matter for which it may be avoided, parol evidence is, of course, admissible to show the facts.[41]

2. To Sustain Award. Parol testimony is admissible in either direct or indirect proceedings to sustain the award by showing facts as to which it is silent, provided such evidence does not contradict or vary the award.[42] But, where

to testify that the award was not intended to be binding unless the losing party should consent to it (Denman *v.* Bayless, 22 Ill. 300); or that it was intended to reserve a certain matter for future determination (Barlow *v.* Todd, 3 Johns. (N. Y.) 367, 2 Johns. Ch. (N. Y.) 551).

A statutory arbitration and award cannot be proved by parol in a subsequent proceeding involving the same property. Wayte *v.* Wayte, 40 Ark. 163.

The testimony of a subscribing witness to the submission and award is the best evidence of their execution. Tyler *v.* Stephens, 7 Ga. 278.

May show non-compliance with award.— It is competent to introduce evidence to show a non-compliance with the terms of an award, inasmuch as that does not impeach the award but merely goes to show a non-compliance with its terms. Keaton *v.* Mulligan, 43 Ga. 308.

39. Intention of parties.— Furber *v.* Chamberlain, 29 N. H. 405; Leslie *v.* Leslie, 50 N. J. Eq. 155, 24 Atl. 1029; Cobb *v.* Dolphin Mfg. Co., 108 N. Y. 463, 15 N. E. 438; Sessions *v.* Barfield, 2 Bay (S. C.) 94.

What not a variance.— In Sharp *v.* Lipsey, 2 Bailey (S. C.) 113, it was held that where a submission was in writing it might be shown by parol that the parties afterward agreed that the arbitrators should have power to call in an umpire, since such evidence did not vary the submission but only rendered certain that which the parties did not intend to make certain by writing.

40. Per Endicott, J., in Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52. And see *infra*, XII, A, 2 *et seq.*

41. Bridgeport *v.* Eisenman, 47 Conn. 34. And see the cases cited *infra*, XII, A, 3; XII, C.

Methods used to arrive at result.— Where an award is drawn in question in a subsequent action involving the same subject-matter, evidence of the methods employed by the arbitrators in reaching their conclusions is not admissible, as this is not a proper subject of inquiry. Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Calculations or grounds for an award, which are not incorporated in or annexed to it at the time of the delivery, are not to be regarded or received as reasons or grounds to avoid it. Taylor *v.* Nicolson, 1 Hen. & M. (Va.) 67.

Paper taken as part of award.— Where a paper entitled a "General Result," containing a summary of the calculations of the arbitrators, accompanied their award, it was taken as part of it for the purposes of a hearing to set the award aside. Bell *v.* Price, 22 N. J. L. 578.

Declarations by an arbitrator, after making and publishing his award, are incompetent to impeach it. Hubbell *v.* Bissell, 2 Allen (Mass.) 196. See also Lemay *v.* McRae, 16 Ont. 307.

An ex parte statement of the evidence before the arbitrators, sworn to by the counsel of one of the parties, was held to be inadmissible at a hearing to set aside the award. Bell *v.* Price, 22 N. J. L. 578.

42. Evidence not varying award.— Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173; Stone *v.* Atwood, 28 Ill. 30; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578.

To show time of meeting.— Parol evidence is admissible in a proceeding to homologate an award to show that the arbitrators met at the time appointed in the submission, although the award does not show any meeting until a later date. Porter *v.* Dugat, 12 Mart. (La.) 245.

To show why one arbitrator did not sign.— Where an award which was made by two of three arbitrators recited that two arbitrators heard the allegations and proofs and made the award, it was held that parol evidence could be offered to show that the three arbitrators had been present at the hearing and at the final submission of the matters to them, and that the award, though signed by two only, the third one being absent, thinking his power had been revoked, was good and valid. Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405.

To show when award returned.—Where the clerk of the district court omitted to make the usual indorsement on arbitration papers left with him to be filed, the testimony of one of the arbitrators is admissible to show that the award had been returned to the clerk within the time stipulated in the arbitration agreement. Young *v.* Dugan, 1 Greene (Iowa) 152.

Where arbitrator's authority questioned.— Where, in an action on an award, the authority of an arbitrator to make the award is drawn in question, he may be permitted to testify as to the time when, and the circumstances under which, his award was made.

there is no means of clearing up uncertainty in an award except by traveling out of the instrument altogether, and such uncertainty cannot be aided by reference to the submission, the award cannot be upheld by relying entirely on parol evidence.[43]

3. To Show That Award Is Void. Parol evidence is always admissible to show than an award is a mere nullity.[44]

4. To Show Extent of Submission and Award — a. In General. Where it does not certainly appear from the submission or award what matters were submitted to and decided by the arbitrators, parol evidence is admissible to show that fact.[45]

Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214.

43. Uncertainty.—Schuyler *v.* Van der Veer, 2 Cai. (N. Y.) 235. And see Alexander *v.* McNear, 28 Fed. 403.

As to what certainty is required in an award see *supra*, VI, J, 8.

44. Strong *v.* Strong, 9 Cush. (Mass.) 560; *In re* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404.

To show that no final award made.—It may be shown by the testimony of an arbitrator that no final award was made. Shulte *v.* Hennessy, 40 Iowa 352; Huntsman *v.* Nichols, 116 Mass. 521; *In re* Williams, 4 Den. (N. Y.) 194.

Consideration of matters not submitted.— It may be shown by parol that the arbitrators failed to pursue their authority, by considering matters which were not submitted.

Iowa.— Thompson *v.* Blanchard, 2 Iowa 44.

Maine.— Wyman *v.* Hammond, 55 Me. 534; Sawyer *v.* Freeman, 35 Me. 542.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718; Bullitt *v.* Musgrave, 3 Gill (Md.) 31. But see State *v.* Stewart, 12 Gill & J. (Md.) 456.

Massachusetts.— Hubbell *v.* Bissell, 2 Allen (Mass.) 196.

Missouri.— Hinkle *v.* Harris, 34 Mo. App. 223.

Nebraska.— Hall *v.* Vanier, 6 Nebr. 85.

New York.—Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398, 23 N. Y. St. 192; Briggs *v.* Smith, 20 Barb. (N. Y.) 409; New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446; Borrowe *v.* Milbank, 6 Duer (N. Y.) 680, 5 Abb. Pr. (N. Y.) 28; *In re* Williams, 4 Den. (N. Y.) 194; Butler *v.* New York, 7 Hill (N. Y.) 329.

North Carolina.— Walker *v.* Walker, 60 N. C. 255.

England.—Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221 [*affirmed* in L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1].

Failure to consider matters submitted.— It may be shown by parol that the arbitrators failed to pursue their authority by omitting to consider matters which were submitted. Thompson *v.* Blanchard, 2 Iowa 44; Mitchell *v.* Staveley, 16 East 58, 14 Rev. Rep. 287; Ingram *v.* Milnes, 8 East 445; Dresser *v.* Stansfield, 15 L. J. Exch. 274, 14 M. & W. 822.

45. Matters submitted and decided.— *Connecticut.*— Bennett *v.* Pierce, 28 Conn. 315.

Delaware.— Stevens *v.* Gray, 2 Harr. (Del.) 347.

Georgia.— Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173; Keaton *v.* Mulligan, 43 Ga. 308.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Louisiana.— Jackson *v.* Hoffman, 31 La. Ann. 97.

Maine.—Carter *v.* Shibles, 74 Me. 273; Buck *v.* Spofford, 35 Me. 526; McNear *v.* Bailey, 18 Me. 251; Galvin *v.* Thompson, 13 Me. 367.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Leonard *v.* Root, 15 Gray (Mass.) 553; Hale *v.* Huse, 10 Gray (Mass.) 99.

New York.— Morss *v.* Osborn, 64 Barb. (N. Y.) 543.

North Carolina.— Osborne *v.* Calvert, 86 N. C. 170 [*reversing* 83 N. C. 365]; Brown *v.* Brown, 49 N. C. 123.

Pennsylvania.— Converse *v.* Colton, 49 Pa. St. 346.

England.— Martin *v.* Thornton, 4 Esp. 180.

Canada.— But see Bennett *v.* Murray, 5 Nova Scotia 614.

Claims not mentioned in award.— In an action on an award pursuant to a submission of a number of claims between the parties, where the award shows an itemized statement of the claims allowed, upon which a balance is struck, it is competent to show by the arbitrators that other claims not included in the statement were submitted and disallowed. Hammond *v.* Deehan, 78 Me. 399, 6 Atl. 3.

To show what considered on a former arbitration.—Defendant erected a mill-dam which overflowed the land of plaintiff. By agreement defendant was to pay damages which might result, to be assessed by arbitrators chosen by the parties. Three successive arbitraments were had and awards made. In an action upon the last award it appeared on the face of the award that the arbitrators had allowed damages adjudicated on in a prior arbitrament. It was held that parol evidence was admissible, as to what had been considered on a prior award, in order to show how far such award was conclusive. Hoagland *v.* Veghte, 23 N. J. L. 92.

To explain language of submission.— Parol evidence may be given to explain the expression "certain controversies and accounts" in a written submission. Faw *v.* Davy, 1 Cranch C. C. (U. S.) 440, 8 Fed. Cas. No. 4,701.

b. Where Submission Oral. Under an oral submission to arbitration, it may be shown by parol evidence what matters were submitted to the arbitrators.[46] And if the award is also oral, the testimony of the arbitrator is admissible to show what was awarded.[47]

c. Submission of All Matters in Difference. In those jurisdictions wherein an award under a general submission of all matters in difference is regarded as merging such matters only as were actually presented to the arbitrators,[48] parol evidence is admissible to show what matters were, in fact, presented, provided the terms of the award be not varied thereby.[49] But where all matters in difference are regarded as merged whether brought forward or not, parol evidence is, of course, inadmissible.[50]

5. Testimony of Arbitrators — a. In General. The testimony of an arbitrator is, generally, admissible in any case where other parol evidence can be received — except to show his own fraud or misconduct — to prove matters of fact arising in connection with the arbitration.[51]

Interlineations in submission.— Where the effect of a submission and award was drawn in question in an action for damages on account of an alleged interlineation in the submission, it was held that the arbitrators were competent to testify as to the existence of the alleged interlineation at the time of the arbitration. Abel *v.* Fitch, 20 Conn. 90.

Submission extended by parol.— In an action of assumpsit upon promises made subsequent to, and in conformity with, an award, parol testimony to prove that other matters than those contained in the written submission were submitted to the arbitrators is admissible. The gist of the action seems to be neither the submission nor the award, but the subsequent promise for which there was an adequate consideration. The court said: "Had the action been brought for the breach of the agreement contained in the written submission, parol testimony to vary the terms of that submission would have been clearly inadmissible. Or had the suit been brought to recover money due and ascertained through an award of arbitrators for which an *indebitatus assumpsit* would have lain, the written submission must alone have been the basis of that award." Dice *v.* Yarnel, Morr. (Iowa) 241, 244.

46. What matters submitted.— Blackwell *v.* Goss, 116 Mass. 394; Tucker *v.* Gordon, 7 How. (Miss.) 306; Torrence *v.* Graham, 18 N. C. 284; Hall *v.* Mott, Brayt. (Vt.) 81.

Matter not presented to arbitrator.—A matter, not in terms included in a written award rendered upon an oral submission, may be shown by parol evidence not to have been, in fact, brought to the notice of the arbitrators or considered by them. Cook *v.* Jaques, 15 Gray (Mass.) 59; Birkbeck *v.* Burrows, 2 Hall (N. Y.) 63.

Question of fact for jury.— Where the submission is by parol and the award does not, on its face, purport to determine all matters of controversy between the parties, the question whether the matters involved in a subsequent suit were embraced in the submission and award is one of fact for the determination of the jury. Birkbeck *v.* Burrows, 2 Hall (N. Y.) 63.

47. What awarded.— Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; Boughton *v.* Seamans, 9 Hun (N. Y.) 392, which was an action on a parol award, founded on a parol submission. It was held that the question to arbitrators: "What did you agree to?" did not, on its face, call for evidence touching the consultations or reasons of the arbitrators, but only a statement of what the award actually was, there being some dispute as to what the award was, owing to the phraseology in which it was delivered. The question was competent and an answer showing what the award was was admissible.

48. As to the effect of an award under a general submission as a merger of matters not considered see *supra*, IX, A, 2, a, (III), (B).

49. Parol evidence admissible.— *Connecticut.*— Bennett *v.* Pierce, 28 Conn. 315.

Kentucky.— Shackelford *v.* Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.—Mt. Desert *v.* Tremont, 75 Me. 252; Buck *v.* Spofford, 35 Me. 526.

Massachusetts.— Hodges *v.* Hodges, 5 Metc. (Mass.) 205.

New Hampshire.— Cheshire Bank *v.* Robinson, 2 N. H. 126.

North Carolina.— Walker *v.* Walker, 60 N. C. 255.

Pennsylvania.— Dickerson *v.* Rorke, 30 Pa. St. 390.

50. Parol evidence inadmissible.— De Long *v.* Stanton, 9 Johns. (N. Y.) 38; Shelling *v.* Farmer, 1 Str. 646. In Patrick *v.* Batten, 123 Mich. 203, 81 N. W. 1081, it was held that an award under a general submission of all questions in dispute would not be set aside on *ex parte* affidavits tending to show that a certain matter awarded upon was not intended to be submitted.

51. Except to show fraud or misconduct.— *Illinois.*— Spurck *v.* Crook, 19 Ill. 415.

Iowa.— Thompson *v.* Blanchard, 2 Iowa 44.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52.

Pennsylvania.— Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

England.— In Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221 [*affirmed*

b. To Show Fraud or Misconduct. An arbitrator is not a competent witness to prove his own fraud or misconduct,[52] or the misconduct of a party involving also misconduct of the arbitrator.[53] But an arbitrator who has refused to join in the award may testify to acts of partiality or misconduct on the part of other arbitrators.[54]

B. Presumption and Burden of Proof. Where objection is taken to an award proper on its face, every reasonable presumption will be indulged in its favor.[55]

in L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1] Blackburn, J., said: "There is no case or authority that I can find that says an umpire or arbitrator is either incompetent as a witness or privileged from giving testimony as to any matter material to the issue. Of course, any attempt to annoy an arbitrator by asking questions tending to show that he had mistaken the law, or found a verdict against the weight of the evidence, should be at once checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire."

Canada.— *In re* Christie, 22 Ont. App. 21.

To sustain award.— Thus, the testimony of an arbitrator is admissible to sustain his award. Stone *v.* Atwood, 28 Ill. 30; Young *v.* Dugan, 1 Greene (Iowa) 152; Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578. But see Lloyd *v.* Seal, 5 Harr. (Del.) 250. Where the affidavits of the arbitrators are used in support of the award, the court, in its discretion, may permit the arbitrators to be orally examined at the instance of the party impeaching the award. Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713.

To prove mistake.— So, the testimony is held to be admissible to prove a mistake in the award. King *v.* Armstrong, 25 Ga. 264; Pulliam *v.* Pensoneau, 33 Ill. 375; Barrows *v.* Sweet, 143 Mass. 316, 9 N. E. 665; Roop *v.* Brubacker, 1 Rawle (Pa.) 304. And see Jones *v.* Corry, 5 Bing. N. Cas. 187, 3 L. J. C. P. 89, 35 E. C. L. 109. But in Newland *v.* Douglass, 2 Johns. (N. Y.) 62, where an action of assumpsit was brought to recover an amount caused by an arithmetical error of the arbitrators in making up their award, it was held that there was no such remedy at law as an action to recover for such a mistake in case of a submission not within the statute, and, consequently, the testimony of the arbitrators was inadmissible to prove the mistake.

To show award void.—Testimony of the arbitrators is held admissible to show that the award is a mere nullity.

Iowa.— Shulte *v.* Hennessy, 40 Iowa 352.

Massachusetts.— Huntsman *v.* Nichols, 116 Mass. 521; Strong *v.* Strong, 9 Cush. (Mass.) 560.

Nebraska.— Hall *v.* Vanier, 6 Nebr. 85.

New York.— Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398, 23 N. Y. St. 192; Cole *v.* Blunt, 2 Bosw. (N. Y.) 116.

England.— *In re* Lord, 5 E. & B. 404, 1 Jur. N. S. 893, 26 L. J. Q. B. 34, 3 Wkly. Rep. 553, 85 E. C. L. 404; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221 [*affirmed* in L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1].

What matters decided.— Testimony of the arbitrators is admissible to establish what matters were submitted and decided, where that fact is not apparent from the award itself.

Connecticut.— Abel *v.* Fitch, 20 Conn. 90.

Delaware.— Stevens *v.* Gray, 2 Harr. (Del.) 347.

Maine.— Hammond *v.* Deehan, 78 Me. 399, 6 Atl. 3; Buck *v.* Spofford, 35 Me. 526.

Massachusetts.— Hale *v.* Huse, 10 Gray (Mass.) 99.

New York.— New York *v.* Butler, 1 Barb. (N. Y.) 325, 4 How. Pr. (N. Y.) 446; Birkbeck *v.* Burrows, 2 Hall (N. Y.) 63.

North Carolina.— Osborne *v.* Calvert, 83 N. C. 365.

Pennsylvania.— Converse *v.* Colton, 49 Pa. St. 346.

Right to compel testimony.— It was formerly held that, in an action on an award, an arbitrator could not be compelled to give evidence as to matters that occurred before him during the arbitration. Johnson *v.* Durant, 2 B. & Ad. 925, 22 E. C. L. 387, 4 C. & P. 327, 19 E. C. L. 537, 1 L. J. K. B. 47; Wilson *v.* Hinckley, 18 L. T. Rep. N. S. 695.

52. Fraud of arbitrator.—*Georgia.*—Overby *v.* Thrasher, 47 Ga. 10.

Illinois.—Tucker *v.* Page, 69 Ill. 179; Claycomb *v.* Butler, 36 Ill. 100.

Massachusetts.— Bigelow *v.* Maynard, 4 Cush. (Mass.) 317.

Missouri.— Ellison *v.* Weathers, 78 Mo. 115.

Pennsylvania.— Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72.

53. Misconduct of party.—Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72. But the arbitrator may testify as to what took place before him, and as to conduct of the party tending to influence his decision. Spurck *v.* Crook, 19 Ill. 415.

54. Arbitrator not joining in award.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; National Bank of Republic *v.* Darragh, 30 Hun (N. Y.) 29.

55. Presumption in favor of award.— *Connecticut.*— Hall *v.* Merriman, 1 Root (Conn.) 197.

Illinois.—Haywood *v.* Harmon, 17 Ill. 477; Shear *v.* Mosher, 8 Ill. App. 119.

C. Sufficiency of Evidence to Impeach. In order to justify the court in setting aside an award, the fraud or other ground of impeachment must be made out by clear and strong evidence.[56]

XIII. LIABILITY OF ARBITRATORS.

A. General Rule — No Liability. The action of arbitrators in pursuance of a submission of matters in controversy is judicial in its nature, and, therefore, they cannot be held liable in damages to either of the parties for failure to exercise care or skill in the performance of their functions,[57] and, like the judges of the courts,

Massachusetts.— Leonard *v.* Root, 15 Gray (Mass.) 553; Bigelow *v.* Newell, 10 Pick. (Mass.) 348.

Michigan.— Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510.

Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.

Mississippi.— Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286.

New York.— Locke *v.* Filley, 14 Hun (N. Y.) 139; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125. And see Smith *v.* Cooley, 5 Daly (N. Y.) 401.

United States.— Reedy *v.* Scott, 23 Wall. (U. S.) 352, 23 L. ed. 109.

See also *supra*, VI, I.

The burden of proof rests upon the party attacking the award.

Georgia.— Hardin *v.* Almand, 64 Ga. 582; Cobb *v.* Morris, 40 Ga. 671, as to burden to prove mistake.

Iowa.— Gorham *v.* Millard, 50 Iowa 554, as to burden to show mistake.

Louisiana.— New Orleans Elevator Co. *v.* New Orleans, 47 La. Ann. 1351, 17 So. 860.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718, as to burden to prove failure to pursue authority. But where it appeared that one of the arbitrators was disqualified from serving by reason of an interest in the subject-matter, it was held that the burden of proving that such disability was waived rested on the party seeking to uphold the award. Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, 17 Atl. 394.

Massachusetts.— Roberts *v.* Old Colony R. Co., 123 Mass. 552; Boston Water Power Co. *v.* Gray, 6 Metc. (Mass.) 131; Bigelow *v.* Newell, 10 Pick. (Mass.) 348.

Michigan.— Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510.

New York.— Birkbeck *v.* Burrows, 2 Hall (N. Y.) 63.

Pennsylvania.— Liverpool, etc., Ins. Co. *v.* Goehring, 99 Pa. St. 13 (as to fraud, misconduct, or mistake); Rex *v.* Merchants' Ins. Co., 2 Phila. (Pa.) 357, 14 Leg. Int. (Pa.) 332.

Tennessee.— Hardeman *v.* Burge, 10 Yerg. (Tenn.) 201; Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239.

England.— Ingram *v.* Milnes, 8 East 445.

56. Strong evidence necessary.— *Connecticut.*— Bridgeport *v.* Eisenman, 47 Conn. 34.

Georgia.— Overby *v.* Thrasher, 47 Ga. 10.

Illinois.— Claycomb *v.* Butler, 36 Ill. 100.

Iowa.—Tomlinson *v.* Hammond, 8 Iowa 40; Thompson *v.* Blanchard, 2 Iowa 44.

Kentucky.— Johnston *v.* Dulin, 10 Ky. L. Rep. 403.

Maine.— Duren *v.* Getchell, 55 Me. 241.

Michigan.—Brush *v.* Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Beam *v.* Macomber, 33 Mich. 127.

Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Goddard *v.* King, 40 Minn. 164, 41 N. W. 659.

Missouri.— Mitchell *v.* Curran, 1 Mo. App. 453.

Nebraska.— The fact that the party swears that he believes the award has been obtained by fraud, corruption, or other undue means is not acceptable evidence. McDowell *v.* Thomas, 4 Nebr. 542.

New Jersey.— Atkinson *v.* Townley, 1 N. J. L. 444, holding that the uncorroborated assertion of a party against whom an award is made, that there was corruption or unfairness on the part of the arbitrators, is not sufficient.

New York.— Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160.

Pennsylvania.— Bond *v.* Olden, 4 Yeates (Pa.) 243; Williams *v.* Paschall, 3 Yeates (Pa.) 564, 4 Dall. (Pa.) 284, 1 L. ed. 835; Warder *v.* Parker, 2 Yeates (Pa.) 513; Gardner *v.* Lincoln, 5 Phila. (Pa.) 24, 19 Leg. Int. (Pa.) 132.

Tennessee.— Hardeman *v.* Burge, 10 Yerg. (Tenn.) 201; Dougherty *v.* McWhorter, 7 Yerg. (Tenn.) 239.

Vermont.— Young *v.* Kinney, 48 Vt. 22.

United States.—Burchell *v.* Marsh, 17 How. (U. S.) 344, 15 L. ed. 96; Davy *v.* Faw, 7 Cranch (U. S.) 171, 3 L. ed. 305.

England.— Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163.

Canada.— Burr *v.* Gamble, 4 Grant Ch. (U. C.) 626. But *compare* Brown *v.* Gurrier, 7 N. Brunsw. 124, in which the court set aside the award, notwithstanding the evidence was conflicting, it appearing that the consequences of sustaining the award would be more serious than those of setting it aside.

57. Failure to exercise care or skill.— Turner *v.* Goulden, L. R. 9 C. P. 57, 43 L. J. C. P. 60; Tharsis Sulphur, etc., Co. *v.* Loftus, L. R. 8 C. P. 1, 42 L. J. C. P. 6, 27 L. T. Rep. N. S. 549, 21 Wkly. Rep. 109; Pappa *v.* Rose, L. R. 7 C. P. 32, 41 L. J. C. P. 11, 20 Wkly. Rep. 62 [*affirmed* in L. R. 7 C. P. 525, 41 L. J. C. P. 187, 27 L. T. Rep. N. S. 348, 20 Wkly. Rep. 784].

they are exempt from civil liability for the making of any award, although it is claimed to have been the result of fraud, corruption, or an unlawful conspiracy.[58]

B. Exceptions — 1. When Acting in Other Capacity. An arbitrator who acts also in a capacity other than that requiring judicial action — such as agent, receiver, or appraiser — is not exempted from liability for improper action in the latter capacity by reason of the fact that he is also an arbitrator.[59]

2. Forfeiture of Compensation. Although an arbitrator acting judicially is protected from civil liability for his wrongful acts, such acts as have rendered his award unavailing to a party may be relied upon to defeat an action by the arbitrator to recover compensation.[60]

ARBITRATOR. See Arbitration and Award.

ARBITRIUM EST JUDICIUM BONI VIRI, SECUNDUM ÆQUUM ET BONUM. A maxim meaning "An award is the judgment of a good man, according to equity and virtue."[1]

ARCHAIONOMIA. A collection of Saxon laws, published during the reign of Elizabeth, in the Saxon tongue, with a Latin version by Mr. Lambard.[2]

ARCHBISHOP. In English ecclesiastical law, the chief of the clergy in his province, having supreme power, under the crown, of all ecclesiastical causes.[3]

ARCHDEACON. One, next after the bishop, having ecclesiastical authority over the clergy and laity either throughout the province or in some part of it only.[4]

ARCHDEACON'S COURT. In English ecclesiastical law, a court held, in the archdeacon's absence, before a judge appointed by the archdeacon, and called his official.[5]

ARCHES COURT. See Court of Arches.

ARCHITECTS. See Builders and Architects.

ARCHIVES. Public records and papers required or permitted by law to be filed in public places of deposit for preservation and use as evidence of facts.[6]

ARCIFINIES. Landed estates having natural boundaries, such as rivers, mountains, or woods.[7]

ARDENT SPIRITS. Liquors obtained by distillation.[8] (See, generally, Intoxicating Liquors.)

ARE. The present indicative plural of the substantive verb "to be,"[9] which has, however, when applied to a transaction yet to come, a future signification, and is only equivalent to "shall be" or "may be."[10]

58. **Fraud or conspiracy.**— Jones *v.* Brown, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185; Hoosac Tunnel Dock, etc., Co. *v.* O'Brien, 137 Mass. 424, 50 Am. Rep. 323.

Under the English chancery practice, misconduct of an arbitrator was sufficient ground upon which he might be adjudged liable to pay the costs. Lonsdale *v.* Littledale, 2 Ves. Jr. 451.

59. **Agent or receiver.**— Cunningham *v.* Denis, 51 La. Ann. 902, 25 So. 531. See also Phelps *v.* Dolan, 75 Ill. 90; Tope *v.* Hockin, 7 B. & C. 101, 14 E. C. L. 54.

Appraiser or valuer.— Turner *v.* Goulden, L. R. 9 C. P. 57, 43 L. J. C. P. 60. But such appraiser has been held to be criminally liable under a statute directed against corruption or misconduct of arbitrators. Earle *v.* Johnson, 81 Minn. 472, 84 N. W. 332.

An architect acting as a quasi-arbitrator under a building contract has been held not liable to an action for want of skill or care in the performance of his duties. Stevenson *v.* Watson, 4 C. P. D. 148, 48 L. J. C. P. 318, 40 L. T. Rep. N. S. 485, 27 Wkly. Rep. 682.

60. Bever *v.* Brown, 56 Iowa 565, 9 N. W. 911, 41 Am. Rep. 118. See also *supra*, VIII, C, 3, c.

1. Burrill L. Dict. [*citing* 3 Bulst. 64].
2. Wharton L. Lex.
3. Burrill L. Dict.
4. Jacob L. Dict.
5. 3 Bl. Comm. 65.
6. Texas Mexican R. Co. *v.* Jarvis, 60 Tex. 527, 537, 7 S. W. 210.
7. Smith *v.* St. Louis Public Schools, 30 Mo. 290, 303.
8. Sarlls *v.* U. S., 152 U. S. 570, 572, 14 S. Ct. 720, 38 L. ed. 556 [*quoting* Worcester Dict.].
9. Century Dict. See also State *ex rel.* Dawson, 39 Ala. 367, 375.
10. Barzizas *v.* Hopkins, 2 Rand. (Va.) 276, 293.

AREA. An inclosed yard in a house; an open place adjoining a house.[11]

A RESCRIPTIS VALET ARGUMENTUM. A maxim meaning "An argument drawn from original writs in the register is good."[12]

ARG. See ARGUENDO.

ARGUENDO. In arguing; in the course of argument.[13] It is frequently abbreviated "*arg.*"[14]

ARGUMENT. Proof or the means of proving or inducing belief; a course or process of reasoning; an address to a jury or court.[15] (Argument: At Trial, see CRIMINAL LAW; TRIAL. On Appeal or Error, see APPEAL AND ERROR.)

ARGUMENTA IGNOTA ET OBSCURA AD LUCEM RATIONIS PROFERUNT ET REDDUNT SPLENDIDA. A maxim meaning "Arguments bring things hidden and obscure to the light of reason and render them clear."[16]

ARGUMENTATIVE. Indirect; inferential.[17] (Argumentative: Averments — In Indictments or Informations, see INDICTMENTS AND INFORMATIONS; In Pleadings, see EQUITY; PLEADING. Instructions, see CRIMINAL LAW; TRIAL.)

ARGUMENTUM AB AUCTORITATE EST FORTISSIMUM IN LEGE. A maxim meaning "An argument from authority is the strongest in the law."[19]

ARGUMENTUM AB IMPOSSIBILI VALET IN LEGE. A maxim meaning "An argument from an impossibility is of weight in law."[19]

ARGUMENTUM AB INCONVENIENTI PLURIMUM VALET IN LEGE. A maxim meaning "An argument drawn from inconvenience is forcible in law."[20]

ARGUMENTUM A COMMUNITER ACCIDENTIBUS IN JURE FREQUENS EST. A maxim meaning "An argument drawn from common understanding of a thing is common in the law."[21]

ARGUMENTUM A DIVISIONE EST FORTISSIMUM IN JURE. A maxim meaning "An argument from division is of the greatest force in law."[22]

ARGUMENTUM A MAJORI AD MINUS NEGATIVE NON VALET; VALET E CONVERSO. A maxim meaning "An argument from the greater to the less is of no force negatively; affirmatively it is."[23]

ARGUMENTUM A SIMILI VALET IN LEGE. A maxim meaning "An argument from analogy is good in law."[24]

ARID LANDS. See PUBLIC LANDS; WATERS.

ARISE. To proceed; to issue; to spring.[25]

ARMA IN ARMATOS SUMERE JURA SINUNT. A maxim meaning "The laws allow us to take up arms against the armed."[26]

ARMISTICE. A cessation of hostilities between belligerent nations for a considerable time.[27]

ARM OF THE SEA. Where the tide flows and reflows, and so far, only, as the tide flows and reflows.[28]

ARMS. See WEAPONS.

11. Black L. Dict.
12. Adams Gloss. [*citing* Coke Litt. 11*a*].
13. Burrill L. Dict.
Used in the expression "the chief justice . . . says, *arguendo*," etc., in 1 Cyc. 142, note 8.
14. Adams Gloss.
15. Anderson L. Dict.
16. Adams Gloss. [*citing* Coke Litt. 295; Halkerston Max.].
17. Sweet L. Dict.
18. Burrill L. Dict.
19. Abbott L. Dict.
Also written Argumentum ab impossibili, plurimum valet in lege — an argument from impossibility is of very great weight in law. Adams Gloss.
20. Broom Leg. Max.
Applied in Weaver *v.* Gregg, 6 Ohio St. 547, 551, 67 Am. Dec. 355.
21. Morgan Leg. Max.
22. Burrill L. Dict.
23. Morgan Leg. Max.
24. Burrill L. Dict.
25. *In re* Bogart, 2 Sawy. (U. S.) 396, 405, 3 Fed. Cas. No. 1,596.
26. Adams Gloss.
27. Bouvier L. Dict.
28. Adams *v.* Pease, 2 Conn. 481, 484; Hubbard *v.* Hubbard, 8 N. Y. 196, 200.

ARMY AND NAVY

EDITED BY HENRY A. SHARPE

Associate Justice of Supreme Court of Alabama

CROSS-REFERENCES

For Matters Relating to:
Bounties, see BOUNTIES.
Captures and Prize-Money, see WAR.
Claims Against United States, see COURTS; UNITED STATES.
Effect on Adverse Possession:
Of Absence on Military Service, see ADVERSE POSSESSION.
Of Quartering of Troops on Land, see ADVERSE POSSESSION.
Exemptions to Soldiers or Sailors, see ARREST; EXECUTIONS; EXEMPTIONS; PROCESS.
False Personation of Soldier or Veteran, see FALSE PERSONATION.
Land Grants and Warrants, see PUBLIC LANDS.
Martial Law, see WAR.
Military Reservations, see PUBLIC LANDS.
Militia, see MILITIA.
Naturalization of Aliens on Discharge From Service, see ALIENS.
Nuncupative Wills, see WILLS.
Pensions, see PENSIONS.
Preference of Veterans in Appointment to Office, see OFFICERS.
Settlement and Support Under Poor Laws, see POOR PERSONS.
Voting of Soldiers and Sailors, see ELECTIONS.
War, see WAR.

I. POWER TO RAISE AND MAINTAIN.

A. In General. Congress is specifically authorized by the constitution[1] to raise and support armies (subject to the limitation that no appropriation of money to that use shall be for a longer term than two years), to provide and maintain a navy, and to make rules for the government of both forces,[2] and this power is not affected by the amendments.[3]

B. Calling Militia Into Service. By the same instrument authority is given to provide for calling forth the militia,[4] the question whether an exigency has arisen requiring this step being for the exclusive determination of the president,[5] who may vest the power of summoning them in a subordinate.[6] The militia, when in the active service of the United States, may be governed by congress.[7] Where a militiaman, who has been called into the military service of the United States, refuses to attend at a rendezvous, his subjection to military discipline and organization may be compelled by military force.[8]

II. OFFICERS.

A. In General. An officer of the United States is one who holds his place by virtue of an appointment by the president, by one of the courts of justice, or

1. U. S. Const. art. 1, § 8.
2. Rielly's Case, 2 Abb. Pr. N. S. (N. Y.) 334. See also *infra*, VIII, E, 1, a.
3. *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.
4. U. S. Const. art. 1, § 8; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19.
No state legislation is necessary to enable the president to exercise this power. Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571; *In re* Griner, 16 Wis. 423.
5. Vanderheyden *v.* Young, 11 Johns. (N.Y.) 150; Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537. *Contra*, *In re* Opinion of Judges, 8 Mass. 548.
6. Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675.
7. U. S. Const. art. 1, § 8; Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150; Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19. See also *infra*, VIII, F, 2, a.
By whom commanded.— Where the exigencies exist authorizing the employment of the militia by the United States, the militia, unless commanded by the president of the United States in person, can be commanded only by their own officers. *In re* Opinion of Judges, 8 Mass. 548.
The expenses of the militia in the active service of the United States under requisition of the president, are to be borne by the general government. Com. *v.* Pierce, 4 Rand. (Va.) 432.
8. Allen *v.* Colby, 47 N. H. 544; Com. *v.* Andress, 2 Pittsh. (Pa.) 402; McCall's Case, 5 Phila. (Pa.) 259, 20 Leg. Int. (Pa.) 108, 15 Fed. Cas. No. 8,669.

by heads of departments authorized by law to make such appointment.[9] The term "officers," as used in the statutes, has reference to commissioned officers only — that is, officers who hold, as evidence of their right to office, a commission, signed by the president, sealed with the seal, and attested by the secretary of war.[10]

B. Appointment — 1. How Made. The appointment to office can be made only by the executive branch of the government, in the manner approved by the constitution, and not by congressional enactment.[11] The power of appointment is not incident to the president as an exclusive power of his office, but is subject to the advice and consent of the senate,[12] and his appointment does not take effect until after it has been confirmed by the senate.[13]

2. Effect of Appointment — a. In General. A message of the president, informing the senate of the dismissal of a naval officer, and the consent of the senate to the nomination of his successor, followed by a commission in due form, invests the successor with the office, and gives him exclusive right to the pay and allowance attached thereto.[14]

b. Not Retroactive. The appointment of an officer cannot be made retroactive, but takes effect from its confirmation.[15]

c. When Made During Recess of Senate. An officer who is appointed during a recess of the senate and serves until notified that his nomination has been rejected is legally appointed and entitled to the office until notified of his rejection.[16]

d. When Made Provisionally. A volunteer officer may be appointed provisionally, in which case his appointment is limited by the terms which he accepts and under which he acts.[17]

C. Commissions. The appointment of an officer is ordinarily made by granting a commission,[18] an instrument signed by the president, sealed with the seal,

9. U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463; U. S. *v.* Germaine, 99 U. S. 508, 25 L. ed. 482.

Chaplain.—A person employed, by the council of administration at an army post prior to the act of March 2, 1867, to officiate as chaplain is in the service of the United States. U. S. *v.* La Tourrette, 151 U. S. 572, 14 S. Ct. 422, 38 L. ed. 274.

A passed assistant surgeon of the navy is an officer, and a notification by the secretary of the navy is a valid appointment to the office. U. S. *v.* Moore, 95 U. S. 760, 24 L. ed. 588; U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830.

A paymaster's clerk in the naval service is not, in the constitutional sense of the word, an officer of the United States. U. S. *v.* Hendee, 124 U. S. 309, 8 S. Ct. 507, 31 L. ed. 465.

10. Babbitt *v.* U. S., 16 Ct. Cl. 202. See also U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463.

The term may be used to apply to all others than enlisted men, without being limited to persons holding commissions. U. S. *v.* Hendee, 124 U. S. 309, 8 S. Ct. 507, 31 L. ed. 465.

Warrant officers.— In Johnson *v.* U. S., 2 Ct. Cl. 167, it was held that a warrant officer in the navy was an officer within the meaning of 2 U. S. Stat. at L. 390, which fixes the complement of officers for each vessel in service.

Boatswains, gunners, sailmakers, and carpenters are warrant officers in the naval service, and must be appointed by the president. U. S. *v.* Fuller, 160 U. S. 593, 16 S. Ct. 386, 40 L. ed. 549.

11. U. S. *v.* Germaine, 99 U. S. 508, 25 L. ed. 482; Wood *v.* U. S., 15 Ct. Cl. 151; Collins *v.* U. S., 14 Ct. Cl. 568.

A mustering officer has no power to appoint officers without the intervention of the president or other legally constituted appointing power. State *v.* Cobb, 2 Kan. 27.

The senior officer present cannot appoint an acting paymaster in the naval service. Webster *v.* U. S., 28 Ct. Cl. 25.

12. McBlair *v.* U. S., 19 Ct. Cl. 528.

13. Bennett *v.* U. S., 19 Ct. Cl. 379.

14. McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189.

Officer resigning being of unsound mind.— The fact that an officer was of unsound mind when he tendered his resignation does not affect the validity of the appointment of his successor. Blake *v.* U. S., 103 U. S. 227, 26 L. ed. 462 [*affirming* 14 Ct. Cl. 462].

15. Bennett *v.* U. S., 19 Ct. Cl. 379; Young *v.* U. S., 19 Ct. Cl. 145; Burchard *v.* U. S., 19 Ct. Cl. 137; Kilburn *v.* U. S., 15 Ct. Cl. 41; Collins *v.* U. S., 15 Ct. Cl. 22. See also 4 Op. Atty.-Gen. (U. S.) 603.

16. Gould *v.* U. S., 19 Ct. Cl. 593.

17. Greer *v.* U. S., 3 Ct. Cl. 182, wherein it was held that compliance with the conditions of the appointment, which required the officer to pass the examining board, to be confirmed by the senate, and commissioned by the president, was necessary before he could acquire a vested right to the office.

18. O'Shea *v.* U. S., 28 Ct. Cl. 392.

"Warrant" and "commission," outside of naval technicality, are synonymous words. There is no difference, in form, between a

and attested by the secretary of war,[19] which evidences the officer's right to his office.[20] A commission is not essential, however, and an open and unequivocal act of appointment to office is effective even though no commission is issued.[21]

D. Promotion — 1. Qualifications. Seniority of rank alone gives no right to promotion, but the officer must be physically, mentally, and morally qualified therefor.[22]

2. Examination — a. In General. The officer's qualifications in these matters are passed upon by an examining board, which cannot inquire into any fact which occurred prior to the last examination whereby he was promoted, and which was inquired into and passed upon, unless the fact, continuing, shows his unfitness for duty, but may take into consideration all matters arising subsequently in his record which will aid them in determining his mental, moral, and professional qualifications.[23]

b. Reëxamination After Failure to Pass. In case an officer is found, upon examination, not to be professionally qualified for promotion, he is entitled to another examination after a lapse of one year.[24]

c. Approval of Findings by President. The president's approval or disapproval of the findings of the examining board as to the qualifications of an officer for promotion are required before any action can be taken in reference to his promotion.[25]

3. Effect of Brevet Promotion. The promotion of an officer by a brevet does not release him from any duty or service attached to his commission by the regulations or by usage.[26]

E. Rank and Grade — 1. Actual — a. In General. The position and rank of officers depend upon the provisions of positive law.[27]

commission and a warrant, as used in the navy, except that one recites that the appointment is made "by and with the advice and consent of the senate," and the other does not. Both are signed by the president. Brown *v.* U. S., 18 Ct. Cl. 537.

19. **The form is not prescribed by law,** nor is it necessary that the great seal be affixed. O'Shea *v.* U. S., 28 Ct. Cl. 392.

20. Babbitt *v.* U. S., 16 Ct. Cl. 202; Benjamin *v.* U. S., 10 Ct. Cl. 474.

Mates in the naval service are petty officers who are promoted by the secretary of the navy from seamen of inferior grades, and are not entitled to commissions or warrants. U. S. *v.* Fuller, 160 U. S. 593, 16 S. Ct. 386, 40 L. ed. 549.

21. U. S. *v.* Moore, 95 U. S. 760, 24 L. ed. 588 (holding that the certificate of an examining board that the applicant had passed a satisfactory examination, the approval of the board's report by the secretary of the navy, and notice thereof to the applicant, constituted a sufficient appointment, without other evidence of the knowledge or consent of the president); Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; O'Shea *v.* U. S., 28 Ct. Cl. 392 (holding that a letter, from the secretary of war to a chaplain appointed during a recess of the senate, stating that the president has appointed him, is conclusive of that fact); Bennett *v.* U. S., 19 Ct. Cl. 379.

The appointment and commission are distinct acts, and the terms of the commission cannot change the effect of an appointment as defined by the statute authorizing it. Quackenbush *v.* U. S., 177 U. S. 20, 20 S. Ct. 530, 44 L. ed. 654.

Notification of appointment as evidence. — A notification from the secretary of war to one that he was appointed to an office on a certain date is conclusive evidence that he had not had that office prior thereto. State *v.* Cobb, 2 Kan. 27.

22. Steinmetz *v.* U. S., 33 Ct. Cl. 404; Schuetze *v.* U. S., 24 Ct. Cl. 299.

Promotion subject to passing examination. — Where an officer is nominated for promotion subject to the condition that his commission will be withheld until he pass an examination, he will not be promoted until he passes the examination. Crygier *v.* U. S., 25 Ct. Cl. 268.

23. Davis *v.* U. S., 24 Ct. Cl. 442.

First assistant engineers become eligible to examination for promotion in the navy after they have served two years at sea upon a naval steamer, but they are not entitled to be examined until their turn for promotion has arrived or is near at hand. Hunt *v.* U. S., 116 U. S. 394, 6 S. Ct. 406, 29 L. ed. 674.

24. Davis *v.* U. S., 24 Ct. Cl. 442.

25. Jouett *v.* U. S., 28 Ct. Cl. 257.

26. Gratiot *v.* U. S., 4 How. (U. S.) 80, 11 L. ed. 884.

27. Babbitt *v.* U. S., 16 Ct. Cl. 202.

"Office" and "rank" distinguished. — In the army "office" and "rank" are not necessarily identical, but the office has a rank attached to it, expressed by its title, when no other rank is conferred. The office remaining the same, however, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to other officers as to privilege, precedence, or command, or to determine his pay.

b. How and When Obtained. To obtain rank an officer must be eligible for promotion, must pass an examination, must be nominated by the president to the senate, and must be confirmed by that body.[28] He takes rank in his grade, however, from the time the law entitled him to do so, and not necessarily from the time he is actually commissioned.[29]

c. Not a Vested Right. The relative rank of officers is not a vested right nor a matter of contract, but is subject to regulation by the legislation of congress and to the action of the executive departments in the scope of their discretion.[30]

2. Brevet. Brevet rank is conferred, for special and meritorious service, by a commission from the president, under authority of an act of congress. It does not entitle the holder to corresponding pay or command except under special circumstances defined by law,[31] and may relate back to a period antecedent to the actual date of the appointment and commission.[32] An officer regularly commissioned is of higher rank than one holding the same commission by brevet.[33]

F. Resignation — 1. What Constitutes. To constitute a valid resignation, there must be some unequivocal indication of an intention to resign on the officer's part,[34] and he must receive due notice of the acceptance of his resignation.[35]

2. Effect. A written resignation addressed to the proper authority by a commissioned officer, and an acceptance of the same, duly notified to the incumbent in the customary mode, creates a vacancy in the office.[36]

Wood *v.* U. S., 107 U. S. 414, 2 S. Ct. 551, 27 L. ed. 542 [*affirming* 15 Ct. Cl. 151]. In the navy, however, the pay of staff officers is fixed, generally, according to, and by the designation or title of, the offices held by them, and does not depend upon their rank; so the rank of staff officers in that service is usually operative only in determining the relation of the different officers to each other, in matters of precedence, privilege, and the like, and is generally called relative rank. Wood *v.* U. S., 15 Ct. Cl. 151.

Grade is a step or degree in either office or rank, and has reference to the divisions of one or the other, or both, according to the connection in which the word is employed. Schuetze *v.* U. S., 24 Ct. Cl. 299; Wood *v.* U. S., 15 Ct. Cl. 151. As used in U. S. Rev. Stat. (1872), § 1588, fixing the pay of retired officers, the word refers to the division of officers into periods of service of five years each. McClure *v.* U. S., 18 Ct. Cl. 347; Rutherford *v.* U. S., 18 Ct. Cl. 339; Thornley *v.* U. S., 18 Ct. Cl. 111.

Officers of the navy are classified (1) according to duty, office, or title; (2) according to relative importance or honor; (3) according to compensation. All of these classes come within the normal meaning of the words "grade" or "rank." Rutherford *v.* U. S., 18 Ct. Cl. 339.

28. Schuetze *v.* U. S., 24 Ct. Cl. 299.

29. Howell *v.* U. S., 25 Ct. Cl. 288, wherein it was held that a naval officer, who, without fault on his part, was prevented by absence on duty from being examined, took rank from the time at which he should have been examined, and not from the time of his examination.

30. U. S. *v.* Whitney, 5 Mackey (D. C.) 370, holding that it is competent for the secretary of the navy to rescind a rule under which officers are assigned to their relative rank.

The rank of judge-advocate general of the navy is actual, and not assimilated, rank. Remey *v.* U. S., 33 Ct. Cl. 218.

31. U. S. *v.* Hunt, 14 Wall. (U. S.) 550, 20 L. ed. 739 [*reversing* 6 Ct. Cl. 8].

32. U. S. *v.* Vinton, 2 Sumn. (U. S.) 299, 28 Fed. Cas. No. 16,624.

33. U. S. *v.* Hunt, 14 Wall. (U. S.) 550, 20 L. ed. 739 [*reversing* 6 Ct. Cl. 8].

34. O'Shea *v.* U. S., 28 Ct. Cl. 392, wherein it was held that an officer who, having been appointed in a recess of the senate, taken his oath, and notified his acceptance to the war department, is requested by the adjutant-general to return the letter of appointment as having been sent him prematurely, does not, by obeying the order, resign his office.

The acquiescence of an officer on the active list in the action of the department in dismissing him is equivalent to a resignation (Ide *v.* U. S., 25 Ct. Cl. 401); but this is not true in the case of an officer on the retired list (Fletcher *v.* U. S., 26 Ct. Cl. 541).

The validity of an officer's resignation is not affected by the fact that he placed an undated resignation in the hands of his commanding officer, authorizing him to fill it in and forward it to the proper authority in the event of the happening of a certain contingency. Mimmack *v.* U. S., 97 U. S. 426, 24 L. ed. 1067.

35. Bennett *v.* U. S., 19 Ct. Cl. 379; Mimmack *v.* U. S., 10 Ct. Cl. 584.

In the British service a commissioned naval officer cannot resign without permission of the admiralty so long as he is on the books of a naval vessel which is in commission (Reg. *v.* Cuming, 19 Q. B. D. 13, 57 L. T. Rep. N. S. 477; *In re* Hearson, 64 L. T. Rep. N. S. 535); and officers in the service of the East Indian Company were not at liberty to resign at will (Parker *v.* Clive, 4 Burr. 2419).

36. Mimmack *v.* U. S., 97 U. S. 426, 24 L. ed. 1067; Bennett *v.* U. S., 19 Ct. Cl. 379.

G. Retirement — 1. In General. Officers are divided into two classes — those on the active list, who perform active duty, and those on the retired list, who perform no duty in time of peace.[37] The retired list is filled from officers on the active list.[38]

2. How Effected — a. Examination by Retiring Board. The officer goes before a duly organized retiring board, which examines into his capacity for active service, and, if it finds him incapacitated, determines the cause, and whether it is an incident of the service.[39]

b. Findings — (I) *Approval by President.* After the examination, a record of the proceedings and decision of the board must be made and transmitted to the secretary of the department, and by him laid before the president for his approval, disapproval, or orders in the case.[40]

(II) *Effect.* The finding of a retiring board, approved by the president, fixes the fact that an officer's incapacity was or was not caused by something arising in the line of his duty, and when that fact has been so fixed the department cannot review it.[41] The legal effect of the finding that an officer is unfit for active service is to put him on leave or waiting orders.[42] If there is any defect or irregularity in the report of the board, it is the duty of the officer to object, without unreasonable delay.[43]

3. Duties. As a general rule, an army officer on the retired list cannot be

An immediate and unconditional resignation tendered by an officer in the army includes his position on the retired list as well as that on the list for active service. Turnley *v.* U. S., 24 Ct. Cl. 317.

37. Thompson *v.* U. S., 18 Ct. Cl. 604; Thornley *v.* U. S., 18 Ct. Cl. 111.

The class of retired officers was created by 12 U. S. Stat. at L. 287. Thompson *v.* U. S., 18 Ct. Cl. 604.

In the military service retired officers constitute two distinct classes — those retired from active service only, and officers wholly retired, the former being considered as still in the service (Hill *v.* Territory, 2 Wash. Terr. 147, 7 Pac. 63; Tyler's Motion, 18 Ct. Cl. 25, in which case it was held that a retired officer could not act as attorney to prosecute a claim against the United States); while the latter are entirely out of the service (Tyler *v.* U. S., 16 Ct. Cl. 223).

In the naval service there are two classes of retired officers — those whose incapacity was caused by their service being placed on the retired list, while those whose incapacity was not an incident of the service are placed on the retired list on furlough pay. Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079. The transfer of a naval officer from the furlough to the retired list does not abrogate the finding of the retiring board, but that remains in his record and determines his position. Potts *v.* U. S., 125 U. S. 173, 8 S. Ct. 830, 31 L. ed. 661; Burchard *v.* U. S., 19 Ct. Cl. 137. Such transfer may be antedated so as to make it date back to the day of the officer's retirement. U. S. *v.* Burchard, 125 U. S. 176, 8 S. Ct. 832, 31 L. ed. 662 [*reversing* 19 Ct. Cl. 137].

38. Thompson *v.* U. S., 18 Ct. Cl. 604.

39. Magaw *v.* U. S., 16 Ct. Cl. 3.

To entitle him to be placed on the retired list, it is incumbent on an officer to show that his incapacity was the result of some incident of the service, and the report of the board that there was no evidence to support such a finding is, to all intents and purposes, a report that the incapacity was not the result of an incident of the service. Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079 [*affirming* 18 Ct. Cl. 537].

Warrant officers may be placed upon the retired list, upon certain findings as to the cause of their incapacity, whenever they shall report themselves unable to comply with an order to perform appropriate duties, or whenever, in the judgment of the president, they are, in any manner, incapacitated from the performance of their duties. Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079 [*affirming* 18 Ct. Cl. 537].

40. U. S. *v.* Burchard, 125 U. S. 176, 8 S. Ct. 832, 31 L. ed. 662; Magaw *v.* U. S., 16 Ct. Cl. 3.

The president's right to determine whether an officer shall be placed on the retired list or wholly retired is entirely dependent upon the letter of positive enactment. He is authorized, when acting upon the board's report, to retain the officer in the active service, or wholly retire him from active service (McBlair *v.* U. S., 19 Ct. Cl. 528; Miller *v.* U. S., 19 Ct. Cl. 338); but this is not a continuing power, and, when the findings have been approved, neither the department nor the president can change them (U. S. *v.* Burchard, 125 U. S. 176, 8 S. Ct. 832, 31 L. ed. 662; McBlair *v.* U. S., 19 Ct. Cl. 528; Miller *v.* U. S., 19 Ct. Cl. 338).

41. Burchard *v.* U. S., 19 Ct. Cl. 137.

42. Hotchkin *v.* U. S., 24 Ct. Cl. 18.

43. Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079 [*affirming* 18 Ct. Cl. 537], in which case it was held that, after a naval officer has, during the remainder of his life, acquiesced in the proceedings of the retiring board, it does not lie with his administratrix to object to them for a mere irregularity.

assigned to duty except at the Soldiers' Home, but congress may at any time impose upon him special duties, which he will have to perform.[44]

H. Dismissal — **1. In General.** An officer of the navy, appointed for a definite time or during good behavior, has no vested interest or contract right in his office of which congress cannot deprive him;[45] and while, by usage, the tenure of a military office has been for life or during good behavior, it has always been subject to the will of the president.[46]

2. Powers of President — **a. In Absence of Statute.** In the absence of statutory enactment, the president has power to dismiss an officer in the military or naval service for any cause which, in his judgment, would render the officer unsuitable for the service, or whose dismissal would promote the public service.[47] He may act without the concurrence of the senate,[48] and his action is not reviewable in the court of claims.[49]

b. Under Statutory Enactment — (1) *In General.* By statute,[50] the president's power to dismiss officers of the army or navy,[51] except upon the sentence of a court martial, has been limited to time of war;[52] but, under later statutes, the president may, under certain circumstances, dismiss an officer in time of peace.[53]

44. Tyler *v.* U. S., 16 Ct. Cl. 223.

45. Crenshaw *v.* U. S., 134 U. S. 99, 10 S. Ct. 431, 33 L. ed. 825.

46. Street *v.* U. S., 24 Ct. Cl. 230.

In the British army every officer holds his office subject to the will of the crown, and is liable to be dismissed at any moment, without cause assigned; and there is no such thing as a military appointment permanent in the sense of being tenable for life, or until the holder is disqualified by misconduct or incapacity from fulfilling the duties attached to it. *In re* Tufnell, L. R. 3 Ch. 164, 45 L. J. Ch. 731, 34 L. T. Rep. N. S. 838, 24 Wkly. Rep. 915.

The East Indian Company, before 21 & 22 Vict. c. 106, when the government of India was transferred to the crown, had the absolute power to dismiss or compel the retirement of an officer in the Indian army, at the will and pleasure of the company, and such power, being in the nature of a crown prerogative, could not be waived by contract between the company and its officers. Grant *v.* Secretary State for India, 2 C. P. D. 445, 46 L. J. C. P. 681, 37 L. T. Rep. N. S. 188, 25 Wkly. Rep. 848.

47. Blake *v.* U. S., 103 U. S. 227, 26 L. ed. 462.

48. McElrath *v.* U. S., 12 Ct. Cl. 201.

49. Gratiot *v.* U. S., 1 Ct. Cl. 258.

50. 14 U. S. Stat. at L. 92.

51. Includes officers appointed during recess of senate.— This limitation includes officers appointed and commissioned by the president during a recess of the senate. O'Shea *v.* U. S., 28 Ct. Cl. 392.

52. This statute went into effect Aug. 20, 1866, upon which day the civil war terminated. U. S. *v.* Corson, 114 U. S. 619, 5 S. Ct. 1158, 29 L. ed. 254; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954; Blake *v.* U. S., 103 U. S. 227, 26 L. ed. 462; McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189. See also Freeborn *v.* The Ship Protector, 12 Wall. (U. S.) 700, 20 L. ed. 463; U. S. *v.* Anderson, 9 Wall. (U. S.) 56, 19 L. ed. 615.

The purpose of this enactment was not to attach a life-tenure or element of vested right to the office, but to save officers from a hasty and dishonorable dismissal in time of peace. Street *v.* U. S., 24 Ct. Cl. 230.

53. Desertion.— The act of July 15, 1870, c. 294, § 17, authorized the president to drop from the rolls of the army for desertion any officer absent from duty for three months without leave. Under this statute jurisdiction to find the fact of desertion was vested in the president alone, and his decision was not subject to review. Newton *v.* U. S., 18 Ct. Cl. 435.

Drunkenness.— It is now provided that the president can discharge an officer of the navy who is unfit, by reason of drunkenness, to perform the duties of a position to which it is proposed to promote him. Jouett *v.* U. S., 28 Ct. Cl. 257.

Supernumerary officers.— Under the act of congress of July 15, 1870, the president was authorized, on the recommendation of a board therein provided for, to muster out of the military service any officers deemed by the board unfit, for certain reasons, to discharge their duties, the officers to have a hearing before the board, and was also authorized to transfer officers to the supernumerary list. It was further provided, in a subsequent section, that "if any supernumerary officers shall remain after the first day of January next, they shall be honorably mustered out." Under this statute it was held that the government might discontinue proceedings commenced against an officer under the former section, and muster him out under the provisions of the latter section; that no limitation was placed by the statute upon the time within which officers might be transferred to the supernumerary list; and that where the validity of an order of the president mustering out an officer under the provisions of the statute had been recognized by several acts of congress, the question whether it was in technical compliance with the statute could not be considered. Street *v.* U. S., 133 U. S. 299, 10 S. Ct. 309, 33 L. ed. 631.

The exercise by the president of the power

(II) *Dismissal by Appointment of Successor.* The prohibition against the dismissal of any officer in the military or naval service except upon, and in pursuance of, the sentence of a court martial does not deprive the president of the power to supersede an officer by the appointment of a successor, by and with the advice and consent of the senate,[54] and the mere appointment of a successor in such manner operates as the removal of the prior incumbent.[55]

3. Power of Department. Congress may restrict, as it appears best for the public interest, the removal of officers whose appointment it has vested in the heads of departments.[56]

4. Order of Dismissal. It is not necessary that an order issued by the secretary of the navy, dismissing a naval officer or appointing his successor, should state in so many words that it is the act of the president.[57]

5. Notice to Officer. The discharge of an officer of the army does not take effect, so as to relieve the government from its obligations to him, until he is notified of the fact, and is actually discharged from the service.[58]

6. Effect of Unwarranted Dismissal. An unwarranted dismissal from the naval service of an officer by the secretary of the navy is of no effect.[59]

I. Reinstatement. As a rule, an appointment by the president, confirmed by the senate, is necessary to reinstate an officer of the army or navy who has lost his office through being dismissed,[60] or wholly retired,[61] or where he has resigned

given by the statute to transfer officers to the supernumerary list was not dependent on the consent of the officer. Byrne *v.* U. S., 24 Ct. Cl. 251.

The examining board authorized by the statute was not a court martial and the president could set aside its proceedings; and his order mustering out officers of the army under this statute could not be collaterally impeached for irregularities of the board on whose recommendation he acted. Duryea *v.* U. S., 17 Ct. Cl. 24.

54. Quackenbush *v.* U. S., 177 U. S. 20, 20 S. Ct. 530, 44 L. ed. 654; Mullan *v.* U. S., 140 U. S. 240, 11 S. Ct. 788, 35 L. ed. 489 [*affirming* 23 Ct. Cl. 34]; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954; Blake *v.* U. S., 103 U. S. 227, 26 L. ed. 462; McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189; Fletcher *v.* U. S., 26 Ct. Cl. 541; 15 Op. Atty.-Gen. (U. S.) 421; 12 Op. Atty.-Gen. (U. S.) 424; 8 Op. Atty.-Gen. (U. S.) 233; 6 Op. Atty.-Gen. (U. S.) 4; 4 Op. Atty.-Gen. (U. S.) 1. See 4 Cent. Dig. tit. "Army and Navy," § 13.

Appointment does not supersede retired officer.— In Fletcher *v.* U. S., 26 Ct. Cl. 541, it was held that the action of the president, with the advice and consent of the senate, in filling a vacancy on the active list of the army, is not such an exercise of the appointing power as to amount to the dismissal of an officer on the retired list.

55. McElrath *v.* U. S., 12 Ct. Cl. 201.

Where an officer is appointed by the president in place of one who has been sentenced by a court martial to dismissal from the navy, it is immaterial whether the court martial was a legal body. Mullan *v.* U. S., 140 U. S. 240, 11 S. Ct. 788, 35 L. ed. 489.

56. U. S. *v.* Perkins, 116 U. S. 483, 6 S. Ct. 449, 29 L. ed. 700 [*affirming* 20 Ct. Cl. 438].

57. McElrath *v.* U. S., 12 Ct. Cl. 201.

58. Gould *v.* U. S., 19 Ct. Cl. 593.

An officer does not lose his commission by reason of the fact that the regiment in which he holds it is disbanded and he himself reduced to half-pay. Bradley *v.* Arthur, 4 B. & C. 292, 6 D. & R. 413, 10 E. C. L. 585.

59. U. S. *v.* Perkins, 116 U. S. 483, 6 S. Ct. 449, 29 L. ed. 700 [*affirming* 20 Ct. Cl. 438], in which case it was held that a cadet engineer was an officer of the navy, and could not be discharged at the will of the secretary of the navy.

Dismissal while officer in captivity.— The war department has power to dismiss an officer while he is in captivity, but he is entitled to his pay and allowances during captivity. Jones *v.* U. S., 4 Ct. Cl. 197.

An officer who claims that he has been illegally dismissed must, to be entitled to trial by court martial, make application therefor in a reasonable time. Newton *v.* U. S., 18 Ct. Cl. 435.

Estoppel.—Where the president directs that an officer be transferred to the list of supernumerary officers and mustered out, and the officer accepted the one year's pay allowed by the statute to officers so mustered out, he is estopped from questioning the regularity of his discharge. Carrick *v.* U. S., 24 Ct. Cl. 264; Duryea *v.* U. S., 17 Ct. Cl. 24; Hildeburn *v.* U. S., 13 Ct. Cl. 62.

60. U. S. *v.* Corson, 114 U. S. 619, 5 S. Ct. 1158, 29 L. ed. 254 [*reversing* 17 Ct. Cl. 344]; McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189; Vanderslice *v.* U. S., 19 Ct. Cl. 480; Runkle *v.* U. S., 19 Ct. Cl. 396; Palen *v.* U. S., 19 Ct. Cl. 389; Montgomery *v.* U. S., 19 Ct. Cl. 370. But see, *contra*, an earlier line of decisions, in which it was held that an officer could be reinstated by the revocation of the order dismissing him. Montgomery *v.* U. S., 5 Ct. Cl. 93; Barnes *v.* U. S., 4 Ct. Cl. 216; Winters *v.* U. S., 3 Ct. Cl. 136; Smith *v.* U. S., 2 Ct. Cl. 206.

See 4 Cent. Dig. tit. "Army and Navy," § 14.

61. McBlair *v.* U. S., 19 Ct. Cl. 528; Miller *v.* U. S., 19 Ct. Cl. 338.

and has been notified of the acceptance of his resignation,[62] unless the vacancy occurs during a recess of the senate, in which case the president may grant a commission, to expire at the end of the next succeeding session.[63] Congress, however, may, by a private act, authorize the president to reinstate a discharged army officer, in which case he may do so without the advice and consent of the senate.[64]

J. Pay and Allowances — 1. Pay — a. In General — (I) *Power of Congress to Control.* Pay is a fixed and direct amount given by law to persons in the service in consideration of, and as compensation for, their personal service.[65] Congress has full control of this compensation,[66] and, where it is fixed by the law which provides for its payment, it can neither be increased nor diminished by an order or regulation of a department or of the president, unless the power to do so is conferred by an act of congress.[67]

(II) *Of Army Officers* — (A) *In General.* All officers of the army, whether on the active or retired list, with the single exception of chaplains, are paid according to their rank,[68] and are entitled to pay, if they were properly commissioned and performed the duties of their rank, though in fact never mustered in.[69]

(B) *Mounted Officers.* Where the service to which an officer is assigned requires that he be mounted, he is entitled to the pay of a mounted officer from

62. Mimmack *v.* U. S., 97 U. S. 426, 24 L. ed. 1067 [*affirming* 10 Ct. Cl. 584]; Bennett *v.* U. S., 19 Ct. Cl. 379.

63. U. S. *v.* Corson, 114 U. S. 619, 5 S. Ct. 1158, 29 L. ed. 254 [*reversing* 17 Ct. Cl. 344].

64. Collins *v.* U. S., 15 Ct. Cl. 22 [*affirming* 14 Ct. Cl. 568, wherein the court, after reviewing the private acts by which discharged officers had been restored for active service and those acts by which they had been reinstated for retirement, said: "These two classes of statutes show that, between officers to be restored for active service and those who are to be restored in order to be placed on the retired list, or whose cases are otherwise peculiar, Congress makes a distinction as to requiring or dispensing with the advice and consent of the Senate to their restoration, and that it acts advisedly in the use of the different language employed, with the clear intent to define in each case upon whom the appointing power is conferred"].

65. Sherburne *v.* U. S., 16 Ct. Cl. 491.

After the appointment of his successor, therefore, the allowance of pay to an officer is illegal. McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189.

66. U. S. *v.* McDonald, 128 U. S. 471, 9 S. Ct. 117, 32 L. ed. 506; U. S. *v.* Williamson, 23 Wall. (U. S.) 411, 23 L. ed. 89; U. S. *v.* Buchanan, Crabbe (U. S.) 563, 24 Fed. Cas. No. 14,678; Collins *v.* U. S., 15 Ct. Cl. 22. See also Embry *v.* U. S., 100 U. S. 680, 25 L. ed. 772.

See 4 Cent. Dig. tit. "Army and Navy," § 15 *et seq.*

67. Goldsborough *v.* U. S., Taney (U. S.) 80, 10 Fed. Cas. No. 5,519.

Antedating commission.— The appointing power cannot, by antedating the appointment or commission of an officer, create a liability on the part of the government for his pay. Collins *v.* U. S., 15 Ct. Cl. 22.

Antedating discharge.—An officer's right to pay down to the time of his discharge cannot be impaired by an order of the war department directing such discharge to bear a date earlier than that on which it was issued. Allstaedt *v.* U. S., 3 Ct. Cl. 284.

Regulations must be uniform.— While the amount of this compensation may depend in some degree upon the regulations of the department, such regulations must be uniform and applicable to all officers under the same circumstances. U. S. *v.* Ripley, 7 Pet. (U. S.) 18, 8 L. ed. 593; U. S. *v.* Webster, 2 Ware (U. S.) 46, 28 Fed. Cas. No. 16,658.

68. Tyler *v.* U. S., 16 Ct. Cl. 223. See also Holahan *v.* U. S., 30 Ct. Cl. 115.

Brevet rank.— The act of congress of April 16, 1818, § 1, providing that brevet officers should receive the pay of their brevet rank when on duty and having a command according to that rank, was not repealed by the act of congress of June 30, 1834, c. 132. U. S. *v.* Freeman, 3 How. (U. S.) 556, 11 L. ed. 724. But this rule was changed by the act of congress of March 3, 1865. Pope *v.* U. S., 19 Ct. Cl. 693.

Certification of pay-account.— The certification required to be attached by an army officer to his pay-account has reference to one who is still in the service. Jones *v.* U. S., 4 Ct. Cl. 197.

69. U. S. *v.* Henry, 17 Wall. (U. S.) 405, 21 L. ed. 673 [*affirming* 6 Ct. Cl. 162]; Cartlidge *v.* U. S., 24 Ct. Cl. 155; North *v.* U. S., 21 Ct. Cl. 15; 16 Op. Atty.-Gen. (U. S.) 38. See also U. S. *v.* Vinton, 2 Summ. (U. S.) 299, 28 Fed. Cas. No. 16,624; Gould *v.* U. S., 19 Ct. Cl. 593.

An officer appointed provisionally, subject to the action of an examining board, even though he is assigned to duty, until the action of such board is not in service or in commission, so as to entitle him to pay. Greer *v.* U. S., 3 Ct. Cl. 182. So, too, an officer, provisionally appointed until duly notified that his services are no longer required, is not entitled to pay for the interval between the time when he knows he has been rejected and the time when he receives his discharge, where he performs no military service during the interval. Greer *v.* U. S., 3 Ct. Cl. 182.

the day of the assignment;[70] but, if his department commander refuses to certify on his pay-accounts that he is entitled to the pay of a mounted officer, he is not entitled to be reimbursed for the expense incurred in performing his duty, mounted, after the certification has been refused.[71]

(III) *Of Navy Officers*—(A) *In General.* By the laws governing the navy the pay of staff officers is, generally, fixed according to, and by the designation or title of, the offices held by them, and does not depend upon their rank.[72]

(B) *Sea-Pay*—(1) In General. A naval officer is not entitled to sea-pay and allowances while performing shore-duty, except where it is so provided by express statute;[73] and, on the other hand, the secretary of the navy has no authority to diminish an officer's compensation as established by law by declaring that to be shore-service which is, in fact, sea-service.[74] The right of the officer to sea-pay begins when his sea-service begins, independent of any order of the navy department.[75]

(2) What Constitutes Sea-Service. To constitute sea-service it must be performed at sea,[76] under orders of a department and in vessels employed by authority of law,[77] or on a vessel which is subject to, and actually governed by, rules and regulations which are applicable to service at sea.[78]

70. Eskridge *v.* U. S., 30 Ct. Cl. 290; Matter of Harrold, 23 Ct. Cl. 295, holding that an officer required by statute, regulations, or army organization to be mounted at his own expense is a mounted officer, whether he or his company be fully equipped or not, and is entitled to pay as such.

Officers of infantry, mounted by permission of the war department, with captured horses, and without expense to themselves, are not entitled to the pay of mounted officers. Carter *v.* U. S., 22 Ct. Cl. 73; Forbes *v.* U. S., 17 Ct. Cl. 132.

71. Eskridge *v.* U. S., 30 Ct. Cl. 290.

72. Wood *v.* U. S., 15 Ct. Cl. 151.

The words "after date of appointment" and "from such date," which occur in U. S. Rev. Stat. (1872), § 1556, fixing the annual pay of passed assistant surgeons of the navy, refer, not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered as a passed assistant surgeon. U. S. *v.* Moore, 95 U. S. 760, 24 L. ed. 588.

Warrant officers.— In the act of congress of April 21, 1806, c. 35, § 3, relating to the pay of naval officers, and providing that "the said officers shall receive no more than half their monthly pay" during the time when they shall not be under orders for actual service, warrant officers are included under the general words "said officers." Johnson *v.* U. S., 2 Ct. Cl. 167.

If a naval officer is delayed in his promotion because he has not been examined owing to his absence on duty, he is entitled, when promoted, to the increased pay of the new grade from the time when he should have been examined (Hunt *v.* U. S., 116 U. S. 394, 6 S. Ct. 406, 29 L. ed. 674); but under such circumstances, if he is found unqualified for promotion at his first examination, and does not become qualified until after reëxamination, he is not entitled to the pay of his new grade from time when he should have been examined (Austin *v.* U. S., 20 Ct. Cl. 269).

73. Lemly *v.* U. S., 28 Ct. Cl. 468 (wherein it was held that the judge-advocate general of the navy, who is given by statute "the rank, pay, and allowances of a captain in the navy," was entitled to shore-duty pay only); Schoonmaker *v.* U. S., 19 Ct. Cl. 170 (holding that an officer assigned to duty as lighthouse inspector is not entitled to sea-pay while making his tour of inspection of lighthouses in his district, although it involves going to sea); Carpenter *v.* U. S., 15 Ct. Cl. 247 (holding that a naval paymaster on shore-duty at a navy-yard is not entitled to pay for sea-duty, though required by the secretary of the navy, in addition to his regular duties, to take charge of the accounts of certain ironclads temporarily at anchor off the yard and in commission for sea-service).

74. U. S. *v.* Bishop, 120 U. S. 51, 7 S. Ct. 413, 30 L. ed. 558 [*affirming* 21 Ct. Cl. 215]; U. S. *v.* Symonds, 120 U. S. 46, 7 S. Ct. 411, 30 L. ed. 557 [*affirming* 21 Ct. Cl. 148].

The burden of proof is on an officer seeking sea-pay to show the character of the service rendered, especially where the duty is designated as shore-duty in the order assigning him. Corwine *v.* U. S., 24 Ct. Cl. 104.

75. Wyckoff *v.* U. S., 34 Ct. Cl. 288.

76. The words "at sea" mean upon the waters of the sea, and not upon the high seas. U. S. *v.* Barnette, 165 U. S. 174, 17 S. Ct. 286, 41 L. ed. 675; McRitchie *v.* U. S., 23 Ct. Cl. 23; Strong *v.* U. S., 23 Ct. Cl. 10.

77. U. S. *v.* Barnette, 165 U. S. 174, 17 S. Ct. 286, 41 L. ed. 675; Strong *v.* U. S., 23 Ct. Cl. 10. See U. S. Rev. Stat. (1872), § 1571. See 4 Cent. Dig. tit. "Army and Navy," § 18.

78. U. S. *v.* Strong, 125 U. S. 656, 8 S. Ct. 1021, 31 L. ed. 823 [*affirming* 23 Ct. Cl. 10]; U. S. *v.* Bishop, 120 U. S. 51, 7 S. Ct. 413, 30 L. ed. 558 [*affirming* 21 Ct. Cl. 215]; U. S. *v.* Symonds, 120 U. S. 46, 7 S. Ct. 411, 30

b. Of Captured Officers. The status of an officer is not changed by his capture by the enemy, so far as his relations to the government are concerned, but he is entitled to all the rights which he had in actual service, under the conditions which existed at the time of his capture, unless he contributed to it by negligence while acting contrary to his orders, and not in discharge of his duties.[79]

c. Of Reinstated Officers. Where an officer is reinstated, his right to pay for the period during which he was out of the service does not depend on the date of his commission, but on the will of congress, expressed in the law reinstating him.[80]

d. Of Retired Officers. A retired officer is still an officer, and his retired pay is the equivalent of salary.[81] Such an officer is entitled to receive only three-quarters of the maximum pay of the rank on which he was retired, regardless of the length of his service,[82] and his pay is subject to such alteration as congress may see fit to make.[83]

e. Upon Resigning. An officer's pay does not cease when he tenders his resignation, but continues, if he remains in actual service, doing actual duty, until he is notified that it has been accepted.[84]

f. While Waiting Orders. An officer at home, waiting orders, is entitled to

L. ed. 557 [*affirming* 21 Ct. Cl. 148]; Barnette *v.* U. S., 30 Ct. Cl. 197; Aulick *v.* U. S., 27 Ct. Cl. 109; Corwine *v.* U. S., 24 Ct. Cl. 104. See 4 Cent. Dig. tit. "Army and Navy," § 18.

This includes services performed by a naval officer on a training-ship at anchor in an arm of the sea (U. S. *v.* Bishop, 120 U. S. 51, 7 S. Ct. 413, 30 L. ed. 558 [*affirming* 21 Ct. Cl. 148]; U. S. *v.* Symonds, 120 U. S. 46, 7 S. Ct. 411, 30 L. ed. 557 [*affirming* 21 Ct. Cl. 215]), even where the vessel is used as a school-ship by a state (U. S. *v.* Barnette, 165 U. S. 124, 17 S. Ct. 286, 41 L. ed. 675 [*affirming* 30 Ct. Cl. 197]); on a receiving-ship (U. S. *v.* Strong, 125 U. S. 656, 8 S. Ct. 1021, 31 L. ed. 823 [*affirming* 23 Ct. Cl. 10]); or on a monitor at anchor in a navigable river (Aulick *v.* U. S., 27 Ct. Cl. 109; Corwine *v.* U. S., 24 Ct. Cl. 104).

79. Phelps *v.* U. S., 4 Ct. Cl. 209. See also Jones *v.* U. S., 4 Ct. Cl. 197.

80. Kilburn *v.* U. S., 15 Ct. Cl. 41; Collins *v.* U. S., 15 Ct. Cl. 22, holding that the officer was entitled to retired pay *ad interim* where the statute authorized the officer's reinstatement and retirement as of the date he was discharged, "charging him with all extra pay and allowances paid him at that time."

Reinstatement by president.— Where the president has approved the sentence of a court martial dismissing an officer, with forfeiture of pay, he cannot, by reinstating such officer, reinvest him with a right to the pay thus forfeited (Vanderslice *v.* U. S., 19 Ct. Cl. 480), although former decisions held *contra* (Barnes *v.* U. S., 4 Ct. Cl. 216; Reynolds *v.* U. S., 3 Ct. Cl. 197; Winters *v.* U. S., 3 Ct. Cl. 136; Smith *v.* U. S., 2 Ct. Cl. 206).

When office has been filled during interim. — Nor can an officer recover pay for the time intervening between an order dismissing him and an order of restoration if the office has, during that time, been filled by another. Montgomery *v.* U. S., 5 Ct. Cl. 93.

81. Franklin *v.* U. S., 29 Ct. Cl. 6, wherein it was held that a retired naval officer who serves on a board as to which a statute prescribes, for members who "are not salaried officers," a salary, and, for members who are salaried officers, "their actual necessary expenses," is entitled to the latter, and not the former.

The one year's pay to which an officer is entitled, who has been found unfit for active service, is leave, or waiting-orders', pay. Hotchkin *v.* U. S., 24 Ct. Cl. 18.

82. Marshall *v.* U. S., 124 U. S. 391, 8 S. Ct. 520, 31 L. ed. 475 [*affirming* 20 Ct. Cl. 370]; Roberts *v.* U. S., 10 Ct. Cl. 283.

Naval officers on the retired-pay list are entitled, ordinarily, to receive three-quarters of the sea-pay of the grade or rank held by them at the time they were retired. Roget *v.* U. S., 148 U. S. 167, 13 S. Ct. 555, 37 L. ed. 408 [*affirming* 24 Ct. Cl. 165]; Rutherford *v.* U. S., 18 Ct. Cl. 339; Thornley *v.* U. S., 18 Ct. Cl. 111.

But a lieutenant in the navy, retired in the first five years of service, because not recommended for promotion, is entitled to one-half of his sea-pay at the time of his retirement, and no more (McClure *v.* U. S., 18 Ct. Cl. 347), and a naval officer retired on furlough-pay is entitled to half of the leave-of-absence pay of an officer on the active list (Potts *v.* U. S., 125 U. S. 173, 8 S. Ct. 830, 31 L. ed. 661; Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079).

83. Magaw *v.* U. S., 16 Ct. Cl. 3, in which case it was held that the pay of a naval officer who had been retired before the passage of U. S. Rev. Stat. (1872), § 1593, was to be fixed at the reduced rate established by that statute.

When a naval officer is transferred from the furlough to the retired-pay list his status as a retired officer is not changed, but his pay is raised to that of an officer retired on half sea-pay. U. S. *v.* Burchard, 125 U. S. 176, 8 S. Ct. 832, 31 L. ed. 662 [*reversing* 19 Ct. Cl. 137]; Potts *v.* U. S., 125 U. S. 173, 8 S. Ct. 830, 31 L. ed. 661.

84. Barger *v.* U. S., 6 Ct. Cl. 35.

full pay during such period, even though the assignment was made at his own request.[85]

g. Longevity-Pay.—(I) *In General.* Longevity-pay is extra compensation for longevity in actual service.[86] This increase does not attach to the commutation of fuel and quarters which is allowed officers.[87] The rate of increased compensation is fixed by the lowest grade having graduated pay which has been held by the officer since last entering the service;[88] but if he has entered the service but once his first entry is to be taken as his last entry,[89] and this holds true where he resigns his office to immediately accept an office of higher rank.[90] Longevity-pay is to be computed, except where otherwise provided, from the day the officer's commission was signed by the president, and not from an antecedent date mentioned in the body of the commission.[91]

(II) *Of Retired Officers.* Army officers, retired from active service with reduced pay, are still in the service, and are entitled to the increased pay which the law allows for every five years' service while in that condition.[92] Officers of the navy on the retired list are not entitled to an increase of pay by reason of longevity while on that list,[93] nor does active service by an officer on the

85. U. S. *v.* Williamson, 23 Wall. (U. S.) 411, 23 L. ed. 89.

86. U. S. *v.* Alger, 151 U. S. 362, 14 S. Ct. 346, 38 L. ed. 192; Thornley *v.* U. S., 18 Ct. Cl. 111. See also U. S. *v.* Mullan, 123 U. S. 186, 8 S. Ct. 79, 31 L. ed. 140.

One temporarily filling a vacancy caused by death is not entitled to the longevity-pay of the deceased officer. Webster *v.* U. S., 28 Ct. Cl. 25.

An officer illegally reinstated in the army cannot maintain an action to recover longevity-pay. Runkle *v.* U. S., 19 Ct. Cl. 396.

An assistant engineer's pay is graduated according to the length of time which he has served. U. S. *v.* Stahl, 151 U. S. 366, 14 S. Ct. 347, 38 L. ed. 194.

The pay of a cadet midshipman, midshipman, and cadet engineer is not graduated according to length of service. U. S. *v.* Stahl, 151 U. S. 366, 14 S. Ct. 347, 38 L. ed. 194. *Contra*, U. S. *v.* Baker, 125 U. S. 646, 8 S. Ct. 1022, 31 L. ed. 824.

Services included in computation.— Service of a naval officer in the marine corps (U. S. *v.* Dunn, 120 U. S. 249, 7 S. Ct. 507, 30 L. ed. 667 [*affirming* 21 Ct. Cl. 20]) or army (Jordan *v.* U. S., 19 Ct. Cl. 621); of an officer as paymaster's clerk (U. S. *v.* Hendee, 124 U. S. 309, 8 S. Ct. 507, 31 L. ed. 465 [*affirming* 22 Ct. Cl. 134]) or paymaster's steward (Jordan *v.* U. S., 19 Ct. Cl. 621; Hawkins *v.* U. S., 19 Ct. Cl. 611; Muse *v.* U. S., 19 Ct. Cl. 441); as a cadet in the Military Academy (U. S. *v.* Watson, 130 U. S. 80, 9 S. Ct. 430, 32 L. ed. 852; U. S. *v.* Morton, 112 U. S. 1, 5 S. Ct. 1, 28 L. ed. 613. *Contra*, Babbitt *v.* U. S., 16 Ct. Cl. 202); as an enlisted man (Palen *v.* U. S., 19 Ct. Cl. 389); as an officer in actual service under color of office (Gould *v.* U. S., 19 Ct. Cl. 593; Palen *v.* U. S., 19 Ct. Cl. 389); as a sailor in the volunteer navy during the Civil War (Hawkins *v.* U. S., 19 Ct. Cl. 611); and in case of a chaplain employed at an army post, and subsequently commissioned, his time of service prior to being commissioned (U. S. *v.* La Tourrette, 151 U. S. 572, 14 S. Ct. 422, 38 L. ed. 274 [*reversing* 26 Ct. Cl. 296, and *overruling* Gerding *v.* U. S., 26 Ct. Cl. 319]) is included in computing longevity-pay. But a contract surgeon in the army is not an officer, and is not to be credited with such service in the computation of his longevity-pay as a surgeon in the navy. Laws *v.* U. S., 27 Ct. Cl. 69; Byrnes *v.* U. S., 26 Ct. Cl. 302 [*distinguishing* U. S. *v.* Dunn, 120 U. S. 249, 7 S. Ct. 507, 30 L. ed. 667 (*affirming* 21 Ct. Cl. 20)]. In estimating the longevity-pay of a mate, appointed, by virtue of a private act, upon the retired list with rank of master, his former service as mate must be credited to him as master. Bradbury *v.* U. S., 20 Ct. Cl. 187.

87. U. S. *v.* Allen, 123 U. S. 345, 8 S. Ct. 163, 31 L. ed. 147.

88. U. S. *v.* Alger, 151 U. S. 362, 14 S. Ct. 346, 38 L. ed. 192; Barton *v.* U. S., 129 U. S. 249, 9 S. Ct. 285, 32 L. ed. 663 [*affirming* 23 Ct. Cl. 376]; U. S. *v.* Foster, 128 U. S. 435, 9 S. Ct. 116, 32 L. ed. 486; U. S. *v.* Rockwell, 120 U. S. 60, 7 S. Ct. 367, 30 L. ed. 561 [*affirming* 21 Ct. Cl. 332], holding that one who reëntered the service as a master, and then became lieutenant, should be credited with his time of service as if he had been a lieutenant, the pay of master not having been graduated until after he had become lieutenant.

89. U. S. *v.* Alger, 151 U. S. 362, 14 S. Ct. 346, 38 L. ed. 192; U. S. *v.* Green, 138 U. S. 293, 11 S. Ct. 299, 34 L. ed. 960; U. S. *v.* Mullan, 123 U. S. 186, 8 S. Ct. 79, 31 L. ed. 140.

90. U. S. *v.* Alger, 152 U. S. 384, 14 S. Ct. 635, 38 L. ed. 488, 151 U. S. 362, 14 S. Ct. 346, 38 L. ed. 192; U. S. *v.* Stahl, 151 U. S. 366, 14 S. Ct. 347, 38 L. ed. 194.

91. Young *v.* U. S., 19 Ct. Cl. 145.

92. U. S. *v.* Tyler, 105 U. S. 244, 26 L. ed. 985 [*affirming* 16 Ct. Cl. 223]. See also Thornley *v.* U. S., 113 U. S. 310, 5 S. Ct. 491, 28 L. ed. 999.

93. U. S. *v.* Alger, 151 U. S. 362, 14 S. Ct. 346, 38 L. ed. 192; Roget *v.* U. S., 148 U. S. 167, 13 S. Ct. 555, 37 L. ed. 408; Brown *v.*

retired list operate to post-date the time of his retirement so as to increase longevity-pay.[94]

h. Not Assignable. Neither the full pay of an officer,[95] nor half-pay of a retired officer,[96] is assignable at law.[97]

i. Forfeiture and Stoppage of Pay. Forfeiture of pay occurs only by sentence of a court martial or upon conviction of specified military offenses.[98] Stoppage of pay rests in the discretion of the secretary of war,[99] but can be legally made only by reason of an accountability to the United States.[1] Lapse of time does not preclude the government from enforcing a forfeiture of pay incurred by an officer.[2]

j. Recovery Back of Amount Paid De Facto Officer. Where an officer *de facto* renders service and receives pay in good faith, the money paid to him cannot be recovered back on proof that his appointment to the army was invalid;[3] but where one claiming to be an officer renders no service and holds no official relation with the service, money paid him for salary may be recovered back.[4]

2. Allowances — a. In General. Allowances are indirect or contingent remuneration which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement.[5]

b. Power of Departments to Control. It is within the authority of the proper department, under the sanction of the president, to establish general rules of uniform application, regulating the allowance of extra compensation to officers, which, when duly promulgated, will be binding on the rights of the officers;[6] but allowances other than those specifically provided for are prohibited by statute.[7] This prohibition, however, does not prevent the payment to an officer of expenses

U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079 [*affirming* 18 Ct. Cl. 537]; Thornley *v.* U. S., 113 U. S. 310, 5 S. Ct. 491, 28 L. ed. 999 [*affirming* 18 Ct. Cl. 111]. See 4 Cent. Dig. tit. "Army and Navy," § 27.

94. Roget *v.* U. S., 148 U. S. 167, 13 S. Ct. 555, 37 L. ed. 408 [*affirming* 24 Ct. Cl. 165].

95. Barwick *v.* Reade, 1 H. Bl. 627.

96. Schwenk *v.* Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 19 Am. St. Rep. 438, 9 L. R. A. 221; Stone *v.* Lidderdale, 2 Anstr. 533; Lidderdale *v.* Montrose, 4 T. R. 248; Flarty *v.* Odlum, 3 T. R. 681.

97. Though an officer's half-pay is not assignable at law, yet the use of it may be assigned in equity; and, when so assigned, the assignor cannot maintain an action for money had and received to his use. Stuart *v.* Tucker, 2 W. Bl. 1137.

98. Davis Mil. L. 177.

Until sentence is approved an officer sentenced by court martial to dismissal from the service is entitled to his pay. Fletcher *v.* U. S., 26 Ct. Cl. 541; Page *v.* U. S., 25 Ct. Cl. 254.

Where an officer is suspended from duty by court martial he is not entitled to allowances. Swaim *v.* U. S., 28 Ct. Cl. 173.

A sentence imposing forfeiture of pay is sufficiently specific and certain if the exact amount can be ascertained from sources of absolute certainty, although the total amount of forfeiture is not stated on the face of the sentence. Williams *v.* U. S., 24 Ct. Cl. 306.

Captivity of officer.— An officer who is dismissed from the service during captivity is entitled to his pay and allowances until he is released (Jones *v.* U. S., 4 Ct. Cl. 197); but an officer who has been sentenced by court martial to dismissal and forfeiture of pay, and is subsequently captured, is not entitled to pay during his captivity after the sentence is promulgated (Phelps *v.* U. S., 4 Ct. Cl. 209).

99. Matter of Billings, 23 Ct. Cl. 166.

1. 16 Op. Atty.-Gen. (U. S.) 477.

2. Crowell *v.* U. S., 22 Ct. Cl. 69.

3. McBlair *v.* U. S., 19 Ct. Cl. 528; Runkle *v.* U. S., 19 Ct. Cl. 396; Palen *v.* U. S., 19 Ct. Cl. 389; Montgomery *v.* U. S., 19 Ct. Cl. 370.

4. Runkle *v.* U. S., 19 Ct. Cl. 396; Miller *v.* U. S., 19 Ct. Cl. 338; McElrath *v.* U. S., 12 Ct. Cl. 201.

5. Sherburne *v.* U. S., 16 Ct. Cl. 491.

Under the term is included everything which can be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay. U. S. *v.* Landers, 92 U. S. 77, 23 L. ed. 603; 13 Op. Atty.-Gen. (U. S.) 198.

The term does not include commutation for fuel and quarters in the case of enlisted men. Lander *v.* U. S., 30 Ct. Cl. 311; McKenna *v.* U. S., 23 Ct. Cl. 308.

To entitle an officer to an allowance by reason of usage, the usage must be applicable to all officers of the same grade similarly situated. U. S. *v.* Buchanan, Crabbe (U. S.) 563, 24 Fed. Cas. No. 14,678.

6. U. S. *v.* Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 L. ed. 559; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968; U. S. *v.* Webster, 2 Ware (U. S.) 46, 28 Fed. Cas. No. 16,658. See 4 Cent. Dig. tit. "Army and Navy," § 22.

7. U. S. Rev. Stat. (1872), §§ 1269, 1558.

arising while on a special mission,[8] nor giving him money, to be expended, in accordance with instructions, for a specified purpose;[9] but constructive allowances of pay will not be allowed except where the intention is clearly indicated.[10]

c. When Entitled to — (I) *In General.* An officer can make no charge for extra services where the duties performed necessarily belong to his office,[11] or where he voluntarily renders additional service without demanding extra compensation, and upon the implied condition that he will not do so.[12]

(II) *Retired Officers.* Where a retired officer renders services which could not be required of him, he is entitled to extra compensation.[13]

(III) *When Performing Duties of Two Offices.* An officer who holds another incompatible office to which a different salary is attached is not entitled to the salary of both offices,[14] but is entitled to the larger salary.[15] But a retired officer may hold an office in the executive department, and receive salary therefor, without barring his right to pay as a retired officer,[16] and payment by a state to an officer of the United States does not in any way affect the rate of pay which he is entitled to receive from the United States.[17]

3. Commutation of Fuel and Quarters — a. In General. A commutation of fuel and quarters constitutes no part of the pay proper of officers, but is merely designed to meet certain expenses which they will necessarily incur in the discharge of their duties.[18]

b. Who Entitled to. As a general rule, to be entitled to this commutation, the officer must have made unsuccessful application for fuel and quarters;[19] but this is not requisite where there are no quarters assignable to officers on duty.[20]

8. U. S. *v.* Catesby, 18 How. (U. S.) 92, 15 L. ed. 274.

9. U. S. *v.* Freeman, 1 Woodb. & M. (U. S.) 45, 25 Fed. Cas. No. 15,163.

10. U. S. *v.* Gilmore, 8 Wall. (U. S.) 330, 19 L. ed. 396, in which case it was held that a statute increasing the pay of private soldiers did not entitle officers to a similar increase of the allowance made them for the pay of servants, the measure of the allowance for such pay being the pay of a private soldier as fixed by law at the time.

11. Gratiot *v.* U. S., 4 How. (U. S.) 80, 11 L. ed. 884, in which case it was held that a chief engineer in the United States army was not entitled to extra compensation for his services in conducting several works of internal improvement.

12. Goode *v.* U. S., 25 Ct. Cl. 261.

13. Yates *v.* U. S., 25 Ct. Cl. 296; Meigs *v.* U. S., 19 Ct. Cl. 497, holding that a retired army officer was entitled to compensation for supervising the erection of a public building, even though he had been designated as the supervising officer by the act which provided for the erection of the building. See also U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286; Converse *v.* U. S., 21 How. (U. S.) 463, 16 L. ed. 192.

14. Winchell *v.* U. S., 28 Ct. Cl. 30, holding that a cadet engineer in the navy was not entitled to the salary of a draughtsman in the hydrographic office in addition to his own.

A regimental quartermaster serving also as acting assistant commissary is entitled to additional pay on that account. U. S. *v.* Morrison, 96 U. S. 232, 24 L. ed. 688 [*affirming* 13 Ct. Cl. 1].

15. Goldsborough *v.* U. S., Taney (U. S.) 80, 10 Fed. Cas. No. 5,519; Webster *v.* U. S., 28 Ct. Cl. 25; Grealish *v.* U. S., 20 Ct. Cl. 486.

16. Collins *v.* U. S., 15 Ct. Cl. 22.

17. U. S. *v.* Barnette, 165 U. S. 175, 17 S. Ct. 286, 41 L. ed. 675 [*affirming* 30 Ct. Cl. 197]; U. S. *v.* Lee, Hayw. & H. (U. S.) 208, 26 Fed. Cas. No. 15,587.

18. U. S. *v.* Allen, 123 U. S. 345, 8 S. Ct. 163, 31 L. ed. 147.

The fact that a hospital steward, when on duty, has assigned to him a room, and is supplied with fuel, when they are necessary for the performance of his duties, does not entitle him to claim commutation for fuel and quarters when he is placed on the retired list. Lander *v.* U. S., 30 Ct. Cl. 311.

19. Crosby *v.* U. S., 13 Ct. Cl. 110.

20. Lippitt *v.* U. S., 14 Ct. Cl. 148; Long *v.* U. S., 8 Ct. Cl. 398; Whittlesey *v.* U. S., 5 Ct. Cl. 99. See 4 Cent. Dig. tit. "Army and Navy," § 24.

Detailed as professor.— Where an officer of the army is detailed to act as a professor in a college, he is entitled to fuel and quarters, or commutation therefor. Long *v.* U. S., 8 Ct. Cl. 398.

Mustered out, but retained in service.— An officer who, though mustered out, is retained in the service of the war department is entitled to this commutation. Brough *v.* U. S., 8 Ct. Cl. 206.

On waiting orders.— An officer who, pursuant to orders, reports to the headquarters of a department to await further orders, is entitled to receive the commuted value of fuel and quarters while awaiting orders (U. S. *v.* Lippitt, 100 U. S. 663, 25 L. ed. 747; Crosby *v.* U. S., 13 Ct. Cl. 110), but not where he is ordered home to await orders (U. S. *v.* Phis-

c. How Ascertained. The commutation of fuel and quarters is ascertained by a reference to the pay given the officer by statute,[21] which includes longevity-pay as well as the pay attached to his office.[22]

4. Mileage — a. In General. Mileage is a compensation allowed by law to officers for their trouble and expense in traveling on public business.[23] To entitle an officer thereto, he must have traveled upon such business under orders,[24] it, ordinarily, being for his commanding officer to determine whether the public business requires that he should travel.[25] Officers of the navy, while traveling under orders, are entitled to mileage for traveling within, as well as without, the United States.[26]

b. How Computed. When only the terminus of the journey is specified in the orders for a naval officer, leaving to his discretion the choice of route, his mileage should be calculated by the shortest route usually traveled, regardless of the distance actually traveled, unless some good cause is shown for the deviation;[27] but where his route is prescribed by superior authority he is entitled to

terer, 94 U. S. 219, 24 L. ed. 116, in which case it was held, in determining an officer's right to fuel and quarters, that a military station is merely synonymous with the term "military post," and means a place where troops are established, where military stores, animate or inanimate, are kept or distributed, where military duty is performed, or military protection afforded, or where something more or less connected with arms or war is kept, or is to be done); nor can he, when ordered home to await orders, recover commutation for fuel and quarters while traveling from his post to his home (Chilson *v.* U. S., 11 Ct. Cl. 691).

21. U. S. *v.* Allen, 123 U. S. 345, 8 S. Ct. 163, 31 L. ed. 147.

22. Allen *v.* U. S., 22 Ct. Cl. 300.

23. Bouvier L. Dict.

Paymasters' clerks in the naval service are entitled to receive actual traveling expenses only. U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463 [*reversing* 22 Ct. Cl. 293]. As to the provision in the case of paymasters' clerks in the army see 27 U. S. Stat. at L. 478.

24. U. S. *v.* Graham, 110 U. S. 219, 3 S. Ct. 582, 28 L. ed. 126; Pendleton *v.* U. S., 21 Ct. Cl. 5; Hannum *v.* U. S., 19 Ct. Cl. 516. See 4 Cent. Dig. tit. "Army and Navy," § 23.

Mileage is allowed where an officer is ordered home, to await orders, from a post at which he is doing duty (U. S. *v.* Graham, 110 U. S. 219, 3 S. Ct. 582, 28 L. ed. 126; U. S. *v.* Phisterer, 94 U. S. 219, 24 L. ed. 116); to an officer who, in compliance with orders, performs a duty while he is absent on leave (Andrews *v.* U. S., 15 Ct. Cl. 264), unless the duty is performed at the place where he is spending his leave (Barr *v.* U. S., 14 Ct. Cl. 272, in which case it was held that an officer who was so ordered to temporary duty was not entitled to mileage when ordered back to his regular station, even though the temporary duty detained him until after his leave has expired); and to an officer ordered abroad by the war department for the purpose of collecting information for the department (Matter of Billings, 23 Ct. Cl. 166).

Mileage is not allowed where an exchange is made, from one station to another, by an officer at his own request (U. S. *v.* Phisterer, 94 U. S. 219, 24 L. ed. 116. But see Barker *v.* U. S., 19 Ct. Cl. 288, holding that where a squadron commander on the high seas decides that there are no habitable quarters for certain warrant officers on their ship, and detaches them, with permission to return home, they are entitled to mileage, for the cause of their travel is public business, and that it is immaterial that they were not ordered home, and that they themselves requested to be sent); where an officer, on leave of absence, is ordered to rejoin his company, which has changed its post since his leave began (Romeyn *v.* U. S., 20 Ct. Cl. 373); where an officer, provisionally appointed, subject to the action of an examining board, is discharged after rejection by the board, even though he has been assigned to military duty (Greer *v.* U. S., 3 Ct. Cl. 182); nor where the officer is delinquent and ordered to travel at his own expense (Hannum *v.* U. S., 19 Ct. Cl. 516; Perrimond *v.* U. S., 19 Ct. Cl. 509, in which last case it was held that a naval officer failing to join his ship when she sailed, and ordered by his superior officer to join her at his own expense, is not entitled to mileage for his travel in so doing).

25. Hannum *v.* U. S., 19 Ct. Cl. 516. But an order which enforces upon an officer additional duty at another point, his personal attention being required to his duty at both places, invests him with discretion to determine when his presence is necessary at either, and entitles him to mileage for travel between the two. Steele *v.* U. S., 30 Ct. Cl. 7.

26. U. S. *v.* Graham, 110 U. S. 219, 3 S. Ct. 582, 28 L. ed. 126 [*affirming* 18 Ct. Cl. 83]; U. S. *v.* Temple, 105 U. S. 97, 26 L. ed. 967 [*affirming* 14 Ct. Cl. 377].

27. Crosby *v.* U. S., 22 Ct. Cl. 131; Hannum *v.* U. S., 19 Ct. Cl. 516; Du Bose *v.* U. S., 19 Ct. Cl. 514. See also U. S. *v.* McDonald, 128 U. S. 471, 9 S. Ct. 117, 32 L. ed. 506 [*affirming* 23 Ct. Cl. 104], where an officer was traveling at the time when the mode of computing mileage was changed, and it was held that the mileage for each part of

mileage for the distance actually traveled.[28] The question whether an officer in traveling is abroad or within the United States, in computing the mileage to which he is entitled, should be determined by the termini of the journey rather than by the route actually taken.[29]

5. Rations — a. Double Rations — (I) *In General.* The mere making of a provision by congress for double rations does not determine what officers are entitled to them.[30] The discretionary power to allow such additional number of rations to officers commanding separate posts as he may think just, having respect to the special circumstances of each case, is vested in the president;[31] but the proper department may designate a post as entitled to double rations, its act in so doing being deemed the president's act.[32]

(II) *Who Entitled To.* No officer is entitled to additional rations unless he be a commandant at a separate post;[33] but, when an officer presents with his account an authentic document or certificate of his having commanded a post or arsenal for which double rations have been allowed by the war department under the army regulations, his right to them is established, and they cannot be withheld.[34]

b. Sea-Going Rations. Officers on duty at the navy department are not entitled to the rations allowed officers attached to sea-going vessels,[35] nor is an officer of the marine corps a naval officer, so as to be entitled to this ration when attached to a sea-going vessel.[36]

K. Duties and Powers — 1. Of Army Officers — a. In General. The duties and powers of a military officer of the United States are regulated by law, and are for the court to determine;[37] but it is an unbending rule of the law that the

his journey was to be computed according to the statute in force at the time it was made, the former statute applying to the first part of his journey, and the latter to that part of his journey which was undertaken after its enactment.

He is not bound to travel by an extraordinary and unusual route because it is the shortest. Hannum *v.* U. S., 19 Ct. Cl. 516.

28. U. S. *v.* Hutchins, 151 U. S. 542, 14 S. Ct. 421, 38 L. ed. 264 [*affirming* 27 Ct. Cl. 137].

When an officer does not travel by the most direct or prescribed route, he must bring to the accounting officers the authority or ratification of the navy department, and, if he neglects to do so, will have no remedy except by establishing judicially the facts upon which his right rests. Pendleton *v.* U. S., 21 Ct. Cl. 5; Hannum *v.* U. S., 19 Ct. Cl. 516. But the ratification, by the secretary of the navy, of an officer's action in choosing a different route from that which he was ordered to take is as effective as antecedent authority in establishing the officer's right to mileage. Allderdice *v.* U. S., 19 Ct. Cl. 511.

29. U. S. *v.* Hutchins, 151 U. S. 542, 14 S. Ct. 421, 38 L. ed. 264 [*affirming* 27 Ct. Cl. 137], in which case it was held that a naval officer traveling under orders from San Francisco to New York by way of the Isthmus of Panama is to be considered as traveling under orders in the United States, and to be entitled to mileage.

An officer, authorized to appear before a court of inquiry on a foreign station, and ordered thereafter to return to a neighboring port and there remain until he receives further orders, is, while so remaining, entitled to his reasonable expenses as one traveling abroad under orders. Selfridge *v.* U. S., 28 Ct. Cl. 440.

30. U. S. *v.* Freeman, 3 How. (U. S.) 556, 11 L. ed. 724.

31. Parker *v.* U. S., 1 Pet. (U. S.) 293, 7 L. ed. 150.

32. Parker *v.* U. S., 1 Pet. (U. S.) 293, 7 L. ed. 150; U. S. *v.* Freeman, 1 Woodb. & M. (U. S.) 45, 25 Fed. Cas. No. 15,163.

33. Parker *v.* U. S., 1 Pet. (U. S.) 293, 7 L. ed. 150, wherein it was held that the adjutant and inspector of the army of the United States was not entitled to additional rations.

A marine station at the Washington navy-yard is a permanent or fixed post, garrisoned by troops, and an officer commanding the marine troops at that point is entitled to double rations. Tyler *v.* Walker, 2 Hayw. & H. (U. S.) 35, 24 Fed. Cas. No. 14,311*a*.

34. U. S. *v.* Freeman, 3 How. (U. S.) 556, 11 L. ed. 724.

35. Lemly *v.* U. S., 28 Ct. Cl. 468, in which case it was held that a judge-advocate general of the navy who is on duty in the department is not entitled to a sea-pay ration.

36. Reid *v.* U. S., 18 Ct. Cl. 625.

A mate in the navy, attached to, and serving on, a receiving-ship, is entitled to a ration while so serving. U. S. *v.* Fuller, 160 U. S. 593, 16 S. Ct. 386, 40 L. ed. 549 [*affirming* 14 Ct. Cl. 148].

A boatswain attached to a receiving-ship at anchor is not entitled to the rations allowed officers while at sea or attached to sea-going vessels. Frary *v.* U. S., 24 Ct. Cl. 114.

37. U. S. *v.* Willard, 1 Paine (U. S.) 539, 28 Fed. Cas. No. 16,698. See also Ryan *v.* U. S., 8 Ct. Cl. 265, 10 Ct. Cl. 115.

The adjutant and inspector-general has no

exercise of military power, when the rights of the citizen are concerned, shall never be pushed beyond what exigency requires.[38]

b. To Confer Power of Appointment. A quartermaster is not authorized to confer a power of appointment on another person.[39]

c. To Contract For Government — (i) *In General.* Only officers specially empowered so to do are authorized to bind the government by express contract,[40] and in the exercise of this power they are bound by the rate of compensation[41] and the articles[42] allowed by law. No claim against the United States can be based upon a purchase within the enemy's lines,[43] and a contract regularly made between United States officials and a contractor for the delivery of supplies at a military post cannot be modified by an oral agreement with an inferior officer.[44]

(ii) *Necessity of Advertising.* A parol contract entered into by a quartermaster, without previous advertisement and without an exigency declared by the commanding officer, is void.[45] Where an exigency exists, however, supplies may be purchased, without advertisement under orders of the commanding officer,[46] in

distinct command; his duties consist in details of service, and not in active military command. Parker *v.* U. S., 1 Pet. (U. S.) 293, 7 L. ed. 150.

A provost marshal is a public officer, whose duties concern the public, as connected with the administration and exercise of justice, and his office bears the same relation to the military courts that sheriffs, marshals, constables, and peace-officers do to the civil courts. Hawley *v.* Butler, 54 Barb. (N. Y.) 490. No authority less than that of congress could authorize a provost marshal to exact of drafted men, volunteers, or those offering substitutes, deposits of money or property, to be forfeited to the government if such men did not report themselves at the proper rendezvous. Richardson *v.* Crandall, 48 N. Y. 348 [*affirming* 47 Barb. (N. Y.) 335 (*reversing* 30 How. Pr. (N. Y.) 134)].

The quartermaster and commissary of subsistence have separate and distinct duties. Shrewsbury *v.* U. S., 18 Wall. (U. S.) 664, 21 L. ed. 850 [*affirming* 7 Ct. Cl. 374].

38. Raymond *v.* Thomas, 91 U. S. 712, 23 L. ed. 434, holding that a commanding officer's order, wholly annulling a decree rendered by a state court of chancery in a case within its jurisdiction, was void.

An officer had no authority, as military commander, to issue an order to the sheriff of a county, requiring him to place a person in possession of a plantation and personal property which were, at the time, in possession of another person. Whalen *v.* Sheridan, 17 Blatchf. (U. S.) 9, 29 Fed. Cas. No. 17,476.

39. Burroughs *v.* U. S., 4 Ct. Cl. 555.

40. Kirkham *v.* U. S., 4 Ct. Cl. 223; Ayres *v.* U. S., 3 Ct. Cl. 1. See also Reeside *v.* U. S., 2 Ct. Cl. 1, 7 Ct. Cl. 82, holding that the responsibility and discretion appertaining to the purchase of military supplies is vested in the officers of the quartermaster department; and that a commander cannot appoint a civilian purchasing agent of the government, nor invest him with authority to make express contracts which transferred to him the responsibility which the law imposes on quartermasters.

The acts of the assistant surgeon-general, appointed under the act of congress, and located at St. Louis, are the acts of the surgeon-general, and have the same validity until countermanded or revoked. Parish *v.* U. S., 100 U. S. 500, 25 L. ed. 763.

Protection of property.— It is the duty of a *de facto* officer to protect government property in his charge, and when such an officer procures tarpaulins to protect from the weather public property in his custody, the government, as bailee for hire, becomes liable to the owner for a reasonable compensation while they continue in its service, and for their reasonable value if lost or destroyed. Holton *v.* U. S., 15 Ct. Cl. 276.

41. Arthur *v.* U. S., 16 Ct. Cl. 422.

42. U. S. *v.* Webster, 2 Ware (U. S.) 46, 28 Fed. Cas. No. 16,658.

Amount of supplies.— A quartermaster has no authority to contract for indefinite and unlimited quantities of articles to be bought by contractors, or to bind the government to take such purchases without reference to its own wants. Cobb *v.* U. S., 18 Ct. Cl. 514. But, when at a remote post, it is his duty to assume that the post will be kept up, and to provide forage for it until notified to the contrary, and a contract made by him for that purpose, in the prope manner, is valid without approval. Cohen *v.* U. S., 15 Ct. Cl. 253.

Protection to party furnishing supplies.— An officer may contract for the government to furnish "sufficient guards and escorts to protect the contractor while engaged in the fulfilment of this contract," it not being an agreement to protect a citizen in his ordinary pursuits, but being of the nature of a contract of indemnity or insurance, where the government is interested in the fulfilment, and where there is a risk which one party or the other must assume. U. S. *v.* McKee, 97 U. S. 233, 24 L. ed. 911 [*reversing* 12 Ct. Cl. 504]. See also Chandler *v.* U. S., 17 Ct. Cl. 1.

43. Hart *v.* U. S., 16 Ct. Cl. 459.

44. Mitchell *v.* U. S., 19 Ct. Cl. 39.

45. Adams *v.* U. S., 7 Ct. Cl. 437.

46. Updegraff *v.* U. S., 8 Ct. Cl. 514; Battelle *v.* U. S., 8 Ct. Cl. 295; Cobb *v.* U. S., 7 Ct. Cl. 470; Crowell *v.* U. S., 2 Ct. Cl. 501

whom exists the exclusive power to declare an emergency.[47] Such contract must be ordered by the commanding officer,[48] and the order must be given in writing.[49] The right is limited, moreover, to the continuance of the emergency.[50]

(III) *Necessity of Approval.* Where a contract is made under orders in due form of law no approval is necessary;[51] but where a contract was not authorized it must be approved by the proper authority.[52]

2. Of Navy Officers. The commander of a vessel of war has a right to issue and enforce orders as to the discipline of his ship,[53] and, on this principle, may control the issue of stores by the purser, but not vary their price.[54] But a naval officer has no authority, by virtue of his office alone, to charter a steamer for the use of the quartermaster's department,[55] or to deliver materials, arising from the breaking up of a war-vessel, to a contractor for the repair of another war-vessel, in payment for the work of the latter, where such materials are not used in the repairs, but are sold by the contractor for his private benefit.[56]

L. Leave of Absence. Authority to give leave of absence is committed by law to certain persons, the mode of application pointed out, and the maximum of its duration prescribed.[57] When granted, an officer is at liberty to go where he wishes during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses, the only requirement being that he shall report at his post at the expiration of the leave.[58] His post is not changed by the fact that, after he has been granted leave of absence, he is ordered to perform temporary duty at another station, and while there accepts his leave.[59]

III. DISBURSING AGENTS.

A. Pay — 1. In General. The pay of disbursing officers is fixed by law,[60] and army registers and general orders of the commander-in-chief, directing that the

(holding this to be true notwithstanding the existence of a contract for the same articles); Floyd *v.* U. S., 2 Ct. Cl. 429; Mowry *v.* U. S., 2 Ct. Cl. 68, 7 Ct. Cl. 84; Reeside *v.* U. S., 2 Ct. Cl. 1, 7 Ct. Cl. 82.

47. Henderson *v.* U. S., 4 Ct. Cl. 75.

48. O'Neil *v.* U. S., 4 Ct. Cl. 542; McKinney *v.* U. S., 4 Ct. Cl. 537.

49. Cobb *v.* U. S., 18 Ct. Cl. 514 [*overruling* Thompson *v.* U. S., 9 Ct. Cl. 187].

50. Emery *v.* U. S., 4 Ct. Cl. 401, holding that, where a vessel remains in service voluntarily after the emergency is past, she must remain at the rate prescribed by the quartermaster-general, and cannot receive that agreed upon in her charter-party.

51. Green *v.* U. S., 18 Ct. Cl. 93; Akers *v.* U. S., 2 Ct. Cl. 375.

Authority to accept bid is a ratification of previous acts. Tenney *v.* U. S., 10 Ct. Cl. 269.

Approval may be inferred from letters, and need not be indorsed formally on the contract. Floyd *v.* U. S., 2 Ct. Cl. 429.

52. Filor *v.* U. S., 9 Wall. (U. S.) 45, 19 L. ed. 549.

Contracts which are to be held in abeyance till approved by a superior officer should contain a clause to that effect. Cohen *v.* U. S., 15 Ct. Cl. 253.

53. Detaining marine after expiration of term.— The commanding officer of an exploring expedition may detain a marine after the term of his enlistment has expired, if, in his opinion, the public interest requires it; and may compel him to do duty, by the use of the proper degree of punishment. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 12 L. ed. 618.

54. U. S. *v.* Buchanan, Crabbe (U. S.) 563, 24 Fed. Cas. No. 14,678.

55. Slawson *v.* U. S., 4 Ct. Cl. 87.

56. Steele *v.* U. S., 113 U. S. 128, 5 S. Ct. 396, 28 L. ed. 952 [*affirming* 19 Ct. Cl. 181].

57. U. S. *v.* Williamson, 23 Wall. (U. S.) 411, 23 L. ed. 89.

A department commander can grant leave for a period not exceeding sixty days; but applications for leave exceeding four months must be referred to the war department. U. S. *v.* Williamson, 23 Wall. (U. S.) 411, 23 L. ed. 89.

58. U. S. *v.* Williamson, 23 Wall. (U. S.) 411, 23 L. ed. 89.

59. Andrews *v.* U. S., 15 Ct. Cl. 264.

60. U. S. *v.* Kuhn, 4 Cranch C. C. (U. S.) 401, 26 Fed. Cas. No. 15,545.

Paymasters of the army are entitled to receive the pay and emoluments of majors of infantry, and not majors of cavalry. Wetmore *v.* U. S., 10 Pet. (U. S.) 647, 9 L. ed. 567; U. S. *v.* Gwynne, 1 McLean (U. S.) 270, 26 Fed. Cas. No. 15,272.

A navy agent appointed acting purser for the naval school is entitled to the salary allowed by law to pursers. U. S. *v.* White, Taney (U. S.) 152, 28 Fed. Cas. No. 16,684.

For navy agents the maximum compensation is fixed at three thousand dollars per annum by the act of congress of March 3, 1855, and the excess of commissions in one year cannot aid the deficiency of another.

general staff is to include the officers of the pay department, are not evidence of the correctness of such classification of a paymaster in the general staff of the army so as to determine his pay.[61]

2. Commission on Disbursements. Officers who, out of the line of their duty,[62] disburse moneys are sometimes allowed extra pay for such services,[63] generally a percentage of the amount disbursed.[64]

B. Liabilities — 1. In General. A disbursing officer to whom money is advanced is liable therefor as a debtor, and not merely as a bailee;[65] but, by a statute[66] retrospective in its operation,[67] the court of claims is authorized to afford relief to such officers[68] where, without any fault or neglect on their part,[69] their money[70] or vouchers[71] are captured by the enemy, or where their funds are stolen.[72] The officer's testimony alone is insufficient to show that the loss was without his fault or neglect, especially when it appears that there were disinterested persons cognizant of all the circumstances.[73] The relief afforded by this statute is not forfeited by accounting for the full amount lost.[74]

2. Entitled to What Credits. A disbursing officer is entitled to credit for payments made by order of his superiors,[75] for payments to officers prior to receiving notice that their pay has been stopped,[76] and for payments of office rent and clerk-hire necessary to the prosecution of his duties.[77]

U. S. *v.* Wendell, 2 Cliff. (U. S.) 340, 28 Fed. Cas. No. 16,666.

One temporarily appointed to fill a vacancy occurring at sea cannot claim paymaster's pay beyond the time when his accounts were settled. Ostrandet *v.* U. S., 22 Ct. Cl. 218.

61. Wetmore *v.* U. S., 10 Pet. (U. S.) 647, 9 L. ed. 567.

62. When disbursements are made in line of duty no commission can be allowed. U. S. *v.* Buchanan, 8 How. (U. S.) 83, 12 L. ed. 997; Browne *v.* U. S., 1 Curt. (U. S.) 15, 4 Fed. Cas. No. 2,036; Goldsborough *v.* U. S., Taney (U. S.) 80, 10 Fed. Cas. No. 5,519.

63. U. S. *v.* Tillebrown, 7 Pet. (U. S.) 28, 8 L. ed. 596; U. S. *v.* Ripley, 7 Pet. (U. S.) 18, 8 L. ed. 593; U. S. *v.* Fitzgerald, 4 Cranch C. C. (U. S.) 203, 25 Fed. Cas. No. 15,107.

Where a particular compensation is fixed by law no commissions can be allowed. Gratiot *v.* U. S., 4 How. (U. S.) 80, 11 L. ed. 884; Minis *v.* U. S., 15 Pet. (U. S.) 423, 10 L. ed. 791.

Where commissions for certain services are expressly abolished, a purser cannot claim such commissions. U. S. *v.* Buchanan, 8 How. (U. S.) 83, 12 L. ed. 997.

64. Gratiot *v.* U. S., 15 Pet. (U. S.) 336, 10 L. ed. 759; U. S. *v.* Eliason, 1 Hayw. & H. (U. S.) 21, 25 Fed. Cas. No. 15,040.

What constitutes disbursement.— Where a private act of congress allows to military officers a commission of "one per cent. upon such amounts of money as were collected, and by them disbursed or paid into the treasury," the terms of the statute are satisfied, and the commission earned, where the moneys were collected upon drafts sent to one officer by another. Randall *v.* U. S., 8 Ct. Cl. 539.

Forfeiture of commissions.— Where judgment is obtained against a person accountable for public money for neglecting to pay into the treasury the balance due on the adjustment of his account, the commissions of the delinquent shall be forfeited, but the commissions referred to are only such as are pending, and not such as have been paid to the officer, under a final adjustment. U. S. *v.* Wendell, 2 Cliff. (U. S.) 340, 28 Fed. Cas. No. 16,666.

65. U. S. *v.* Carr, 1 Woods (U. S.) 480, 25 Fed. Cas. No. 14,732; U. S. *v.* Freeman, 1 Woodb. & M. (U. S.) 45, 25 Fed. Cas. No. 15,163.

66. U. S. Rev. Stat. (1872), § 1062.

This statute is auxiliary to the general system of the treasury, which enables the accounting officers to secure the immediate payment of balances due from disbursing officers, and yet open and readjust their accounts at any time. Smith *v.* U. S., 14 Ct. Cl. 114.

67. Glenn *v.* U. S., 4 Ct. Cl. 501

68. This statute enumerates the officers of the subsistence department, without including an acting commissary of subsistence, but the latter is included in the enumeration of army officers in U. S. Rev. Stat. (1872), § 1261, and in U. S. Army Reg. (1876), § 47, and is entitled to relief. Wood *v.* U. S., 25 Ct. Cl. 98.

69. An officer is not without fault or negligence where he sends a package of money, by an orderly detailed for service in his office, to a treasury depository, and the package is stolen by or from the orderly. Holman *v.* U. S., 11 Ct. Cl. 642.

70. Prime *v.* U. S., 3 Ct. Cl. 209.

71. Murphy *v.* U. S., 3 Ct. Cl. 212.

72. Broadhead *v.* U. S., 19 Ct. Cl. 125; Scott *v.* U. S., 18 Ct. Cl. 1; Reynolds *v.* U. S., 15 Ct. Cl. 314; Malone *v.* U. S., 5 Ct. Cl. 486.

73. Pattee *v.* U. S., 3 Ct. Cl. 397.

74. Smith *v.* U. S., 14 Ct. Cl. 114.

75. Armstrong *v.* U. S., Gilp. (U. S.) 399, 1 Fed. Cas. No. 548; Matter of Smith, 24 Ct. Cl. 209; Carpenter *v.* U. S., 15 Ct. Cl. 247.

76. Matter of Smith, 23 Ct. Cl. 452.

77. U. S. *v.* White, Taney (U. S.) 152, 28 Fed. Cas. No. 16,684; U. S. *v.* Jarvis, 2 Ware (U. S.) 278, 25 Fed. Cas. No. 15,468.

C. Liabilities of Sureties. The sureties on a disbursing officer's bond are responsible for his faithful performance of any service he may lawfully be required to perform,[78] and they are not relieved from liability by the failure of the government to recall a delinquent officer,[79] or to adjust his accounts when he reports himself ready for settlement.[80]

IV. NAVAL CADETS.

A. Examinations. A cadet, while upon the two years' cruise prescribed as a part of the course at the Naval Academy, is still a member of the academy, and is subject to final examination before graduation from the institution;[81] and a cadet who has been found deficient at any examination has no right to continue at the academy unless upon the recommendation of the academic board.[82] The secretary of the navy cannot drop a cadet, however, because he has not been examined for promotion.[83]

B. Term of Office. The term of office of naval cadets is not a term for life;[84] but expires with the completion of their six years' course, and they then cease to be officers in the navy if not appointed to another office.[85]

V. ENLISTED MEN.

A. Enlistment — 1. Who May Enlist — a. In General. Enlistment being only another and less objectionable mode of securing military service, any person liable to be drafted[86] may voluntarily enlist.[87]

b. Persons Over Prescribed Age. Though persons are required by statute to be between certain ages to be proper subjects for enlistment, one over the maximum age, who was enlisted on his representation that he was under such age, cannot avoid his contract.[88]

c. Family Man. A regulation of the army, providing that no man having a wife or child shall be enlisted in time of peace,[89] is merely a directory regulation of the war department, and an enlistment by such a man is valid.[90]

d. Minors — (i) *In General.* At common law a minor may enlist in either the army or navy wherever such contract is not positively forbidden by the state itself.[91] But, under some statutes, the enlistment of a minor under a certain age[92]

78. U. S. *v.* Cutter, 2 Curt. (U. S.) 617, 25 Fed. Cas. No. 14,911.

79. U. S. *v.* Vanzandt, 11 Wheat. (U. S.) 184, 6 L. ed. 448 [*reversing* 2 Cranch C. C. (U. S.) 338, 28 Fed. Cas. No. 16,611].

80. Smith *v.* U. S., 5 Pet. (U. S.) 292, 8 L. ed. 130.

81. Crenshaw *v.* U. S., 134 U. S. 99, 10 S. Ct. 431, 33 L. ed. 825.

82. Potter *v.* U. S., 34 Ct. Cl. 13.

83. Crygier *v.* U. S., 25 Ct. Cl. 268.

A naval cadet erroneously discharged cannot be regarded as still in the service so as to entitle him to recover the salary incident to the office to which he might have been appointed. Grambs *v.* U. S., 23 Ct. Cl. 420.

84. Crenshaw *v.* U. S., 134 U. S. 99, 10 S. Ct. 431, 33 L. ed. 825.

85. Potter *v.* U. S., 34 Ct. Cl. 13; Grambs *v.* U. S., 23 Ct. Cl. 420.

Congress has power to provide for the mode of appointment of graduates to the naval service. Crenshaw *v.* U. S., 134 U. S. 99, 10 S. Ct. 431, 33 L. ed. 825.

Physical ability is a condition prerequisite to the right of a graduate of the Naval Academy to remain in the service. Potter *v.* U. S., 34 Ct. Cl. 13.

Where the president refuses to issue a commission to a cadet who is entitled thereto, no action will lie for the salary of the office. Benjamin *v.* U. S., 10 Ct. Cl. 474.

86. See *infra*, V, B, 2.

87. Lanahan *v.* Birge, 30 Conn. 438.

88. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636 [*reversing* 38 Fed. 84].

89. If war actually exists, although congress has not declared war, such a man may enlist. Baker *v.* Gordon, 23 Ind. 204.

90. *Ex p.* Schmeid, 1 Dill. (U. S.) 587, 21 Fed. Cas. No. 12,461; *In re* Ferrens, 3 Ben. (U. S.) 442, 8 Fed. Cas. No. 4,746.

91. Com. *v.* Gamble, 11 Serg. & R. (Pa.) 93. See also opinion of Brackenridge, J., in Com. *v.* Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412, to the effect that such a contract is binding if for the benefit of the minor.

Contra, in Massachusetts. *In re* McNulty, 2 Lowell (U. S.) 270, 16 Fed. Cas. No. 8,917.

92. Wantlan *v.* White, 19 Ind. 470; Com. *v.* Carter, 20 Leg. Int. (Pa.) 21 (both holding that, under the act of congress of Feb. 13, 1862, no consent can validate the enlistment of a minor under the age of eighteen); *In re* Davison, 21 Fed. 618 (holding that, under U. S. Rev. Stat. (1872), § 1118, the enlist-

is absolutely void, while under others the consent of the minor's parent, guardian, or master is necessary under certain circumstances.[93]

(II) *Consent of Parent or Guardian*—(A) *Necessity of to Valid Enlistment*—(1) In Army. Under certain statutes of the United States, the enlistment of a minor in the army is illegal unless made with the consent of his parents or guardian,[94] while, under others, such consent was necessary only when the minor was less than eighteen years of age.[95] This does not apply to enlistments in volunteer organizations mustered into the service of the federal government.[96]

(2) In Navy. In the navy, however, minors may be enlisted without the consent of their parents or guardians,[97] except where the statute provides for consent.[98]

(3) In Marine Corps. The marine corps being a part of the naval establishment,[99] it has been held that minors may be lawfully enlisted therein without the consent of parent or guardian,[1] though, under some statutes, such consent is deemed necessary.[2]

ment of a person under the age of sixteen is void); *In re* Riley, 1 Ben. (U. S.) 408, 20 Fed. Cas. No. 11,834.

93. See *infra*, V, A, 1, d, (II).

94. *Massachusetts.*— McConologue's Case, 107 Mass. 154; *In re* Dew, 25 L. R. 538; *In re* Kimball, 9 L. R. 500.

New Hampshire.—State *v.* Dimick, 12 N. H. 194, 37 Am. Dec. 197.

New York.— Matter of Dobbs, 21 How. Pr. (N. Y.) 68; Matter of Carlton, 7 Cow. (N. Y.) 471; *In re* Barlow, 8 West. L. J. (N. Y.) 567.

Ohio.— *In re* Wiesenberger, 7 Ohio Dec. (Reprint) 529, 3 Cinc. L. Bul. 766.

Pennsylvania.— Com. *v.* Fox, 7 Pa. St. 336, 7 Pa. L. J. 227; Com. *v.* Blake, 8 Phila. (Pa.) 523; Com. *v.* Biddle, Brightly N. P. (Pa.) 447, 4 Pa. L. J. Rep. 35, 6 Pa. L. J. 288; Com. *v.* Carter, 20 Leg. Int. (Pa.) 21.

United States.— *In re* Kaufman, 41 Fed. 876; *In re* Spencer, 40 Fed 149; *In re* Cosenow, 37 Fed. 668; *In re* Doyle, 18 Fed. 369; U. S. *v.* Hanchett, 18 Fed. 26; *In re* McDonald, 1 Lowell (U. S.) 100, 16 Fed. Cas. No. 8,752; *Ex p.* Burke, 4 Fed. Cas. No. 2,156*a*; U. S. *v.* Wright, 5 Phila. (Pa.) 299, 20 Leg. Int. (Pa.) 181, 28 Fed. Cas. No. 16,777; U. S. *v.* Wright, 5 Phila. (Pa.) 296, 20 Leg. Int. (Pa.) 21, 28 Fed. Cas. No. 16,778; U. S. *v.* Stewart, Crabbe (U. S.) 265, 27 Fed. Cas. No. 16,400.

See 4 Cent. Dig. tit. "Army and Navy," § 46.

Where the father is dead, the mother is "a parent," whose consent is necessary and sufficient, under the acts of congress concerning the enlistment of minors in the United States army (*Ex p.* Mason, 5 N. C. 336; Com. *v.* Callan, 6 Binn. (Pa. 255; Shorner's Case, 22 Fed. Cas. No. 12,808) even after her marriage to a second husband (Matter of Cook, 17 How. Pr. (N. Y.) 337).

Where no parent, guardian, or master exists.— Under an act of congress which prohibited the enlistment of minors into the army without the consent of their parents, guardians, or masters, a minor who has no parent, guardian, or master cannot be enlisted at all. Com. *v.* Cushing, 11 Mass. 67, 6 Am. Dec. 156.

Ratification by minor on attaining majority.— Where a minor, having enlisted without the consent of his father, remained in the service more than a year after he came of age, receiving his pay and rations, without any dissent, and without any reasonable excuse for not making an application for a discharge, his acts amounted to a ratification of the enlistment. State *v.* Dimick, 12 N. H. 194, 37 Am. Dec. 197.

95. Phelan's Case, 9 Abb. Pr. (N. Y.) 286; Matter of Beswick, 25 How. Pr. (N. Y.) 149; *In re* Higgins, 16 Wis. 351; Matter of Gregg, 15 Wis. 479; *In re* Riley, 1 Ben. (U. S.) 408, 20 Fed. Cas. No. 11,834.

96. Lanahan *v.* Birge, 30 Conn. 438; Matter of Disinger, 12 Ohio St. 256; U. S. *v.* Lipscomb, 4 Gratt. (Va.) 41.

97. *In re* Doyle, 18 Fed. 369; U. S. *v.* Stewart, Crabbe (U. S.) 265, 27 Fed. Cas. No. 16,400; U. S. *v.* Bainbridge, 1 Mason (U. S.) 71, 24 Fed. Cas. No. 14,497. *Compare* Com. *v.* Downes, 24 Pick. (Mass.) 227; Com. *v.* Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412 (wherein it was held that the consent of a mother was not necessary, there being no father or guardian living). See 4 Cent. Dig. tit. "Army and Navy," § 46.

98. *In re* Hayes, 11 Fed. Cas. No. 6,261*a*; *In re* McLave, 8 Blatchf. (U. S.) 67, 16 Fed. Cas. No. 8,876; in which cases it was held that, under a statute providing that it shall be lawful to enlist boys for the navy with the consent of their parents, and that "it shall be lawful to enlist other persons for the navy to serve not exceeding five years," a minor over eighteen is not included in the terms "other persons," and that, therefore, his enlistment without such consent is invalid, although it was held *contra* in Matter of Collins, 25 How. Pr. (N. Y.) 157; U. S. *v.* Watson, 2 Hayw. & H. (U. S.) 226, 28 Fed. Cas. No. 16,650*a*.

99. Com. *v.* Gamble, 11 Serg. & R. (Pa.) 93; *In re* Doyle, 18 Fed. 369.

1. Com. *v.* Gamble, 11 Serg. & R. (Pa.) 93; Com. *v.* Morris, 1 Phila. (Pa.) 381, 9 Leg. Int. (Pa.) 126; *In re* Doyle, 18 Fed. 369.

2. Matter of Shugrue, 3 Mackey (D. C.) 324; *In re* Wall, 8 Fed. 85; *In re* McNulty, 2 Lowell (U. S.) 270, 16 Fed. Cas. No. 8,917. *Compare Ex p.* Brown, 5 Cranch C. C. (U. S.) 554, 4 Fed. Cas. No. 1,972, holding that minors may be enlisted in the marine corps, as mu-

(B) *Sufficiency of.* Where consent is required it is sufficient if it is given after the enlistment.[3]

e. Aliens. Aliens may be legally enlisted in the army of the United States.[4]

2. FORMALITIES OF ENLISTMENT. To constitute one a duly enlisted man he must be mustered in[5] and must have taken the oath of enlistment or allegiance,[6] which may properly be administered by a commissioned officer.[7] Mere informalities in the enlistment proceedings will not invalidate the enlistment.[8]

3. EVIDENCE OF ENLISTMENT. Muster-rolls, properly certified and filed in the war department, are official records, and afford conclusive proof, as between the soldiers and the government, of the facts of enlistment and the length of the term thereof.[9]

4. DISCHARGE FROM ILLEGAL ENLISTMENT — a. Grounds for. In addition to the illegal enlistment of a minor,[10] the enlistment of a man under duress[11] is a ground for discharge. An enlistment on Sunday is valid.[12]

b. Who May Seek Discharge. Where the consent of a minor's parents or guardian is required, an enlistment without such consent is voidable at the instance of such parent or guardian,[13] even though the minor consents to remain in the service,[14] or on the application of a person claiming the minor as an apprentice,[15] but not at the instance of the minor.[16]

c. Who May Grant Discharge. Notwithstanding a statute empowering the secretary of war to discharge minors illegally enlisted without their parents' consent, a parent is not precluded from procuring his child by habeas corpus proceedings in the proper court.[17]

sicians, with the assent of their fathers, and may be bound as apprentices to the drum-major, in behalf of the government.

3. State *v.* Brearly, 5 N. J. L. 653; Matter of Cook, 17 How. Pr. (N. Y.) 337; Com. *v.* Camac, 1 Serg. & R. (Pa.) 87.

4. U. S. *v.* Wyngall, 5 Hill (N. Y.) 16; U. S. *v.* Cottingham, 1 Rob. (Va.) 649, 40 Am. Dec. 710; *In re* Bailey, 2 Sawy. (U. S.) 200, 2 Fed. Cas. No. 728; Wilson *v.* Izard, 1 Paine (U. S.) 68, 30 Fed. Cas. No. 17,810. *Contra*, Matter of Ross, 1 N. Y. Leg. Obs. 340.

5. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; Bamfield *v.* Abbot, 9 L. R. 510, 2 Fed. Cas. No. 832.

6. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; *In re* McDonald, 1 Lowell (U. S.) 100, 16 Fed. Cas. No. 8,752.

7. *In re* Ferrens, 3 Ben. (U. S.) 442, 8 Fed. Cas. No. 4,746.

Where the oath was taken before a military officer it will be presumed that the services of a civil magistrate could not be obtained, as required by the act of congress of June 12, 1858. *In re* Cline, 1 Ben. (U. S.) 338, 6 Fed. Cas. No. 2,896.

8. *In re* Stevens, 24 L. R. 205.

Reading Articles of War.—The fact that the one hundred and twenty-eight Articles of War, many of which do not concern the duty of a soldier, were not 'l read to a recruit before he took the oath will not vitiate his enlistment. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636.

9. *In re* Stevens, 24 L. R. 205.

10. See *supra*, V, A, 1, d.

11. McDonald *v.* Carlton, 1 M. M. 172, holding that lawful arrest for a military offense is not such duress as to render enlistment invalid.

12. McDonald *v.* Carlton, 1 N. M. 172.

13. Com. *v.* Downes, 24 Pick. (Mass.) 227; Com. *v.* Fox, 7 Pa. St. 336; Com. *v.* Beatty, 18 Leg. Int. (Pa.) 316; *In re* Baker, 23 Fed. 30; *In re* McLave, 8 Blatchf. (U. S.) 67, 16 Fed. Cas. No. 8,876; *In re* Andrews, 1 Hask. (U. S.) 87, 1 Fed. Cas. No. 369; *In re* Keeler, Hempst. (U. S.) 306, 14 Fed. Cas. No. 7,637; U. S. *v.* Anderson, Brunner Col. Cas. 202, 24 Fed. Cas. No. 14,449.

14. Com. *v.* Harrison, 11 Mass. 63; Com. *v.* Biddle, Brightly N. P. (Pa.) 447.

15. State *v.* Brearly, 5 N. J. L. 653.

16. Morrissey *v.* Perry, 137 U. S. 157, 11 S. Ct. 57, 34 L. ed. 644; *In re* Cosenow, 37 Fed. 668; *In re* Hearn, 32 Fed. 141; *In re* Davison, 21 Fed. 618. *Contra*, Com. *v.* Cushing, 11 Mass. 67, 6 Am. Dec. 156; State *v.* Dimick, 12 N. H. 194, 37 Am. Dec. 197; *In re* Chapman, 37 Fed. 327, 2 L. R. A. 332; U. S. *v.* Hanchett, 18 Fed. 26; *In re* McNulty, 2 Lowell (U. S.) 270, 16 Fed. Cas. No. 8,917.

17. Com. *v.* Blake, 8 Phila. (Pa.) 523; U. S. *v.* Hanchett, 18 Fed. 26; Seavey *v.* Seymour, 3 Cliff. (U. S.) 439, 21 Fed. Cas. No. 12,596; *In re* McDonald, 1 Lowell (U. S.) 100, 16 Fed. Cas. No. 8,752. *Contra*, Matter of O'Connor, 48 Barb. (N. Y.) 258, 3 Abb. Pr. N. S. (N. Y.) 137; *In re* Neill, 8 Blatchf. (U. S.) 156, 17 Fed. Cas. No. 10,089; *In re* Riley, 1 Ben. (U. S.) 408, 20 Fed. Cas. No. 11,834.

After refusal by the court of common pleas, on application of the father of a minor who had enlisted in the army without his consent, to discharge such minor, as he elected to remain in the army, it was in the discretion of the supreme court to entertain a second application for such purpose. Com. *v.* Biddle, Brightly N. P. (Pa.) 447.

d. Not Granted While Minor a Prisoner of War. A minor will not be discharged while he is a prisoner of war on parole, awaiting exchange, the national faith being pledged for the execution of his promise, and the right of the parent temporarily subordinated to that of the government.[18]

e. Conclusiveness of Enlistment Oath. By statute, the oath taken by a recruit, on his enlistment in the army of the United States, as to his age is conclusive as against himself and every one else.[19] This statute, however, does not render the certificate of enlistment, stating the recruit's age, conclusive on this point if he made no oath respecting it.[20]

B. Draft — 1. Constitutionality of Statutes Authorizing. A statute authorizing the raising of a national military force by a draft is not repugnant to the constitution which gives congress power "to provide for calling forth the militia . . . to suppress insurrections," by interfering with the reserved rights of the states over their own militia.[21]

2. Who May Be Drafted — a. In General. Every citizen[22] of sufficient age and capacity is under obligation to render military service to the country, when required, and is subject to draft for such service.[23]

b. Exempted Persons. The proper board may declare certain persons exempt from draft,[24] and has no power, after publication of its decision declaring a person exempt, to revise the same.[25] The exemption from draft is a personal privilege, however, and if not pleaded or claimed at the proper time, before the proper tribunal, is waived.[26]

3. Formalities of Draft. Where the statute establishes the system of enrolling and drafting, and directs the commissioner of a county to cause "to be drawn from the wheel a number of ballots equal to the number of drafted men fixed by the governor to be drawn as the proper quota," it does not authorize the commissioner to take additional names from the wheel to make up for any that might be rejected by the mustering officer.[27] A misnomer in the enrolment prevents the

18. U. S. *v.* Wright, 5 Phila. (Pa.) 299, 20 Leg. Int. (Pa.) 181, 28 Fed. Cas. No. 16,777.

19. Rielly's Case, 2 Abb. Pr. N. S. (N. Y.) 334; *In re* Cosenow, 37 Fed. 668; U. S. *v.* Gibbon, 24 Fed. 135; *In re* Riley, 1 Ben. (U. S.) 408, 20 Fed. Cas. No. 11,834; *In re* Stokes, 1 Ben. (U. S.) 341, 23 Fed. Cas. No. 13,474; *In re* Cline, 1 Ben. (U. S.) 338, 5 Fed. Cas. No. 2,896; *In re* Conley, 6 Fed. Cas. No. 3,102; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,439. But see Wantlan *v.* White, 19 Ind. 470; Matter of Beswick, 25 How. Pr. (N. Y.) 149; Matter of Webb, 24 How. Pr. (N. Y.) 247; Seavey *v.* Seymour, 3 Cliff. (U. S.) 439, 21 Fed. Cas. No. 12,596; U. S. *v.* Wright, 5 Phila. (Pa.) 296, 20 Leg. Int. (Pa.) 21, 28 Fed. Cas. No. 16,778, holding that it is conclusive only between the government and the recruit.

Where the enlisting officer has knowledge that the oath is false the statute does not apply. *In re* Higgins, 16 Wis. 351.

20. *In re* Tarble, 25 Wis. 390, 3 Am. Rep. 85; Seavey *v.* Seymour, 3 Cliff. (U. S.) 439, 21 Fed. Cas. No. 12,596; *In re* McDonald, 1 Lowell (U. S.) 100, 16 Fed. Cas. No. 8,752.

Presumption of regularity.— Where the descriptive roll made out at enlistment states the recruit to have been over twenty-one, and he has since received pay, subsistence, etc., as a properly enlisted soldier, without objection, the presumption is in favor of the regularity of the proceedings of the enlisting officer, and that such recruit was of lawful age, until he clearly establishes the contrary. Green *v.* Ewell, 1 N. M. 166.

Insufficient evidence to rebut.—Evidence of the recruit's relations that he was under sixteen years of age when he enlisted is not sufficient to establish that fact, against his sworn statement made at the time of enlistment, and the record in the family Bible, showing that his birth, as recorded, had been changed from 1870 to 1871, and the record of the birth of a younger sister in 1871 entirely erased. *In re* Lawler, 40 Fed. 233.

21. Kneedler *v.* Lane, 45 Pa. St. 238 [*affirming* 5 Phila. (Pa.) 485, 21 Leg. Int. (Pa.) 28].

22. **Persons of foreign birth** who have declared their intentions to become citizens of the United States, have become qualified electors of the state, and have exercised the right of suffrage thus conferred, are liable to be drafted into the military service of the United States. Matter of Co way, 17 Wis. 526; *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

23. Lanahan *v.* Birge, 30 Conn. 438.

Minors of suitable age are subject to draft. Lanahan *v.* Birge, 30 Conn. 438; Johnson *v.* Dodd, 56 N. Y. 76.

24. Stingle's Case, 23 Fed. Cas. No. 13,458, holding that a married man, over thirty-five years of age, enrolled and drafted in the first class, may be discharged by a federal court on habeas corpus.

25. *In re* Irons, 5 Blatchf. (U. S.) 166, 13 Fed. Cas. No. 7,066.

26. Com. *v.* Rogers, 2 Pittsb. (Pa.) 377.

27. Com. *v.* Bierer, 2 Pittsb. (Pa.) 380.

person misnamed from being liable to the draft;[28] but where the name of a person was fully given, and properly spelled upon the enrolment list, the dropping out of the last letter of his name from the ballot placed in the box did not invalidate the drafting of his name.[29]

4. FURNISHING SUBSTITUTES. Persons drafted into the service of the United States may furnish substitutes in their stead, or pay, in lieu of service, a specified sum of money,[30] and the secretary of war is authorized to prescribe regulations relating to such substitutes.[31] Recruits mustered in, to stand to the credit of members of a subdistrict in case a draft should take place, and to be taken as substitutes for those drafted, are volunteers.[32]

5. CUSTODY OF DRAFTED MEN. Drafted men are held under federal authority,[33] and, from the time they regularly report for duty, are in the custody of the provost marshal.[34]

C. Place of Service. The place of service of volunteers may be changed notwithstanding the insertion in their enrolment of the officer's name under whom they were to serve.[35]

D. Pay and Allowances — 1. PAY — a. In General — (I) *POWER OF CONGRESS TO CONTROL.* Congress has a right to prescribe and determine what pay and bounty a soldier shall receive, and to whom, in the case of his death, the unpaid bounty and arrears of pay shall be paid.[36]

(II) *OF MUSICIANS.* One who enlisted as a private in the marine corps, and has performed duty with the marine band, on the capitol grounds or the president's grounds, under proper order, is entitled to four dollars a month in addition to his pay as private though he may not have been rated as a musician.[37]

b. Longevity-Pay. An enlisted man, who has served thirty years, may be retired on seventy-five per centum of the pay and allowances of the rank upon which he was retired.[38] This entitles him to three-fourths of his service ration, but not to commutation for things which he enjoys only in common with others, such as medicine, fuel, and quarters.[39]

c. On Discharge. An enlisted man, whether discharged at his own request[40] or as unfit for service,[41] is entitled to transportation to his place of enlistment.[42] But one commissioned as an officer and receiving an officer's mileage cannot claim transportation as an enlisted man,[43] and one discharged without court martial as

28. McCall's Case, 5 Phila. (Pa.) 259, 20 Leg. Int. (Pa.) 108, 15 Fed. Cas. No. 8,669.

29. Matter of Spangler, 11 Mich. 298.

30. State *v.* Jackson, 31 N. J. L. 189, holding that a tax authorized by state statute and raised by a town for the purpose of relieving the inhabitants of the town from a draft was valid, although the tax was imposed upon persons not liable to be drafted as well as upon those liable thereto.

31. Gates *v.* Thatcher, 11 Minn. 204.

32. McClure's Estate, 63 Pa. St. 226.

33. Matter of Spangler, 11 Mich. 298; Kneedler *v.* Lane, 45 Pa. St. 238 [*affirming* 5 Phila. (Pa.) 485, 21 Leg. Int. (Pa.) 28].

34. *In re* Irons, 5 Blatchf. (U. S.) 166, 13 Fed. Cas. No. 7,066.

35. Wilson *v.* Izard, 1 Paine (U. S.) 68, 30 Fed. Cas. No. 17,810.

36. Reed *v.* Reed, 53 Me. 527.

37. U. S. *v.* Bond, 124 U. S. 301, 8 S. Ct. 501, 31 L. ed. 473 [*affirming* 21 Ct. Cl. 457].

Statutes affecting marine band.— The pay of the marine band, fixed by the act of congress of July 22, 1861, at the pay of engineer soldiers, was not increased by the act of congress of May 15, 1872, increasing the pay of engineer soldiers. Keppler *v.* U. S., 27 Ct. Cl. 482.

The naval appropriation act of May 3, 1880, appropriating nine thousand dollars "for thirty musicians," did not increase or change the pay of musicians of the third class in the marine band, which is fixed, by U. S. Rev. Stat. (1872), § 1280, at seventeen dollars per month. Campagna *v.* U. S., 26 Ct. Cl. 316.

38. 23 U. S. Stat. at L. 305.

In determining the right to longevity-pay under this statute, a carpenter in the navy is not entitled to be credited with his service as an apprentice in the navy-yard. Davis *v.* U. S., 28 Ct. Cl. 21.

39. McKenna *v.* U. S., 23 Ct. Cl. 308.

40. Thornton *v.* U. S., 27 Ct. Cl. 342.

41. U. S. *v.* Kingsley, 138 U. S. 87, 11 S. Ct. 286, 34 L. ed. 896 [*reversing* 24 Ct. Cl. 219].

42. Where a soldier's first discharge is followed by his reënlistment within a few days, so that his service is practically continuous, and his second discharge occurs at the place of his original enlistment, he is not entitled to commutation for travel and subsistence to the place of his second enlistment. U. S. *v.* Thornton, 160 U. S. 654, 16 S. Ct. 415, 40 L. ed. 570.

43. Reichman *v.* U. S., 24 Ct. Cl. 485.

unfit for service and of bad character is not entitled to the retained pay allowed to a soldier upon his discharge, but which shall be forfeited unless he serves honestly and faithfully to the date of his discharge.[44]

2. Allowances — a. For Distinguished Service. By a statute held to be retroactive in effect, an enlisted man's certificate of merit for distinguished service entitles him, from the date of such service, to additional pay of two dollars a month,[45] and soldiers reënlisted for clerical service and messenger duty are still in the service, and are entitled to the additional pay for certificates of merit.[46]

b. For Loss of Horses. Where horses were furnished by soldiers, and orders were given to dismount and to do duty at a station separated from the horses, and a consequent loss of the horses and equipment occurred, their owners are entitled to recover;[47] but, where they were to furnish forage, they cannot recover for the loss of such horses on the claim that the United States failed to furnish sufficient forage.[48] Even where a soldier's horse was lost as a direct result of orders to do duty at a place detached from the horse, such soldier, by deserting soon after the orders were given, forfeits his claim for the loss.[49]

c. On Reënlistment. The additional pay allowed to men who reënlist depends upon an honorable discharge and a voluntary reënlistment as well as upon mere length of service.[50]

d. When Performing Extra Services. Although an enlisted man is entitled to additional pay when detailed for constant labor[51] or when on extra duty,[52] one who acts as schoolmaster at the marine barracks, and receives extra pay from his pupils, is not entitled to such additional pay.[53]

3. Rations, and Commutation Therefor. In the navy no person not attached to, or doing duty on, a sea-going vessel, except those attached to receiving-ships or to ships laid up in ordinary at a navy-yard, are entitled to a ration.[54] One who takes the cost-price of his rations instead of subsistence in kind is not entitled to the commutation price therefor.[55]

4. When Claim Accrues. A claim for pay and allowances due when a soldier is mustered out of the service accrues then, and at that time the statute of limitations begins to run.[56]

5. Effect of Capture. The status of a soldier is not changed by his capture, so far as his relations to the government are concerned. He is entitled to all the rights of a soldier after capture the same as if he were in actual service, under the conditions which existed at the time he was taken.[57]

E. Discharge — 1. Effect of. A certificate of honorable discharge at the expiration of a soldier's term of service constitutes a formal final judgment on his entire military record, and operates as a removal of any charge against him,[58] and this is true of soldiers in the volunteer service as well as those in the regular army.[59] It does not, however, restore to him pay and allowances forfeited for desertion.[60]

44. U. S. *v.* Kingsley, 138 U. S. 87, 11 S. Ct. 286, 34 L. ed. 896 [*reversing* 24 Ct. Cl. 219].

45. McNamara *v.* U. S., 28 Ct. Cl. 416.

46. Bell *v.* U. S., 28 Ct. Cl. 462.

47. Valdez *v.* U. S., 16 Ct. Cl. 550.

48. Valdez *v.* U. S., 16 Ct. Cl. 550.

49. Papia *v.* U. S., 16 Ct. Cl. 561.

50. Webb *v.* U. S., 23 Ct. Cl. 58.

51. U. S. Rev. Stat. (1872), § 1287.

52. U. S. Army Reg. (1889), § 163.

53. Fugitt *v.* U. S., 28 Ct. Cl. 253.

54. Herbert *v.* U. S., 21 Ct. Cl. 53 (holding that an apothecary doing duty in the marine barracks is not attached to the ordinary of a navy-yard within the meaning of U. S. Rev. Stat. (1872), § 1579); Button *v.* U. S., 20 Ct. Cl. 423 (holding that an apothecary at the Naval Academy is not entitled to such ration).

55. Jaegle *v.* U. S., 28 Ct. Cl. 133.

56. Wilson *v.* U. S., 25 Ct. Cl. 339; Bowman *v.* U. S., 10 Ct. Cl. 408 (holding that the refusal of the officers of the treasury to examine his accounts until certain charges of desertion are removed does not suspend his right of action, or relieve his claim from the operation of the statute).

57. Phelps *v.* U. S., 4 Ct. Cl. 209.

58. U. S. *v.* Kelly, 15 Wall. (U. S.) 34, 21 L. ed. 106 [*affirming* 5 Ct. Cl. 476].

59. Lander *v.* U. S., 9 Ct. Cl. 242.

60. U. S. *v.* Landers, 92 U. S. 77, 23 L. ed. 603 [*distinguishing* U. S. *v.* Kelly, 15 Wall. (U. S.) 34, 21 L. ed. 106].

2. EVIDENCE OF. The certificate of discharge issued to a soldier is legal evidence of his discharge,[61] and his discharge will, in the absence of contrary evidence, be held to have been honorable.[62]

3. STATUS WHEN DISCHARGE REFUSED. Where a soldier who has served out his term is refused his discharge, he is, nevertheless, while remaining in the barracks, subject to the rules of the establishment.[63]

VI. CIVILIAN EMPLOYEES AND CONTRACTORS.

A. Compensation. A civilian employee whose appointment is not authorized by law can claim no salary,[64] and one duly appointed is not entitled to subsistence.[65] A contractor may recover, on an implied contract, for supplies or services rendered.[66]

B. Suspension. The suspension, by proper authority, of a civilian employee receiving a *per diem* compensation is equivalent, so far as the right of compensation is concerned, to a dismissal.[67]

C. Rights and Liabilities. A contract to furnish supplies is executed when such supplies reach and pass under the control and into the possession of the army, and any subsequent loss will fall on the government.[68] The contractor cannot be charged for services voluntarily rendered by the government,[69] with arbitrary deductions made by a military commission,[70] or for any losses occurring *in transitu*, except in accordance with the terms of his contract.[71] He is entitled to notice of intended transportation as prescribed in his contract.[72]

VII. COURTS OF INQUIRY.

A. In General. Courts of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, are provided for both in the army[73] and navy.[74]

B. By Whom Ordered — 1. IN THE ARMY. In the military service a court may be ordered by the president or by any commanding officer, but cannot be ordered by commanding officers unless a request is made therefor by the one whose conduct is to be inquired into.[75]

2. IN THE NAVY. In the naval service the power to order a court of inquiry is vested in the president, the secretary of the navy, or the commander of a fleet or squadron,[76] and may be ordered at the request of a naval officer.[77]

C. Composition — 1. IN GENERAL. The court is composed of not more than three officers.[78]

2. OFFICERS. In the military service provision is made for a recorder, whose functions correspond to those of the judge-advocate of a court martial;[79] but in

61. Adams County *v.* Mertz, 27 Ind. 103.
62. Brockton *v.* Uxbridge, 138 Mass. 292. *Contra*, Bowman *v.* U. S., 10 Ct. Cl. 408, in which case it was held that the fact that a soldier was mustered out with his company at the end of the war was not evidence of an honorable discharge.
63. U. S. *v.* Travers, 2 Wheel. Crim. (N. Y.) 490, 28 Fed. Cas. No. 16,537.
64. Larkin *v.* U. S., 5 Ct. Cl. 535.
65. Herendeen *v.* U. S., 28 Ct. Cl. 348.
66. Lobb *v.* U. S., 8 Ct. Cl. 250; Seeberger *v.* U. S., 4 Ct. Cl. 405.
67. Murphy *v.* U. S., 54 Fed. 110, holding that the fact that a board of investigation is subsequently appointed to inquire into the charges against him, which board recommends his dismissal, is not a recognition of his status as a government employee, and the fact that he was not formally dismissed is immaterial.
68. Battelle *v.* U. S., 8 Ct. Cl. 295.
69. Kihlberg *v.* U. S., 13 Ct. Cl. 148.
70. Child *v.* U. S., 4 Ct. Cl. 176.
71. U. S. *v.* Shrewsbury, 23 Wall. (U. S.) 508, 23 L. ed. 78; Baldwin *v.* U. S., 15 Ct. Cl. 297.
72. Mason *v.* U. S., 14 Ct. Cl. 59.
73. U. S. Rev. Stat. (1872), § 1342, art. 115.
74. U. S. Rev. Stat. (1872), § 1624, art. 55.
75. U. S. Rev. Stat. (1872), § 1342, art. 115. The president can order a court of inquiry where a military officer is charged with fraudulent practices by a citizen. Swaim *v.* U. S., 28 Ct. Cl. 173.
76. U. S. Rev. Stat. (1872), § 1624, art. 55.
77. Selfridge *v.* U. S., 28 Ct. Cl. 440.
78. U. S. Rev. Stat. (1872), §§ 1342, art. 116; 1624, art. 56.
79. U. S. Rev. Stat. (1872), § 1342, arts. 116–118.

the naval service provision is made for a judge-advocate, or person officiating as such.[80]

D. Jurisdiction. This court, in the military service, has no jurisdiction where the person whose conduct is to be investigated is neither an officer nor a soldier;[81] but in the naval service the cases in which it may be ordered is not limited to any particular class of persons.[82]

E. Procedure — 1. CHALLENGES. The practice is to allow the challenging of members of the court, though it is not specifically authorized.[83]

2. SUMMONING AND EXAMINING WITNESSES. Courts of inquiry have the same power to summon and examine witnesses as courts martial.[84] Naval courts of inquiry are specifically given power to punish contempts,[85] but the military courts have not this power.[86]

3. REPORT. These courts are confined to a statement of the facts, unless they are expressly required in the order for convening to give their opinion,[87] and their report is a privileged communication.[88] In case of a disagreement between the members of the court as to the opinion, separate reports may be presented.[89]

F. Inquiry Does Not Bar Further Proceedings. The fact that the accused has appeared before a court of inquiry does not constitute a former trial so as to bar further proceedings against him.[90]

G. Civil Courts Will Not Interfere. Where a court of inquiry, properly instituted, has jurisdiction of the person and has entered into an investigation, a civil court will not remove the person while the inquiry is in progress.[91]

VIII. COURTS MARTIAL.

A. Definition. A court martial is a tribunal for the administration of the military and naval law by which the army and navy are governed.[92]

B. History and Origin. In England, the original of the modern court martial was the court of chivalry, which first had a distinct existence toward the end of the thirteenth century, the lord high admiral having a similar jurisdiction in naval causes.[93] In the United States, the earliest exercise of national authority by congress in the form of positive legislation was the enactment of rules and articles of war for the government of the army, and rules and regulations for the government of the navy, by which the entire authority over both these branches of the public service was assumed by congress, and enforced by courts martial, without reference to the local tribunals. This separation of the land and naval forces from connection with the local courts, and the method of punishment of

80. U. S. Rev. Stat. (1872), § 1624, art. 56.

81. Dig. J. A. G. 135, par. 1; Davis Mil. L. 556.

82. U. S. Rev. Stat. (1872), § 1624, art. 55.

83. Dig. J. A. G. 136, par. 4.

84. U. S. Rev. Stat. (1872), §§ 1342, art. 118; 1624, art. 57.

85. U. S. Rev. Stat. (1872), § 1342, art. 57.

86. Davis Mil. L. 557.

87. U. S. Rev. Stat. (1872), § 1342, arts. 57, 119.

88. Home *v.* Bentinck, 2 B. & B. 130.

89. Dig. J. A. G. 137, par. 1; Davis Mil. L. 558.

90. Dig. J. A. G. 137, par. 1.

91. U. S. *v.* Mackenzie, 26 Fed. Cas. No. 15,690, in which case it was held that the district court will not issue a warrant of arrest for parties charged with murder on the high seas, on board a naval vessel, while the matter is under investigation by a court of inquiry instituted by the secretary of the navy.

92. People *v.* Allen, 55 N. Y. 31, wherein it is said: "It has all the elements of a court. It has judges to hear the evidence, and determine the facts, and apply the law. It has parties, prosecutor and defendant. It has pleadings and a formal trial, renders judgment, and issues process to enforce it. In short, it does everything within the sphere of its jurisdiction which any judicial tribunal can do to administer justice."

Not a court of record.— A court martial is not a court of record. Wilson *v.* John, 2 Binn. (Pa.) 209; *Ex p.* Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650.

93. People *v.* Van Allen, 55 N. Y. 31; Clode Mil. L. 41; Davis Mil. L. 13; 1 Winthrop Mil. L. 49.

The authority of this court was gradually curtailed until it ceased to exercise the functions of a military tribunal, and the military law was administered during this period by courts or tribunals convened by special com-

offenses committed within either by the appropriate courts martial, was resumed and maintained under the Confederation, while that government continued.[94] These rules and articles of war were borrowed in substance from the English mutiny acts, and those of the navy were copied literally, in all important features, from 22 Geo. II, c. 25.[95]

C. Constitutional Authority For. These courts are established, in the United States, by virtue of the authority conferred by the constitution[96] on congress to raise and support armies, and to make rules for the government and discipline thereof;[97] and, under this authority, congress may provide for the trial and punishment by courts martial, without indictment or the intervention of a jury, of all offenses committed by persons in the military or naval service of the United States,[98] and may provide for the trial and punishment of such offenses in the manner practised by civilized nations.[99]

D. Classification. The highest court martial in both the land and the naval service is the general court martial; the inferior courts martial in the land service are the regimental court martial, the garrison court martial, the field-officer's court and the summary court. The inferior court in the naval service is the summary court.[1]

E. Law Which Is Administered by — 1. In General — a. Articles of War and Regulations. The law administered by courts martial is a well-defined system of laws, consisting of the Articles of War enacted by congress,[2] and the regulations and instructions, sanctioned by the president, for the government of the army[3]

mission or ordinances of the sovereign, until the passage of the mutiny act in 1689, by which the sovereign was, for the first time, authorized to grant commissions for the assembling of courts martial. This act was, with many changes and additions, reënacted annually until the passage of the army acts of 1879 and 1881, by which the powers and jurisdiction of courts martial are established and defined. Grant *v.* Gould, 2 H. Bl. 69; 1 Winthrop Mil. L. 6–10, 50.

94. U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; 1 Journal Cont. Cong. 128, 139, 262; 12 Journal Cont. Cong. 173; 2 American Archives, 1855.

Before the act of congress of April 10, 1806, the military code of the United States was made up almost entirely of the rules and articles for the government of the troops which had been established before the adoption of the constitution, and were continued in force thereunder by statutory provision. Those rules and articles had been enacted by the Continental congress and the congress of the Confederation during, and shortly after, the Revolutionary War. 15 Op. Atty.-Gen. (U. S.) 152.

95. U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; 1 McArthur Courts Martial 348; Jacob L. Dict. *sub voce* "Navy."

The different codes adopted in the United States for the government of the army are the code of 1775, which was enacted by the second Continental congress; the code of 1776, which was amended in 1786, after the adoption of the constitution; the code of 1806 and the code and revision of 1874 (U. S. Rev. Stat. (1872), §§ 1342, 1343). The laws passed at the time of the Spanish-American War in 1898, and to meet subsequent developments occasioned thereby, have necessitated a new codification which is now in preparation. The later codes for the government of the navy are the code of 1800 and the code of 1862 (U. S. Rev. Stat. (1872), § 1624).

96. U. S. Const. art. 1, § 8.

97. *District of Columbia.*— *In re* Esmond, 5 Mackey (D. C.) 64.

Illinois.— Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159.

Iowa.— *Ex p.* Anderson, 16 Iowa 595.

Utah.— *Ex p.* Bright, 1 Utah 145.

United States.— *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

98. Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

"When in actual service," etc.—In article 5 of the amendments to the United States constitution, providing that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," the words "when in actual service in time of war or public danger" apply to the militia only. Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313.

99. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838.

1. U. S. Rev. Stat. (1872), §§ 1342, 1624.

2. *Ex p.* Bright, 1 Utah 145.

Military law has also been defined as "those rules enacted by the legislative power for the government and regulation of the army and navy, and the militia when called into the active service of the United States." *In re* Kemp, 16 Wis. 359, 368.

3. *Ex p.* Bright, 1 Utah 145; U. S. *v.* Freeman, 3 How. (U. S.) 556, 11 L. ed. 724.

and navy.[4] These orders may be promulgated, for the land service, by the secretary of war,[5] and for the naval service by the secretary of the navy,[6] who are the regular constitutional organs of the president for the administration of justice in their respective departments; and rules and orders, when properly promulgated through them, must be received as acts of the executive, and, as such, be binding upon all within the sphere of their legal and constitutional authority.[7]

b. Usages. Usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits; and no change of such usages can have a retrospective effect, but must be limited to the future.[8]

2. Distinguished From Martial Law. This military law is distinct from martial law in that it applies only to persons in the military or naval service of the government; whereas martial law, when once established, applies alike to citizen and soldier.[9]

F. Jurisdiction — 1. In General. A court martial has the same plenary jurisdiction over offenses against military law as that which is exercised by the civil courts of the United States over controversies in their cognizance,[10] and is supreme while acting within the sphere of its exclusive jurisdiction.[11] This juris-

Army regulations part of law of land.— By the act of congress of Aug. 23, 1842, the army regulations were made a part of the law of the land. Root *v.* Stevenson, 24 Ind. 115. See also Gratiot *v.* U. S., 4 How. (U. S.) 80, 11 L. ed. 884.

The construction placed by a commanding officer of a military department upon the Articles of War and the rules and regulations promulgated by the executive, through the secretary of war, is not binding upon the judiciary, even though approved by the secretary of war. *In re* Fair, 100 Fed. 149.

Powers of president and congress distinguished.— The constitutional power of the president to command the army and navy, and of congress to make rules for the government and regulation of the land and naval forces, are distinct, and the president cannot evade the legislative regulations by military orders, nor can congress impair his authority as commander-in-chief by rules and regulations. Swaim *v.* U. S., 28 Ct. Cl. 173.

4. *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538.

5. Hickey *v.* Huse, 56 Me. 493; Gratiot *v.* U. S., 4 How. (U. S.) 80, 11 L. ed. 884; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968; *In re* Fair, 100 Fed. 149.

6. *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538.

7. U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968.

8. U. S. *v.* Macdaniel, 7 Pet. (U. S.) 1, 8 L. ed. 587.

The military law is not altogether a written law, but is composed, in part, of military usage, which must govern in all well organized troops when it is not unreasonable, or in opposition to special enactments. Schuneman *v.* Diblee, 14 Johns. (N. Y.) 235.

9. Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159.

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." Per Chase, C. J., in *Ex p.* Milligan, 4 Wall. (U. S.) 2, 142, 18 L. ed. 281. See also *In re* Egan, 5 Blatchf. (U. S.) 319, 8 Fed. Cas. No. 4,303.

10. Com. *v.* McLean, 2 Pars. Eq. Cas. (Pa.) 367; *Ex p.* Bright, 1 Utah 145; Carter *v.* McClaughry, 105 Fed. 614; Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199; *In re* McVey, 23 Fed. 878; *In re* Davison, 21 Fed. 618; *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

11. *Ex p.* Bright, 1 Utah 145; Carter *v.* Roberts, 177 U. S. 496, 20 S. Ct. 713, 44 L. ed. 861; U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458; Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954; *Ex p.* Mason,

diction is limited and special, however, the court being called into existence for a temporary and special purpose and to perform a special duty, and when the object of its creation is accomplished it ceases to exist.[12]

2. PERSONS[13] — a. In General. All persons connected with the military or naval service of the United States[14] are amenable to the jurisdiction which congress has created for their government, and while thus serving surrender their right to be tried by the civil courts.[15] Courts martial also have jurisdiction of offenses committed by members of the militia when in actual service of the United States in time of war or public danger.[16] A person not connected with the land or naval forces of the United States is not subject to the jurisdiction of a court martial.[17]

105 U. S. 696, 26 L. ed. 1213; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19; U. S. *v.* Maney, 61 Fed. 140; *In re* McVey, 23 Fed. 878; *In re* White, 9 Sawy. (U. S.) 49, 17 Fed. 723; *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596; U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; Grant *v.* Gould, 2 H. Bl. 69.

12. *Massachusetts.*— Brooks *v.* Daniels, 22 Pick. (Mass.) 498; Brooks *v.* Adams, 11 Pick. (Mass.) 441.

New York.— Matter of Wright, 34 How. Pr. (N. Y.) 207.

Pennsylvania.— Duffield *v.* Smith, 3 Serg. & R. (Pa.) 590.

Vermont.— Barrett *v.* Smith, 16 Vt. 246.

United States.— Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167. But *compare* Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

13. Jurisdiction of persons illegally enlisted see infra, VIII, F, 3, b.

14. This includes retired officers (Hill *v.* Territory, 2 Wash. Terr. 147, 7 Pac. 63; Runkle *v.* U. S., 19 Ct. Cl. 396. See also 12 U. S. Stat. at L. 287), the paymaster-general of the navy (Smith *v.* U. S., 26 Ct. Cl. 143), clerks of paymasters of the army (*In re* Thomas, 23 Fed. Cas. No. 13,888. *Contra,* 16 Op. Atty.-Gen. (U. S.) 13, 48, where it was ruled that a civilian employed as quartermaster's clerk is not amenable to the jurisdiction of a court martial) or navy (Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; U. S. *v.* Bogart, 3 Ben. (U. S.) 257, 3 Fed. Cas. No. 14,616; *In re* Bogart, 2 Sawy. (U. S.) 396, 24 Fed. Cas. No. 1,596; *In re* Reed, 20 Fed. Cas. No. 11,636. *Contra, Ex p.* Van Vranken, 47 Fed. 888, where it was held that the clerk of a paymaster in the navy, who was doing duty on land, was not amenable to the jurisdiction of a court martial). See also Davis Mil. L. 478.

Army contractors and their subordinates, when in the course of the execution of their contracts, are subject to the rules of war, and may be arrested and tried by court martial for fraud. Holmes *v.* Sheridan, 1 Dill. (U. S.) 351, 12 Fed. Cas. No. 6,644. But see *Ex p.* Henderson, 11 Fed. Cas. No. 6,349, where it was held that a statute which attempts to render a mere contractor subject to the jurisdiction of a court martial is so far unconstitutional, or, if not unconstitutional, it only renders them subject to such jurisdiction for fraud or wilful neglect of duty in connection with their contracts.

15. Carter *v.* Roberts, 177 U. S. 496, 20 S. Ct. 743, 44 L. ed. 861; Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Ex p.* Van Vranken, 47 Fed. 888; *In re* Davison, 21 Fed. 618; U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; Swaim *v.* U. S., 28 Ct. Cl. 173.

16. Kerr *v.* Jones, 19 Ind. 351; Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19; U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313. But see *Ex p.* McRoberts, 16 Iowa 600, in which it was held that the civil courts had exclusive jurisdiction of an offense committed by a militiaman in the actual service of the United States where, at the time of the commission of the offense, he was on furlough.

Refusing to serve.— This jurisdiction includes militiamen who refuse to serve when called into active service by the president. Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537. *Contra,* Rathbun *v.* Martin, 20 Johns. (N. Y.) 343.

A state statute providing for the enforcement of the penalties prescribed by acts of congress against officers and privates in the militia for neglecting to serve when called into the service of the United States by the president, and providing for the trial of such delinquents by a state court martial, is constitutional. Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19.

17. Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159; Smith *v.* Shaw, 12 Johns. (N. Y.) 257; *In re* Kemp, 16 Wis. 359.

Inmates of soldiers' homes.—The statutory provisions (U. S. Rev. Stat. (1872), §§ 4824, 4853) making the inmates of soldiers' homes subject to the jurisdiction of courts martial are considered unconstitutional and are not enforced. Dig. J. A. G. 705, par. 2; Davis Mil. L. 54. See also U. S. *v.* Murphy, 9 Fed. 26, where it was held that the inmates of a soldiers' home are not in the military service.

Superintendents of national cemeteries who are required to be selected from meritorious and trustworthy officers or soldiers, honorably mustered out or discharged from the military

b. Effect of Expiration of Term of Enlistment. The jurisdiction of courts martial over offenses committed by persons in the military or naval service is not defeated by the fact that the term of enlistment of the offender expired before the proceedings were commenced,[18] and where its jurisdiction attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment, and execution, notwithstanding the fact that the term of enlistment of the accused expires before the conclusion of the proceedings.[19]

c. Effect of Sentence of Dismissal. A court martial's jurisdiction is not exhausted by a sentence dismissing the accused from the service, but it may impose in the same sentence additional penalties,[20] and it has jurisdiction of offenses committed by him while in a military prison, undergoing a sentence of confinement which was so imposed.[21]

3. Offenses — a. In General. Neither military nor naval courts martial are limited in their jurisdiction to the offenses specified in the articles of war, but it is also provided that they shall have jurisdiction of unenumerated offenses,[22] and this jurisdiction extends to the trial and punishment of acts which tend to bring reproach and disgrace upon the service of which they are members, whether those acts are done in the performance of military duties, in a civil position, in a social relation, or in private business.[23] Under this general authority, military courts martial are entrusted with the discretion of determining whether the acts proved are prejudicial to good order and military discipline, the gravity and degree of the offense, and the punishment appropriate to be imposed.[24] Where, however, an offense is specially provided for, the grant of jurisdiction to a court martial to

service, are not amenable to the jurisdiction of courts martial. 16 Op. Atty.-Gen. (U. S.) 16.

Congress cannot give to a simple court martial any jurisdiction over a person who is neither in the military service of the United States nor regularly amenable to the military police of a territory occupied by the government for military purposes. Antrim's Case, 5 Phila. (Pa.) 278, 20 Leg. Int. (Pa.) 300; *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

The consent of the accused cannot confer jurisdiction upon a court martial which does not possess it by virtue of statutory authority. 22 Op. Atty.-Gen. (U. S.) 137. But see Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150, holding that, where a court martial is convened under the authority of the United States to try delinquent militiamen, the members sit as judges, and one accused who pleads guilty waives all objections to the jurisdiction of the court.

18. *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596; *In re* Bird, 2 Sawy. (U. S.) 33, 3 Fed. Cas. No. 1,428.

19. Barrett *v.* Hopkins, 2 McCrary (U. S.) 129, 7 Fed. 312; *In re* Bird, 2 Sawy. (U. S.) 33, 3 Fed. Cas. No. 1,428; *In re* Walker, 3 Am. Jur. 281; *In re* Dew, 25 L. R. 538.

20. Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199.

21. *In re* Craig, 70 Fed. 969; *Ex p.* Wildman, 29 Fed. Cas. No. 17,653*a*; 16 Op. Atty.-Gen. (U. S.) 292; U. S. Rev. Stat. (1872), § 1361.

22. U. S. Rev. Stat. (1872), §§ 1342, art. 62; 1624, art. 32. See also Johnstone *v.* Sutton, 1 T. R. 510.

23. Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; Runkle *v.* U. S., 19 Ct. Cl. 396; Matter of Poe, 5 B. & Ad. 681, 27 E. C. L. 288; 1 Winthrop Mil. L. 1023.

Attempts to shoot prisoner.—A soldier may be tried by a general court martial, under the sixty-second Article of War, for attempting to shoot a prisoner confined in a jail at which he was on duty. *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213.

Making false entries.—A purser in the navy is liable, under 22 Geo. II, c. 33, to be tried by a court martial for fraudulently and unlawfully charging goods to seamen to whom none had been issued, and for making false entries to that end in the ship's books, that being within article 33, which covers all offenses not capital and whose punishment is not otherwise provided for in the articles. Mann *v.* Owen, 9 B. & C. 595, 17 E. C. L. 268.

Manslaughter.— Naval courts martial have jurisdiction to punish the offense of manslaughter, committed at sea on board ships of war, even though it is not named in the naval code as an offense punishable by them. U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313.

Refusal to pay debt.— In Fletcher *v.* U. S., 26 Ct. Cl. 541, it was held that the refusal to pay a just debt is "conduct unbecoming an officer and a gentleman" within the meaning of a charge for which an army officer may be tried by a court martial, and sentenced to be dismissed from the service.

24. *In re* Carter, 97 Fed. 496; Swaim *v.* U. S., 28 Ct. Cl. 173.

try and to punish such offense is conferred by the particular article which mentions it, and not by this general grant of jurisdiction.[25]

b. Desertion. A court martial has exclusive jurisdiction to try and punish persons, duly enlisted,[26] for the offense of desertion,[27] and this jurisdiction extends to desertion by persons above maximum age [28] as well as by a minor, his enlistment being voidable, not void,[29] and where he is held for trial by a court martial on the charge of desertion he must abide by the decision of that court before he can contest in a civil court the validity of his enlistment.[30]

4. Liability For Acts in Excess of. The proceedings of a court martial in excess of its jurisdiction are void,[31] and the court martial and the officer who executes its sentence are trespassers where the case was clearly without their jurisdiction.[32]

G. Constituting Authority — 1. President. The president, as commander-in-chief of the army and navy, has authority to constitute general courts martial in every case where that power is granted to general officers, even though the power is not conferred on him specifically,[33] and is required to exercise this power whenever a commander authorized to convene a general court martial is the accuser or prosecutor of any officer under his command,[34] or where an officer summarily dismissed by him makes a written application for trial, setting forth, under oath, that the dismissal was wrongful.[35]

25. *In re* Carter, 97 Fed. 496.

26. If never enlisted the court has no jurisdiction. *In re* Baker, 23 Fed. 30; *In re* Davison, 21 Fed. 618.

27. Huber *v.* Reily, 53 Pa. St. 112; U. S. *v.* Landers, 92 U. S. 77, 23 L. ed. 603; *In re* Zimmermann, 30 Fed. 176; *In re* White, 9 Sawy. (U. S.) 49, 17 Fed. 723.

28. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636.

29. McConologue's Case, 107 Mass. 154; Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; *In re* Spencer, 40 Fed. 149; *In re* Cosenow, 37 Fed. 668; *In re* Wall, 8 Fed. 85; *In re* Dew, 25 L. R. 538.

Contra, In re Baker, 23 Fed. 30, in which case it was held that the enlistment of a minor was absolutely void, that it must be so held upon the application of any person not estopped from setting up the prohibition, and that in such a case a court martial could not retain jurisdiction of a charge of desertion against him. See also Matter of Carlton, 7 Cow. (N. Y.) 471; Com. *v.* Fox, 7 Pa. St. 336; U. S. *v.* Wright, 5 Phila. (Pa.) 296, 20 Leg. Int. (Pa.) 21, 28 Fed. Cas. No. 16,778.

30. *Iowa.*— *Ex p.* Anderson, 16 Iowa 595.

Massachusetts.— McConologue's Case, 107 Mass. 154; Tyler *v.* Pomeroy, 8 Allen (Mass.) 480.

New York.— Matter of Beswick, 25 How. Pr. (N. Y.) 149.

North Carolina.— Matter of Graham, 53 N. C. 416.

Pennsylvania.— Com. *v.* Gamble, 11 Serg. & R. (Pa.) 93.

United States.—*In re* Spencer, 40 Fed. 149; *In re* Dohrendorf, 40 Fed. 148; *In re* Cosenow, 37 Fed. 668; *In re* Zimmermann, 30 Fed. 176; *In re* Davison, 21 Fed. 618; *In re* Wall, 8 Fed. 85; *In re* Dew, 25 L. R. 538.

31. Barrett *v.* Smith, 16 Vt. 246; *Ex p.* Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650; Barrett *v.* Hopkins, 2 McCrary (U. S.) 129, 7 Fed. 312.

32. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; Smith *v.* Shaw, 12 Johns. (N. Y.) 257; Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457; Warden *v.* Bailey, 4 Taunt. 67; Comyn *v.* Sabine [*cited* in Mostyn *v.* Fabrigas, Cowp. 169]; Frye *v.* Ogle, 1 McArthur Courts Martial 229.

33. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823 [*affirming* 28 Ct. Cl. 173]; Runkle *v.* U. S., 19 Ct. Cl. 396; 15 Op. Atty.-Gen. (U. S.) 297 note; U. S. Rev. Stat. (1872), § 1642, art. 38.

The English sovereign, being vested with the supreme command of the army and navy, has power to constitute general courts martial, and the mutiny acts declaring that it shall be lawful for him to do so are merely declaratory of that power. Clode Mil. L. 19, 91; 1 Winthrop Mil. L. 66.

34. U. S. Rev. Stat. (1872), § 1342, art. 72.

In order that a commander shall be disqualified to convene a court martial, on the ground that he is the accuser or prosecutor, he must be actually such, the mere fact that, in his official capacity, he has ordered charges to be preferred, upon information received, not constituting him the accuser or prosecutor. 16 Op. Atty.-Gen. (U. S.) 106 (holding that where the record of a trial before a court martial is defective in failing to show who was the originator or signer of the charges against the accused, and who is to be treated legally as the accuser or prosecutor, evidence *aliunde* is admissible to supply the information); Dig. J. A. G. 83, 84, par. 11; 1 Winthrop Mil. L. 73, 74.

The president does not become the accuser or prosecutor of an officer on trial before a court martial because, by reason of an accusation made by a private person to the secretary of war, he has convened a court of inquiry, and, upon its report, the necessary routine steps have been taken by the war department to bring defendant to trial. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823.

35. U. S. Rev. Stat. (1872), § 1230.

It would seem that the powers conferred by this statute can be exercised only in the case of officers dismissed in time of war, the presi-

2. Secretaries of War and Navy. The secretary of war, as the regular constitutional organ of the president for the administration of the military affairs of the nation,[36] and the secretary of the navy by authority of statute,[37] may convene general courts martial.

3. Other Officers — a. In Land Forces — (I) *In General* — (A) *General Officers.* In the land service, general courts martial may be constituted, whenever necessary, by any general officer commanding an army, a territorial division or a department, or by a colonel commanding a separate department,[38] except when such commander is the accuser or prosecutor of any officer under his command.[39]

(B) *Brevet Officers.* A court martial may be convened by a brevet general officer who has been assigned by the president to command an army or separate department, and has been placed on duty according to his rank.[40]

(C) *Commanding Officers.* The commanding officer of a garrison, fort, or other place, regiment, corps, detached battalion, or company, may appoint one officer as a summary court, with jurisdiction, except in certain cases, over cases formerly tried by the other inferior courts.[41]

(D) *Superintendent of Military Academy.* The superintendent of the Military Academy is authorized to convene general courts martial for the trial of the cadets.[42]

(II) *In Time of War.* It is further provided that in time of war,[43] the commander of a division,[44] or of a separate brigade[45] of troops shall be competent to

dent having no power to dismiss officers summarily at other times. See *supra*, II, H, 2, b, (I). It has been held that it did not apply to officers dismissed before its passage. Dig. J. A. G. 373; 16 Op. Atty.-Gen. (U. S.) 599. The constitutionality of the statute has been sustained by the attorney-general. 12 Op. Atty.-Gen. (U. S.) 4. But see 1 Winthrop Mil. L. 78, in which the author inclines to the view that it is unconstitutional.

36. Hickey *v.* Huse, 56 Me. 493; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264; Dig. J. A. G. 25.

37. U. S. Rev. Stat. (1872), § 1642, art. 38; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601.

38. U. S. Rev. Stat. (1872), § 1342, art. 72.

This authority cannot be delegated (Dig. J. A. G. 82; 1 Winthrop Mil. L. 81), and the officer's authority to convene general courts martial is suspended where he is absent from his command (Dig. J. A. G. 82, par. 5; Davis Mil. L. 19; 1 Winthrop Mil. L. 82) if the absence is not merely temporary and incidental (16 Op. Atty.-Gen. (U. S.) 679).

A division commander, acting as department commander in the absence of the department commander, may convene a general court martial. Dig. J. A. G. 84, par. 10.

Whether the holding of a court is expedient is, under this provision, for the determination of the commander authorized to convene it, and his decision is final. Dig. J. A. G. 81, pars. 1, 2.

39. See *supra*, VIII, G, 1.

40. 17 Op. Atty.-Gen. (U. S.) 39; Ives Mil. L. 30.

41. 30 U. S. Stat. at L. 483; Davis Mil. L. 24.

The regimental court martial consisted of three officers, who were appointed, for his own regiment or corps, by the officer commanding a regiment or corps, to try offenses not capital. U. S. Rev. Stat. (1872), § 1342, art. 81. Under this provision it was held that a regimental court could be appointed for the engineer battalion by the chief of engineers, and for the signal corps by the chief signal officer. Dig. J. A. G. 92, par. 1.

A garrison court martial consists of three officers appointed by the officer commanding a garrison, fort, or other place, where the troops are composed of different corps (U. S. Rev. Stat. (1872), § 1342, art. 82) and may be ordered even when there is only one member of a different corps present on duty with the garrison (Dig. J. A. G. 94, par. 4). The commanding officer cannot appoint himself a member of the court. Dig. J. A. G. 93, par. 1.

42. U. S. Rev. Stat. (1872), § 1326.

43. **In time of peace** the formation of divisions and brigades cannot be made except for purposes of instruction. U. S. Army Reg. (1895), par. 189.

44. **A division** is composed of two brigades. U. S. Rev. Stat. (1872), § 1114.

45. **A brigade** is constituted, in the ordinary arrangement of the army, of two regiments of infantry or of cavalry. U. S. Rev. Stat. (1872), § 1114.

A separate brigade is one which is a distinct command, not constituting a part of any division. Dig. J. A. G. 85, par. 1. The war department requires that "when a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or army will designate it in orders as 'a separate brigade,' and a copy of such orders will accompany the proceedings of any general court martial convened by such brigade commander. Without such authority commanders of posts and dis-

appoint a general court martial, except when such commander is the accuser or prosecutor of any person under his command, in which event the court shall be appointed by the next higher commander.[46]

(III) *For Trial of Militiamen.* A court martial may be convened under state authority for the trial and punishment, in accordance with the federal statutes, of militiamen of the state who refuse or neglect to serve when called into actual service by the governor in pursuance of an order or requisition of the president.[47]

b. In Naval Service. In the naval service, the power of convening general courts martial is further vested in the commander-in-chief of a fleet or squadron,[48] the latter being required, when his fleet or squadron is in the waters of the United States, to have the express authority of the president.[49]

4. Effect of Illegal Constitution. Where a court martial has been illegally convened and organized, its acts are void,[50] as trial by such a court is not trial by due process of law,[51] and the act of an officer in convening a court when he had no authority to do so cannot be legalized.[52]

H. Composition — 1. In General — a. What Officers May Serve. Courts martial must be composed of commissioned officers only.[53] Among those eligible for this service are included volunteer officers,[54] officers of the marine corps who are qualified to serve on courts martial in both the land and the naval service,[55] officers of the medical corps and of the paymasters' corps,[56] officers of the militia,[57] and graduated cadets with brevet rank.[58] Professors at the government academies are not competent to serve[59] unless they are regular officers of the service, temporarily detailed for duty at the academies;[60] nor are retired officers,[61] undergraduate cadets at the academies,[62] civilians, without appointment or commission, acting as officers,[63] or non-combatant officers.[64] It has been decided that

tricts having no brigade organization will not convene general courts martial." G. O. 251, A. G. O., 1864.

46. U. S. Rev. Stat. (1872), § 1342, art. 73.

47. Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19 [*affirming* 3 Serg. & R. (Pa.) 169].

48. Presumption as to rank of convening officer.— The designation of an officer in the proceedings of a naval court martial as commander-in-chief raises the presumption, under article 243 of the regulations for the government of the navy, that he was in command of a fleet or squadron, and was therefore a proper officer to convene the court. *In re* Crain, 84 Fed. 788.

49. U. S. Nav. Reg. (1900), 483; U. S. Rev. Stat. (1872), § 1642, art. 38.

Sufficient allegation of authority.— Where a naval court martial is convened in the waters of the United States, an allegation by the officer convening that it is done "by virtue of the express authority" vested in him "by the president of the United States, in accordance with the provisions of article 38, § 1624" of the revised statutes sufficiently alleges his authority. *In re* Crain, 84 Fed. 788.

Cadets at the Naval Academy are not entitled to trial by courts martial except for the offense of hazing, and may be dismissed from the academy and from the service for misconduct, without trial by court martial. 15 Op. Atty.-Gen. (U. S.) 634.

No officer can demand court martial on himself or others, the granting of a trial resting solely in the discretion of the officer authorized to convene a court. U. S. Nav. Reg. (1900), par. 1103.

50. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838.

51. 22 Op. Atty.-Gen. (U. S.) 137.

52. 4 Am. St. Papers, Mil. Aff., 82.

53. U. S. Rev. Stat. (1872), § 1342, art. 75; U. S. Nav. Reg. (1900), 483, art. 39; 7 Op. Atty.-Gen. (U. S.) 323; Davis Mil. L. 30; 1 Winthrop Mil. L. 87.

In the English service, before an officer is eligible to serve on a general court martial, he must have had a commission for three years. Clode Mil. L. 115.

54. 10 Op. Atty.-Gen. (U. S.) 522; 1 Winthrop Mil. L. 93.

55. Com. *v.* Gamble, 11 Serg. & R. (Pa.) 93; 2 Op. Atty.-Gen. (U. S.) 311; U. S. Rev. Stat. (1872), § 1342, art. 78.

A court martial of an officer of the marine corps on shore duty should be composed of officers of the army and of the marine corps. 2 Op. Atty.-Gen. (U. S.) 312.

56. Dig. J. A. G. 336; Ives Mil. L. 27. *Contra*, De Hart Mil. L. 38; Benet Mil. L. 22.

57. Davis Mil. L. 27.

58. 7 Op. Atty.-Gen. (U. S.) 323.

59. Dig. J. A. G. 615, par. 2; 1 Op. Atty.-Gen. (U. S.) 469.

60. 1 Winthrop Mil. L. 90.

61. Dig. J. A. G. 87, par. 1.

62. Babbitt *v.* U. S., 16 Ct. Cl. 202; 1 Op. Atty.-Gen. (U. S.) 469.

63. Dig. J. A. G. 144; 1 Winthrop Mil. L. 89. See also Byrnes *v.* U. S., 26 Ct. Cl. 302.

64. 2 Op. Atty.-Gen. (U. S.) 297, holding

it is not necessary that the members of a court martial shall have attained their majority.[65]

b. Number. General courts martial[66] may consist of any number of officers from five to thirteen, inclusive;[67] but they must not consist of less than thirteen when that number can be convened without manifest injury to the service.[68] Where a court has been duly organized, with more than five members, the trial is not to be arrested on account of the absence of any of the members, provided five continue to be present,[69] nor does the absence of members of a court martial, reassembled, by order of the secretary of war, to revise its sentence, impair its jurisdiction or otherwise affect its power to revise the sentence, if the number present is not less than five.[70] Where the number of members falls below the minimum, those remaining have no power to act as a court,[71] except for certain purposes.[72] This reduction does not of itself, however, dissolve the court, but the convening officer may either dissolve it, or may appoint the additional number requisite to constitute a lawful court.[73]

c. Rank. Provisions intended to prevent the trial of an officer, when it can be avoided, by officers inferior to him in rank, are merely directory to the officer summoning the court, and his decision is conclusive,[74] and a challenge to a member, based merely on his inferiority in rank, is not good.[75]

2. For Trial of Militiamen. Courts martial for the trial of the militia must be composed of militia officers,[76] either of the same or different states.[77]

I. Procedure — 1. Organization of Court — a. Summons. An order designating the officers to compose a court martial constitutes a sufficient summons to such officers.[78]

that chaplains, surgeons, pursers, and all other non-combatant officers were incompetent to officiate as members of naval courts martial. But as to legal eligibility of chaplains see, *contra*, 1 Winthrop Mil. L. 88 note.

65. 16 Op. Atty.-Gen. (U. S.) 550.

66. Inferior courts, number of officers composing, see *supra*, VIII, G, 3, a, (I), (C).

67. U. S. Rev. Stat. (1872), § 1342, art. 75; U. S. Nav. Reg. (1900), 457, par. 1836.

Number in discretion of convening officer.—The provision as to the number of members to compose the court is, within the limits prescribed, merely directory to the officer appointing it, and his decision as to the number which can be convened without manifest injury to the service is conclusive (Mullan *v.* U. S., 140 U. S. 240, 11 S. Ct. 788, 35 L. ed. 489 [*affirming* 23 Ct. Cl. 34]; Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537; *In re* Crain, 84 Fed. 788; Wooley *v.* U. S., 20 L. R. 631; 6 Op. Atty-Gen. (U. S.) 506, 510; 2 Op. Atty.-Gen. (U. S.) 534; 1 Winthrop Mil. L. 98); and both the army (Army Reg. par. 1002) and naval (U. S. Nav. Reg. (1900) 457, par. 1837) regulations now provide that the decision of the appointing authority as to the number that can be assembled without manifest injury to the service shall be conclusive.

68. A court martial of less than thirteen members is not a lawful court if that number could have convened without manifest injury to the service. 1 Op. Atty.-Gen. (U. S.) 299, wherein Wirt, Atty.-Gen., suggested that, in every case of life and death, at least, the president should be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number.

69. 7 Op. Atty.-Gen. (U. S.) 101; Davis Mil. L. 29.

70. 7 Op. Atty.-Gen. (U. S.) 338.

71. Dig. J. A. G. 87, par. 3; 88, par. 6.

72. Thus, where the court consists of five members, four of them may pass on the validity of a challenge to the fifth (Dig. J. A. G. 88); and, where the membership falls below the minimum, those remaining may adjourn from day to day until the court is dissolved or the absent members return (Dig. J. A. G. 18; 4 Op. Atty.-Gen. (U. S.) 17; 1 Winthrop Mil. L. 99; Ives Mil. L. 26).

73. Dig. J. A. G. 88.

74. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823; Mullan *v.* U. S., 140 U. S. 240, 11 S. Ct. 788, 35 L. ed. 489 [*affirming* 23 Ct. Cl. 34]; Wooley *v.* U. S., 20 L. R. 631, U. S. Naval Orders, etc., § 143; Davis Mil. L. 29; 1 Winthrop Mil. L. 90.

75. Dig. J. A. G. 89, par. 1; 17 Op. Atty.-Gen. (U. S.) 397.

76. U. S. Rev. Stat. (1872), §§ 1342, art. 77; 1658.

Number.—Under the act of congress of Feb. 28, 1795, c. 101, relating to courts martial for the trial of militiamen disobeying the order of the president calling h into the service of the United States, a court martial composed of six militia officers is sufficient as to number. Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

77. Mills *v.* Martin, 19 Johns. (N. Y.) 7.

78. *In re* Crain, 84 Fed. 788, in which case it was held that a subsequent order, making a change as to one of the members of the court, was immaterial.

b. Challenges. A prisoner may challenge the members of a court martial, one at a time, for cause stated to the court, which determines the relevancy and validity of the challenge;[79] but this right must be exercised before arraignment or it will be deemed waived.[80]

c. Officers — (I) *PRESIDENT.* The senior in rank of the officers serving on a court martial is the president.[81]

(II) *JUDGE-ADVOCATE.* The judge-advocate is generally a commissioned officer,[82] detailed for that duty by the officer convening the court,[83] and prosecutes in the name of the United States, being required, however, to act as counsel for the prisoner, after the latter has made his plea, to the extent of objecting in his behalf to any leading question, and to any question which might tend to incriminate him.[84] Upon him rests the duty of preparing the case for trial, which includes the preliminary examination of the prosecution's witnesses, summoning them, and issuing formal summons for the witnesses for the accused;[85] the administration of the oath required of witnesses,[86] the preparation and forwarding of the interrogatories in cases in which depositions are taken,[87] and the forwarding of the original proceedings and sentence of the court for the judge-advocate general.[88] Both he and the accuser, when the latter acts as prosecutor, have the right of a reply in a trial before a court martial.[89] The proceedings of a court martial without a judge-advocate, legally appointed, are illegal and void.[90]

(III) *REPORTERS AND INTERPRETERS.* The judge-advocate is authorized to appoint a reporter to take down the proceedings of the court and the testimony;[91] and the court, it seems, may appoint interpreters where they are necessary.[92]

d. Oath of Officers and Members. The organization of a court martial for trial is completed by the administration to each member of the court, including the reporter[93] and interpreters,[94] by the judge-advocate, of the oath[95] prescribed by statute,[96] after which the oath is administered to the judge-advocate by the president of the court.[97] Irregularity in the order in which the oath is administered does not invalidate the proceedings of the court,[98] but the administration of the oath to each member before the commencement of the trial is essential,[99] and

79. U. S. Rev. Stat. (1872), § 1342, art. 88.

For form of challenge to member of court martial see Brooks *v.* Daniels, 22 Pick. (Mass.) 498.

Not reviewable by civil court. — The decision of a court martial in determining the validity of a challenge to a member of the court cannot be reviewed in a collateral action in a civil court. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954 [*affirming* 15 Ct. Cl. 532].

80. Keyes *v.* U. S., 15 Ct. Cl. 53. See also Brooks *v.* Daniels, 22 Pick. (Mass.) 498.

81. Davis Mil. L. 30.

82. Authority to employ a civilian as judge-advocate is vested in the department of justice. 14 Op. Atty.-Gen. (U. S.) 13; 13 Op. Atty.-Gen. (U. S.) 514.

83. U. S. Rev. Stat. (1872), § 1342, art. 74.

84. U. S. Rev. Stat. (1872), § 1342, art. 90; Davis Mil. L. 30.

As to right of prisoner to have counsel see Davis Mil. L. 38 notes; People *v.* Van Allen, 55 N. Y. 31.

85. A writ of subpœna is issued to civilian witnesses. Dig. J. A. G. 462, par. 31.

Military orders are used in the case of military witnesses. Davis Mil. L. 35, note 2.

86. Dig. J. A. G. 108, par. 2; 27 U. S. Stat. at L. 278.

87. Davis Mil. L. 514.

88. U. S. Rev. Stat. (1872), § 1342, art. 113.

89. 2 Op. Atty.-Gen. (U. S.) 286, wherein it is said that the reply must be limited to a commentary on the evidence introduced by the prisoner, and on the remarks made by him in enforcing that evidence, or in arraigning the testimony offered in support of the prosecution, and must not give additional testimony, nor be an attempt to explain or contradict what has previously been given in evidence.

90. Brooks *v.* Adams, 11 Pick. (Mass.) 441.

91. U. S. Rev. Stat. (1872), § 1203.

92. Davis Mil. L. 41.

93. U. S. Rev. Stat. (1872), § 1203.

94. Davis Mil. L. 41.

95. Affirmation is allowed instead of swearing. Dig. J. A. G. 96, par. 1; 3 Op. Atty.-Gen. (U. S.) 544.

96. U. S. Rev. Stat. (1872), § 1342, art. 84, in which will be found the form of the oath required.

97. U. S. Rev. Stat. (1872), § 1342, art. 85 (in which the oath required is set out); 3 Op. Atty.-Gen. (U. S.) 544.

98. 13 Op. Atty.-Gen. (U. S.) 374.

99. Dig. J. A. G. 96, par. 1; 3 Op. Atty.-Gen. (U. S.) 544.

the record must show that the oath was administered.[1] It is also essential that the oath be taken anew by the members of the court and the judge-advocate before entering upon the trial of each case, even though the court is composed, for every case, of the same members.[2]

2. CONTINUANCES. Continuances are granted by the court martial to either party, for reasonable cause, for such time, and as often as may appear to be just, provided that, if the prisoner be in close confinement, the trial shall not be delayed for more than sixty days.[3]

3. CHARGES AND SPECIFICATIONS[4] — a. In General. The charge states the general nature of the offense, and the Article of War which is violated, being framed in the words of the article, except when the article treats of a single offense, in which case the charge may give the article by number merely.[5] The specifications are merely by way of exemplification and detailed statement of the principal charges to which they respectively relate.[6] The same precision is not required in a charge brought before a court martial as is required to support a conviction by ordinary courts of justice;[7] but the charge must be sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense.[8] The mere fact that certain acts of the accused are set out in all of the specifications supporting the charges against him does not destroy the distinctive character of the offense charged.[9]

1. 3 Op. Atty.-Gen. (U. S.) 397.

2. 2 Op. Atty.-Gen. (U. S.) 460; 1 Winthrop Mil. L. 346. But see 2 Op. Atty.-Gen. (U. S.) 297, wherein Berrien, Atty.-Gen., held that where the warrant of a naval court martial, though general, is accompanied with a specification of the persons to be tried, with a reference to the charges to be exhibited against them, the court need not be resworn on the trial of each successive case.

3. U. S. Rev. Stat. (1872), § 1342, art. 93; Manual for Courts Martial 29, par. 7. See also Dig. J. A. G. 108–110.

Where the court martial has not power to grant a continuance for the time for which it is required, the authority convening the court should be applied to; where the application is made to the court, and if, in the opinion of the court, it is well founded, it will be referred to the convening authority to decide whether the court is to be adjourned or dissolved. Manual for Courts Martial 29, par. 8.

4. For forms of charges and specifications see Davis Mil. L., appendix F; 3 Greenleaf Ev. (16th ed.) 456; Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838.

5. Dig. J. A. G. 224, 225; Davis Mil. L. 69 *et seq.*; 3 Greenleaf Ev. (16th ed.) § 472.

6. Carter *v.* McClaughry, 105 Fed. 614.

The specification should give, in the case of military offenders, the name, rank, company, and regiment; in the case of naval offenders, their rank and vessel, or the yard or other post at which they are stationed; in the case of civilians, the facts which render them subject to the court's jurisdiction; and in all cases the acts constituting the alleged offense; the time, or the approximate time, where the exact time is not ascertainable, at which the acts were committed; the criminal intent, where it is an element; and the name of the person injured, where the offense alleged is the injury to another's person or property. Davis Mil. L. 69.

7. *Ex p.* Henderson, 11 Fed. Cas. No. 6,349; Grant *v.* Gould, 2 H. Bl. 69; Matter of Poe, 5 B. & Ad. 681, 27 E. C. L. 288. See also Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601. So, it has been held that a court martial has jurisdiction of a case in which the charge is "conduct to the prejudice of good order and military discipline," although the specifications allege facts showing homicide by the accused. U. S. *v.* Maney, 61 Fed. 140. But, a charge that defendant, a contractor, was engaged in furnishing supplies "for the military services" is indefinite and does not show that he is amenable to the jurisdiction of a court martial composed of officers in the regular army, as he may have been engaged in furnishing supplies to the militia. *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

"The most bald statement of the facts alleged as constituting the offense, provided the legal offense itself be distinctively and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork of conviction and sentence." 7 Op. Atty.-Gen. (U. S.) 603.

A specification is good, and will support a finding and sentence upon it, with or without a descriptive designation of the quality of the imputed criminal act, provided it appear that the facts alleged and proved constitute in any point of view the offense charged. 7 Op. Atty.Gen. (U. S.) 601.

8. 1 Op. Atty.-Gen. (U. S.) 286.

Separate and incongruous charges may be joined in the same prosecution before a court martial. 22 Op. Atty.-Gen. (U. S.) 589.

9. Carter *v.* McClaughry, 105 Fed. 614.

b. Amendments. After arraignment, an amendment of such nature as to entirely obliterate the original specifications and introduce new ones describing wholly different offenses, cannot be made.[10]

c. Service on Accused. Where an army officer is put under arrest for the purpose of trial, except at remote military posts or stations, it is required that a copy of the charges on which he is to be tried shall be served upon him within eight days after his arrest, and in event of a failure to serve them within that time his arrest ceases.[11] In the naval service it is required that the accused shall be furnished with a copy of the charges and specifications at the time he is put under arrest,[12] but, where the service is not made on the accused, he must apply to the officer ordering his arrest, or to other proper authority, for release, as the failure to serve them does not authorize him to release himself.[13]

4. Arrest and Confinement of Accused — a. Before Trial — (I) *In General.* Where an officer is charged with crime, under which term is included both military offenses and civil offenses of which a court martial has cognizance, it is the duty of his commanding officer to arrest him and confine him in his barracks, quarters, or tent, and deprive him of his sword.[14] Soldiers charged with crimes, except minor offenses,[15] are confined until tried by court martial or released by proper authority.[16] It is customary for the arrest to be ordered by the authority which convenes the court;[17] but arrest before trial is not necessary, and does not affect the court's jurisdiction.[18]

(II) *Limitation of Time of Confinement.* The statute upon confinement preliminary to trial is limited by the provision that the confinement shall not be for more than eight days, or until a court martial can be assembled,[19] but this applies solely to confinement preliminary to trial, and it is not intended that the assembling of the court martial for the trial of the offender should entitle him to be released from confinement.[20]

b. During Trial. When a court martial takes cognizance of a charge preferred against a prisoner awaiting trial, it is the duty of the commanding officer thereafter to have the accused at all times at hand to receive the judgment of the court when it shall be promulgated, and to that end he may keep him in confinement;[21] and the court martial itself has the power of keeping the delinquent until the will of the officer who affirms or disapproves its findings is known.[22]

10. *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

11. U. S. Rev. Stat. (1872), § 1342, art. 71.

What copy served.— The service on the accused of a copy of the charges and specifications as they stand at the time is sufficient, even though they are not in the legal form, and will have to be drawn again. Dig. J. A. G. 81, par. 3.

12. U. S. Rev. Stat. (1872), § 1624, art. 43.

This refers to his arrest for trial by court martial, and, if he is already in custody to await the result of a court of inquiry, is sufficiently complied with by delivering the copy to him immediately after the secretary of the navy has informed him of that result, and has ordered a court martial to convene to try him. Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914.

Presumption as to service.—Where the record of a court martial shows that the accused stated at the beginning of the trial that he had received a copy of the charges and specifications against him, and no objection on that ground was made at the trial, it will be presumed that they were served as required. *In re* Crain, 84 Fed. 788.

13. Dig. J. A. G. 80, par. 1.

14. U. S. Rev. Stat. (1872), § 1342, art. 65.

15. Dig. J. A. G. 79, par. 2.

16. U. S. Rev. Stat. (1872), § 1342 art. 66.

17. Dig. J. A. G. 170, par. 2.

18. Davis Mil. L. 482.

19. *In re* Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219. See U. S. Rev. Stat. (1872), § 1342, art. 70.

The confinement does not exceed the bounds set by statute, although it is more than eight days, if it does not appear that a court martial could be assembled in a less time. Hutchings *v.* Van Bokkelen, 34 Me. 126.

20. *In re* Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219.

21. *In re* Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219.

The nature of a prisoner's confinement rests solely with the commanding officer, and the court martial cannot in any way regulate it, except when the prisoner is actually before it. Dig. J. A. G. 314, par. 5.

22. Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150.

c. Bail. Where an officer has been placed in confinement no bail can be granted.[23]

5. Pleas in Bar — a. Limitation — (I) *In General.* A general court martial cannot try or punish any person for any offense which appears to have been committed more than two years before the issuance of the order for the trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.[24]

(II) *Offenses to Which Applicable* — (A) *In General.* The limitation provided by this statute applies to all offenses triable and punishable by a general court martial,[25] except desertion;[26] but does not apply to trials before courts of inquiry,[27] nor to a regimental court martial summoned to hear the complaint of a soldier who thinks himself wronged by an officer.[28]

(B) *Desertion.* The provisions of the statute[29] have been held applicable to the offense of desertion,[30] with the qualification that it is for the court martial to decide whether the limitation can be successfully invoked by the accused.[31]

(III) *How Pleaded.* This limitation is a matter of defense, to be entertained and determined like any other question involving an adjudication upon the merits of the case,[32] and should be specially pleaded and proved, although there is

23. Dig. J. A. G. 177.

24. U. S. Rev. Stat. (1872), § 1342, art. 103; U. S. Nav. Reg. (1900), p. 485, art. 61.

The first provision known to the military code of the United States fixing a limitation for the trial and punishment by court martial of military offenses is found in the eighty-eighth Article of War contained in the act of 1806, and was copied from a similar provision of the English mutiny act then in force. 15 Op. Atty.-Gen. (U. S.) 152.

This statute does not limit or qualify the jurisdiction of courts martial, but prescribes a rule of procedure for the benefit of the accused, to be considered and enforced upon the trial, in the exercise of a jurisdiction already conferred. *In re* Davison, 21 Fed. 618; *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

25. *In re* Davison, 4 Fed. 507; 14 Op. Atty.-Gen. (U. S.) 52.

The forty-eighth Article of War (U. S. Rev. Stat. (1872), § 1342, art. 48) which provides that deserters shall be liable to serve for such period as shall, with the time served before desertion, amount to the full term of their enlistment, and that they shall be tried by court martial and punished, although their terms of enlistment may have elapsed before they were apprehended and tried, cannot alter the limitation provided for by the one hundred and third article (U. S. Rev. Stat. (1878), § 1342, art. 103). 16 Op. Atty.-Gen. (U. S.) 396; 16 Op. Atty.-Gen. (U. S.) 170; 15 Op. Atty.-Gen. (U. S.) 156; 13 Op. Atty.-Gen. (U. S.) 462.

The sixtieth article (U. S. Rev. Stat. (1872), § 1342, art. 60) is also to be construed as subject to the limitation imposed by the one hundred and third article. 14 Op. Atty.-Gen. (U. S.) 52.

Neither does the seventy-first article (U. S. Rev. Stat. (1872), § 1342, art. 71) modify its provisions. 1 Winthrop Mil. L. 386.

26. See *infra*, VIII, I, 5, a, (II), (B).

27. 6 Op. Atty.-Gen. (U. S.) 239.

28. Dig. J. A. G. 124, par. 10.

29. By a later statute it has been provided that no person shall be liable to be tried and punished by a court martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of limitation; provided, that the limitation shall not begin until the end of the term for which such person was enlisted in the service. 26 U. S. Stat. at L. 54; U. S. Nav. Reg. (1900), § 485, art. 62.

30. *In re* Zimmerman, 30 Fed. 176; *In re* Davison, 4 Fed. 507; 16 Op. Atty.-Gen. (U. S.) 170; 15 Op. Atty.-Gen. (U. S.) 152; 14 Op. Atty.-Gen. (U. S.) 265; 13 Op. Atty.-Gen. (U. S.) 462.

The limitation begins to run, in case of desertion by an enlisted soldier, from the last day of the term for which he enlisted, unless he has previously surrendered himself or has been apprehended, or unless, by reason of some manifest impediment, he is not then amenable to justice. Lunenburg *v.* Shirley, 132 Mass. 498; 16 Op. Atty.-Gen. (U. S.) 170; 15 Op. Atty.-Gen. (U. S.) 152.

31. *In re* Zimmerman, 30 Fed. 176; *In re* Davison, 21 Fed. 618; *In re* White, 9 Sawy. (U. S.) 49, 17 Fed. 723.

Presumption as to accused's amenability to justice.— Where the absence of a deserter continues after his term of service has expired, no presumption of law arises that he was not amenable to justice while he was absent, and that his case was therefore within the exception contained in the statute which will prevent the limitation from running, but the fact that it was covered by the exception must be shown by evidence submitted at the trial. 16 Op. Atty.-Gen. (U. S.) 170.

32. *In re* Zimmerman, 30 Fed. 176; *In re* Davison, 21 Fed. 618; *In re* White, 9 Sawy.

excellent authority in support of the view that it may be taken advantage of under the general issue.[33]

(IV) *What Will Bar Running of Statute.* The absence which will bar the running of the limitation is absence from the jurisdiction of the military courts — that is, absence from the United States; and the "other manifest impediment," which has a similar effect, is only such impediment as will operate to prevent the court from exercising its jurisdiction,[34] and does not include the concealment of his offense by the accused.[35] The limitation does not run in favor of the accused where the proceedings were instituted within the statutory period, but were suspended beyond that period on account of his having pleaded the pendency of civil proceedings arising in the same matter.[36]

b. Former Trial — (I) *In General* — (A) *By Military Authority* — (1) Generally. Courts martial are prohibited from trying those amenable to their jurisdiction a second time for the same offense;[37] and, under this provision, the plea of former trial may be made where there has been a trial[38] for the offense,[39] whether or not there has been a sentence adjudged,[40] and without regard to the disapproval of the findings by the reviewing authority.[41]

(2) By Illegally Organized Court. Where, however, the trial was held before a court which was not legally organized, there may be another trial for the same offense.[42]

(B) *By Civil Authorities.* Trial by the civil authorities for the civil relations of an act committed by an officer in the land service is not a bar to trial by court martial for the military relations of the same act.[43]

(II) *Waiver of Plea.* The fact that one has already been tried and con-

(U. S.) 49, 17 Fed. 723; *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

Effect of plea of guilty.— When it appears by the record that the order for trial was issued more than two years after the commission of the offense for which one is on trial before a court martial, a plea of guilty is not to be taken as an admission by the accused of the existence of an exception withdrawing his case from the limitation provided. 16 Op. Atty.-Gen. (U. S.) 170.

Waiver of right.—It was formerly held that the accused could not waive the statutory limitation provided by the one hundred and third Article of War, and that a court martial could not proceed, even on his application, to examine into offenses which were barred thereby, the view being taken that the statute provided a limitation upon the jurisdiction of the court, presenting an absolute bar to trial. 16 Op. Atty.-Gen. (U. S.) 173; 14 Op. Atty.-Gen. (U. S.) 267; 13 Op. Atty.-Gen. (U. S.) 463; 6 Op. Atty.-Gen. (U. S.) 240; 1 Op. Atty.-Gen. (U. S.) 383.

33. Davis Mil. L. 113; 1 Winthrop Mil. L. 379, 385.

34. *In re* Davison, 4 Fed. 507; 14 Op. Atty.-Gen. (U. S.) 265.

35. 14 Op. Atty.-Gen. (U. S.) 52.

36. 6 Op. Atty.-Gen. (U. S.) 506.

37. U. S. Rev. Stat. (1872), § 1342, art. 102; U. S. Const. Amend. V.

A former conviction is a matter of defense on the merits, which must be investigated in the exercise of jurisdiction, and is not a fact upon which the jurisdiction to hear and determine the cause depends. *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

38. **A mere arrest and discharge without trial is no bar to a trial for the same offense.** 1 Op. Atty.-Gen. (U. S.) 294.

39. **Identity of offenses.**— It is not necessary that the offense charged shall be identical with the one on which trial has been had, but, also, where the offense charged is embraced in another charge for which the accused has already been tried, he may plead the former acquittal or conviction. Dig. J. A. G. 118, par. 2.

40. Dig. J. A. G. 120; 1 Winthrop Mil. L. 389.

41. 1 Winthrop Mil. L. 390.

42. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 12 L. ed. 618; *In re* Bird, 2 Sawy. (U. S.) 33, 3 Fed. Cas. No. 1,428; Ives Mil. L. 98; 1 Winthrop Mil. L. 390.

Judge-advocate not sworn.— So, where the proceedings of a court martial do not show that the judge-advocate was sworn, the accused may be put upon another trial, but not before the same officers who constituted the first court. 3 Op. Atty.-Gen. (U. S.) 397.

43. *In re* Esmond, 5 Mackey (D. C.) 64; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; 6 Op. Atty.-Gen. (U. S.) 506; 3 Op. Atty.-Gen. (U. S.) 749.

Conversely, trial and acquittal by a court martial is not a bar to an inquiry and prosecution by the proper civil authorities. *In re* Fair, 100 Fed. 149; U. S. *v.* Clark, 31 Fed. 710.

State in military occupation.— An enlisted man convicted of murder by a court martial, while the state in which the murder was committed was in the military occupation of the United States, is not subsequently amenable to the laws of that state then in force for the same offense. Coleman *v.* Tennessee, 97 U. S. 509, 24 L. ed. 1118.

victed before a court martial of an offense does not preclude him from having a second trial for the same offense on his own motion.[44]

6. Witnesses — Experts. The secretary of war has discretionary power to order the employment of experts in court-martial proceedings.[45]

7. Evidence — a. Burden of Proof. When the accused pleads a former trial, the burden of proving the facts alleged in the plea is on him.[46]

b. Admissibility — (I) *In General.* In the absence of specific statutory enactments, courts martial should adhere to the rules of evidence established in the common-law courts of criminal jurisdiction.[47]

(II) *Of Record and Character.* One on trial before a court martial may introduce evidence of his record, services, and good character, after which the prosecution may introduce evidence attacking them;[48] and he may also introduce circumstances tending to extenuate his offense.[49]

(III) *Opinion Evidence.* Opinion evidence is not admissible upon questions of military science where the members of the court are as competent to form conclusions as the witness,[50] but opinions are admissible when depending on knowledge of special branches of the science.[51]

(IV) *Depositions* — (A) *When Admissible.* The introduction of depositions before courts martial is limited to those cases in which they are expressly allowed by statute.[52]

(B) *Authentication.* Depositions may be authenticated before the judge-advocate of a department or of a court martial,[53] or before a competent civil official;[54] but the officer's authority to take the deposition and administer the oath must appear.[55]

(C) *Introduction Discretionary With Parties.* Whether a deposition which conforms to the requirements of the statute shall be read in evidence is not for the determination of the court, but of the parties.[56]

44. 1 Op. Atty.-Gen. (U. S.) 233.

45. Matter of Smith, 24 Ct. Cl. 209.

46. 1 Winthrop Mil. L. 401.

47. 2 Op. Atty.-Gen. (U. S.) 344; Dig. J. A. G. 398, par. 16. See also People *v.* Van Allen, 55 N. Y. 31.

After the court has been cleared for deliberation courts martial cannot receive evidence. 3 Op. Atty.-Gen. (U. S.) 545.

As to degree and character of offense.— In cases subject to a discretionary punishment courts martial may, after the accused has pleaded guilty, receive testimony showing the degree and character of the offense. 2 Op. Atty.-Gen. (U. S.) 636.

Official correspondence.— In a suit brought by a marine against the commanding officer of a squadron, in which illegal detention of plaintiff after the expiration of his term of enlistment is alleged, official correspondence of defendant with the secretary of the navy in reference to the circumstances of the enlistment is admissible. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 12 L. ed. 618.

Review of errors by civil court.— Errors of a court martial in the admission and exclusion of evidence cannot be reviewed by a civil court in a collateral proceeding. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823.

48. Dig. J. A. G. 394, par. 4; Davis Mil. L. 266.

49. Dig. J. A. G. 398, par. 15.

50. Gen. Whitelocke's Case, 2 McArthur Courts Martial 147; Admiral Keppel's Case, 2 McArthur Courts Martial 135; 3 Greenleaf Ev. (16th ed.) § 478.

51. 3 Greenleaf Ev. (16th ed.) § 478.

52. 2 Op. Atty.-Gen. (U. S.) 344.

The statute provides that depositions of witnesses residing beyond the limits of the state, territory, or district in which the court is ordered to sit may, if taken on reasonable notice to the opposite party and duly authenticated, be read in evidence before the court in cases not capital. U. S. Rev. Stat. (1872), § 1342, art. 91.

Compelling attendance of witnesses.— Neither naval courts martial nor their judge-advocates have the power to compel one who is not subject to the articles for the government of the navy to appear and testify before the court. 19 Op. Atty.-Gen. (U. S.) 501.

53. 27 U. S. Stat. at L. 278.

54. Davis Mil. L. 514.

55. Dig. J. A. G. 105, par. 8.

Authority to administer the oath cannot be conferred by a court martial. Dig. J. A. G. 106, par. 11.

56. Dig. J. A. G. 105, par. 7.

Where the deposition has been irregularly taken, the court should, if the other party objects, exclude it (Dig. J. A. G. 105, par. 6), but the irregularity may be waived by the opposing party (Dig. J. A. G. 106, par. 14).

Introduction by adverse party.— The introduction of the deposition is not limited to the

8. EFFECT OF ABSENCE OF MEMBER OF COURT. The absence of a member of the court during the trial, and his subsequent resumption of his seat, do not affect the validity of the proceedings;[57] but the court may exclude him from further participation if it see fit,[58] and this seems to be the better practice.[59]

9. FINDING GUILTY OF LESSER OFFENSE. A court martial may find the accused guilty of a lesser offense than the principal charge, if it be covered by, and be within, the scope of the specifications;[60] but it cannot convict him of a distinct crime,[61] nor of a more serious offense than the one with which he has been charged.[62]

10. SENTENCE — a. **May Cover Several Offenses.** A single sentence may be rendered covering all the convictions for the several offenses adjudicated.[63]

b. **Imprisonment in Penitentiary.** In the land service courts martial have power to sentence the accused to confinement in other than military prisons whenever the civil courts are authorized to inflict a similar punishment for the same offense,[64] but this does not prohibit the punishment from being greater in other respects than the civil courts can inflict.[65] Courts martial in the naval service are authorized to inflict such punishment in those cases only in which they are also authorized to adjudge the punishment of death.[66]

c. **Power of Court to Reconsider.** Courts martial have the power to reconsider any judgment or sentence rendered by them during the term or sitting and to change such judgment or sentence.[67]

d. **Publication of Sentence.** In cases where an officer is dismissed for fraud or cowardice, it is required that the sentence shall direct the crime, punishment, name, and place of abode of the delinquent to be published in the newspapers in and about the camp, and in the state from which he came or usually resides,[68] and this publication cannot be omitted, at the discretion of the court, but must be made.[69]

11. REVIEW — a. **In General** — (1) *STATUTORY PROVISION FOR.* In addition to courts for the trial of offenders in the land and naval service, congress has provided a separate and complete line of reviewing authorities, terminating in the

party who takes it, but, if he fails to do so, his adversary may introduce it. Dig. J. A. G. 105, par. 4.

Part only may be read.— The party introducing a deposition may, if his adversary consents, read in evidence only a part of the deposition, but the consent of the other party is essential. Dig. J. A. G. 104, par. 3.

57. Davis Mil. L. 136. *Contra*, 2 Op. Atty.-Gen. (U. S.) 414.

An officer who sat in the original trial may be recalled to take part in a revision of the proceedings, though he had, after the trial, been replaced by another, without affecting the validity of the sentence. *In re* Reed, 20 Fed. Cas. No. 11,636.

58. 7 Op. Atty.-Gen. (U. S.) 99.

59. 1 Op. Atty.-Gen. (U. S.) 698; Davis Mil. L. 136.

60. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; Pullan *v.* Kinsinger, 2 Abb. (U. S.) 94, 20 Fed. Cas. No. 11,463; U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; Swaim *v.* U. S., 28 Ct. Cl. 173; Bankhead *v.* U. S., 20 Ct. Cl. 405, where it was held that an army officer charged with habitual drunkenness may be convicted of the lesser offense of various acts of drunkenness prejudicial to good order and discipline. See also 18 Op. Atty.-Gen. (U. S.) 113. But see State *v.* Plume, 44 N. J. L. 362, holding that a finding that the accused is guilty of the specification, but not guilty of the charge, is equivalent to an acquittal.

61. U. S. *v.* Mackenzie, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313.

62. Dig. J. A. G. 410; 1 Winthrop Mil. L. 582.

63. Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199.

64. *In re* Esmond, 5 Mackey (D. C.) 64, in which case it was held that a court martial had authority to punish larceny by sentencing the offender to the penitentiary, such punishment for that offense being authorized by the laws of the place where the offense was committed. See also U. S. Rev. Stat. (1872), § 1342, art. 97; Davis Mil. L. 521 *et seq.*

65. *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213.

66. *Ex p.* Van Vranken, 47 Fed. 888.

67. 1 Op. Atty.-Gen. (U. S.) 296.

68. U. S. Rev. Stat. (1872), § 1342, art. 100; *In re* Carter, 97 Fed. 496.

"**The terms 'cowardice' and 'fraud,'** employed in this article may be considered as referring mainly to the offenses made punishable by articles 42 and 60. With these, however, may be regarded as included all offenses in which fraud or cowardice is necessarily involved, though the same be not expressed in terms in the charge or specification." Davis Mil. L. 529.

69. *In re* Carter, 97 Fed. 496.

executive,[70] and the effect and conclusiveness of the court martial's action depends equally as much upon the approval and order of this reviewing authority as upon the original proceedings.[71] The reviewing authority has power to confirm, disapprove, pardon, or mitigate the punishment adjudged by the court martial,[72] or to return the record for revision as many times as he deems proper,[73] before the court martial has been dissolved,[74] making therewith a recommendation that a more severe sentence be imposed,[75] but cannot impose a new sentence of a more severe character, or interfere with the proper discretion of the court.[76]

(II) *The Reviewing Authority* — (A) *President* — (1) Sentences Which He Must Review — (a) Affecting General Officers. The confirmation of the president is required before the sentence of a court martial respecting a general officer can be executed, whether in time of peace or war.[77]

(b) Dismissing Officer in Time of Peace. Sentences directing the dismissal of any officer in time of peace must be reviewed and confirmed by the president.[78] Until such a sentence has been approved by him it is interlocutory and inchoate only.[79]

(c) Of Naval Courts Martial. Where the sentence of a naval court martial held within the United States extends to the loss of life or to the dismissal of a commissioned or warrant officer, it cannot be carried into execution until confirmed by the president;[80] but neither the president nor secretary of navy has lawful authority to approve or disapprove the sentence of a court martial where the case is not one in which the president's approval is required.[81]

(d) When Death Penalty Is Inflicted. In cases in which the death penalty is inflicted, the confirmation of the president is required, except where it is inflicted as a punishment for certain specified crimes committed in time of war, in which cases the power of revision is vested in the commanding general in the field or the commander of the department, as the case may be.[82]

(2) Must Act Personally. The decision of the president confirming or disapproving the sentence of a general court martial in the cases where it is required is a judicial act,[83] to be done by him personally,[84] and not an official act

70. No one can have this authority to affirm or disaffirm the decisions of a court martial unless it can be shown that such authority has been delegated by congress. 5 Op. Atty.-Gen. (U. S.) 508.

71. *In re* Esmond, 5 Mackey (D. C.) 64.

Proper place to seek redress.— To this authority the party aggrieved by the sentence of the court martial must apply for redress. Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150.

72. U. S. Rev. Stat. (1872), art. 112; Swaim *v.* U. S., 28 Ct. Cl. 173; 6 Op. Atty.-Gen. (U. S.) 204; Davis Mil. L. 199.

73. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823 [*affirming* 28 Ct. Cl. 173]; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538 [*affirming* 20 Fed. Cas. No. 11,636]; 1 Winthrop Mil. L. 700.

Revision by a court martial does not constitute a new trial of the case, but the court merely reconsiders the record for the purpose of correcting or modifying its conclusions thereon. *In re* Reed, 20 Fed. Cas. No. 11,636; 6 Op. Atty.-Gen. (U. S.) 205.

74. Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; 6 Op. Atty.-Gen. (U. S.) 205.

Mere adjournment without dissolution does not affect the power of revision. 7 Op. Atty.-Gen. (U. S.) 339.

75. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823; *Ex p.* Reed, 20 Fed. Cas. No. 11,636.

76. Swaim *v.* U. S., 28 Ct. Cl. 173.

77. U. S. Rev. Stat. (1872), § 1342, art. 108.

78. U. S. Rev. Stat. (1872), § 1342, art. 106; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 [*reversing* 19 Ct. Cl. 396]; Fletcher *v.* U. S., 26 Ct. Cl. 541.

In all cases not falling within the operation of the Articles of War (U. S. Rev. Stat. (1872), §§ 1342, 1624) the approval by the president of the sentence of a court martial constitutes a sufficient approval. Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

79. Mills *v.* Martin, 19 Johns. (N. Y.) 7; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 [*reversing* 19 Ct. Cl. 396]; 1 Op. Atty.-Gen. (U. S.) 241.

80. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; *In re* Reed, 20 Fed. Cas. No. 11,636; U. S. Rev. Stat. (1872), § 1624.

81. 11 Op. Atty.-Gen. (U. S.) 251.

82. U. S. Rev. Stat. (1872), § 1342, art. 105; 1 Op. Atty.-Gen. (U. S.) 241.

83. U. S. *v.* Fletcher, 148 U. S. 84, 13 S. Ct. 552, 37 L. ed. 378; U. S. *v.* Page, 137 U. S. 673, 11 S. Ct. 219, 34 L. ed. 828; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167; 11 Op. Atty.-Gen. (U. S.) 21.

84. The president may call others to his assistance in making his examinations, and in

presumptively his. It is not necessary, however, to render it effectual, that it be attested by his sign-manual,[85] though an order dismissing an officer, in conformity with the sentence of a court martial, must show otherwise than argumentatively that the proceedings of the court were laid before the president, and that the confirmation of the sentence was the result of his own judgment, and not merely a departmental order.[86]

(3) Powers. The president, in the exercise of the supervisory power committed to him, has authority to mitigate, as well as to affirm or reject, the sentence of a general court martial,[87] or to order it to reconsider its judgment,[88] or he may order a new trial before a court martial where, in his opinion, the court erred on the first trial in excluding certain testimony.[89]

(4) Effect of Disapproval. In cases involving sentence of death or of dismissal of officers, the disapproval of the president annihilates the sentence of a court martial, the case standing as if there had been no trial and being just as open for an order for a court martial as it was in the first instance.[90]

(B) *Secretary of Navy.* The secretary of navy has power to approve the sentence of a court martial convened by him where the sentence of the court does not extend to loss of life or to the dismissal of a commissioned or warrant officer.[91]

(c) *Convening Officer* — (1) Of General Court Martial — (a) In General. As a general rule, the reviewing power is vested in the officer ordering the court, and no sentence of the court martial can be carried into execution until it has been approved by him or by the officer commanding for the time being,[92] who may be either the temporary or permanent successor of the officer who convened the court, it being necessary, however, that he be of sufficient rank to be authorized to convene the court.[93]

(b) Cases Involving Dismissal of Officers in Time of War. A general, commanding forces in the field, does not possess power to commute the sentence of dismissal pronounced by a court martial, or pardon the offender, but only has the power to approve the sentence, or to suspend it and take the direction of the president.[94]

informing himself as to what should be done, but he cannot delegate the power vested in him to pass finally upon the sentence, and this is because he is the only person to whom has been committed the judicial power of making a final determination. Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167.

85. Ide *v.* U. S., 150 U. S. 517, 14 S. Ct. 188, 37 L. ed. 1166; U. S. *v.* Fletcher, 148 U. S. 84, 13 S. Ct. 552, 37 L. ed. 378 [*reversing* 26 Ct. Cl. 541]; U. S. *v.* Page, 135 U. S. 673, 11 S. Ct. 219, 34 L. ed. 828 [*reversing* 25 Ct. Cl. 254]; 17 Op. Atty.-Gen. (U. S.) 397; 17 Op. Atty.-Gen. (U. S.) 43; 17 Op. Atty.-Gen. (U. S.) 19; 15 Op. Atty.-Gen. (U. S.) 290; 7 Op. Atty.-Gen. (U. S.) 473; 2 Op. Atty.-Gen. (U. S.) 67.

Notification by the secretary of the navy that the president has approved a sentence of a court martial is sufficient evidence of both the approval and promulgation of the sentence. 16 Op. Atty.-Gen. (U. S.) 550; 16 Op. Atty.-Gen. (U. S.) 312.

86. U. S. *v.* Page, 137 U. S. 673, 11 S. Ct. 219, 34 L. ed. 828 [*reversing* 25 Ct. Cl. 254]; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 [*reversing* 19 Ct. Cl. 396]; Fletcher *v.* U. S., 26 Ct. Cl. 541.

87. 2 Op. Atty.-Gen. (U. S.) 286.

88. 4 Op. Atty.-Gen. (U. S.) 19.

89. 1 Op. Atty.-Gen. (U. S.) 233.

90. 1 Op. Atty.-Gen. (U. S.) 241.

In other cases, where the reviewing officer disapproves the sentence of a court martial and orders the release of the accused, his action is tantamount to an acquittal by the court itself. 13 Op. Atty.-Gen. (U. S.) 459.

91. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; 5 Op. Atty.-Gen. (U. S.) 508.

92. *In re* Esmond, 5 Mackey (D. C.) 64; Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; *In re* Reed, 20 Fed. Cas. No. 11,636; Swaim *v.* U. S., 28 Ct. Cl. 173; 19 Op. Atty.-Gen. (U. S.) 106; 11 Op. Atty.-Gen. (U. S.) 251; 6 Op. Atty.-Gen. (U. S.) 204; 4 Op. Atty.-Gen. (U. S.) 19; U. S. Rev. Stat. (1872), § 1342, art. 104.

Effect of setting aside sentence. — Where, by the sentence of a court martial, a soldier is discharged from the service before the expiration of his term of enlistment, and such sentence is afterward set aside as null and void, the status of the soldier is not in any way affected by the sentence, and he is deemed to have been in the service all of the time. *In re* Bird, 2 Sawy. (U. S.) 33, 3 Fed. Cas. No. 1,428.

93. Davis Mil. L. 199.

94. 6 Op. Atty.-Gen. (U. S.) 123.

(2) Of Summary Courts. In the case of sentences adjudged by a summary court, the approval of the officer appointing the court, or the officer commanding for the time being, is required.[95]

(iii) *Record to Be Laid Before.* The record of a court martial laid before the reviewing authority must contain all of the evidence, and is defective where it contains merely an inference drawn from the evidence.[96]

(iv) *Effect of Confirming Sentence*—(a) *In General.* The action of the proper authority approving the sentence of a general court martial is, in contemplation of law, final, and no relief can thereafter be afforded defendant through a revision of the sentence.[97] This rule is not confined to cases in which, by the Articles of War, a sentence of a court martial is required to be approved by the president.[98]

(b) *Where Court Was Illegally Constituted.* The sentence cannot be confirmed by the reviewing authority where a member of the court, appointed by the officer convening it, has been relieved by a subordinate, and another officer substituted without the authorization of the convening officer.[99]

(v) *Record of Reviewing Authority.* When the reviewing officer sets forth in his order of approval the matters of fact and of law which have been considered by the court martial, his order and its recitals are, equally with the record of the proceedings of the court, evidence of what matters of fact and of law were adjudicated by the whole proceeding and sentence.[1]

b. By Civil Courts—(i) *Inquiry Limited to Question of Jurisdiction.* If the court has jurisdiction of the person accused and of the offense charged, and acts within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts.[2] The province of the civil courts extends, therefore, no further than to ascertaining whether the military court had

95. 30 U. S. Stat. at L. 483; Davis Mil. L. 499.

96. 3 Op. Atty.-Gen. (U. S.) 547.

97. Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 [*affirming* 19 Ct. Cl. 396]; Dynes *v.* Hoover, 20 How. (U. S.) 65, 5 L. ed. 838; Wooley *v.* U. S., 20 L. R. 631; 19 Op. Atty.-Gen. (U. S.) 106; 18 Op. Atty.-Gen. (U. S.) 21; 17 Op. Atty.-Gen. (U. S.) 297; 15 Op. Atty.-Gen. (U. S.) 432; 15 Op. Atty.-Gen. (U. S.) 291; 10 Op. Atty.-Gen. (U. S.) 64; 6 Op. Atty.-Gen. (U. S.) 514; 6 Op. Atty.-Gen. (U. S.) 372; 6 Op. Atty.-Gen. (U. S.) 369; 4 Op. Atty.-Gen. (U. S.) 274; 4 Op. Atty.-Gen. (U. S.) 170.

Effect of pardon.— So, it has been held that the president cannot, by virtue of his constitutional power, pardon offenses or reinstate an officer sentenced by court martial and reinvest in him a right to the pay which he has forfeited, after the sentence has been carried into effect. Vanderslice *v.* U. S., 19 Ct. Cl. 480.

A prohibition cannot issue to a court martial after its sentence has been ratified by the sovereign and carried into execution. Matter of Poe, 5 B. & Ad. 681, 27 E. C. L. 288.

98. 10 Op. Atty.-Gen. (U. S.) 64; 6 Op. Atty.-Gen. (U. S.) 514.

99. 22 Op. Atty.-Gen. (U. S.) 137.

The objection, made by one on trial before a court martial, to a witness against him sitting as a member of the court goes to the propriety of the member sitting after testifying, not to his legal capacity to sit, and, if seasonably made, affords good ground for the disapproval of the proceedings by the reviewing officer, though not of itself sufficient to invalidate them. 15 Op. Atty.-Gen. (U. S.) 432.

1. *In re* Esmond, 5 Mackey (D. C.) 64.

2. Com. *v.* McClean, 2 Pars. Eq. Cas. (Pa.) 367; Carter *v.* Roberts, 177 U. S. 496, 20 S. Ct. 713, 44 L. ed. 861; Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823 [*affirming* 28 Ct. Cl. 173]; Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; U. S. *v.* Fletcher, 148 U. S. 84, 13 S. Ct. 552, 37 L. ed. 378; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954 [*affirming* 15 Ct. Cl. 532]; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; *In re* Biddle, 2 Hayw. & H. (U. S.) 198, 30 Fed. Cas. No. 18,236.

Certiorari will not be granted to bring before a civil court the proceedings of a court martial. *Ex p.* Dunbar, 14 Mass. 393; *In re* Mansergh, 1 B. & S. 400, 101 E. C. L. 400. *Contra*, Durham *v.* U. S., 4 Hayw. (Tenn.) 54. See also State *v.* Plume, 44 N. J. L. 362, holding that a writ of certiorari will not lie where a court martial finds the accused guilty of the specification, but not guilty of the charge, as such finding is equivalent to an acquittal.

A writ of prohibition will not lie where the court martial has jurisdiction. Washburn *v.* Phillips, 2 Metc. (Mass.) 296; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; Grant *v.* Gould, 2 H. Bl. 69.

jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced,[3] and to confining them to the exercise of that special jurisdiction.[4] They are not allowed to avoid the effect of the court martial's sentence on the ground of any circumstantial irregularity in the details of the proceeding, whether occurring before or at the time of the trial.[5]

(II) *Who May Question Jurisdiction.* The question of the jurisdiction of the court martial may always be inquired into by the civil courts upon the application of any party aggrieved by its proceedings,[6] even though he has appeared before the court martial, and has confessed his guilt,[7] and though the sentence has been approved by the reviewing authority;[8] but any question as to the legality of the sentence must be raised within a reasonable length of time, else it will be deemed that the accused acquiesced.[9] He who seeks to justify the judgment must set forth affirmatively all facts necessary to show that the court martial was legally constituted and had jurisdiction.[10]

(III) *Power Where Court Martial Exceeds Jurisdiction.* If the court martial had not jurisdiction, its judgment may be declared void by any court having jurisdiction of the proper parties and of the subject-matter.[11]

IX. CIVIL STATUS OF SOLDIERS AND SAILORS.

A. Liabilities Inter Sese. An action may be maintained against an officer of the navy for illegally assaulting and imprisoning one of his subordinates, though the act was done upon the high seas, and under color of naval discipline;[12] but an officer is not answerable for an injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty, although he may have committed an error of judgment in the exercise of his discretionary authority.[13] So, too, an officer, authorized to arrest deserters, who takes property

3. *In re* Esmond, 5 Mackey (D. C.) 64; Cox *v.* Gee, 60 N. C. 516; Carter *v.* Roberts, 177 U. S. 496, 20 S. Ct. 713, 44 L. ed. 861; Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199; *In re* Crain, 84 Fed. 788; *In re* Spencer, 40 Fed. 149; *In re* Dohrendorf, 40 Fed. 148; *In re* Grimley, 38 Fed. 84; *In re* McVey, 23 Fed. 878; *In re* Davison, 21 Fed. 618; *In re* White, 9 Sawy. (U. S.) 49, 17 Fed. 723; Barrett *v.* Hopkins, 2 McCrary (U. S.) 129, 7 Fed. 312; *In re* Biddle, 2 Hayw. & H. (U. S.) 198, 30 Fed. Cas. No. 18,236; *In re* Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219; *In re* Bogart, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596; Williams *v.* U. S., 24 Ct. Cl. 306; Rex *v.* Suddis, 1 East 306; *In re* Mansergh, 1 B. & S. 400, 101 E. C. L. 400.

Correction of mistake.— A court of equity has no jurisdiction to correct the order of a military commander on the ground of mistake. Thomas *v.* Raymond, 4 S. C. 347.

4. *In re* Zimmerman, 30 Fed. 176; *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

5. Brown *v.* Wadsworth, 15 Vt. 170, 40 Am. Dec. 674; Keyes *v.* U. S., 109 U. S. 336, 3 S. Ct. 202, 27 L. ed. 954 (in which case it was held that a sentence dismissing the defendant from the service could not be collaterally questioned, in a proceeding by him for salary, on the ground that one of the officers composing the court had preferred one of the charges against him, and was also a witness against him); *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

6. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838; *In re* Davison, 21 Fed. 618.

7. Duffield *v.* Smith, 3 Serg. & R. (Pa.) 590; The Marshalsea Case, 10 Coke 68.

8. Dynes *v.* Hoover, 20 How. (U. S.) 65, 15 L. ed. 838.

9. Armstrong *v.* U. S., 26 Ct. Cl. 387; Ide *v.* U. S., 25 Ct. Cl. 401.

Six years' delay not too great.— The legality of the sentence of a court martial suspending an army officer from duty, but retaining him in the service, may be questioned by him even though he fails to do so until six years after it is promulgated. Swaim *v.* U. S., 28 Ct. Cl. 173.

10. Brooks *v.* Davis, 17 Pick. (Mass.) 148; Brooks *v.* Adams, 11 Pick. (Mass.) 441; Mills *v.* Martin, 19 Johns. (N. Y.) 7; Barrett *v.* Smith, 16 Vt. 246. See also Duffield *v.* Smith, 3 Serg. & R. (Pa.) 590.

11. Barrett *v.* Hopkins, 2 McCrary (U. S.) 129, 7 Fed. 312.

12. Wilson *v.* Mackenzie, 7 Hill (N. Y.) 95, 42 Am. Dec. 51.

13. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 12 L. ed. 618, holding that the burden of proof is on plaintiff to show that the officer exceeded his authority.

belonging to the deserters arrested must respond to the latter in an appropriate action.[14]

B. Liabilities to Civilians — 1. IN GENERAL. A militiary or naval officer, acting under instructions from his superiors, acts at his peril, and, if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.[15]

2. FOR ACTS OF SUBORDINATES. A person in command is not liable for a trespass committed by any of his command without his knowledge or abetment;[16] but, if he advises or aids such trespass, the fact that he was so acting is no defense.[17]

3. FOR SEIZING OR DESTROYING PROPERTY. A military officer may, without liability, take private property under circumstances of pressing public nececessity,[18] or in the enforcement of orders relating to a military reservation.[19] So, too, lawful and public orders from the president and from the secretary of the navy are a good defense to a suit against a naval officer for the destruction of property by a bombardment of a foreign town.[20]

4. ON CONTRACTS MADE FOR GOVERNMENT. Officers contracting on behalf of the government are not, ordinarily, bound thereby.[21]

X. AID AND RELIEF OF INDIGENTS.

A. In General. In several states statutes have been enacted providing for the aid and relief of members of the militia called into active service, and of persons dependent upon them.[22]

14. Clark *v.* Cumins, 47 Ill. 372.

15. Griffin *v.* Wilcox, 21 Ind. 370; Hogue *v.* Penn, 3 Bush (Ky.) 663, 96 Am. Dec. 274; Terrill *v.* Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500; Eifort *v.* Bevins, 1 Bush (Ky.) 460; Mitchell *v.* Harmony, 13 How. (U. S.) 115, 14 L. ed. 75 [*affirming* 1 Blatchf. (U. S.) 549, 11 Fed. Cas. No. 6,082]; Little *v.* Barreme, 2 Cranch (U. S.) 170, 2 L. ed. 243; McCall *v.* McDowell, 1 Abb. (U. S.) 212, Deady (U. S.) 233, 15 Fed. Cas. No. 8,673; Clay *v.* U. S., Dev. Ct. Cl. 25.

16. Witherspoon *v.* Farmers' Bank, 2 Duv. (Ky.) 496, 87 Am. Dec. 503; Echols *v.* Staunton, 3 W. Va. 574.

17. Smith *v.* Shaw, 12 Johns. (N. Y.) 257; Echols *v.* Staunton, 3 W. Va. 574; The Eleanor, 2 Wheat. (U. S.) 345, 4 L. ed. 257.

18. Holmes *v.* Sheridan, 1 Dill. (U. S.) 351, 12 Fed. Cas. No. 6,644, holding that whether the taking of such property is justified by the necessity of the case is a question for a jury.

19. Brown *v.* Ilges, 1 Wyo. 202, holding that a subordinate officer of the United States who, in compliance with the general orders of the commanding officer, seizes stock found roaming on a military reservation contrary thereto, cannot be held to answer therefor in the territorial court.

20. Durand *v.* Hollins, 4 Blatchf. (U. S.) 451, 8 Fed. Cas. No. 4,186.

21. Perrin *v.* Lyman, 32 Ind. 16; Crowell *v.* Crispin, 4 Daly (N. Y.) 100; Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621. But *compare* Yulee *v.* Canova, 11 Fla. 9 (holding that equity had jurisdiction to enforce against an officer of the Confederate army, personally, an agreement, which he had no authority to make, to purchase a quantity of sugar, at a compensation to be fixed by the court, the sugar having been taken by the government); Stanley *v.* Schwalby, 85 Tex. 348, 19 S. W. 264.

22. Thus, under N. J. Pamphl. L. p. 17, authority is conferred upon the boards of freeholders to impose, upon some competent proper county official or authority already in existence, the duty of superintending the burial of any honorably discharged soldier, sailor, or marine who dies without leaving means sufficient to defray funeral expenses. State *v.* Essex County, 58 N. J. L. 141, 33 Atl. 54.

Right of undertaker to collect burial fees. — By Burns' Rev. Stat. Ind. (1894), §§ 8359, 8362, the duty of causing the burial of ex-Union soldiers who have died in indigent circumstances is imposed upon the township trustees, the expense to be borne by the county. This does not authorize an undertaker who has buried such a person, on the refusal of the trustees to do so, to collect the expenses thereof from the county. Sherfey, etc., Co. *v.* Clay County, (Ind. 1901) 59 N. E. 186. *Contra*, Rackliff *v.* Greenbush, 93 Me. 99, 44 Atl. 375, where it was held that an undertaker who had buried an ex-soldier without having been authorized by the trustees could maintain an action of assumpsit against them for expenses so incurred.

Right of relatives to collect burial fees.— Under Kan. Gen. Stat. (1889), § 5916, the surviving relatives of an indigent soldier may conduct the burial at the expense of the county, free from interference on the part of the county, but cannot make it liable for more than fifty dollars. State *v.* Fagan, 55 Kan. 150, 40 Pac. 314.

B. Beneficiaries. This aid was not intended for soldiers who enlisted from other states, but for those who formed a part of the quota of the state furnishing the aid, the consideration for it being actual service in the army of the United States under an enlistment in some city, town, or place in the state;[23] nor was it intended to be extended to those persons who enlisted in the regular army of the United States.[24] The relief provided for the widowed mothers and families of volunteers is intended only for those dependents who had their permanent residence in the state at the time of the enlistment.[25] Where the soldier deserted, he was entitled to no relief thereafter,[26] and, under some statutes, no state aid could properly be furnished to the family of a volunteer after his discharge, and where such aid had been given a family by a town, in ignorance of the soldier's discharge, it might be recovered from him.[27]

C. Distribution of Funds — 1. Basis. Where the fund is to be distributed among the several counties, the distribution is based, not on the amount which they respectively contributed, but on the number who are entitled to receive aid.[28]

2. Right to Compel. The distribution of the revenue collected under these acts was not a matter of discretion, but a duty, on the part of the commissioners and township trustees.[29] Where, however, the statute allowing aid has been repealed, a person cannot claim it as a matter of right, even though his right to relief accrued before the repeal and though all of the fund collected for the purpose has not been distributed.[30]

D. Effect of Acceptance. The acceptance by the family of a soldier of the benefits provided causes neither him nor his family to incur the disabilities of pauperism, and such disabilities cannot be imposed by the city granting the aid.[31]

XI. Soldiers' Homes.

A. Status of Inmates. The inmates of soldiers' homes are not in the military service, nor subject to the regulations prescribed for the military forces.[32]

23. Eaton *v.* Berlin, 49 N. H. 219; State *v.* Mercer County, 29 N. J. L. 296; State *v.* Newark, 29 N. J. L. 232.

24. State *v.* Mercer County, 29 N. J. L. 296; State *v.* Newark, 29 N. J. L. 232.

25. State *v.* Mercer County, 29 N. J. L. 296; State *v.* Newark, 29 N. J. L. 232. *Contra,* O'Connell *v.* State, 33 Conn. 144, in which case it was held that the family of one who came to the state where he had enlisted after his enlistment were entitled to receive aid from the time they took up their residence in the state until he left the service.

26. O'Connell *v.* State, 33 Conn. 144.

27. Manchester *v.* Burns, 45 N. H. 482.

28. State *v.* State Auditor, 15 Ohio St. 482.

29. Floyd County *v.* Love, 28 Ind. 198.

30. Jackson County *v.* Elliott, 39 Ind. 191; Sims *v.* Monroe County, 39 Ind. 40 [*overruling* Clinton County *v.* McDowell, 30 Ind. 87], in which case it was held that the Indiana act of Dec. 20, 1865, which provided that disbursements of the fund raised under the act should cease on and after March 3, 1866, and that the county commissioners should thereafter, out of such fund, allow support to such families when in their opinion it seemed proper, left it in the discretion of the board of commissioners to refuse a petition filed in March, 1869, for relief by one alleging herself to be the widow of a soldier, and that no appeal lay to any other court from the action of such board.

31. Ames *v.* Smith, 51 Me. 602 (in which case it was held that the forcible removal of the wife and family of a volunteer to the town of their legal settlement from the town in which they resided at the time of his enlistment, and from which they had received the benefits provided for, was unauthorized as placing upon them a disability of pauperism); Veazie *v.* China, 50 Me. 518. See also Manchester *v.* Burns, 45 N. H. 482.

Me. Laws (1861), c. 63, § 6, requiring towns to make proper provision for the support of soldiers' families residing therein, and prohibiting any pauper disabilities to result therefrom, are applicable only to the first ten regiments sent out. Orland *v.* Ellsworth, 56 Me. 47.

No action can be maintained by a city or town, furnishing supplies under Me. Laws (1861), c. 63, against the city or town where the soldier whose family has received such supplies has his settlement. Milford *v.* Orono, 50 Me. 529.

The subsequent act of 1875 [Me. Laws (1875), c. 21], and the amendatory act of 1885, c. 269, providing that soldiers shall not be considered paupers, removes from them pauper disabilities, and supplies furnished a soldier may be recovered of the town charged with his legal settlement. Augusta *v.* Mercer, 80 Me. 122, 13 Atl. 401.

32. U. S. *v.* Murphy, 9 Fed. 26. *Contra,* Renner *v.* Bennett, 21 Ohio St. 431.

In only one instance has an inmate of a

B. How Governed. The board of commissioners of a home have authority, under a statute authorizing them to make rules for its government, to enforce reasonable rules adopted for that purpose, including those necessary to preserve order, enforce discipline, and preserve health;[33] but the power given them to enact these rules authorizes them to enact only such laws as are incidental to, and limited by, the objects of the charge which they are to administer, and gives them no authority as to general subjects of legislation.[34] Thus, it has been held that they may require the inmates to turn over to the commandant all of their pension money in excess of a certain amount;[35] but they have no authority to determine what relatives are dependent on the pensioner for support, nor to direct how much of his pension money shall be sent to his relatives.[36]

C. Jurisdiction Over Premises. The purchase, by a corporation created by the government of the United States for that purpose, of land for a soldiers' home does not withdraw that land from the jurisdiction of the state in which it is situated.[37]

XII. OFFENSES BY PERSONS NOT IN SERVICE.

A. Enticing Enlisted Man to Desert. To sustain a conviction under a statute making it an offense to entice an enlisted man to desert it is sufficient to show the making of representations as to the means and facilities for deserting to induce a person to enlist, with the belief that they were likely to cause him to desert, if they had such effect;[38] but the person enticed must have been actually enlisted.[39]

B. Purchasing Arms of Soldier. An indictment for purchasing his arms of a soldier can only be sustained by showing that the soldier was in lawful possession of the arms, or had a special bailment of them.[40]

C. Soliciting Person to Leave State to Enlist Elsewhere. Under a statute making it an offense to solicit a person to leave the state for the purpose of enlisting elsewhere,[41] it is immaterial that the person solicited was unfit for service,[42] and the indictment need not allege that the person solicited did leave, or was a citizen of, or liable to do military duty in, the state, or set forth the means used to solicit such person.[43] The exact time at which the offense was committed need not be proved as laid.[44]

soldiers' home been tried by court martial, the court in the case being constituted by the commandant and composed of inmates of the home. The proceedings were, upon reference to the judge-advocate general, declared void and unauthorized. Davis Mil. L. 54.

33. Ball *v.* Evans, 98 Iowa 708, 68 N. W. 435.

34. Renner *v.* Bennett, 21 Ohio St. 431.

35. Ball *v.* Evans, 98 Iowa 708, 68 N. W. 435; Loser *v.* Soldiers' Home, 92 Mich. 633, 52 N. W. 956; O'Donohue *v.* New Jersey Soldiers' Home (N. J. 1900) 47 Atl. 452; Brooks *v.* Hastings, 192 Pa. St. 378, 44 Wkly. Notes Cas. (Pa.) 333, 43 Atl. 1075.

Who may be required to surrender pension. — Under U. S. Rev. Stat. (1872), § 4820, only those invalid pensioners who have not contributed to the funds of the Soldiers' Home are required to surrender to it their pensions while receiving its benefits. U. S. *v.* Bowen, 100 U. S. 508, 25 L. ed. 631.

36. Loser *v.* Soldiers' Home, 92 Mich. 633, 52 N. W. 956. *Contra*, Ball *v.* Evans, 98 Iowa 708, 68 N. W. 435.

37. *In re* O'Connor, 37 Wis. 379, 19 Am. Rep. 765. See also People *v.* Godfrey, 17 Johns. (N. Y.) 225. *Contra*, Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

Effect of punishment by managers. — The jurisdiction of a state court over the offenses committed by an inmate of a soldiers' home is not affected by the fact that he has already been punished under the rules of the institution. *In re* O'Connor, 37 Wis. 379, 19 Am. Rep. 765.

**Failure of a sheriff to notify the commandant of the charges against an inmate of the institution against whom process had been issued does not affect the jurisdiction of the court issuing the process, nor the duty of the sheriff to execute the writ. *In re* O'Connor, 37 Wis. 379, 19 Am. Rep. 765.

38. U. S. *v.* Clark, 2 Sprague (U. S.) 55, 25 Fed. Cas. No. 14,808.

39. U. S. *v.* Thompson, 2 Sprague (U. S.) 103, 28 Fed. Cas. No. 16,491, holding that a seaman who has passed the examination at the naval rendezvous, merely, and has not been examined and passed on the receiving-ship, is not enlisted, within the meaning of the statute.

40. U. S. *v.* Brown, 1 Mason (U. S.) 151, 24 Fed. Cas. No. 14,669.

41. This offense was distinct from the offense of recruiting another in and for military service without authority, described in Mass. Stat. (1863), c. 91, § 1. Com. *v.* White, 9 Allen (Mass.) 195.

42. Com. *v.* Jacobs, 9 Allen (Mass.) 274.

43. Com. *v.* McGovern, 10 Allen (Mass.) 193.

44. Com. *v.* Jacobs, 9 Allen (Mass.) 274.

ARPENT or **ARPEN.** An acre or furlong of ground.[1]

ARRAIGNMENT. See CRIMINAL LAW.

ARRANGEMENT. Setting in order.[2]

ARRAS. In Spanish law, that which the husband gives the woman on account of marriage.[3]

ARRAY. The whole body of persons summoned to attend a court as they are arrayed or arranged on the panel;[4] the order in which jurors' names are ranked in the panel containing them.[5] (See, generally, JURIES.)

ARREARS. That which is behind in payment, or which remains unpaid though due;[6] that which remains unpaid after it is due;[7] money unpaid at the due time.[8] (Arrears: Of Annuities, see ANNUITIES. Of Interest, see CHATTEL MORTGAGES; MORTGAGES. Of Rent, see LANDLORD AND TENANT. Of Taxes, see TAXATION.)

1. Jacob L. Dict.
In Louisiana the word is used to indicate linear measure. U. S. *v.* Le Blanc, 12 How. (U. S.) 435, 436, 13 L. ed. 1055; Strother *v.* Lucas, 6 Pet. (U. S.) 763, 769, 8 L. ed. 573.
2. Tetley *v.* Taylor, 1 El. & Bl. 521, 540, 72 E. C. L. 521.
3. Cutter *v.* Waddingham, 22 Mo. 206, 254 [*citing* 1 Partidas 507, 508].
4. Durrah *v.* State, 44 Miss. 789, 796.
5. Burrill L. Dict.
6. Hollingsworth *v.* Willis, 64 Miss. 152, 157, 8 So. 170 [*quoting* Webster Dict.]; Corbett *v.* Taylor, 23 U. C. Q. B. 454, 455.
7. Hollingsworth *v.* Willis, 64 Miss. 152, 157, 8 So. 170 [*quoting* Worcester Dict.].
8. Wiggin *v.* Knights of Pythias, 31 Fed. 122, 125, where the word is said to be derived "from the French *arriere, retro*; behind."

ARREST

By John C. Myers

CROSS-REFERENCES

For Matters Relating to:

Arrests in:

Admiralty, of Respondent or Vessel, see ADMIRALTY.

Bankruptcy, see BANKRUPTCY.

For Matters Relating to — (*continued*)
Arrests in — (*continued*)
Bastardy Proceedings, see BASTARDS.
Contempt Proceedings, see CONTEMPT.
Courts Martial, see ARMY AND NAVY; MILITIA.
Deportation of Aliens, see ALIENS.
Enforcement of Payment of:
Alimony, see DIVORCE.
Costs, see COSTS.
Fines, see FINES; MILITIA.
Licenses, see LICENSES.
Taxes, see TAXATION.
Insolvency, see INSOLVENCY.
Suppression of Affray, see AFFRAY.
Assault in Making Arrest, see ASSAULT AND BATTERY.
Bail, see BAIL.
Deprivation of Liberty Without Due Process of Law, see CONSTITUTIONAL LAW.
Discharge on Habeas Corpus, see HABEAS CORPUS.
Duties and Liabilities:
Of Clerks as to Issuance of Process, see CLERKS OF COURTS.
Of Officers Making Arrest, see MUNICIPAL CORPORATIONS; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.
Escape, see ESCAPE; SHERIFFS AND CONSTABLES.
Homicide in Making or Resisting Arrest, see HOMICIDE.
Illegal Arrest as Ground of Action, see FALSE IMPRISONMENT.
Ill Treatment of Prisoners, see MUNICIPAL CORPORATIONS; SHERIFFS AND CONSTABLES.
Jails and Jailers, see PRISONS.
Malicious Arrest, see MALICIOUS PROSECUTION.
Ne Exeat, see NE EXEAT.
Rescue, see PRISONS; RESCUE; SHERIFFS AND CONSTABLES.
Resistance to Arrest, see ASSAULT AND BATTERY; HOMICIDE; OBSTRUCTING JUSTICE.
Rewards For Arrest, see REWARDS.

I. ON CRIMINAL CHARGES.

A. Definition. As applied to criminal proceedings the word "arrest"[1] signifies the apprehension or detention of the person in order to be forthcoming to answer for an alleged or suspected crime,[2] or to prevent the commission of a criminal offense.[3]

B. What Constitutes — 1. NECESSITY OF ASSUMING CONTROL OF PERSON. To constitute an arrest it is necessary that the officer should assume custody and control over the party, either by force or with his consent, and it has been held that neither the utterance of words[4] indicating an intention to arrest on the

1. "Apprehension" is more properly used in criminal cases, "arrest" in civil cases. Hogan *v.* Stophlet, 179 Ill. 150, 154, 53 N. E. 604, 44 L. R. A. 809; Montgomery County *v.* Robinson, 85 Ill. 174, 176 [*quoting* Bouvier L. Dict.].

2. Bouvier L. Dict. [*quoted* in Montgomery County *v.* Robinson, 85 Ill. 174, 176]; 4 Bl. Comm. 289.

3. Black L. Dict.

Other definitions are: "To take, seize, or apprehend a person by virtue of legal process issued for that purpose." Montgomery County *v.* Robinson, 85 Ill. 174, 176.

"The taking of a person into custody, that he may be held for a public offense." Rhodes *v.* Walsh, 55 Minn. 542, 552, 57 N. W. 212, 23 L. R. A. 632 [*citing* Min. Rev. Stat. (1851), c. 113, § 1]; Judson *v.* Reardon, 16 Minn. 431.

"The taking into custody of a person, or person and goods, under some lawful command or authority." 1 Bishop New Crim. Proc. § 156.

4. Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899; Searls *v.* Viets, 2 Thomps. & C. (N. Y.) 224; Conoly *v.* State, 2 Tex. App. 412; Russen *v.* Lucas, 1 C. & P. 153, R. & M. 26, 12

part of the person uttering them, nor the reading of the warrant[5] is of itself sufficient.

2. NECESSITY OF MANUAL TOUCHING. On the other hand, neither actual force, a manual touching of the body, nor physical restraint is necessary when the party submits to, or is in the power of, the officer.[6]

C. Who May Be Arrested — 1. IN GENERAL. With certain exceptions[7] all persons capable of committing crime[8] are equally liable to arrest in all criminal cases, although no man should be arrested unless he is charged with such a crime as will at least justify holding him to bail when taken.[9]

2. PERSONS ILLEGALLY BROUGHT WITHIN JURISDICTION. A person may be lawfully arrested and held for trial, under criminal process issued by a court of competent jurisdiction, even though he was brought within the jurisdiction of such court by fraud or force, after an illegal arrest made in another jurisdiction.[10]

3. PERSONS PRIVILEGED FROM ARREST. Diplomatic agents,[11] members of parliament, of congress, and of the various state legislatures, election officers, and jurors, suitors, and witnesses in attendance on a court of record,[12] are exempt from arrest in certain cases — usually in all cases except for treason, felony, or breach

E. C. L. 98. See also Hershey *v.* O'Neill, 36 Fed. 168, holding that where a salesman, acting on the suspicion that a person has stolen goods from his employer's store, touches such person lightly on the shoulder and requests her to return to the store, which she does, there is no arrest.

See 4 Cent. Dig. tit. "Arrest," § 167.

5. Baldwin *v.* Murphy, 82 Ill. 485.

In Indiana, under 2 Rev. Stat. p. 362, §§ 33, 34, providing that in making an arrest "the officer must inform the defendant that he acts under the authority of a warrant, and must show the warrant, if required," and "an arrest is made by an actual restraint of the defendant," if the officer took hold of the person named in the warrant and continued to hold him while he read the warrant to him, at his request, the arrest was complete. Kernan *v.* State, 11 Ind. 471.

6. *Alabama.*—Field *v.* Ireland, 21 Ala. 240.

Georgia.— Courtoy *v.* Dozier, 20 Ga. 369.

Michigan.— Brushaber *v.* Stegemann, 22 Mich. 266.

New York.— Searls *v.* Viets, 2 Thomps. & C. (N. Y.) 224; Tracy *v.* Seamans, 7 N. Y. St. 144.

North Carolina.— Journey *v.* Sharpe, 49 N. C. 165; Jones *v.* Jones, 35 N. C. 448; Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426; Mead *v.* Young, 19 N. C. 521.

Texas.— Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477 (holding that there is an actual arrest where the officer executes a warrant by reading it to the person to be arrested while such person is confined in bed); Grosse *v.* State, 11 Tex. App. 364.

England.— Warner *v.* Riddiford, 4 C. B. N. S. 180, 93 E. C. L. 180; Herring *v.* Boyle, 1 C. M. & R. 377, 6 C. & P. 496, 3 L. J. Exch. 344, 4 Tyrw. 801, 25 E. C. L. 543.

Canada.— Alderich *v.* Humphrey, 29 Ont. 427.

See 4 Cent. Dig. tit. "Arrest," § 167.

7. See *infra*, I, C, 3.

8. **An insane person,** who is committing, or is about to commit, an act which would constitute a criminal offense if committed by a sane person may be arrested, for, though he may not be guilty of crime, he may lawfully be prevented from doing harm. Paetz *v.* Dain, Wils. (Ind.) 148; Lott *v.* Sweet, 33 Mich. 308.

9. 4 Bl. Comm. 289. See also Com. *v.* Cheney, 6 Mass. 347.

10. *Illinois.*— Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706.

Iowa.— State *v.* Day, 58 Iowa 678, 12 N. W. 733; State *v.* Ross, 21 Iowa 467.

Michigan.— People *v.* Payment, 109 Mich. 553, 67 N. W. 689, holding that the validity of an arrest under proper proceedings is not affected by the fact that the person is already in custody for the same offense under an invalid arrest.

New York.— Lagrave's Case, 14 Abb. Pr. N. S. (N. Y.) 333 note; People *v.* Rowe, 4 Park. Crim. (N. Y.) 253.

Pennsylvania.— Dows' Case, 18 Pa. St. 37, 1 Phila. (Pa.) 234, 8 Leg. Int. (Pa.) 138.

South Carolina.— State *v.* Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679.

Vermont.— *In re* Durant, 60 Vt. 176, 12 Atl. 650, holding that, upon his release, he may be arrested under a valid warrant.

United States.— *Ex p.* Ker, 18 Fed. 167.

Contra, State *v.* Simmons, 39 Kan. 262, 18 Pac. 177; *In re* Robinson, 29 Nebr. 135, 45 N. W. 267, 26 Am. St. Rep. 378, 8 L. R. A. 398; Kendall *v.* Aleshire, 28 Nebr. 707, 45 N. W. 167, 26 Am. St. Rep. 367.

See 4 Cent. Dig. tit. "Arrest," § 143.

11. See AMBASSADORS AND CONSULS, 2 Cyc. 267, 269.

12. 3 Bl. Comm. 289. See, also, the constitutions of the United States and of the various states.

An officer or employee of the United States is not exempt from arrest for a violation of the criminal laws of a state merely by reason of his position and the services which he is called on to perform. Penny *v.* Walker, 64 Me. 430, 18 Am. Rep. 269; U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278; U. S. *v.* Hart, Pet. C. C. (U. S.) 390, 26 Fed. Cas. No. 15,316, 2 Wheel. Crim. (N. Y.) 304.

of the peace.[13] But the arrest of such persons is not void, as the exemption is only a personal privilege, which the person is entitled to plead in abatement.[14] An arrest is illegal when it is made, on a criminal charge, merely as a contrivance to get an exempt person into custody in a civil suit.[15]

D. Modes of Arrest — 1. In General. An arrest may be made in four ways[16] — either by a warrant,[17] by an officer without a warrant, by a private person without a warrant,[18] or by hue and cry.[19]

2. By Warrant — a. Who May Serve — (I) *When Addressed to Peace-Officer* — (A) *In General.* While a peace-officer may make an arrest under a warrant directed either to peace-officers of his class generally, or to him by name, or by the designation of his office,[20] it seems that he has no right to make an arrest under a warrant directed to peace-officers of another class.[21]

(B) *Right of Officer to Deputize.* A sheriff, being the highest peace-officer within his jurisdiction, may, when a warrant is directed to him, issue his warrant deputizing others to execute it,[22] and may even authorize, by word of mouth, his under-sheriff to execute it;[23] but an inferior peace-officer to whom a warrant is directed cannot authorize any one else to execute it, either verbally or otherwise.[24]

(II) *When Addressed to Private Person.* A private person may lawfully execute any warrant directed to him by name,[25] but cannot execute a warrant not so directed to him.[26] It follows, therefore, that a private person cannot

13. Any indictable offense is considered a breach of the peace within the meaning of these exemption clauses. Com. *v.* Jail-Keeper, 4 Wkly. Notes Cas. (Pa.) 540, 1 Del. Co. Ct. (Pa.) 215; *Ex p.* Levi, 28 Fed. 651.

Bribery. — In State *v.* Polacheck, (Wis. 1898) 77 N. W. 708, it was held that, since bribery was not a felony at common law, and the statutes making it such were enacted subsequent to the constitution, it is not a felony within the constitutional provision exempting legislators from arrest in all cases except treason, felony, and breach of the peace.

Fighting a duel. — A congressman is not privileged from arrest on a warrant charging that he is about to commit a breach of the peace by fighting a duel. U. S. *v.* Wise, 1 Hayw. & H. (U. S.) 82, 28 Fed. Cas. No. 16,746*a*.

Offense committed during absence as witness. — The privilege from arrest of a witness residing in one district and cited to appear before a court sitting in another will not protect him from arrest for a criminal offense committed during the time he was absent from his residence for the purpose of giving evidence. *Ex p.* Ewan, 6 Quebec Q. B. 465.

Rejecting vote. — Election officers cannot be arrested on election-day for rejecting a vote. Matter of Election Officers, 1 Brewst. (Pa.) 182.

14. State *v.* Polacheck, (Wis. 1898) 77 N. W. 708.

15. Com. *v.* Daniel, 4 Pa. L. J. Rep. 49, 6 Pa. L. J. 330.

16. 4 Bl. Comm. 289.

17. Arrest by warrant see *infra*, I, D, 2.

18. Arrest without warrant see *infra*, I, D, 3.

19. See, generally, Hue and Cry.

20. Paul *v.* Vankirk, 6 Binn. (Pa.) 123. See, generally, Sheriffs and Constables.

Arrest of truant. — A warrant for the arrest of a truant may be served by a truant officer. O'Malia *v.* Wentworth, 65 Me. 129.

21. Thus, a sheriff has no right to make an arrest under a justice's warrant directed to "any constable" (State *v.* Wenzel, 77 Ind. 428), and a constable has no authority to execute a warrant directed to the sheriff (Winkler *v.* State, 32 Ark. 539), unless he is deputized in the manner provided by law (see *infra*, I, D, 2, a, (I), (B)).

22. Winkler *v.* State, 32 Ark. 539; 1 Hale P. C. 581; 2 Hawkins P. C. c. 13, § 29.

Compare Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211, which holds that, although a sheriff cannot legally deputize a private person to execute a warrant of arrest, such person's possession of the warrant does not deprive him of the right to make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

23. 2 Hale P. C. 115.

24. State *v.* Ward, 5 Harr. (Del.) 496; Rex *v.* Patience, 7 C. & P. 775, 32 E. C. L. 866; 1 Hale P. C. 581; 2 Hawkins P. C. c. 13, § 11.

25. Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Doughty *v.* State, 33 Tex. 1; 2 Hawkins P. C. c. 12, § 21; c. 13, § 11.

26. State *v.* Ward, 5 Harr. (Del.) 496; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Dietrichs *v.* Schaw, 43 Ind. 175.

Indorsement of authority on warrant. — Where the body of a warrant was directed "to the sheriff, or any constable of the county" in which the magistrate resided, it was held that authority to execute such warrant could not be conferred, upon one who was not an officer, by an indorsement on it, signed by the justice, "authorizing and empowering" such person to arrest defendant

authorize another to execute a warrant directed to him,[27] although it seems that he may call others to his assistance.[28]

b. Necessity of Having Warrant in Possession — (I) *In General.* When a warrant has been issued, and the circumstances are such as to render an arrest without a warrant illegal, neither a private person nor an officer has a right to make an arrest unless he has the warrant with him at the time,[29] even though the person arrested knows that a warrant has been issued.[30]

(II) *Where Arrest Is Made by Bystander.* Where, however, an officer, armed with a warrant of arrest, calls upon a citizen or another officer for assistance,[31] the latter may make the arrest, though not in actual possession of the warrant,[32] provided the officer whom he is assisting is present, or near, and acting in the arrest.[33]

c. Necessity of Showing Warrant — (I) *In General* — (A) *When Arrest Made by Known Peace-Officer.* In making an arrest, a sworn peace-officer, commonly known as such and acting within the limits of his jurisdiction, is not bound to show his warrant,[34] even though it is demanded of him,[35] as every one is

and bring him before the justice. Abbott *v.* Booth, 51 Barb. (N. Y.) 546.

Substitution of name.— Where a warrant was directed by a magistrate to a certain person, but was executed by an individual selected by the prosecutor, who erased the name of the person appointed and substituted that of the person whom he selected, it was held that the arrest was illegal. Wells *v.* Jackson, 3 Munf. (Va.) 458.

27. 2 Hale P. C. 115; 2 Hawkins P. C. c. 13, § 29.

28. See *infra*, I, E, 5, a.

29. *Michigan.*—People *v.* McLean, 68 Mich. 480, 36 N. W. 231.

New Jersey.— Smith *v.* Clark, 53 N. J. L. 197, 21 Atl. 491; Webb *v.* State, 51 N. J. L. 189, 17 Atl. 113.

New York.— People *v.* Shanley, 40 Hun (N. Y.) 477.

Texas.— Cabell *v.* Arnold, (Tex. Civ. App. 1893) 22 S. W. 62.

England.— Codd *v.* Cabe, 13 Cox C. C. 202, 1 Ex. D. 352, 45 L. J. M. C. 101, 34 L. T. Rep. N. S. 453; Reg. *v.* Chapman, 12 Cox C. C. 4.

Canada.— *Ex p.* McManus, 32 N. Brunsw. 481.

See 4 Cent. Dig. tit. "Arrest," § 163.

30. People *v.* Shanley, 40 Hun (N. Y.) 477.

31. Right to summon bystanders see *infra*, I, E, 5, a.

32. Com. *v.* Black, 12 Pa. Co. Ct. 31, 2 Pa. Dist. 46; Kirbie *v.* State, 5 Tex. App. 60; *Ex p.* McManus, 32 N. Brunsw. 481.

33. People *v.* Moore, 2 Dougl. (Mich.) 1; *Ex p.* McManus, 32 N. Brunsw. 481.

Arrest of two persons.— Where an officer has summoned a posse to assist him in arresting two persons who are separated from each other a few paces, he need not be actually present, aiding in the arrest of each. Bowling *v.* Com., 7 Ky. L. Rep. 821.

What constitutes presence.— Where a sheriff took a warrant for the arrest of a person for a misdemeanor, and started in search of him, directing his deputy to search in another place, it was held that the deputy had no authority to make the arrest. People *v.* McLean, 68 Mich. 480, 36 N. W. 231. But where a sheriff called a citizen to assist in the arrest of persons who had taken refuge in a house, and left the citizen to guard such persons and prevent their escape while he went four miles for assistance, and during his absence the citizen permitted the persons to escape, it was held that the citizen had authority to retake such persons, as the sheriff was, constructively, present at the time. Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85.

34. *Delaware.*—State *v.* Townsend, 5 Harr. (Del.) 487.

Massachusetts.— Com. *v.* Cooley, 6 Gray (Mass.) 350.

Michigan.— People *v.* Moore, 2 Dougl. (Mich.) 1.

Minnesota.— State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

New York.— Bellows *v.* Shannon, 2 Hill (N. Y.) 86.

North Carolina.— State *v.* Dula, 100 N. C. 423, 6 S. E. 89.

Pennsylvania.— Com. *v.* Hewes, 1 Brewst. (Pa.) 348.

Vermont.—State *v.* Caldwell, 2 Tyler (Vt.) 212.

United States.— U. S. *v.* Rice, 1 Hughes (U. S.) 560, 27 Fed. Cas. No. 16,153; U. S. *v.* Jailer, 2 Abb. (U. S.) 265, 26 Fed. Cas. No. 15,463.

England.— 1 Hale P. C. 315, 583; 2 Hale P. C. 116; 2 Hawkins P. C. c. 13, § 28.

But *compare* Bates *v.* Com., 13 Ky. L. Rep. 132, 16 S. W. 528; Hamlin *v.* Com., 11 Ky. L. Rep. 348, 12 S. W. 146.

See 4 Cent. Dig. tit. "Arrest," § 164.

Exhibiting warrant to third person upon search of dwelling.— An officer who is searching the house of a third person for one against whom he holds a warrant is not bound to exhibit his warrant to the householder, provided the latter has reasonable notice that he is an officer and acting under a warrant against a person supposed to be there. Com. *v.* Irwin, 1 Allen (Mass.) 587.

35. People *v.* Moore, 2 Dougl. (Mich.) 1; Bellows *v.* Shannon, 2 Hill (N. Y.) 86; 2 Hale P. C. 116; 2 Hawkins P. C. c. 13, § 28.

bound to know the character of such an officer when acting within his proper jurisdiction,[36] and is bound to submit peaceably to the arrest before he can demand that the cause thereof be made known to him.[37] After the person has submitted to the arrest or acquiesced in the authority of the officer, however, the latter should, if demanded, acquaint the former with the cause of the arrest,[38] either by stating the substance of the warrant to him,[39] or by reading it to him;[40] but, when the officer is resisted and there is danger of the prisoner's escape, it seems that he is not bound to exhibit his warrant.[41]

(B) *When Arrest Made by Private Person or One Not Known as Peace-Officer.* In making an arrest under a warrant under circumstances which do not justify an arrest without a warrant, either a private person, a special officer, one who is not commonly known as a peace-officer, or a regular officer who is not sworn, or is acting beyond the limits of his jurisdiction, must, if demanded, show the warrant to the person before he makes the arrest.[42]

(II) *When Not Requested So to Do.* In no event is it necessary for either an officer or a private person to show the warrant until he is requested so to do.[43]

d. Only Person Named May Be Arrested. No one may be arrested under a warrant other than the person named therein,[44] even though the warrant was intended to designate the person arrested,[45] unless the statute authorizes the designation by a fictitious name of a person whose name is unknown.[46]

3. Without Warrant — a. By Peace-Officer — (I) *Who Are Peace-Officers* — (A) *In General.* At common law the officers who were recognized as peace-officers and had the right to arrest in certain cases without warrants,[47] *virtute officii*, were justices of the peace, sheriffs, coroners, constables, and watchmen,[48] and these classes include all who come to their aid and assistance.[49] In many jurisdictions, however, other peace-officers have been created by statute,[50] who are

36. State *v.* Townsend, 5 Harr. (Del.) 487.

37. State *v.* Townsend, 5 Harr. (Del.) 487; Plasters *v.* State, 1 Tex. App. 673; U. S. *v.* Rice, 1 Hughes (U. S.) 560, 27 Fed. Cas. No. 16,153.

38. 2 Hale P. C. 116.

39. *Massachusetts.*— Com. *v.* Cooley, 6 Gray (Mass.) 350.

Minnesota.— State *v.* Spaulding, 34 Minn. 36, 25 N. W. 793.

Michigan.— People *v.* Moore, 2 Dougl. (Mich.) 1.

New York.— Bellows *v.* Shannon, 2 Hill (N. Y.) 86.

England.— 2 Hawkins P. C. c. 13, § 28.

40. State *v.* Townsend, 5 Harr. (Del.) 487; Com. *v.* Hewes, 1 Brewst. (Pa.) 348; U. S. *v.* Rice, 1 Hughes (U. S.) 560, 27 Fed. Cas. No. 16,153; U. S. *v.* Jailer, 2 Abb. (U. S.) 265, 26 Fed. Cas. No. 15,463.

41. Com. *v.* Hewes, 1 Brewst. (Pa.) 348.

42. *Kentucky.*— Bates *v.* Com., 13 Ky. L. Rep. 132, 16 S. W. 528.

Michigan.— People *v.* Moore, 2 Dougl. (Mich.) 1.

New York.— Frost *v.* Thomas, 24 Wend. (N. Y.) 418.

North Carolina.— State *v.* Dula, 100 N. C. 423, 6 S. E. 89; State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359.

United States.— U. S. *v.* Rice, 1 Hughes (U. S.) 560, 27 Fed. Cas. No. 16,153, wherein it is said, however, that it would seem that this duty is not imperative when the person has notice of the warrant, and is fully aware of its contents.

England.— 2 Hawkins P. C. c. 13, § 28.

43. 1 Hale P. C. 458; 2 Hale P. C. 116.

44. West *v.* Cabell, 153 U. S. 78, 14 S. Ct. 752, 38 L. ed. 643.

45. Harris *v.* McReynolds, 10 Colo. App. 532, 51 Pac. 1016; Mead *v.* Haws, 7 Cow. (N. Y.) 332.

The correction of the name after the arrest will not validate an arrest which is illegal because the party's name was incorrectly set out in the warrant. Harris *v.* McReynolds, 10 Colo. App. 532, 51 Pac. 1016.

46. Williams *v.* Tidball, (Ariz. 1885) 8 Pac. 351.

47. See *infra*, I, D, 3, a, (II).

48. 4 Bl. Comm. 292; 2 Hale P. C. 85, 86.

Deputy constable who has not qualified.— One who has been appointed a deputy constable has the same right to act as a peace-officer as if he had taken the oath of office and registered his appointment as required by law. State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; State *v.* Underwood, 75 Mo. 230.

49. 2 Hale P. C. 85, 86.

50. Aldermen are clothed with the same power by the charter of the city of Syracuse. Butolph *v.* Blust, 5 Lans. (N. Y.) 84.

The City Guard of Charleston may arrest for breaches of the peace without warrants. City Council *v.* Payne, 2 Nott & M. (S. C.) 475.

usually clothed by the statutes which create them with the same powers as common-law peace-officers.[51]

(B) *United States Marshals.* United States marshals and their deputies have in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in each state have by law in executing the laws thereof,[52] and may arrest without warrant when the sheriffs may do so.[53]

(II) *When Authorized* — (A) *For Felony* — (1) Committed or Attempted in Officer's Presence. It is universally recognized that it is not only the right, but the duty, of a peace-officer to arrest, without a warrant, one whom he finds attempting to commit,[54] or one who is committing, or has committed, a felony in his presence or within his view,[55] and the arrest may be made at any subsequent time as well as at the time of the commission of the felony.[56] If the felony is committed in the presence of a justice of the peace or other peace-officer having similar powers,[57] he may arrest the felon himself, or give a verbal order for his apprehension and detention.[58]

(2) To Prevent Felony. A peace-officer also has the right to make an arrest without a warrant, for the purpose of preventing the commission of a felony.[59]

(3) Upon Suspicion of Felony. A peace-officer may also arrest, without a warrant, one whom he has reasonable or probable grounds to suspect[60] of having

Policemen, whether regular (Williams *v.* State, 44 Ala. 41; Johnson *v.* State, 30 Ga. 426; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186, 69 N. Y. St. 265; Carpenter *v.* Mills, 29 How. Pr. (N. Y.) 473; State *v.* Carpenter, 54 Vt. 551), or special (Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899), and park policemen within the territorial limits of the park department of the city of New York (Griffin *v.* Flock, 11 Daly (N. Y.) 274), are clothed with such powers.

Town and city marshals are statutory peace-officers. Hayes *v.* Mitchell, 69 Ala. 452; Bryan *v.* Bates, 15 Ill. 87; Ballard *v.* State, 43 Ohio St. 340, 1 N. E. 76.

51. Whether city watchmen who are not constables have the power to arrest without warrants depends upon the extent and force of the city ordinances. State *v.* Brown, 5 Harr. (Del.) 505.

A private detective cannot arrest without a warrant, when in pursuit of a fugitive from justice from another state, by merely procuring the assistance of a policeman. Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

52. U. S. Rev. Stat. (1872), § 788.

A special deputy marshal, appointed under U. S. Rev. Stat. (1872), § 2021, is, as to the crimes for which he may make arrests without process, under U. S. Rev. Stat. (1872), § 2022, a peace-officer. *Ex p.* Morrill, 13 Sawy. (U. S.) 322, 35 Fed. 261.

53. *In re* Acker, 66 Fed. 290.

54. Rex *v.* Howarth, 1 Moody 207; Rex *v.* Hunt, 1 Moody 93. See also U. S. *v.* Fuellhart, 106 Fed. 911, holding that, under the secret-service rules sanctioning arrest without a warrant in cases of "exceedingly rare occurrence," secret-service agents are justified in so arresting one whom they surprise in the act of attempting to conceal articles commonly used in counterfeiting.

That persons caught in an attempt were acquitted of the charge does not affect the right of the officer who discovered them to arrest without a warrant. McMahon *v.* People, 189 Ill. 222, 59 N. E. 584.

55. What constitutes presence or view see *infra,* I, D, 3, e.

56. *Michigan.*—Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266 (holding that any offense punishable by imprisonment in the state prison is a felony within this rule though not declared such by statute); People *v.* Wilson, 55 Mich. 506, 21 N. W. 905.

New York.—Willis *v.* Warren, 1 Hilt. (N. Y.) 590; People *v.* Wolven, 2 Edm. Sel. Cas. (N. Y.) 108, 7 N. Y. Leg. Obs. 89.

Texas.— Giroux *v.* State, 40 Tex. 97; Staples *v.* State, 14 Tex. App. 136; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Johnson *v.* State, 5 Tex. App. 43.

Vermont.— Corbett *v.* Sullivan, 54 Vt. 619.

Virginia.— Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

United States.— Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458; *In re* Acker, 66 Fed. 290.

England.— 4 Bl. Comm. 292; 1 Hale P. C. 588 (dangerous wounding).

57. Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

58. Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534; 1 Hale P. C. 587.

Arrest for perjury.— A trial court has the undoubted right to order the sheriff to take into custody for perjury one who has testified to a palpable untruth in its presence. Lindsay *v.* People, 67 Barb. (N. Y.) 548.

59. 1 East P. C. 306; 2 Hawkins P. C. c. 12, § 19.

60. What constitutes reasonable and prob-

committed a felony,[61] even though the person suspected is innocent,[62] and, generally, though no felony has in fact been committed by any one,[63] although, under some statutes, a felony must have been committed.[64]

able grounds of suspicion see *infra*, I, D, 3 f.

61. *Alabama.*—Williams *v.* State, 44 Ala. 41.

Arkansas.— Carr *v.* State, 43 Ark. 99.

California.— People *v.* Pool, 27 Cal. 572.

District of Columbia.— Bright *v.* Patton, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

Georgia.— Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Johnson *v.* State, 30 Ga. 426.

Illinois.— Marsh *v.* Smith, 49 Ill. 396; Dodds *v.* Board, 43 Ill. 95; Quinlan *v.* Badenoch, 78 Ill. App. 481.

Indiana.— Dœring *v.* State, 49 Ind. 56, 19 Am. Rep. 669.

Kentucky.— Wright *v.* Com., 85 Ky. 123, 8 Ky. L. Rep. 718, 2 S. W. 904; Jamison *v.* Gaernett, 10 Bush (Ky.) 221; Bates *v* Com., 13 Ky. L. Rep. 132, 16 S. W. 528; Taylor *v.* Com., 9 Ky. L. Rep. 257, 5 S. W. 46; Palmer *v.* Com., 6 Ky. L. Rep. 510.

Maryland.— Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Massachusetts.— Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; Com. *v.* McLaughlin, 12 Cush. (Mass.) 615; Rohan *v.* Sawin, 5 Cush. (Mass.) 281.

Michigan.— Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; Ross *v.* Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 609.

Minnesota.—Warner *v.* Grace, 14 Minn. 487.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

Missouri.— State *v.* Grant, 76 Mo. 236; Taaffe *v.* Slevin, 11 Mo. App. 507.

Nebraska.— Diers *v.* Mallon, 46 Nehr. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

New York.— Fulton *v.* Staats, 41 N. Y. 498; Burns *v.* Erben, 40 N. Y. 463 [*affirming* 1 Rob. (N. Y.) 555]; Carpenter *v.* Mills, 29 How. Pr. (N. Y.) 473; People *v.* Wolven, 2 Edm. Sel. Cas. (N. Y.) 108, 7 N. Y. Leg. Obs. 89; Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

North Carolina.— Neal *v.* Joyner, 89 N. C. 287; Brockway *v.* Crawford, 48 N. C. 433, 67 Am. Dec. 250.

Ohio.— State *v.* West, 3 Ohio St. 509.

Pennsylvania.— McCarthy *v.* De Armit, 99 Pa. St. 63; McCullough *v.* Com., 67 Pa. St. 30; Russell *v.* Shuster, 8 Watts & S. (Pa.) 308.

Rhode Island.—Wade *v.* Chaffee, 8 R. I. 224, 5 Am. Rep. 572.

Tennessee.— Lewis *v.* State, 3 Head (Tenn.) 127; Eanes *v.* State, 6 Humphr. (Tenn.) 53, 44 Am. Dec. 289.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

Virginia.— Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

Washington.— State *v.* Symes, 20 Wash. 484, 55 Pac. 626.

England.— Hadley *v.* Perks, L. R. 1 Q. B. 444, 12 Jur. N. S. 662, 35 L. J. M. C. 177, 14 L. T. Rep. N. S. 325, 14 Wkly. Rep. 730; Beckwith *v.* Philby, 6 B. & C. 635, 9 D. & R. 487, 5 L. J. M. C. O. S. 132, 13 E. C. L. 287; Davis *v.* Russell, 5 Bing. 354, 7 L. J. M. C. O. S. 52, 2 M. & P. 590, 30 Rev. Rep. 637, 15 E. C. L. 618; Hedges *v.* Chapman, 2 Bing. 523, 9 E. C. L. 688; Ledwith *v.* Catchpole, Cald. Cas. 291; Nicholson *v.* Hardwick, 5 C. & P. 495, 24 E. C. L. 673; Cowles *v.* Dunbar, 2 C. & P. 565, M. & M. 37, 12 E. C. L. 735; Samuel *v.* Payne, 2 Dougl. 345; McCloughan *v.* Clayton, Holt N. P. 478, 3 E. C. L. 190; Griffin *v.* Colman, 4 H. & N. 265, 28 L. J. Exch. 134; Rex *v.* Woolmer, 1 Moody 334; Rex *v.* Ford, R. & R. 329; 4 Bl. Comm. 292; 1 East P. C. 301; 1 Hale P. C. 587; 2 Hale P. C. 87.

See 4 Cent. Dig. tit. "Arrest," § 149.

62. Williams *v.* State, 44 Ala. 41; Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; People *v.* Wolven, 2 Edm. Sel. Cas. (N. Y.) 108, 7 N. Y. Leg. Obs. 89; Cowles *v.* Dunbar, 2 C. & P. 565, M. & M. 37, 12 E. C. L. 735.

63. *Alabama.*— Williams *v.* State, 44 Ala. 41.

Arkansas.— Carr *v.* State, 43 Ark. 99.

Indiana.— Dœring *v.* State, 49 Ind. 56, 19 Am. Rep. 669.

Massachusetts.— Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; Rohan *v.* Sawin, 5 Cush. (Mass.) 281.

Michigan.— Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

Nebraska.— Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

New York.— Burns *v.* Erben, 40 N. Y. 463 [*affirming* 1 Rob. (N. Y.) 555]; Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

Ohio.— State *v.* West, 3 Ohio St. 509.

Pennsylvania.— McCarthy *v.* De Armit, 99 Pa. St. 63.

Tennessee.— Lewis *v.* State, 3 Head (Tenn.) 127.

England.— Hadley *v.* Perks, L. R. 1 Q. B. 444, 12 Jur. N. S. 662, 35 L. J. M. C. 177, 14 L. T. Rep. N. S. 325, 14 Wkly. Rep. 730; Beckwith *v.* Philby, 6 B. & C. 635, 9 D. & R. 487, 5 L. J. M. C. O. S. 132, 13 E. C. L. 287; Hobbs *v.* Branscomb, 3 Campb. 420; Nicholson *v.* Hardwick, 5 C. & P. 495, 24 E. C. L. 673; Samuel *v.* Payne, 2 Dougl. 345; McCloughan *v.* Clayton, Holt N. P. 478, 3 E. C. L. 190; Rex *v.* Woolmer, 1 Moody 334; 1 East P. C. 301.

See 4 Cent. Dig. tit. "Arrest," § 149.

64. Marsh *v.* Smith, 49 Ill. 396; Dodds *v.* Board, 43 Ill. 95; Quinlan *v.* Badenoch, 78 Ill. App. 481; Warner *v.* Grace, 14 Minn. 487; Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

(B) *For Misdemeanor* — (1) IN GENERAL — (a) AT COMMON LAW. At common law, as a general rule, an arrest could not be made without a warrant for an offense less than felony, except for a breach of the peace;[65] and such an arrest is not authorized by a statute providing for arrests for felonies without a warrant.[66]

(b) UNDER STATUTE. In some jurisdictions, however, the common-law rule has been modified to the extent of permitting a peace-officer to arrest, without a warrant, one who has committed, or is committing, a misdemeanor in the presence or within the view of such officer;[67] but such an arrest can be made only at the time of the commission of the offense,[68] or upon fresh and immediate pursuit

65. *Florida.*— Roherson *v.* State, (Fla. 1901) 29 So. 535.

Massachusetts.— Com. *v.* Wright, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206; Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; Com. *v.* O'Connor, 7 Allen (Mass.) 583.

Michigan.— Matter of Way, 41 Mich. 299, 1 N. W. 1021; Quinn *v.* Heisel, 40 Mich. 576.

New York.— Butolph *v.* Blust, 5 Lans. (N. Y.) 84.

England.— King *v.* Poe, 15 L. T. Rep. N. S. 37.

Suspicious night-walkers.—At common law any peace-officer might arrest, without a warrant, a suspicious night-walker and detain him until he gave a good account of himself (Miles *v.* Weston, 60 Ill. 361; 4 Bl. Comm. 292; 1 East P. C. 303; 2 Hale P. C. 96; 2 Hawkins P. C. c. 13, § 5); but such an arrest was illegal if the person was innocent and there were no reasonable grounds of suspicion to mislead the officer (Tooley's Case, 2 Ld. Raym. 1296. But *compare* Lawrence *v.* Hedger, 3 Taunt. 14, 12 Rev. Rep. 371, which holds that watchmen and beadles have authority at common law to arrest and detain in prison for examination persons walking in the street at night whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed).

66. Westbrook *v.* New York Sun Assoc., 58 N. Y. App. Div. 562, 69 N. Y. Suppl. 266; San Antonio, etc., Pass. R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Griffin *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 319.

67. *Alabama.*—Williams *v.* State, 44 Ala. 41.

Georgia.— Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; O'Connor *v.* State, 64 Ga. 125, 37 Am. Rep. 58.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966.

Indiana.— O'Brian *v.* State, 12 Ind. 369; Weser *v.* Welty, 18 Ind. App. 664, 47 N. E. 639.

Kansas.— State *v.* Dietz, 59 Kan. 576, 53 Pac. 870.

Kentucky.— Quinn *v.* Com., (Ky. 1901) 63 S. W. 792; Lynam *v.* Com., (Ky. 1900) 55 S. W. 686; Curran *v.* Taylor, 92 Ky. 537, 13 Ky. L. Rep. 750, 18 S. W. 232; Wright *v.* Com., 85 Ky. 123, 12 S. W. 904; Jamison *v.* Gaernett, 10 Bush (Ky.) 221; Hughes *v.* Com., 19 Ky. L. Rep. 497, 41 S. W. 294; Palmer *v.* Com., 6 Ky. L. Rep. 510.

Maine.— Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673.

Massachusetts.— Krulevitz *v.* Eastern R. Co., 143 Mass. 228, 9 N. E. 613; Phillips *v.* Fadden, 125 Mass. 198; Com. *v.* Coughlin, 123 Mass. 436; Com. *v.* Presby, 14 Gray (Mass.) 65.

Michigan.— Ross *v.* Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 609.

Minnesota.— Judson *v.* Reardon, 16 Minn. 431.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

Missouri.— State *v.* McNally, 87 Mo. 644; State *v.* Hancock, 73 Mo. App. 19; Taaffe *v.* Slevin, 11 Mo. App. 507.

New Hampshire.— O'Connor *v.* Bucklin, 59 N. H. 589.

New Jersey.—Webb *v.* State, 51 N. J. L. 189, 17 Atl. 113.

Ohio.— Ballard *v.* State, 43 Ohio St. 340, 1 N. E. 76.

Pennsylvania.— Com. *v.* Bryant, 9 Phila. (Pa.) 595, 29 Leg. Int. (Pa.) 125; Flinn *v.* Graham, 3 Pittsb. (Pa.) 195.

Tennessee.—Touhey *v.* King, 9 Lea (Tenn.) 422.

Texas.— Hodges *v.* State, 6 Tex. App. 615.

Virginia.— Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

Wisconsin.— Stittgen *v.* Rundle, 99 Wis 78, 74 N. W. 536.

England.— Simmons *v.* Millingen, 2 C. B. 524, 10 Jur. 224, 15 L. J. C. P. 102, 52 E. C. L. 524.

Erecting a nuisance in the street is not an offense for which a peace-officer can arrest without a warrant. Danovan *v.* Jones, 36 N. H. 246.

When the law clearly defines the duties of a policeman, and does not authorize him to arrest without a warrant for the offense of carrying concealed weapons, he may not do so. State *v.* Holcomb, 86 Mo. 371.

What constitutes presence or view see *infra*, I, D, 3, e.

68. *Delaware.*— State *v.* Dill, 9 Houst. (Del.) 495, 18 Atl. 763.

Illinois.— Shanley *v.* Wells, 71 Ill. 78.

Massachusetts.— Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; Com. *v.* Carey, 12 Cush. (Mass.) 246.

Michigan.—White *v.* McQueen, 96 Mich.

of the offender.[69] It follows, therefore, that a peace-officer has no right to make an arrest without a warrant, upon information or mere suspicion that a misdemeanor has been committed.[70] When the statute authorizes such a course, a justice of the peace may give a verbal order for the arrest of an offender against the public morals.[71]

(2) Breach of Peace — (a) Committed in Officer's Presence. Any officer charged with the preservation of the public peace may arrest, without a warrant, any person who is committing, or has committed, a breach of the peace in his presence, or within his view,[72] but cannot so arrest for a breach of the peace, not

249, 55 N. W. 843; People *v.* McLean, 68 Mich. 480, 36 N. W. 231.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

New York.— Meyer *v.* Clark, 41 N. Y. Super. Ct. 107.

United States.— *In re* Acker, 66 Fed. 290.

England.— Reg. *v.* Phelps, 1 C. & M. 180, 2 Moody 240, 41 E. C. L. 103 (holding that where a statute creates an offense, but does not make it either a felony or a misdemeanor, and provides that one guilty thereof may be arrested by an officer without a warrant at the time of the commission of the offense, an arrest for such offense subsequent to its commission, without a warrant, is unjustifiable); Hanway *v.* Boultbee, 4 C. & P. 350, 1 M. & Rob. 15, 19 E. C. L. 549; Derecourt *v.* Corbishley, 5 E. & B. 188, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 188, 32 Eng. L. & Eq. 186.

69. Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473; State *v.* Sims, 16 S. C. 486; Hanway *v.* Boultbee, 4 C. & P. 350, 1 M. & Rob. 15, 19 E. C. L. 549.

70. *Kansas.*— Matter of Kellam, 55 Kan. 700, 41 Pac. 960.

Kentucky.— Jamison *v.* Gaernett, 10 Bush (Ky.) 221.

Massachusetts.— Kennedy *v.* Favor, 14 Gray (Mass.) 200; Mason *v.* Lothrop, 7 Gray (Mass.) 354; Com. *v.* McLaughlin, 12 Cush. (Mass.) 615; Com. *v.* Carey, 12 Cush. (Mass.) 246.

Michigan.—Pinkerton *v.* Verberg, 78 Mich. 573, 44 N. W. 579, 18 Am. St. Rep. 473, 7 L. R. A. 507; Quinn *v.* Heisel, 40 Mich. 576.

Missouri.— State *v.* Davidson, 44 Mo. App. 513; Taaffe *v.* Slevin, 11 Mo. App. 507.

New York.— People *v.* Bush, 1 Wheel. Crim. (N. Y.) 137.

England.— Hadley *v.* Perks, L. R. 1 Q. B. 444, 12 Jur. N. S. 662, 35 L. J. M. C. 177, 14 L. T. Rep. N. S. 325, 14 Wkly. Rep. 730; Fox *v.* Gaunt, 3 B. & Ad. 798, 1 L. J. K. B. 198, 23 E. C. L. 349; Bowditch *v.* Balchin, 5 Exch. 378, 19 L. J. Exch. 337; Griffin *v.* Colman, 4 H. & N. 265, 28 L. J. Exch. 134. See also Rex *v.* Birnie, 5 C. & P. 206, 1 M. & Rob. 160, 24 E. C. L. 528, which says that a magistrate has no right to detain a "known" person to answer a charge of misdemeanor verbally intimated to him, but without regular information.

Contra, Ex p. Sherwood, 29 Tex. App. 334, 15 S. W. 812; Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408.

See 4 Cent. Dig. tit. "Arrest," § 149.

71. Farrell *v.* Warren, 3 Wend. (N. Y.) 253.

72. *Alabama.*—Williams *v.* State, 44 Ala. 41.

Connecticut.—Holcomb *v.* Cornish, 8 Conn. 375, profane swearing.

Delaware.—State *v.* Dennis, 2 Marv. (Del.) 433, 43 Atl. 261; State *v.* Russell, Houst. Crim. Cas. 122; State *v.* Dennis, 2 Hard. (Del.) 184.

Illinois.— Shanley *v.* Wells, 71 Ill. 78.

Indiana.—Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; Vandeveer *v.* Mattocks, 3 Ind. 479.

Louisiana.— State *v.* Guy, 46 La. Ann. 1441, 16 So. 404; Boutte *v.* Emmer, 43 La. Ann. 980, 9 So. 921, 15 L. R. A. 63.

Massachusetts.— Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899; Phillips *v.* Fadden, 125 Mass. 198; Com. *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375.

Michigan.— People *v.* Rounds, 67 Mich. 482, 35 N. W. 77; Davis *v.* Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828; Matter of Way, 41 Mich. 299, 1 N. W. 1021; Quinn *v.* Heisel, 40 Mich. 576.

Missouri.— State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; Taaffe *v.* Slevin, 11 Mo. App. 507; Taaffe *v.* Kyne, 9 Mo. App. 15.

New Hampshire.— O'Connor *v.* Bucklin, 59 N. H. 589.

New York.— McIntyre *v.* Raduns, 46 N. Y. Super. Ct. 123; Willis *v.* Warren, 1 Hilt. (N. Y.) 590; Harft *v.* McDonald, 1 N. Y. City Ct. 181; Taylor *v.* Strong, 3 Wend. (N. Y.) 384.

North Carolina.— State *v.* McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607.

Pennsylvania.— McCullough *v.* Com., 67 Pa. St. 30; Com. *v.* Deacon, 8 Serg. & R. (Pa.) 47; Weiler *v.* Pennsylvania R. Co., 29 Pittsb. Leg. J. (Pa.) 347.

Rhode Island.— Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

South Carolina.— State *v.* Bowen, 17 S. C. 58.

Texas.— Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443; Giroux *v.* State, 40 Tex. 97; Mosley *v.* State, 23 Tex. App. 409, 4 S. W. 907; Beville *v.* State, 16 Tex. App. 70; Staples *v.* State, 14 Tex. App. 136; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Johnson *v.* State, 5 Tex. App. 43.

Vermont.— State *v.* Carpenter, 54 Vt. 551; *In re* Powers, 25 Vt. 261.

amounting to felony, committed out of his presence, or without his view,[73] except when especially authorized.[74] A justice of the peace or magistrate, moreover, may not only make the arrest himself, in such cases, but may give a verbal order for the apprehension and detention of the person who has broken, or is about to break, the peace.[75] It appears, however, that the arrest, under such circumstances, must be made at the time the offense is committed,[76] or upon fresh pursuit of the

England.— Davis *v.* Russell, 5 Bing. 354, 7 L. J. M. C. O. S. 52, 2 M. & P. 354, 30 Rev. Rep. 637, 15 E. C. L. 618; Reg. *v.* Brown, 1 C. & M. 314, 41 E. C. L. 175; Wooding *v.* Oxley, 9 C. & P. 1, 38 E. C. L. 13; Howell *v.* Jackson, 6 C. & P. 723, 25 E. C. L. 657; Sharrock *v.* Hannemer, Cro. Eliz. 375; Derecourt *v.* Corbishley, 5 E. & B. 188, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 188; Coupey *v.* Henley, 2 Esp. 540; Baynes *v.* Brewster, 2 Q. B. 375, 1 G. & D. 669, 6 Jur. 392, 11 L. J. M. C. 5, 42 E. C. L. 720; 4 Bl. Comm. 292; 1 Hale P. C. 587.

But *compare* State *v.* McGinnis, 3 Ohio Dec. 4, holding that an officer should not make an arrest without a warrant, for a breach of the peace, where there is no necessity for making the arrest forthwith, and an opportunity is given to procure a warrant.

See 4 Cent. Dig. tit. "Arrest," § 152.

What constitutes presence or view see *infra*, I, D, 3, e.

Fraudulently changing a meal-check given at a restaurant for one of a less amount and paying the smaller amount is not such a breach of the peace as will justify an arrest without a warrant. Boyleston *v.* Kerr, 2 Daly (N. Y.) 220.

Standing on sidewalk.— A policeman has no right to arrest, without a warrant, one whom he finds standing in front of his boarding-house, between the sidewalk and the building, and who is creating no disturbance. Com. *v.* Ridgeway, 2 Pa. Dist. 59.

Suppression of affray, arrest without a warrant in, see AFFRAY, 2 Cyc. 49.

Using loud words in the street, though disorderly conduct, is not an offense for which a peace-officer can arrest without a warrant. Mundini *v.* State, 37 Tex. Crim. 5, 38 S. W. 619; Hardy *v.* Murphy, 1 Esp. 294.

73. *Delaware.*— State *v.* Crocker, Houst. Crim. Cas. (Del.) 434. *Compare* State *v.* Brown, 5 Harr. (Del.) 505, which holds that a peace-officer has the right to arrest without a warrant one whom he has reasonable grounds to suspect has been guilty of a breach of the peace.

Massachusetts.— Com. *v.* Ruggles, 6 Allen (Mass.) 588.

Michigan.— People *v.* Johnson, 86 Mich. 175, 48 N. W. 870, 24 Am. St. Rep. 116, 13 L. R. A. 163; People *v.* Rounds, 67 Mich. 482, 35 N. W. 77; People *v.* Haley, 48 Mich. 495, 12 N. W. 671.

New York.— People *v.* Pratt, 22 Hun (N. Y.) 300; Winn *v.* Hobson, 54 N. Y. Super. Ct. 330; Sternack *v.* Brooks, 7 Daly (N. Y.) 142; Boyleston *v.* Kerr, 2 Daly (N. Y.) 220.

Ohio.— State *v.* Lewis, 50 Ohio St. 179, 33 N. E. 405, 19 L. R. A. 449.

Tennessee.— Galvin *v.* State, 6 Coldw. (Tenn.) 283.

England.— Coupey *v.* Henley, 2 Esp. 540; Griffin *v.* Colman, 4 H. & N. 265, 28 L. J. Exch. 134; Rex *v.* Curvan, 1 Moody 132; Webster *v.* Watts, 11 Q. B. 311, 12 Jur. 243, 17 L. J. Q. B. 73, 63 E. C. L. 311; Baynes *v.* Brewster, 2 Q. B. 375, 1 G. & D. 669, 6 Jur. 392, 11 L. J. M. C. 5, 42 E. C. L. 720; 2 Hawkins P. C. c. 13, § 8.

See 4 Cent. Dig. tit. "Arrest," § 152.

74. Thus, the city charter of Chicago expressly authorizes conservators of the peace to arrest, with or without warrant, for breaches of the peace or threats to break the peace, even though the offenses were committed out of the presence of the officers. Main *v.* McCarty, 15 Ill. 441.

75. *Connecticut.*— Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102.

Illinois.— Lancaster *v.* Lane, 19 Ill. 242.

Michigan.— Lott *v.* Sweet, 33 Mich. 308.

New Hampshire.— Forrist *v.* Leavitt, 52 N. H. 481.

Tennessee.— Touhey *v.* King, 9 Lea (Tenn.) 422.

Texas.— Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643.

Virginia.— Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

England.— 4 Bl. Comm. 292; 2 Hawkins P. C. c. 13, § 14.

In Indiana it is provided by statute that "where any offense is committed in view of any justice, he may by verbal direction to any constable, etc., call such constable to arrest such offender and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody by virtue of a warrant issued on complaint on oath; but such person shall not be confined in jail, nor put upon any trial, until arrested by virtue of such warrant." O'Brian *v.* State, 12 Ind. 369.

76. *Illinois.*— Newton *v.* Locklin, 77 Ill. 103.

Indiana.— Pow *v.* Beckner, 3 Ind. 475.

Maryland.— Baltimore, etc., R. Co. *v.* Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.

New York.— Carpenter *v.* Pennsylvania R. Co., 13 N. Y. App. Div. 328, 43 N. Y. Suppl. 203; McKay's Case, 5 City Hall Rec. (N. Y.) 95.

North Carolina.— State *v.* Campbell, 107 N. C. 948, 12 S. E. 441.

Pennsylvania.— Com. *v.* Cosler, 8 Kulp (Pa.) 97.

Texas.— Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443.

offender, whether it be made by the peace-officer himself or by a third person at his direction.[77]

(b) To Prevent Breach of Peace. In like manner, a peace-officer may make an arrest, without a warrant, for the purpose of preventing an imminent breach of the peace.[78]

(3) Obstructing Justice. It is the right of a peace-officer to arrest, without a warrant, one who assaults him, or otherwise interferes with him, while he is discharging his duty as a public peace-officer.[79]

(4) Violation of Municipal Ordinances. Municipal peace-officers are sometimes authorized either by general statute, municipal charter, or the terms of a particular ordinance[80] to arrest, without warrants, persons whom they find[81]

England.— Cook *v.* Nethercote, 6 C. & P. 741, 25 E. C. L. 666; Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 4 L. J. M. C. 73, 5 Tyrw. 244, 25 E. C. L. 544; Derecourt *v.* Corbishley, 5 E. & B. 188, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 188, 32 Eng. L. & Eq. 186; Cohen *v.* Huskisson, 6 L. J. M. C. 133, M. & H. 150, 2 M. & W. 477; 1 East P. C. 305.

See 4 Cent. Dig. tit. "Arrest," § 147.

What is arresting at time of offense.— As things cannot all be done at the same moment, if a constable sees a breach of the peace and immediately (Derecourt *v.* Corbishley, 5 E. & B. 188, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 188, 32 Eng. L. & Eq. 186) or soon afterward (Reg. *v.* Light, 7 Cox C. C. 389, Dears. & B. 332, 3 Jur. N. S. 1130, 27 L. J. M. C. 1, 6 Wkly. Rep. 42), makes the arrest, it is arresting at the time of the commission of the offense. So, too, a delay of half an hour after a misdemeanor has been committed before making an arrest without a warrant has been held not unreasonable. Butolph *v.* Blust, 41 How. Pr. (N. Y.) 481. But see Meyer *v.* Clark, 41 N. Y. Super. Ct. 107, holding that the shortness of the interval makes no difference.

77. Com. *v.* Cosler, 8 Kulp (Pa.) 97.

There is not a fresh pursuit where the officer goes for assistance and, after an interval of an hour, returns with other officers, and, without any warrant, apprehends the offender (Reg. *v.* Marsden, L. R. 1 C. C. 131, 11 Cox C. C. 90, 37 L. J. M. C. 80, 18 L. T. Rep. N. S. 298, 16 Wkly. Rep. 711; Reg. *v.* Walker, 6 Cox C. C. 371, Dears. 358, 18 Jur. 409, 23 L. J. M. C. 123, 2 Wkly. Rep. 416, 25 Eng. L. & Eq. 589), or where there is an interval of five hours between the alleged offense and the arrest, during which the officer was not engaged in anything connected with the arrest (Wahl *v.* Walton, 30 Minn. 506, 16 N. W. 397).

78. *Alabama.*— Hayes *v.* Mitchell, 80 Ala. 183; Williams *v.* State, 44 Ala. 41.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

Pennsylvania.— Crosland *v.* Shaw, (Pa. 1888) 12 Atl. 849.

Vermont.— State *v.* Carpenter, 54 Vt. 551.

England.— Reg. *v.* Mabel, 9 C. & P. 474, 38 E. C. L. 280; Sharrock *v.* Hannemer, Cro. Eliz. 375; Reg. *v.* Lockley, 4 F. & F. 155; Cohen *v.* Huskisson, 6 L. J. M. C. 133, M. & H. 150, 2 M. & W. 477; 1 East P. C. 303.

See 4 Cent. Dig. tit. "Arrest," § 152.

Danger must be imminent.— Threats or other indications of a breaking of the peace will not justify an officer in making an arrest without a warrant unless the facts are such as will warrant him in believing an arrest necessary to prevent an immediate execution of such threats — as where they are coupled with some overt act in the attempted execution thereof. Quinn *v.* Heisel, 40 Mich. 576; Giroux *v.* State, 40 Tex. 97; Rex *v.* Bright, 4 C. & P. 387, 19 E. C. L. 567.

79. *Iowa.*— Montgomery *v.* Sutton, 67 Iowa 497, 25 N. W. 748.

Kentucky.— Riggs *v.* Com., 17 Ky. L. Rep. 1015, 33 S. W. 413.

Massachusetts.— Leddy *v.* Crossman, 108 Mass. 237.

Texas.— Mosley *v.* State, 23 Tex. App. 409, 4 S. W. 907.

England.— Levy *v.* Edwards, 1 C. & P. 40, 12 E. C. L. 34; White *v.* Edmunds, 1 Peake 89.

See 4 Cent. Dig. tit. "Arrest," § 156.

When an officer is acting beyond the scope of his authority and is attempting to take property without proper process, he has no right to arrest, without a warrant, one who forcibly resists him. Isaacs *v.* Flahive, 14 Misc. (N. Y.) 249, 35 N. Y. Suppl. 716, 70 N. Y. St. 450.

80. **Particular ordinance need not authorize arrest.**— Where there is a statute authorizing a town marshal to arrest, without warrant, any one whom he finds violating a town ordinance, he has the right to make such arrest whether the ordinance which was violated expressly authorizes him so to do or not. Scircle *v.* Neeves, 47 Ind. 289.

81. **Violation must be in officer's presence.**— An officer cannot arrest, without a warrant, for a violation of an ordinance not committed in his presence. Plymouth *v.* Williams, 8 Kulp (Pa.) 167; Pesterfield *v.* Vicker, 3 Coldw. (Tenn.) 205. See, also, Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109 [*distinguishing* Roderick *v.* Whitson, 51 Hun (N. Y.) 620, 4 N. Y. Suppl. 112, 22 N. Y. St. 858], holding that the General Village Act, which authorizes a police

violating municipal ordinances;[82] but at common law no such authority is vested in peace-officers, municipal or otherwise.[83]

(c) *For Military Offenses.* A civil peace-officer has no right to arrest, without a warrant or military order, a deserter from the United States army.[84]

b. By Private Persons — (i) *For Felony* — (a) *Committed or Attempted in Person's Presence.* It is both the right and the duty of a private person, who is present when a felony is committed, to apprehend the felon, without waiting for the issuance of a warrant; and the arrest may be made at any subsequent time, as well as at the time of the commission of the felony.[85] So, too, he may arrest, without a warrant, one whom he finds attempting to commit a felony.[86]

(b) *To Prevent Felony.* A private person also has a right to make an arrest, without a warrant, for the purpose of preventing the commission of a felony.[87]

constable to arrest a person while in the act of violating a village ordinance, does not authorize an arrest on a warrant issued long after the violation of such ordinance.

82. *Illinois.*— Main *v.* McCarty, 15 Ill. 441; Wice *v.* Chicago, etc., R. Co., 93 Ill. App. 266.

Indiana.—Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; Boaz *v.* Tate, 43 Ind. 60. *Compare* Low *v.* Evans, 16 Ind. 486.

Maryland.— Mitchell *v.* Lemon, 34 Md. 176.

Michigan.— Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Missouri.— Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97 [*followed* in Jones *v.* State, 14 Mo. 409]; Bierwith *v.* Pieronnet, 65 Mo. App. 431; Oran *v.* Bles, 52 Mo. App. 509.

Nebraska.— Fry *v.* Kaessner, 48 Nebr. 133, 66 N. W. 1126.

New York.— Roderick *v.* Whitson, 51 Hun (N. Y.) 620, 4 N. Y. Suppl. 112, 22 N. Y. St. 858.

North Carolina.— State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529; State *v.* Freeman, 86 N. C. 683.

Ohio.— White *v.* Kent, 11 Ohio St. 550; Ryan *v.* Jacob, 8 Ohio Dec. (Reprint) 167, 6 Cinc. L. Bul. 139.

England.— Simmons *v.* Millingen, 2 C. B. 524, 10 Jur. 224, 15 L. J. C. P. 102, 52 E. C. L. 524; Grant *v.* Moser, 2 Dowl. N. S. 923, 7 Jur. 854, 12 L. J. C. P. 146, 5 M. & G. 123, 6 Scott N. R. 46, 44 E. C. L. 74.

See 4 Cent. Dig. tit. "Arrest," § 155.

Proceedings for the recovery of penalties for violations of city ordinances cannot be commenced by a summary arrest without process. State *v.* New Brunswick, 43 N. J. L. 175; Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163, 33 Leg. Int. (Pa.) 12. Nor does a summons in an action against a person for a breach of a city ordinance, requiring a license, authorize arrest of the delinquent. Wallenweber *v.* Com., 3 Bush (Ky.) 68.

83. Tillman *v.* Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; Main *v.* St. Stephen, 20 N. Brunsw. 330. To same effect see Pittston *v.* Dimond, 7 Kulp (Pa.) 431, which holds that where the violation of an ordinance does not constitute a breach of the peace, and has no tendency to cause one, it is not such an offense as would justify an arrest without a warrant.

84. Trask *v.* Payne, 43 Barb. (N. Y.) 569; Kendall *v.* Scheve, 3 Ohio Cir. Ct. 526, 2 Ohio Cir. Dec. 303; Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458.

85. *Connecticut.*— Wrexford *v.* Smith, 2 Root (Conn.) 171.

Georgia.— Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Long *v.* State, 12 Ga. 293.

Indiana.— Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

New York.— Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; People *v.* Adler, 3 Park. Crim. (N. Y.) 249; People *v.* Wolven, 2 Edm. Sel. Cas. (N. Y.) 108, 7 N. Y. Leg. Obs. 89; Randall's Case, 5 City Hall Rec. (N. Y.) 141.

North Carolina.— State *v.* Bryant, 65 N. C. 327. *Compare* State *v.* Rutherford, 8 N. C. 457, 9 Am. Dec. 658, which holds that it is not the duty of a private individual to pursue and arrest a fleeing felon, unless called upon by an officer of the peace.

Oregon.— Lander *v.* Miles, 3 Oreg. 35.

Texas.— Staples *v.* State, 14 Tex. App. 136.

Wisconsin.— Keenan *v.* State, 8 Wis. 132.

United States.— Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458.

England.— *Ex p.* Krans, 1 B. & C. 258, 2 D. & R. 411, 25 Rev. Rep. 389, 8 E. C. L. 110; 4 Bl. Comm. 292; 1 Hale P. C. 587; 2 Hale P. C. 77; 2 Hawkins P. C. c. 12, § 1.

See 4 Cent. Dig. tit. "Arrest," § 159.

86. Rex *v.* Howarth, 1 Moody 207 (holding that, to make such an arrest legal, it is not necessary that the person should have, at the time he is arrested, a continuing purpose to commit the felony, and that he may be arrested though that purpose is wholly ended, provided the arrest is made upon fresh pursuit); Rex *v.* Hunt, 1 Moody 93.

87. 1 East P. C. 306; 2 Hawkins P. C. c. 12, § 19. See also Allen *v.* London, etc., R. Co., L. R. 6 Q. B. 65, 11 Cox C. C. 621, 40 L. J. Q. B. 55, 23 L. T. Rep. N. S. 612, 19 Wkly. Rep. 127, holding that a clerk in the service of a railway company, who has the

(c) *Upon Suspicion of Felony.* When a felony has been committed, any private person may, without a warrant, arrest one whom he has reasonable grounds to suspect[88] of having committed it; but such an arrest is illegal when no felony has, in fact, been committed by any one,[89] though, if a felony has actually been committed, such an arrest is legal even though the party suspected and arrested is innocent.[90]

(II) *For Misdemeanor.* It being the duty of every citizen to assist in preserving the peace, any private person may arrest, without a warrant, one who commits a breach of the peace in his presence,[91] provided he makes the arrest at

till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property.

88. What constitutes reasonable ground of suspicion see *infra*, I, D, 3, f.

89. *Arkansas.*— Carr *v.* State, 43 Ark. 99.

Connecticut.— Wrexford *v.* Smith, 2 Root (Conn.) 171.

District of Columbia.— Davis *v.* U. S., 16 App. Cas. (D. C.) 442.

Georgia.— Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Long *v.* State, 12 Ga. 293.

Illinois.— Kindred *v.* Stitt, 51 Ill. 401; Dodds *v.* Board, 43 Ill. 95; Siegel *v.* Connor, 70 Ill. App. 116.

Indiana.— Teagarden *v.* Graham, 31 Ind. 422.

Massachusetts.— Morley *v.* Chase, 143 Mass. 396, 9 N. E. 767.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

Nebraska.— Simmerman *v.* State, 16 Nebr. 615, 21 N. W. 387.

New Jersey.— Reuck *v.* McGregor, 32 N. J. L. 70.

New Mexico.— Territory *v.* McGinnis, (N. M. 1900) 61 Pac. 208.

New York.— Farnam *v.* Feeley, 56 N. Y. 451; Burns *v.* Erben, 40 N. Y. 463; Hawley *v.* Butler, 54 Barb. (N. Y.) 490; Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

North Carolina.— Neal *v.* Joyner, 89 N. C. 287.

Ohio.— Burch *v.* Franklin, 7 Ohio N. P. 155, 7 Ohio Dec. 519.

Oregon.— Lander *v.* Miles, 3 Oreg. 35.

Pennsylvania.— McCarthy *v.* De Armit, 99 Pa. St. 63; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; Wakely *v.* Hart, 6 Binn. (Pa.) 316; Harris *v.* Bennet, 1 Phila. (Pa.) 175, 8 Leg. Int. (Pa.) 54.

Tennessee.—Wilson *v.* State, 11 Lea (Tenn.) 310.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

United States.— U. S. *v.* Boyd, 45 Fed. 851.

England.— Hadley *v.* Perks, L. R. 1 Q. B. 444, 12 Jur. N. S. 662, 35 L. J. M. C. 177, 14 L. T. Rep. N. S. 325, 14 Wkly. Rep. 730; Beckwith *v.* Philby, 6 B. & C. 635, 9 D. & R. 487, 5 L. J. M. C. O. S. 132, 13 E. C. L. 287; Ledwith *v.* Catchpole, Cald. Cas. 291; Williams *v.* Croswell, 2 C. & K. 422, 61 E. C. L. 422; Allen *v.* Wright, 8 C. & P. 522, 34 E. C. L. 870; Reg. *v.* Price, 8 C. & P. 282, 34 E. C. L. 735; Nicholson *v.* Hardwick, 5 C. & P. 495, 24 E. C. L. 673; Cowles *v.* Dunbar, 2 C. & P. 565, M. & M. 37, 12 E. C. L. 735 (holding that 3 Geo. IV, c. 55, § 21, authorizing private persons to apprehend, without warrants, suspected persons and reputed thieves, extends only to persons generally reputed to be thieves, and not to a person suspected of a particular theft); Ashley's Case, 12 Coke 90; Samuel *v.* Payne, 2 Dougl. 345; McCloughan *v.* Clayton, Holt N. P. 478, 3 E. C. L. 190; Adams *v.* Moore, 2 Selw. N. P. 910; 4 Bl. Comm. 293; 1 East P. C. 300; Foster 318; 1 Hale P. C. 588; 2 Hale P. C. 78; 2 Hawkins P. C. c. 12, § 16.

Canada.—McKenzie *v.* Gibson, 8 U. C. Q. B. 100; Ashley *v.* Dundas, 5 U. C. Q. B. O. S. 749; Murphy *v.* Ellis, 13 N. Brunsw. 347.

Contra, in Kentucky under Code Crim Proc. § 37, which provides that a private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony. Begley *v.* Com., 22 Ky. L. Rep. 1546, 60 S. W. 847; Wright *v.* Com., 85 Ky. 123, 8 Ky. L. Rep. 718, 2 S. W. 904.

See 4 Cent. Dig. tit. "Arrest," § 158.

In Texas, however, the statute authorizes private persons to arrest, without a warrant, only when the offense is committed "in the presence, or within the view" of the person making the arrest. Lacy *v.* State, 7 Tex. App. 403. *Compare* Smith *v.* State, 13 Tex. App. 507.

90. *Georgia.*— Habersham *v.* State, 56 Ga. 61.

North Carolina.— Brockway *v.* Crawford, 48 N. C. 433, 67 Am. Dec. 250.

New York.— Farnam *v.* Feeley, 56 N. Y. 451; Burns *v.* Erben, 40 N. Y. 463.

Tennessee.—Wilson *v.* State, 11 Lea (Tenn.) 310.

England.— 2 Hale P. C. 78.

Canada.—McKenzie *v.* Gibson, 8 U. C. Q. B. 100.

Contra, Kindred *v.* Stitt, 51 Ill. 401; Siegel *v.* Connor, 70 Ill. App. 116; Rohan *v.* Sawin, 5 Cush. (Mass.) 281; Wakely *v.* Hart, 6 Binn. (Pa.) 316; Harris *v.* Bennet, 1 Phila. (Pa.) 175, 8 Leg. Int. (Pa.) 54.

91. Knot *v.* Gay, 1 Root (Conn.) 66; People *v.* Morehouse, 6 N. Y. Suppl. 763, 25 N. Y. St. 294; Phillips *v.* Trull, 11 Johns. (N. Y.) 486; Wallace's Case, 4 City Hall Rec. (N. Y.) 111; Price *v.* Seeley, 10 Cl. & F. 28, 8 Eng.

the time of the commission of the offense.[92] Such arrest cannot be made, however, for a violation of a municipal ordinance,[93] except when authorized by statute.[94]

e. By Officers or Agents of Private Societies. Private individuals, who are officers or agents of associations having for their object the prevention or punishment of certain offenses, are sometimes authorized, by statute, to arrest, without warrants, persons guilty of such offenses.[95]

d. By Military Officers. A military officer has a right to arrest, without a warrant, and confine for trial a deserter from the United States army,[96] or one who interferes with him in the execution of his official duties;[97] but neither the president nor any military officer has the right to arrest or imprison, even during a rebellion or insurrection, any person, not subject to military law, without process issued by some civil court of competent jurisdiction.[98]

e. What Constitutes Presence or View. An offense is committed in the presence or view of an officer,[99] within the meaning of the rule authorizing an arrest without a warrant, when the officer sees it, although at a distance,[1] or hears the disturbance created thereby, and proceeds at once to the scene thereof;[2] or

Reprint 651; Webster *v.* Watts, 11 Q. B. 311, 12 Jur. 243, 17 L. J. Q. B. 73, 63 E. C. L. 311; Forrester *v.* Clarke, 3 U. C. Q. B. 151. See also Smith *v.* Donelly, 66 Ill. 464.

Compare Crumeill *v.* Hill, 2 N. Y. City Ct. 236, which holds that an arrest for a misdemeanor, made by a private person, without a warrant, is illegal even though such person had reasonable cause to suspect the supposed offender.

Suppression of affray, right to arrest in, see AFFRAY, 2 Cyc. 49.

Suspicious night-walker.—Any private person may, without a warrant, lawfully arrest a suspicious night-walker and detain him until he makes it appear that he is a person of good reputation. 2 Hawkins P. C. c. 12, § 20.

92. Winn *v.* Hobson, 54 N. Y. Super. Ct. 330; Phillips *v.* Trull, 11 Johns. (N. Y.) 486; State *v.* Campbell, 107 N. C. 948, 12 S. E. 441; Com. *v.* McNall, 1 Woodw. (Pa.) 423; Clifford *v.* Brandon, 2 Campb. 358; 2 Hawkins P. C. c. 12, § 20.

To prevent renewal of breach of peace, a private person may deliver a person into the custody of a constable. Price *v.* Seeley, 10 Cl. & F. 28, 8 Eng. Reprint 651; Ingle *v.* Bell, 5 L. J. M. C. 85, 1 M. & W. 516.

93. Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329.

94. Judson *v.* Reardon, 16 Minn. 431.

95. Thus, under an Indiana statute authorizing the formation of companies for the detection and apprehension of horse-thieves and other felons, every one of the members of such company, when engaged in arresting offenders against the criminal laws of the state, is entitled to all the rights and privileges of a constable. Kercheval *v.* State, 46 Ind. 120.

Societies for prevention of cruelty to animals, right of officers and agents to arrest, see ANIMALS, 2 Cyc. 353.

96. Hutchings *v.* Van Bokkelen, 34 Me. 126. See, generally, ARMY AND NAVY.

97. Teagarden *v.* Graham, 31 Ind. 422; Walker *v.* Crane, 13 Blatchf. (U. S.) 1, 29 Fed. Cas. No. 17,067.

98. Skeen *v.* Monkeimer, 21 Ind. 1; Jones *v.* Seward, 40 Barb. (N. Y.) 563. See also *Ex p.* Merryman, Taney (U. S.) 246, 17 Fed. Cas. No. 9,487, which holds that a military officer has no right to arrest and detain a person, not subject to the rules and Articles of War, for an offense against the laws of the United States, except in aid of the judicial authority, and subject to its control, and that, if such a person is arrested by the military, it is the duty of the officer to deliver him immediately to the civil authority, to be dealt with according to law.

99. Presumption as to presence.— Where a police officer is authorized to make an arrest only where he has a warrant for the offender or when the offense is committed in his presence, under an allegation that plaintiff was arrested by a police officer it may be presumed that he had a warrant, or that the offense was committed in his presence. Davis *v.* Pacific Telephone, etc., Co., 127 Cal. 312, 57 Pac. 764.

1. People *v.* Bartz, 53 Mich. 493, 19 N. W. 161.

Merely being near enough to see, but not seeing, is not enough. Russell *v.* State, 37 Tex. Crim. 314, 39 S. W. 674.

2. *Georgia.*— Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613.

Kentucky.— Dilger *v.* Com., 88 Ky. 550, 11 Ky. L. Rep. 67, 11 S. W. 651.

North Carolina.— State *v.* McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607.

South Carolina.— State *v.* Williams, 36 S. C. 493, 15 S. E. 554.

Wisconsin.— Hawkins *v.* Lutton, 95 Wis. 492, 70 N. W. 483, 60 Am. St. Rep. 131.

Shouting in the streets of a village is not "in the presence" of an officer, so as to justify an arrest, without a warrant, when the officer was one hundred and fifty feet away, on another street, did not see the offender, and had no direct knowledge that it was he who committed the offense. People *v.* Johnson, 86 Mich. 175, 48 N. W. 870, 24 Am. St. Rep. 116, 13 L. R. A. 163.

the offense is continuing, or has not been consummated, at the time the arrest is made.[3]

f. What Constitutes Reasonable and Probable Grounds of Suspicion. The reasonable and probable grounds that will justify an officer in arresting, without a warrant, one whom he suspects of felony must be such as would actuate a reasonable man, acting in good faith.[4] The necessary elements of the grounds of suspicion are that the officer acts upon a belief in the person's guilt, based either upon facts or circumstances within the officer's own knowledge,[5] or upon information imparted to him by reliable and credible third persons.[6] Hence, an arrest

3. Thus, where a person had taken butter from an express office and carried it about five hundred yards, when he was apprehended, it was held that the larceny might be considered as still continuing, so as to authorize his arrest by a police officer, without a warrant. State *v.* Grant, 76 Mo. 236.

View of such acts as show a reasonable ground for arrest is sufficient. O'Connor *v.* Bucklin, 59 N. H. 589; State *v.* McNinch, 90 N. C. 695.

4. Chandler *v.* Rutherford, 101 Fed. 774, 43 C. C. A. 218; Tooley's Case, 2 Ld. Raym. 1296. See also *Ex p.* Morrill, 13 Sawy. (U. S.) 322, 35 Fed. 261, 267, wherein it is said: "At common law, a peace-officer might arrest, without warrant, on reasonable grounds of suspicion; and the facts and circumstances which furnish such grounds of suspicion amount to probable cause under the constitution, which is such cause as will constitute a defense to an action for false imprisonment or malicious prosecution."

5. *Alabama.*— Williams *v.* State, 44 Ala. 41; Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

District of Columbia.— Davis *v.* U. S., 16 App. Cas. (D. C.) 442.

Michigan.— People *v.* Burt, 51 Mich. 199, 16 N. W. 378; Somerville *v.* Richards, 37 Mich. 299.

United States.— *Ex p.* Morrill, 13 Sawy. (U. S.) 322, 35 Fed. 261.

England.— 2 Hale P. C. 81; 2 Hawkins P. C. 76, §§ 10–14.

Canada.—Hamilton *v.* Calder, 23 N. Brunsw. 373.

6. *Alabama.*— Williams *v.* State, 44 Ala. 41.

Maryland.— Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Michigan.— Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

New York.— Fulton *v.* Staats, 41 N. Y. 498; Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

United States.— Chandler *v.* Rutherford, 101 Fed. 774, 43 C. C. A. 218.

England.— Hedges *v.* Chapman, 2 Bing. 523, 9 E. C. L. 688; Cowles *v.* Dunbar, 2 C. & P. 565, M. & M. 37, 12 E. C. L. 735; 1 Hale P. C. 587.

Common fame.— At common law, the common fame of the country was a sufficient ground of suspicion. 2 Hale P. C. 81; 2 Hawkins P. C. c. 12, § 9.

Information given by accomplice.— A constable is not justified in arresting a person, without a warrant, on the mere statement of a confessed principal in the felony that such person was also guilty, when such statement is not corroborated by trustworthy information from others, or by circumstances affording reasonable grounds of suspicion against the person arrested. Wills *v.* Jordan, 20 R. I. 630, 41 Atl. 233; Isaacs *v.* Brand, 2 Stark. 167, 19 Rev. Rep. 695, 3 E. C. L. 362.

Unauthorized publication in foreign paper.— An unauthorized publication in a foreign detective agency's paper, over the signature of a private person, offering a reward for the arrest of one whom he accuses of crime, is not of itself reasonably sufficient ground to justify an arrest by an officer, without a warrant. State *v.* Evans, 83 Mo. App. 301.

Upon photograph or description.— An officer making an arrest, without a warrant, but with knowledge that a warrant is out, of one whose person is unknown to him, and which officer can, under the circumstances, act only upon photograph or description, or both, should be excused if he acts honestly and prudently, making such inquiry and examination as the circumstances of the case enable him to do. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

Upon proclamation by governor.— The official proclamation by the governor of the commission of a felony, published as directed by law, is sufficient evidence of the commission of it to justify an arrest of the supposed felon by a peace-officer, without a warrant. Eanes *v.* State, 6 Humphr. (Tenn.) 53, 44 Am. Dec. 289.

Upon telegram from authorities of another state.— An offender cannot be arrested by an officer, without a warrant, on a mere telegraphic message from the police authorities of another state, charging him with a crime. Simmons *v.* Vandyke, 138 Ind. 380, 37 N. E. 973, 46 Am. St. Rep. 411, 26 L. R. A. 33. *Contra*, in Canada, under the code. Reg. *v.* Cloutier, 12 Manitoba 183. And *compare* Cunningham *v.* Baker, 104 Ala. 160, 16 So. 68, 53 Am. St. Rep. 27, wherein it was held that such an arrest, under a telegram charging the person arrested with "swindling," was illegal, the word having no legal or technical meaning, the court, however, refusing to decide whether or not the arrest would have been legal had a technical felony been charged.

When circumstances contradict charge.— A peace-officer is not bound to arrest a person merely upon a statement by another that he

is illegal when it is made by an officer upon mere suspicion or belief, unsupported by facts, circumstances, or credible information calculated to produce such suspicion or belief.[7] A private person, however, can arrest only when the suspicion arises in his own mind, upon facts or circumstances within his knowledge, and cannot act upon information or suspicion imparted or communicated to him by others.[8]

g. Making Known Authority and Intention — (i) *Necessity For* — (a) *When Arrest Made by Known Peace-Officer.* In making an arrest, without a warrant, a known peace-officer is not bound to disclose his character or authority, or give notice of his intention, until the party has submitted,[9] especially when the arrest is made at the time of the commission of the offense,[10] or upon quick pursuit of

is a thief, especially when the goods alleged to be stolen are not in his possession. Wark's Case, 5 City Hall Rec. (N. Y.) 141.

In Texas an arrest can be made, without a warrant, only when a felony or an offense against the public peace is committed in the presence, or within the view, of the person making the arrest, or when "it is shown by satisfactory proof to a peace-officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant." Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656; Stewart *v.* State, (Tex. Crim. 1894) 26 S. W. 203; Staples *v.* State, 14 Tex. App. 136; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Sheehan *v.* Holcomb, 1 Tex. App. Civ. Cas. § 463. An arrest may be so made, without a warrant, even though the offender is in a distant part of the county at the time the information is given, and even though the arrest is not made immediately and there is time to procure a warrant before making it. Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408. But an officer has no right to arrest, without a warrant, at the request of a third party, on mere suspicion that the person arrested is guilty of a felony. Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

7. *Alabama.*— Williams *v.* State, 44 Ala. 41; Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

Michigan.— People *v.* Burt, 51 Mich. 199, 16 N. W. 378.

Missouri.— State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218.

England.— Hogg *v.* Ward, 3 H. & N. 417, 4 Jur. N. S. 885, 27 L. J. Exch. 443, 6 Wkly. Rep. 595.

Canada.—Mousseau *v.* Montreal, 12 Quebec Super. Ct. 61.

8. Ashley's Case, 12 Coke 90; 2 Hawkins P. C. c. 12, § 15. *Compare* State *v.* Morgan, 22 Utah 162, 61 Pac. 527, which holds that when facts showing the commission of a robbery are related to the members of a sheriff's posse, the members of such posse, although private citizens and non-residents of the county, may follow and capture the person who committed the crime, using sufficient force to effect the capture, under Utah Rev. Stat. (1898), § 4638, permitting a private person to arrest another who has committed a felony in his presence, or where a felony has been committed and he has reasonable cause for believing that the person arrested has committed it.

The common fame of the country constitutes a reasonable ground of suspicion, authorizing a private person to arrest, without a warrant, one whom he suspects of felony. Ashley's Case, 12 Coke 90; 2 Hale P. C. 81; 2 Hawkins P. C. c. 12, § 16.

Assistance by third party.— The fact that a private person has reasonable grounds for believing that another has committed a felony, and, therefore, is justified in arresting him, furnishes no authority to another to aid in making such arrest unless he, likewise, has reasonable grounds to believe that the person arrested has committed a felony. Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211.

9. State *v.* Townsend, 5 Harr. (Del.) 487; Arnold *v.* Steeves, 10 Wend. (N. Y.) 514; State *v.* Curtis, 2 N. C. 543; 1 Hale P. C. 460. *Contra*, Drennan *v.* People, 10 Mich. 169. *Compare* Day *v.* Day, 4 Md. 262 (holding that a justice of the peace, in making an arrest for a misdemeanor committed in his presence, should make it known that he is acting in his official capacity); Tiner *v.* State, 44 Tex. 128 (holding that, "while it is the duty of an officer attempting to arrest to make known his purpose and the capacity in which he acts, if that purpose and capacity are known to the party when arrest is attempted, and the arrest is otherwise lawful, submission to the arrest becomes a duty, and resistance unjustifiable").

10. *California.*— People *v.* Pool, 27 Cal. 572.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Mississippi.— Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473.

North Carolina.— State *v.* McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607.

Ohio.— Wolf *v.* State, 19 Ohio St. 248.

Pennsylvania.— Shovlin *v.* Com., 106 Pa. St. 369.

Tennessee.— Lewis *v.* State, 3 Head (Tenn.) 127.

See 4 Cent. Dig. tit. "Arrest," § 168.

In New York an officer, in making an arrest without a warrant, is required, by N. Y. Code Crim. Proc. § 180, to inform the person of the cause of the arrest, except when it is made at the time of the actual commission of the offense. Snead *v.* Bonnoil, 49 N. Y. App. Div. 330, 63 N. Y. Suppl. 553.

the offender,[11] or where the officer is met with a demonstration of force before he attempts the arrest;[12] but, when the officer has effectually consummated the arrest, he should inform the prisoner of his authority, and the cause for which the former is arrested.[13]

(B) *When Arrest Made by Private Person or One Not Known as Peace-Officer.* When either a special officer[14] or one not generally known as an officer[15] makes an arrest, without a warrant, he must disclose his authority, if demanded; and a private person, in making such an arrest, should in all cases notify the person arrested of his purpose, and acquaint him with the cause of the arrest.[16]

(II) *Who Entitled to Notice.* It is not necessary that the notice should be given to any one other than the person sought to be arrested.[17]

(III) *Sufficiency of Notice.* When notice is requisite, its sufficiency is dependent upon the facts surrounding each particular arrest;[18] but it may be stated as a general rule that the notice is sufficient when it is such as to inform a reasonable man of the authority and purpose of the one making the arrest, and the reason thereof.[19]

E. Manner of Making Arrest[20]— **1. Time.** It may be stated as a general rule that an arrest may be made for a criminal offense, either with or without a warrant, on any day, and at any time of the day.[21]

2. Place — a. In General — (I) *When Made Without Warrant or Under Warrant Directed to Class of Officers.* An arrest can be lawfully made, without a warrant, only for an offense committed within the state where the arrest is made;[22] and when so made or when made under a warrant directed to a certain class of officers, generally, or to an officer by description of his office, a peace-officer can act, ordinarily, only within the limits of the geographical or political division constituting his particular jurisdiction.[23]

11. People *v.* Pool, 27 Cal. 572; State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; Lewis *v.* State, 3 Head (Tenn.) 127.

Except when so arrested the accused must know that he is about to be arrested and the offense with which he is charged. Bowling *v.* Com., 7 Ky. L. Rep. 821; Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473. But when a felony committed at night is discovered in the morning, and an officer immediately follows and overtakes the felon, who is attempting to escape, it is a fresh pursuit within the meaning of Miss. Code, § 3026. White *v.* State, 70 Miss. 253, 11 So. 632.

12. State *v.* Gay, 18 Mont. 51, 44 Pac. 411; State *v.* Miller, 13 Ohio Cir. Ct. 67; State *v.* Miller, 7 Ohio N. P. 458, 5 Ohio Dec. 703; Lewis *v.* State, 3 Head (Tenn.) 127.

13. State *v.* Phinney, 42 Me. 384; State *v.* Miller, 7 Ohio N. P. 458, 5 Ohio Dec. 703; Com. *v.* Weathers, 7 Kulp (Pa.) 1.

14. State *v.* Curtis, 2 N. C. 543; 1 Hale P. C. 461.

15. Arnold *v.* Steeves, 10 Wend. (N. Y.) 514; State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359; State *v.* Curtis, 2 N. C. 543.

The superintendent of a convict-gang is not such an officer as is contemplated by N. C. Code, § 1126, providing that every sheriff, coroner, constable, policeman, or other peace-officer may arrest, without a warrant, a person guilty of a felony or larceny, and has no greater right to arrest or recapture one who does not know him to be such superintendent than a private citizen would have. State *v.* Stancill, 128 N. C. 606, 38 S. E. 926.

16. State *v.* Stancill, 128 N. C. 606, 38 S. E. 926; State *v.* Bryant, 65 N. C. 327; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; 2 Hale P. C. 82. But see U. S. *v.* Jailer, 2 Abb. (U. S.) 265, 26 Fed. Cas. No. 15,463; Rex *v.* Davis, 7 C. & P. 785, 32 E. C. L. 872; Rex *v.* Payne, 1 Moody 378; Rex *v.* Howarth, 1 Moody 207, to the effect that, where the circumstances are such as to make the intention to apprehend plain to the mind of him who is to be apprehended, he need be given no notice, and the arrest will be legal; and People *v.* Morehouse, 6 N. Y. Suppl. 763, 25 N. Y. St. 294, which holds that a private person making an arrest on fresh pursuit need not inform the one arrested of the cause of the arrest.

17. 1 East P. C. 317.

18. Territory *v.* McGinnis, (N. M. 1900) 61 Pac. 208.

19. State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

20. **Making known authority and intention** see *supra*, I, D, 2, c; I, D, 3, g.

21. Williams *v.* State, 44 Ala. 41; Mackaley's Case, 9 Coke 65*b*.

As to arrests on Sunday see, generally, Sunday.

22. Malcolmson *v.* Gibbons, 56 Mich. 459, 23 N. W. 166; State *v.* Shelton, 79 N. C. 605; Tarvers *v.* State, 90 Tenn. 485, 16 S. W. 1041. *Contra* State *v.* Anderson, 1 Hill (S. C.) 327; Reg. *v.* Weil, 15 Cox C. C. 189, 53 L. J. M. C. 74, 47 L. T. Rep. N. S. 630, 9 Q. B. D. 701, 31 Wkly. Rep. 60.

23. *Illinois.*— Krug *v.* Ward, 77 Ill. 603; Kindred *v.* Stitt, 51 Ill. 401.

Kentucky.— York *v.* Com., 82 Ky. 360;

(II) *When Made Under Warrant Directed to Officer by Name.* When a warrant is addressed to an officer by name, he may execute it anywhere within the jurisdiction of the court or justice which issued it, though without his own jurisdiction;[24] and, ordinarily, has no right to execute it beyond the limits of such jurisdiction, except in some cases upon pursuit of the person sought to be apprehended.[25]

b. Right to Pursue Into Another Jurisdiction. A peace-officer may pursue and apprehend in another jurisdiction in the same state[26] one charged with felony;[27] but, even though armed with a warrant, has no right to pursue and apprehend, beyond the jurisdiction of the officer issuing the warrant, one charged with a misdemeanor merely.[28]

c. Waiver of Right to Object. When a party has been unlawfully arrested by an officer without his jurisdiction, he waives his objection to the illegality of the arrest by failing to object and voluntarily accompanying the officer.[29]

3. Use of Force — a. In General. An officer who is making an arrest, or has made an arrest, is justified in using such force as is necessary to secure and detain

Cardwell *v.* Com., 20 Ky. L. Rep. 496, 46 S. W. 705.

New York.— Butolph *v.* Blust, 41 How. Pr. (N. Y.) 481.

North Carolina.— Copeland *v.* Islay, 19 N. C. 505.

Texas.— Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

England.— Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; Blatcher *v.* Kemp, 1 H. Bl. 15 note; 2 Hawkins P. C. c. 13, § 30.

See 4 Cent. Dig. tit. "Arrest," § 165.

Statutory enlargement of jurisdiction.— In some jurisdictions statutes authorize constables and municipal peace-officers to make arrests without their jurisdictions, but within their counties. Williams *v.* State, 44 Ala. 41; Sullivan *v.* Wentworth, 137 Mass. 233; Newburn *v.* Durham, 88 Tex. 288, 31 S. W. 195; Newburn *v.* Durham, 10 Tex. Civ. App. 655, 32 S. W. 112. See also Com. *v.* Martin, 98 Mass. 4 (holding that a police officer, authorized to superintend the police of a certain town, has authority, under a warrant, to apprehend, in any place within the commonwealth, a person alleged to have committed an offense within the town); State *v.* Sigman, 106 N. C. 728, 11 S. E. 520 (holding that a city or town constable, acting under a valid warrant, may make an arrest at any place within the county in which such city or town is located, but can make an arrest, without a warrant, only within the corporate limits of his town).

Offense committed on or near county boundary.— Under Iowa Code (1873), § 4160, providing that when a public offense is committed on the boundary of two counties, or within five hundred yards thereof, the jurisdiction is within either county, an officer has the same authority to make the arrest in the contiguous county, within five hundred yards of the boundary, as he has in his own county, a crime committed within the limits designated being in effect committed within the officer's county. State *v.* Seery, 95 Iowa 652, 64 N. W. 631.

24. Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; 1 Hale P. C. 459; 2 Hawkins P. C. c. 13, § 30.

25. Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

Indorsement authorizing service in another county.— In some jurisdictions a warrant may be served in another county if indorsed in a certain way, but cannot be so executed unless it is indorsed by a proper officer of the latter county in the manner provided by law. State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; Peter *v.* State, 23 Tex. App. 684, 5 S. W. 228; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226. In Missouri and New York a warrant so indorsed should be executed by an officer of the county whence it issued. State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; People *v.* Shaver, 4 Park. Crim. (N. Y.) 45. In Texas, however, the warrant should be executed by an officer of the county where the arrest is made. Peter *v.* State, 23 Tex. App. 684, 5 S. W. 228; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

Warrant having county clerk's certificate of justice's commission.— In Indiana a justice's warrant which bears the certificate of the county clerk, showing that the justice is duly commissioned and qualified and that his signature is genuine, may be served in any county of the state by the constable to whom it was issued. Sturm *v.* Potter, 41 Ind. 181, Wils. (Ind.) 124.

26. Arrest in another state.— An officer of a foreign state cannot, under a warrant issued to him in pursuance of an indictment found in such state, arrest a person in New York. Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99.

27. Ressler *v.* Peats, 86 Ill. 275; 2 Hale P. C. 115, where it is said that the arrest in such case is made, not by virtue of the warrant, but by the authority conferred upon the officer by the law.

28. Butolph *v.* Blust, 41 How. Pr. (N. Y.) 481; 2 Hale P. C. 115.

29. *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222.

the offender, overcome his resistance, prevent his escape, and recapture him if he escapes;[30] but is never justified in using unnecessary force or treating his prisoner with wanton violence,[31] or in resorting to dangerous means when the arrest could be effected otherwise.[32]

b. When Arresting For Felony — (i) *In General.* In arresting for felony, a peace-officer,[33] or even a private person, acting without a warrant,[34] may, if necessary, kill a felon, if he resists or flies so that he cannot be otherwise taken.

30. *Alabama.*— Patterson *v.* State, 91 Ala. 58, 8 So. 756; Clements *v.* State, 50 Ala. 117.

California.— People *v.* Adams, 85 Cal. 231, 24 Pac. 629.

Delaware.— State *v.* Lafferty, 5 Harr. (Del.) 491; State *v.* Mahon, 3 Harr. (Del.) 568; State *v.* O'Niel, Houst. Crim. (Del.) 468.

Georgia.— Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613; Burns *v.* State, 80 Ga. 544, 7 S. E. 88.

Kentucky.— Hamlin *v.* Com., 11 Ky. L. Rep. 348, 12 S. W. 146; Taylor *v.* Com., 9 Ky. L. Rep. 257, 5 S. W. 46; Bowling *v.* Com., 7 Ky. L. Rep. 821.

Maine.— Murdock *v.* Ripley, 35 Me. 472.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

Missouri.— State *v.* Fuller, 96 Mo. 165, 9 S. W. 583; State *v.* Hancock, 73 Mo. App. 19; State *v.* Gregory, 30 Mo. App. 582.

New York.— People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257, 26 N. Y. St. 434; Fulton *v.* Staats, 41 N. Y. 498; People *v.* O'Brien, 48 N. Y. App. Div. 66, 62 N. Y. Suppl. 571; People *v.* Wolven, 2 Edm. Sel. Cas. (N. Y.) 108, 7 N. Y. Leg. Obs. 89; People *v.* Adler, 3 Park. Crim. (N. Y.) 249.

North Carolina.— State *v.* Sigman, 106 N. C. 728, 11 S. E. 520; State *v.* Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; State *v.* Bryant, 65 N. C. 327.

Ohio.— State *v.* Miller, 6 Ohio N. P. 202, 7 Ohio Cir. Dec. 552, 5 Ohio Dec. 703.

Pennsylvania.— Shovlin *v.* Com., 106 Pa. St. 369; Com. *v.* Jayne, 11 Pa. Super. Ct. 459; Com. *v.* Hare, 2 Pa. L. J. Rep. 467, 4 Pa. L. J. 257.

South Carolina.— Golden *v.* State, 1 S. C. 292.

Texas.—James *v.* State, 44 Tex. 314; Tiner *v.* State, 44 Tex. 128; Skidmore *v.* State, 43 Tex. 93; Giroux *v.* State, 40 Tex. 97; Beaverts *v.* State, 4 Tex. App. 175.

Virginia.— Mesmer *v.* Com., 26 Gratt. (Va.) 976.

United States.— U. S. *v.* Fullhart, 47 Fed. 802.

England.— Reg. *v.* Price, 8 C. & P. 282, 34 E. C. L. 735.

Discretion as to use of force.— The amount of force, and the employment of the usual means in arresting and detaining an offender, when within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when he is engaged in discharging a public and official duty and is actuated by no ill-will or malice. State *v.* McNinch, 90 N. C. 695. But the law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him. He cannot kill unless there is a necessity for it, and the jury must determine from the evidence the existence or absence of the necessity. They must judge of the reasonableness of the grounds upon which the officer acted. State *v.* Bland, 97 N. C. 438, 2 S. E. 460.

31. *Alabama.*— Williams *v.* State, 44 Ala. 41; Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

Delaware.—State *v.* Mahon, 3 Harr. (Del.) 568.

Georgia.— Burns *v.* State, 80 Ga. 544, 7 S. E. 88.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966.

Kentucky.— Head *v.* Martin, 85 Ky. 480, 9 Ky. L. Rep. 45, 3 S. W. 622; Hamlin *v.* Com., 11 Ky. L. Rep. 348, 12 S. W. 146.

Maine.— Murdock *v.* Ripley, 35 Me. 472.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

Missouri.— State *v.* Fuller, 96 Mo. 165, 9 S. W. 583; State *v.* Hancock, 73 Mo. App. 19.

Ohio.— State *v.* Pate, 7 Ohio N. P. 543, 5 Ohio Dec. 732.

Tennessee.—Reneau *v.* State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

Texas.— Skidmore *v.* State, 43 Tex. 93; Giroux *v.* State, 40 Tex. 97; Beaverts *v.* State, 4 Tex. App. 175.

England.— Levy *v.* Edwards, 1 C. & P. 40, 12 E. C. L. 34.

See, generally, Assault and Battery; Homicide.

32. Lander *v.* Miles, 3 Oreg. 35; Reneau *v.* State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

33. *Arkansas.*— Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.

Kentucky.— Head *v.* Martin. 85 Ky. 480, 9 Ky. L. Rep. 45, 3 S. W. 622.

Mississippi.— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423; Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

New York.— Conraddy *v.* People, 5 Park. Crim. (N. Y.) 234.

North Carolina.— State *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

Tennessee.—Reneau *v.* State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

United States.—U. S. *v.* Clark, 31 Fed. 710.

England.— 4 Bl. Comm. 292.

See, generally, Homicide.

34. Foster 271; 1 Hale P. C. 587. *Compare* Rex *v.* Murphy, 1 Cr. & Dix. 20, which holds that while a gamekeeper may lawfully arrest, without a warrant, for a felony which is being committed in his presence, he may

(II) *Upon Suspicion of Felony.* Neither an officer nor a private person, in making an arrest, without a warrant, upon suspicion of felony, is justified in killing the person in order to effect an arrest, except in self-defense, no matter how reasonable his grounds of suspicion may be.[35]

c. When Arresting For Misdemeanor. Except in self-defense, an officer has no right to proceed to the extremity of shedding blood in arresting, or preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise.[36]

4. Breaking Doors[37] **— a. When Permissible** — (I) *For Civil Offenses* — (A) *When Arrest Made Under Warrant.* A person who is armed with a warrant of arrest is entitled, after due demand,[38] to break the outer or inner doors of a dwelling in which the person described in the warrant has taken refuge, and it is immaterial whether it be the dwelling of the latter, or of a third person,[39] and whether the person sought is a felon or one suspected of felony,[40]

not fire upon the offender, for that would be punishing, perhaps with death, an offense for which the law provides a milder penalty.

35. Conraddy *v.* People, 5 Park. Crim. (N. Y.) 234; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; Reg. *v.* Dadson, 3 C. & K. 148, 4 Cox C. C. 360, 2 Den. C. C. 35, 14 Jur. 1051, 20 L. J. M. C. 57, T. & M. 385, 1 Eng. L. & Eq. 566. *Contra,* Shanley *v.* Wells, 71 Ill. 78; 2 Hale P. C. 78.

36. *Alabama.*— Williams *v.* State, 44 Ala. 41.

Arkansas.— Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.

Kentucky.— Head *v.* Martin, 85 Ky. 480, 9 Ky. L. Rep. 45, 3 S. W. 622.

Mississippi.— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423.

New York.— Conraddy *v.* People, 5 Park. Crim. (N. Y.) 234.

Ohio.— Rischer *v.* Meehan, 11 Ohio Cir. Ct. 403, 5 Ohio Cir. Dec. 416.

Tennessee.—Reneau *v.* State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

United States.— U. S. *v.* Clark, 31 Fed. 710.

England.— Forster's Case, 1 Lewin 187.

Contra, State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380, which holds that a peace-officer, in making an arrest for a breach of the peace, without a warrant, has the right to use all the force necessary to overcome resistance, even to the taking of life. And *compare* State *v.* McNally, 87 Mo. 644 (holding that an officer arresting, without a warrant, one in the act of committing a misdemeanor has the same authority to use force in overcoming resistance as in case of an arrest for felony); State *v.* Sigman, 106 N. C. 728, 11 S. E. 520 (which holds that an officer has no right to shed blood in order to effect the arrest of one charged with a misdemeanor, but, after having made the arrest, may kill his prisoner if it is necessary to prevent his escape; but, when a person charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest). See, generally, Homicide.

37. Breaking doors on arrest after escape from officer see *infra,* I, G, 1, a.

38. See *infra,* I, E, 4, b.

39. Necessity of person's presence in house of third party.— At common law an officer, even though armed with a warrant, had no right to break and enter the dwelling of a third person, for the apprehension of a felon, unless the felon was actually there. 2 Hale P. C. 117. In some jurisdictions, however, this rule has been modified to the extent of justifying the breaking when the officer acted in good faith and upon reasonable grounds of suspicion. State *v.* Brown, 5 Harr. (Del.) 505; Barnard *v.* Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123. But see Hawkins *v.* Com., 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147, which holds that a sheriff, in executing criminal process, may lawfully break open the outer and inner doors of the criminal's residence in search of him, but not the residences of other persons, unless such persons give their consent, which consent may be withdrawn at any time.

Search of third person's premises after peaceable entry.— An officer who has a warrant for the arrest of a person on a criminal charge, and who has reasonable cause to believe, and does believe, that he is in the house of another, may, after being admitted into the outer door thereof, lawfully search the premises for the person named in his warrant, if he acts in good faith and in a reasonable manner, even though, in fact, the person sought for is not there. Com. *v.* Irwin, 1 Allen (Mass.) 587.

40. *Connecticut.*— Kelsy *v.* Wright, 1 Root (Conn.) 83.

Delaware.—State *v.* Brown, 5 Harr. (Del.) 505.

Indiana.—McGee *v.* Givan, 4 Blackf. (Ind.) 16, 18 note.

Massachusetts.— Barnard *v.* Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123.

England.— Semayne's Case, 5 Coke 91*b*; 1 Hale P. C. 459, 577, 579, 582; 2 Hale P. C. 116, 117; 2 Hawkins P. C. c. 14, § 2.

See 4 Cent. Dig. tit. "Arrest," § 169.

Warrant must specify particular felony.— A constable is not justified in breaking open a door in order to make an arrest under a

or charged with a misdemeanor.[41] This right may be exercised in the night as well as in the day.[42]

(B) *When Arrest Made Without Warrant.* After due demand,[43] either a peace-officer or a private person may, without a warrant, break open doors for the purpose of apprehending a felon[44] or for the purpose of preventing the commission of a felony.[45] When the arrest is upon suspicion of felony, it seems that a peace-officer may break doors for the purpose of apprehending the suspected party,[46] but that a private person may not.[47] A peace-officer, moreover, may, without a warrant, break into a dwelling or other house for the purpose of suppressing or preventing a disturbance or breach of the peace, and of arresting the offenders,[48] even at night,[49] but a private person may not.[50]

(II) *For Military Offenses.* A military officer has no right to break into a private house for the purpose of capturing deserters.[51]

b. Necessity of Notice, and Demand and Refusal of Admittance. Neither an officer nor a private person, whether acting with or without a warrant, can break a door, for the purpose of making an arrest, until he has first given notice to those in the house of the cause of his coming, and has requested and been denied admittance.[52]

5. Summoning Bystanders — a. Right to Summon. A peace-officer has the right to summon and require the assistance of as many bystanders as may be nec-

warrant which does not specify the particular felony of which the person sought is accused. 1 Hale P. C. 584.

41. *Connecticut.*— State *v.* Shaw, 1 Root (Conn.) 134.

Delaware.— State *v.* Oliver, 2 Houst. (Del.) 585.

Massachusetts.— Com. *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510.

North Carolina.— State *v.* Mooring, 115 N. C. 709, 20 S. E. 182.

United States.— U. S. *v.* Faw, 1 Cranch C. C. (U. S.) 487, 25 Fed. Cas. No. 15,079.

Contra, Com. *v.* County Prison, 5 Pa. Dist. 635.

42. State *v.* Smith, 1 N. H. 346; 1 East P. C. 324.

43. See *infra,* I, E, 4, b.

44. Semayne's Case, 5 Coke 91*b*; 4 Bl. Comm. 292; 1 Hale P. C. 588.

45. Handcock *v.* Baker, 2 B. & P. 260, 5 Rev. Rep. 587.

46. Shanley *v.* Wells, 71 Ill. 78 [*quoting* 4 Bl. Comm. 292]; Semayne's Case, 5 Coke 91*b*. *Contra,* Foster 321; 2 Hawkins P. C. c. 14, § 7.

Right to enter at night.— A constable has the right to enter at night the house of one whom he suspects of having committed a felony, and to arrest such person, without a warrant. Davis *v.* Russell, 5 Bing. 354, 7 L. J. M. C. O. S. 52, 2 M. & P. 590, 30 Rev. Rep. 637, 15 E. C. L. 618.

47. Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; 4 Bl. Comm. 292. But *compare* 2 Hale P. C. 82, to the effect that a private person is not justified in breaking doors in order to arrest, without a warrant, one whom he suspects of felony unless the person arrested is guilty.

Right to enter at night.— A private citizen who suspects another of having committed a felony has no right to proceed at night to the house of such person and, without a warrant, enter and make an arrest. Ryan *v.* Donnelly, 71 Ill. 100.

48. State *v.* Lafferty, 5 Harr. (Del.) 491; McLennon *v.* Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353; McCullough *v.* Com., 67 Pa. St. 30; 1 Hale P. C. 588; 2 Hawkins P. C. c. 14, § 2.

Entry through open door.— Police officers, finding open the door of a dwelling-house in which an intoxicated person is committing a breach of the peace, have the right to enter for the purpose of arresting him, without express or implied invitation. Ford *v.* Breen, 173 Mass. 52, 53 N. E. 136. To same effect see Com. *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375, which holds that a constable, by virtue of his office, has the right, without a warrant, to enter, through an unfastened door, a house in which there is a noise amounting to a disturbance of the peace, for the purpose of arresting those making the disturbance. *Compare* Com. *v.* Krubeck, 8 Pa. Dist. 521, 5 Lack. Leg. N. (Pa.) 342, 23 Pa. Co. Ct. 35, which holds that an officer has no right to enter private property for the purpose of making an arrest, without a warrant, for disorderly conduct, when no violence is being committed or threatened.

49. State *v.* Stouderman, 6 La. Ann. 286; Rex *v.* Smith, 6 C. & P. 136, 25 E. C. L. 360; 2 Hale P. C. 95.

50. Rockwell *v.* Murray, 6 U. C. Q. B. 412.

51. Clay *v.* U. S., Dev. Ct. Cl. 25.

52. State *v.* Oliver, 2 Houst. (Del.) 585; McLennon *v.* Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353; Launock *v.* Brown, 2 B. & Ald. 592, 21 Rev. Rep. 410; Semayne's Case, 5 Coke 91*b*; Foster 321; 2 Hawkins P. C. c. 14, § 1.

essary to enable him to perform his duty in making an arrest,[53] or preventing or suppressing[54] a breach of the peace; and a private person may summon bystanders to assist him in arresting, without a warrant, one whom he knows to have committed a felony.[55] No person who has not been duly summoned to aid the officer has the right to participate in an attempted arrest.[56]

b. Duty of Persons Summoned to Respond. When a known officer summons a bystander for the purpose of assisting him in making an arrest, the bystander is bound to respond.[57]

F. Custody, Disposition, and Treatment of Prisoner — 1. Custody and Disposition — a. When Arrested Under Warrant. It has long been recognized that when an officer makes an arrest under a warrant, it is his duty to dispose of the prisoner in the manner directed by the warrant,[58] provided such direction is

53. *Alabama.*— Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Watson *v.* State, 83 Ala. 60, 3 So. 441.

Indiana.— Patterson *v.* Kise, 2 Blackf. (Ind.) 127.

Kentucky.—Hamlin *v.* Com., 11 Ky. L. Rep. 348, 12 S. W. 146; Taylor *v.* Com., 9 Ky. L. Rep. 257, 5 S. W. 46.

Michigan.— Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

United States.— U. S. *v.* Rice, 1 Hughes (U. S.) 560, 27 Fed. Cas. No. 16,153.

England.— 1 Hale P. C. 577.

See 4 Cent. Dig. tit. "Arrest," § 170.

When assistance may be demanded.— The statute which provides that an officer having a warrant of arrest to execute "may pursue the defendant into another county," and, on obtaining an indorsement of the warrant, as prescribed, "may summon persons to assist him in making the arrest, and exercise the same authority as in his own county," does not mean that, to authorize the calling for such assistance, the execution of the warrant must be begun in the county where it was issued and be followed up in the event that the person sought to be arrested flies into another county. Coleman *v.* State, 63 Ala. 93. An officer, armed with a warrant from another county, may summon the police of a city as a posse to assist him in arresting the person charged, even beyond the limits of the city. Phillips *v.* State, 66 Ga. 755.

54. Reg. *v.* Brown, 1 C. & M. 314, 41 E. C. L. 175.

55. 2 Hale P. C. 76.

56. Hamlin *v.* Com., 11 Ky. L. Rep. 348, 12 S. W. 146.

Duty of officer's assistants.— Where, in making an arrest, a struggle ensues between the officer and the person whom he is attempting to arrest, it is the duty of the officer's assistants to come to his aid, whether commanded to do so or not. State *v.* Miller, 7 Ohio N. P. 458, 5 Ohio Dec. 703.

57. *Alabama.*— Dougherty *v.* State, 106 Ala. 63, 17 So. 393; Watson *v.* State, 83 Ala. 60, 3 So. 441.

Indiana.— Pruitt *v.* Miller, 3 Ind. 16.

Michigan.— Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

Vermont — McMahan *v.* Green. 34 Vt. 69, 80 Am. Dec. 665.

England.— 2 Hawkins P. C. c. 12, § 7.

Defective warrant.— A citizen may make an arrest at the call of an officer even where the officer's warrant is defective. McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665.

58. 2 Hale P. C. 119.

Commitment to common jail.— Under a warrant commanding the arrest of a person accused of crime, and directing the officer to "safely keep, so that you have him to appear" at the next term of said court, etc., the officer may commit the prisoner to the common jail. *In re* Durant, 60 Vt. 176, 12 Atl. 650.

Taking before justice other than one named. — Where a justice of the peace issues a warrant for the apprehension of a party charged with crime, the arresting officer may take the party before another justice of the peace of the same county, who may examine and commit the prisoner in the absence or inability to act of the justice who issued the warrant, and it is not essential that the warrant shall contain a direction to that effect. *Ex p.* Branigan, 19 Cal. 133. *Compare* Stetson *v.* Packer, 7 Cush. (Mass.) 562; and see People *v.* Fuller, 17 Wend. (N. Y.) 211, holding that a person, arrested under a warrant on a charge of having violated the act to prevent disturbances of religious meetings, cannot be taken by the arresting officer before any magistrate other than the one who issued the process; the provisions of the statute authorizing persons arrested under a warrant to be brought before the nearest magistrate applying only to cases where the accused may be required to give bond to appear before a court of criminal jurisdiction, or, in default thereof, be committed to jail.

Taking into county other than one from which warrant issued.— When a person commits a felony in one county and, upon a warrant being issued against him by a justice of the peace therein, he is pursued and flies into another county and is there taken, he must not, by virtue of that warrant, be carried to a justice of the peace in the county where he committed the felony, but to a justice of the peace in the county where he was taken. But if a felon is taken under a warrant in the county where he committed the felony, and breaks away into another county and is there taken, upon fresh pursuit, by those who first took him, he may be brought either to a justice of the county where he was last taken or

legal.[59] For this purpose he may keep the prisoner in custody a reasonable length of time,[60] but no longer.[61] An officer's custody of a prisoner, whom he has arrested under a warrant and brought before a court, does not cease until the prisoner has been discharged, admitted to bail, or committed to jail upon a warrant issued by the court.[62]

b. When Arrested Without Warrant. When either an officer or a private person makes an arrest, without a warrant, it is his duty to take the person arrested, without unnecessary delay,[63] before a justice of the peace, magistrate, or other proper judicial officer having jurisdiction, in order that he may be examined and held, or dealt with as the case requires.[64] He may, however, detain the per-

to a justice of the county under whose warrant he was first taken, for, in supposition of law, he was always in custody. 1 Hale P. C. 580.

59. Pratt *v.* Hill, 16 Barb. (N. Y.) 303.

60. Kent *v.* Miles, 69 Vt. 379, 37 Atl. 1115; 2 Hale P. C. 119.

61. Thus, where an officer makes an arrest on Sunday under a warrant which commands that the body of the accused be brought before the police court, he cannot justify his act in allowing the accused to remain in jail longer than Monday morning. Tubbs *v.* Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744.

62. Com. *v.* Morihan, 4 Allen (Mass.) 585; 2 Hale P. C. 120. *Compare* State *v.* Dean, 48 N. C. 393, which holds that, when a person not regularly a constable has been deputized under the act of the assembly to execute a state's warrant, the deputation ceases when he has executed the warrant by bringing the person arrested before a justice of the peace and returning the process; and that an authority to convey a prisoner to jail cannot be given by parol by a justice of the peace.

Custody upon surrender by bondsman.— Where the presiding judge told the sheriff that the prisoner's surety wished to be relieved as soon as the trial commenced, and, after the prisoner's motion to continue had been denied and before the jury was impaneled, he was taken into custody at the noon recess by the sheriff on his own motion, it was held that this was proper, as the prisoner was left free to consult with counsel. Turner *v.* State, 70 Ga. 765.

Custody after verdict but before judgment.— After a verdict of guilty, but before judgment is pronounced, it is unlawful for an officer to arrest defendant, who is under bail, in the absence of an order of arrest commanding him to be taken into custody. Redman *v.* State, 28 Ind. 205.

63. Detaining a prisoner longer than is absolutely necessary to enable his captor to take him before a magistrate renders such custody illegal. Cary *v.* State, 76 Ala. 78; Habersham *v.* State, 56 Ga. 61; Johnson *v.* Americus, 46 Ga. 80; Green *v.* Kennedy, 46 Barb. (N. Y.) 16; Wright *v.* Court, 4 B. & C. 596, 6 D. & R. 623, 4 L. J. K. B. 17, 28 Rev. Rep. 418, 10 E. C. L. 718.

By-law authorizing such detention void.— Me. Stat. (1848), c. 71, enacts that if an officer "shall detain any offender, without warrant, longer than such time as is necessary to procure a legal warrant, such officer shall be liable," and a town by-law giving power to an officer to arrest and detain any person, without a warrant, forty-eight hours is repugnant thereto and void. Burke *v.* Bell, 36 Me. 317.

Custody under warrant.— One arrested by order of a magistrate is also in custody under a warrant held by the officer against him, though he is not informed that he is arrested thereunder. U. S. *v.* Omeara, 1 Cranch C. C. (U. S.) 165, 27 Fed. Cas. No. 15,919.

64. *Georgia.*—Ocean Steamship Co. *v.* Williams, 69 Ga. 251; Harris *v.* Atlanta, 62 Ga. 290; Johnson *v.* Americus, 46 Ga. 80.

Indiana.— Simmons *v.* Vandyke, 138 Ind. 380, 37 N. E. 973, 46 Am. St. Rep. 411, 26 L. R. A. 33.

Maryland.—Twilley *v.* Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632.

Massachusetts.— Brock *v.* Stimson, 108 Mass. 520, 11 Am. Rep. 390.

Minnesota.— Judson *v.* Reardon, 16 Minn. 431.

New York.— Pastor *v.* Regan, 9 Misc. (N. Y.) 547, 30 N. Y. Suppl. 657, 62 N. Y. St. 204; Matter of Henry, 29 How. Pr. (N. Y.) 185; Taylor *v.* Strong, 3 Wend. (N. Y.) 384.

North Carolina.— State *v.* Freeman, 86 N. C. 683.

Texas.— Missouri, etc., R. Co. *v.* Warner, 19 Tex. Civ. App. 463, 49 S. W. 254.

Virginia.— Muscoe *v.* Com., 86 Va. 443, 14 Va. L. J. 26, 10 S. E. 534.

England.— Wright *v.* Court, 4 B. & C. 596, 6 D. & R. 623, 4 L. J. K. B. 17, 28 Rev. Rep. 418, 10 E. C. L. 718; 1 Hale P. C. 588.

Canada.— Ashley *v.* Dundas, 5 U. C. Q. B. O. S. 749.

See 4 Cent. Dig. tit. "Arrest," § 172.

Arrest for intoxication.— Where an officer makes an arrest, without a warrant, for the statutory offense of intoxication, he must, in compliance with the statute, take the offender before a justice of the peace of the town where the arrest is made, and not before a trial justice of another town, even though there is no trial justice in the town where the arrest is made. Papineau *v.* Bacon, 110 Mass. 319.

Taking prisoner to third person.— An officer who has arrested a person for embezzlement has no authority to take him to a third person, at the request of the injured party,

son arrested in custody a reasonable time, until he can conveniently and safely take him before a magistrate, when the circumstances preclude an immediate examination, hearing, or trial [65] — as where the arrest was made at night,[66] or the person arrested was ill [67] or drunk [68] at the time of the arrest, or the arresting officer was unable to find a judicial officer [69] — but to detain the person arrested in custody for any purpose other than taking him before a magistrate is illegal.[70]

2. TREATMENT — a. Right to Handcuff. While handcuffing should not be resorted to unnecessarily, it may be stated as a general rule that an officer has the right to handcuff his prisoner whenever he deems it necessary to do so in order to retain his custody,[71] although it may subsequently develop that the prisoner was inoffensive and reputable.[72]

b. Right to Search and Take Property — (I) *In General* — (A) *Connected With, or Furnishing Clue to, Offense.* After making an arrest an officer has the right to search the prisoner [73] and take from his person, and hold for the disposition of the trial court, any property connected with the offense charged [74] or that may be used as evidence against him,[75] or that may give a clue to the commission of the crime or the identification of the criminal,[76] or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.[77]

to obtain his signature as surety to notes given by the prisoner in settlement of the loss. Rouse *v.* Mohr, 29 Ill. App. 321.

A United States marshal, who arrests a person in one district for an alleged offense against the laws of the United States, has no right to remove such person to another district for examination, as the person arrested is entitled to be taken before the proper officer of the district in which the arrest is made for examination. U. S. *v.* Shepard, 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273.

65. *Georgia.*— Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607.

Indiana.— Scircle *v.* Neeves, 47 Ind. 289; Vandeveer *v.* Mattocks, 3 Ind. 479.

Iowa.— Hutchinson *v.* Sangster, 4 Greene (Iowa) 340.

Massachusetts.— Rohan *v.* Sawin, 5 Cush. (Mass.) 281.

North Carolina.— State *v.* Freeman, 86 N. C. 683.

England.— 2 Hale P. C. 95.

In New York it has been held that General Rules, No. 28, of the metropolitan police board, enabling police officers to detain persons charged with "a felony or other offense," by the word "offense" refers only to criminal offenses, and not to violations of municipal ordinances, and that a person violating a municipal ordinance must be taken immediately before a magistrate. Schmeider *v.* McLane, 4 Abb. Dec. (N. Y.) 154 [*affirming* 36 Barb. (N. Y.) 495].

66. Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607; Scircle *v.* Neeves, 47 Ind. 289; State *v.* Freeman, 86 N. C. 683; 2 Hale P. C. 95.

67. 2 Hale P. C. 95.

68. Scircle *v.* Neeves, 47 Ind. 289; Hutchinson *v.* Sangster, 4 Greene (Iowa) 340; State *v.* Freeman, 86 N. C. 683.

69. Hutchinson *v.* Sangster, 4 Greene (Iowa) 340.

70. Thus, where a constable arrested without a warrant a person who was intoxicated, and imprisoned him in the lockup until he became sober, and then released him without having carried him before a magistrate, the imprisonment was illegal. State *v.* Parker, 75 N. C. 249, 22 Am. Rep. 669.

71. Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Cochran *v.* Toher, 14 Minn. 385; State *v.* Stalcup, 24 N. C. 50; Reg. *v.* Taylor, 59 J. P. 393. But see Giroux *v.* State, 40 Tex. 97 (holding that an officer in making an arrest is not justified in handcuffing the prisoner immediately when he is not of a dangerous character and is not making any show of resistance); Wright *v.* Court, 4 B. & C. 596, 6 D. & R. 623, 4 L. J. K. B. 17, 28 Rev. Rep. 418, 10 E. C. L. 718 (holding that a constable cannot be justified in handcuffing a prisoner unless he has attempted to escape or unless it is necessary in order to prevent him from doing so).

Handcuffing misdemeanant to felon.— No general rule will justify a constable in handcuffing one charged with a misdemeanor to a felon, and walking them together through the streets. Leigh *v.* Cole, 6 Cox C. C. 329.

72. Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

73. He may remove the clothing of such person if necessary. Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

74. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; Reifsnyder *v.* Lee, 44 Iowa 101, 24 Am. Rep. 733.

May be taken by force.— If necessary, such property may be taken by force, provided no unnecessary violence is used. Dillon *v.* O'Brien, 16 Cox C. C. 245, 20 L. R. Ir. 300.

75. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

76. Reifsnyder *v.* Lee, 44 Iowa 101, 24 Am. Rep. 733.

77. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; Commercial Exch. Bank *v.* McLeod, 65 Iowa 665, 19

(B) *Money and Articles of Value.* There has been a disposition on the part of some courts to extend the operation of this rule to money, jewelry, and other articles of value, as a prisoner might therewith procure the means or facilities to effect his escape.[78] The better rule, however, seems to be that, unless such property is connected with, or constitutes the fruits of, the particular crime for which the prisoner was arrested,[79] the officer has no right to take it from him, as he might thereby be deprived of the means of making his defense.[80]

(II) *Disposition of Property Taken.* Property taken from a person at the time of his arrest should be returned to him if it is not connected with the offense for which he was arrested,[81] and it seems that this should be done if he is acquitted.[82] On the other hand, if the property is connected with the offense charged it should not be returned to the prisoner, but may be disposed of in such manner as the ends of justice may require, under the order of the trial court or by the prisoner's consent.[83]

G. Second Arrest — 1. After Escape — a. From Officer. A peace-officer[84] may, without process, arrest one who has escaped from his custody[85] after a law-

N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; O'Connor *v.* Bucklin, 59 N. H. 589; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

Searching as means of protection.—"The right of searching a person in custody must depend on the circumstances; the mere fact that a person is drunk and disorderly will not justify a constable in searching his person, although he may have received general orders to search all persons in custody; but a person may so conduct himself, by reason of violent language and conduct, that it may be prudent and right to search him, as well for his own protection as for those intrusted with the duty." Leigh *v.* Cole, 6 Cox C. C. 329.

78. Commercial Exch. Bank *v.* McLeod, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; O'Connor *v.* Bucklin, 59 N. H. 589; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

79. *Alabama.*— *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120.

Illinois.— Stuart *v.* Harris, 69 Ill. App. 668.

Michigan.— Hubbard *v.* Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580.

Utah.— Rickers *v.* Simcox, 1 Utah 33.

England.— Rex *v.* Burgiss, 7 C. & P. 488, 32 E. C. L. 722; Rex *v.* Kinsey, 7 C. & P. 447, 32 E. C. L. 700 (holding that, where a police officer apprehended a person on a charge of rape, he had no right to take from him a watch and other articles); Rex *v.* O'Donnell, 7 C. & P. 138, 32 E. C. L. 539; Rex *v.* Jones, 6 C. & P. 343, 25 E. C. L. 465 (holding that, if a person taken on a charge of stealing a horse has the horse in his possession at the time of his apprehension, any money found on him ought not to be taken away from him by the officer making the arrest); Rex *v.* Barnett, 3 C. &. P. 600, 14 E. C. L. 736. *Compare* Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87, wherein it was held that the court could not order that money taken from a prisoner charged with high treason be restored to him, unless it was made to appear to the court that the money formed no part of the proof against him.

Money taken for prisoner's transportation expenses.— Where a constable took from the person of a prisoner in his charge a sum of money for the purpose, as he alleged, of paying the expenses of conveying the prisoner to prison and of maintaining him in prison until the trial, it was held that this was wrong, and that the money should be restored to the prisoner. Reg. *v.* Bass, 2 C. & K. 822, 61 E. C. L. 822.

80. Rex *v.* Burgiss, 7 C. & P. 488, 32 E. C. L. 722; Rex *v.* O'Donnell, 7 C. & P. 138, 32 E. C. L. 539.

81. Commercial Exch. Bank *v.* McLeod, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; King *v.* Ham, 6 Allen (Mass.) 298; *Ex p.* Craig, 4 Wash. (U. S.) 710, 6 Fed. Cas. No. 3,321; Reg. *v.* Bass, 2 C. & K. 822, 61 E. C. L. 822; Rex *v.* Burgiss, 7 C. & P. 488, 32 E. C. L. 722; Rex *v.* Kinsey, 7 C. & P. 447, 32 E. C. L. 700; Rex *v.* Barnett, 3 C. & P. 600, 14 E. C. L. 736. *Compare* Reg. *v.* Pierce, 6 Cox C. C. 117, wherein a motion to return to the prisoner money found on his person at the time of the arrest, in order that he might be able to prepare for his defense, was denied, on the ground that it did not appear that the trial judge had the power to grant such an order.

82. Welch *v.* Gleason, 28 S. C. 247, 5 S. E. 599.

83. Wooding *v.* Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223. *Compare* Thatcher *v.* Weeks, 79 Me. 547, 11 Atl. 599, which holds that an officer has no right to hold, after the expiration of the trial, even property connected with the offense, without some order of the court.

84. A private person who has made an arrest for a breach of the peace, under a warrant directed to him, may, upon the offender's escape, rearrest him, either under the warrant or under a verbal order from a justice of the peace. Rex *v.* Williams, 1 Moody 387.

85. Duration of officer's custody see *supra*, I, F, 1, a.

ful arrest, whether with or without a warrant,[86] unless such escape was voluntary;[87] and to that end may, if necessary, break doors, after demanding and being refused admittance.[88]

b. After Trial and Commitment. In like manner, an officer may arrest, without a warrant, a prisoner who has escaped from custody after trial and commitment.[89]

2. After Illegal Discharge or Release. When a prisoner has been illegally discharged or released from prison after trial and commitment, a peace-officer may retake him, without process,[90] or upon process issued at the instance of the district attorney.[91]

3. After Admission to Bail. After a prisoner has been admitted to bail an officer has no right to arrest him, without process,[92] because the bail was insufficient[93] or because the bail bond was defective or void.[94] It seems, however, that one who has been discharged on bail, by collusion between the witnesses, complainant, and justice of the peace, may be again arrested, upon a warrant issued by another justice, and required to give bail in a larger amount for the same offense.[95]

II. Under Mesne Process in Civil Actions.

A. Definition. An arrest[96] under mesne civil process is the apprehension of a person, by virtue of a lawful authority, to answer the demand against him in a civil action.[97]

86. *Alabama.*— Floyd *v.* State, 79 Ala. 39; Murphy *v.* State, 55 Ala. 252.

Indiana.— State *v.* Wamire, 16 Ind. 357.

Kansas.— Hollon *v.* Hopkins, 21 Kan. 638.

New York.— Clark *v.* Cleveland, 6 Hill (N. Y.) 344.

Pennsylvania.— Com. *v.* Sheriff, 1 Grant (Pa.) 187.

See 4 Cent. Dig. tit. "Arrest," § 177.

Arrest three years after escape.— Where a defendant, sentenced to three years' imprisonment, escapes from custody before commitment, he may be rearrested and committed for the old offense, though he has eluded arrest for more than three years. Hollon *v.* Hopkins, 21 Kan. 638.

Right to question officer's authority.— If a person, after being arrested, escapes from the officer without questioning his authority, he is not entitled to demand his authority upon rearrest. State *v.* Phinney, 42 Me. 384.

Constitute but one arrest.— The arrest of an offender and the retaking of him on fresh pursuit, after an escape, constitute but one effective arrest. Cooper *v.* Adams, 2 Blackf. (Ind.) 294; 2 Hale P. C. 115.

87. Doyle *v.* Russell, 30 Barb. (N. Y.) 300 [*disapproving* Clark *v.* Cleveland, 6 Hill (N. Y.) 344]; 2 Hawkins P. C. c. 13, § 9. But see Com. *v.* Sheriff, 1 Grant (Pa.) 187, holding that it is immaterial that the escape was voluntary.

88. Cahill *v.* People, 106 Ill. 621; Com. *v.* McGahey, 11 Gray (Mass.) 194; Harft *v.* McDonald, 1 N. Y. City Ct. 181. *Compare* Allen *r.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564, which holds that, where one arrested by an officer breaks away and shuts himself up in his house, the officer may, to retake him, break open the outer door of the house, without making known his business or first demanding admission and receiving a refusal, if the pursuit be fresh, as the party must be aware of the officer's object.

89. McQueen *v.* State, (Ala. 1901) 30 So. 414; Com. *v.* Sheriff, 1 Grant (Pa.) 187; *Ex p.* Sherwood, 29 Tex. App. 334, 15 S. W. 812.

A private person may arrest a felon who, after conviction, has, without actual breaking or force, escaped from the house of reformation to which he was sentenced. State *v.* Holmes, 48 N. H. 377.

90. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; Schwamble *v.* Sheriff, 22 Pa. St. 18; Com. *v.* Sheriff, 1 Grant (Pa.) 187.

91. Com. *v.* Heiffer, 2 Woodw. (Pa.) 311.

92. Doyle *v.* Russell, 30 Barb. (N. Y.) 300.

93. Ingram *v.* State, 27 Ala. 17.

Arrest under new warrant.— If a justice of the peace has been imposed on to receive insufficient bail for defendant's appearance at the next term of the common pleas, he may arrest again and hold to better bail. Carothers *v.* Scott, Tappan (Ohio) 227.

94. McQueen *v.* Heck, 1 Coldw. (Tenn.) 212.

95. Bulson *v.* People, 31 Ill. 409.

96. **Derivation.**— The word is derived from the French *arreter* — to stop or stay — and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the will of the law. It is called the beginning of imprisonment. Legrand *v.* Bedinger, 4 T. B. Mon. (Ky.) 539, 540. See also Bouvier L. Dict.

97. Black L. Dict.; Bouvier L. Dict.

Other definitions are: "A restraint of the person, restriction of the right of locomotion." Hart *v.* Flynn, 8 Dana (Ky.) 190, 191.

"The taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any

B. Constitutionality and Construction of Statutes Concerning Remedy

1. Statutes Authorizing. Statutes authorizing the arrest and holding to bail of defendants in certain civil actions do not violate constitutional provisions forbidding deprivation of liberty without due process of law,[98] the imposition of cruel and unusual punishment,[99] or imprisonment for debt.[1] Such statutes should, however, be strictly construed.[2]

2. Statutes Abolishing or Prohibiting. Statutes abolishing imprisonment for debt as to existing contracts are not unconstitutional, as they affect the remedy only, and do not impair the obligation thereof.[3] Constitutions and statutes abol-

act indicating an intention to arrest." U. S. *v.* Benner, Baldw. (U. S.) 234, 239, 24 Fed. Cas. No. 14,568.

"The term 'arrest' has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process." State *v.* Buxton, 102 N. C. 129, 131, 8 S. E. 774.

It is an auxiliary remedy designed to keep defendant within the reach of the court's final process. Davis *v.* Robinson, 10 Cal. 411; Matoon *v.* Esler, 6 Cal. 57; Green *v.* Morse, 5 Me. 291.

Distinction between "arrest" and "attachment."—"As ordinarily used, the terms 'arrest' and 'attachment' coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to 'attachment,' including the act of taking, it would seem to differ from 'arrest' in that it is more peculiarly applicable to a taking of property, while 'arrest' is more commonly used in speaking of persons. The terms are, however, often interchanged when speaking of the taking of a man by virtue of legal authority. 'Arrest' is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law." Bouvier L. Dict.

98. Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075.

99. Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564.

1. Mayewski *v.* His Creditors, 40 La. Ann. 94, 4 So. 9; *Ex p.* Dexter, 1 Hayw. & H. (U. S.) 191, 7 Fed. Cas. No. 3,854.

Prohibition of imprisonment for debt except in cases of fraud.— So, where constitutional provisions exist prohibiting imprisonment for debt except in cases of fraud, statutes have been held constitutional which authorize the arrest of a debtor for fraudulently disposing of his property (Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564), where he has removed or disposed of his property, or is about to do so, with intent to defraud his creditors (*Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209), where he is about to remove from the state (Norman *v.* Manciette, 1 Sawy. (U. S.) 484, 18 Fed. Cas. No. 10,300), or in a civil action for the recovery of a fine or penalty (U. S. *v.* Walsh, 1 Abb. (U. S.) 66, Deady (U. S.) 281, 28 Fed. Cas. No. 16,635); but unconstitutional where they provide that defendant may be arrested when the action is for wilful injury to person or character (*Ex p.* Prader, 6 Cal. 239), or in an action on a promise to marry, as the fraud meant is some fraud in procuring a contract to be made, or in attempting to evade performance — as by concealing or disposing of property, or attempting to run it out of the state (Matter of Tyson, 32 Mich. 262; Moore *v.* Mullen, 77 N. C. 327); but this last statement does not apply to a case where defendant seduced plaintiff under promise of marriage (Matter of Sheahan, 25 Mich. 145; Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397).

2. Merritt *v.* Openheim, 9 La. Ann. 54; Absolom *v.* Callum, 6 La. Ann. 536; Hathaway *v.* Johnson, 55 N. Y. 93, 14 Am. Rep. 186 (wherein the court said that such statutes, although remedial to the extent that they are designed to coerce payment, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them); Spice *v.* Steinruck, 14 Ohio St. 213.

3. *Indiana.*— Fisher *v.* Lacky, 6 Blackf. (Ind.) 373.

Michigan.— Bronson *v.* Newberry, 2 Dougl. (Mich.) 38.

South Carolina.—Ware *v.* Miller, 9 S. C. 13.

Tennessee.— Woodfin *v.* Hooper, 4 Humphr. (Tenn.) 13.

United States.— Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Gray *v.* Munroe, 1 McLean (U. S.) 528, 10 Fed. Cas. No. 5,724.

See 4 Cent. Dig. tit. "Arrest," § 5.

Persons arrested before passage of act.— The act of congress of Feb. 28, 1839, adopting the state laws regarding the abolition of imprisonment for debt, gives immediate effect to such laws. Hence, a person entitled to discharge under the state law may be discharged even though he was arrested before the passage of the act, and had given appearance bail. Gray *v.* Munroe, 1 McLean (U. S.) 528, 10 Fed. Cas. No. 5,724.

ishing or prohibiting arrest and imprisonment for debt apply only to actions *ex contractu*, and not to actions *ex delicto*.[4]

3. **Statutes of Exemption.** A statute exempting a certain class of citizens from civil arrest, which statute applies to all in the same situation, is not unconstitutional, as being class legislation.[5] Nor is a statute which exempts permanent residents from arrest void, as discriminating between the citizens of the several states.[6]

C. Right to Remedy — 1. Who Entitled to — a. In General. An order of arrest or a capias ad respondendum may be obtained only by plaintiff in a civil action;[7] and may be obtained by him only when he has a right to maintain the action wherein it is sought.[8]

b. Copartners. A partner is not entitled to an order for the arrest of his copartner.[9]

c. Corporations. Whenever a corporation is entitled to maintain an action, it has the same right to arrest defendant that an individual plaintiff would have.[10]

4. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

Connecticut.—Armstrong *v.* Ayres, 19 Conn. 540.

Georgia.— Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495. But, where an alternative verdict in bail-trover has become absolute for money, by defendant's failure to deliver the property within the time fixed, further imprisonment under the bail process would be for debt, and, therefore, unconstitutional. Southern Express Co. *v.* Lynch, 65 Ga. 240.

Illinois.— McKindley *v.* Rising, 28 Ill. 337.

New York.— McDuffie *v.* Beddoe, 7 Hill (N. Y.) 578, holding that the New York act abolishing imprisonment for debt did not apply to suits founded in tort, even though a contract between the parties was alleged by way of inducement.

North Carolina.— Long *v.* McLean, 88 N. C. 3; Moore *v.* Green, 73 N. C. 394, 21 Am. Rep. 470.

Pennsylvania.—Sedgebeer *v.* Moore, Brightly (Pa.) 197, 1 Phila. (Pa.) 116, 7 Leg. Int. (Pa.) 194.

Wisconsin.— Medcraft *v.* Dartt, 67 Wis. 115, 30 N. W. 223, 31 N. W. 476; Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Howland *v.* Needham, 10 Wis. 495, the last case holding that ejectment under a claim for mesne profits is founded in tort and not in contract, and that, although the legislature may declare that there shall be but one form of action, they cannot thereby convert torts into contracts or contracts into torts, as, though they may change the form of the action, its essence is beyond their reach. The Wisconsin constitutional provision, however, is that "no person shall be imprisoned for debt arising out of or founded on a contract, express or implied." Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

United States.— Hanson *v.* Fowle, 1 Sawy. (U. S.) 497, 11 Fed. Cas. No. 6,041. See also U. S. *v.* Banister, 70 Fed. 44, holding that an action to recover the forfeiture created by statute is not an action arising on a contract, within Vt. Rev. Laws, § 1477, forbidding arrest on mesne process in action on contract.

See 4 Cent. Dig. tit. "Arrest," § 9.

5. *In re* Oberg, 21 Oreg. 406, 28 Pac. 130, 14 L. R. A. 577.

6. Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423, the court saying that such a statute exacted of citizens of other states simply that they should put themselves on a footing with the citizens of New York, when they would be entitled to the same immunities.

7. Williams *v.* Griffith, 6 Dowl. & L. 449, 3 Exch. 584.

8. Dunbar *v.* Hughes, 6 La. Ann. 466 (holding that when an agent fails to pay over funds in his hands, in accordance with his principal's instructions, to a creditor of the latter, such creditor may not arrest and hold the agent to bail under the Louisiana act of March 24, 1840, section 10, as the principal alone can proceed under that act); Batchelder *v.* Batchelder, 66 N. H. 31, 20 Atl. 728; Hart *v.* Grant, 8 S. D. 248, 66 N. W. 322 (holding that plaintiff may not have defendant arrested on allegations that the latter falsely represented himself as plaintiff's agent to a third person (plaintiff's debtor), and thereby induced such third person to pay him money, as the fraud is against the third person, who alone may obtain an arrest therefor).

Remedy follows debt.— Plaintiff, in an action upon a debt which has been assigned to him, may hold defendant to bail in the same manner as though he were the original creditor, as the remedy attaches to and follows the debt, provided the relations of the parties remain the same, and the cause of action is not substantially changed. King *v.* Kirby, 28 Barb. (N. Y.) 49.

9. Soule *v.* Hayward, 1 Cal. 345; Smith *v.* Small, 54 Barb. (N. Y.) 223. *Compare* Madge *v.* Puig, 12 Hun (N. Y.) 15, holding that, in an action for breach of contract, defendant may be arrested on the ground that he induced plaintiff to enter into the contract by fraudulent misrepresentations, even though the contract created the relationship of partners between the parties.

10. Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201.

d. Non-Residents. A non-resident is entitled to resort to the provisional remedy of arrest,[11] in the absence of express statutory provision to the contrary.[12]

2. In What Actions — a. At Law — (i) *Actions Ex Contractu* — (a) *Generally.* At common law, plaintiff was entitled to arrest defendant in nearly every action *ex contractu*, for the recovery of a personal money judgment,[13] if the amount in controversy exceeded a certain sum.[14] Exceptions to this rule existed in actions of debt on penal statutes [15] and on collateral undertakings.[16] The right to arrest in civil actions has everywhere been greatly modified and limited by statute.[17]

11. Burrows *v.* Dumphy, 2 Harr. (Del.) 308; De la Vega *v.* Vianna, 1 B. & Ad. 284, 8 L. J. K. B. O. S. 388, 20 E. C. L. 487.

12. In Louisiana, where a resident agent purchased for a non-resident principal a bill indorsed in blank, and afterward protested same for non-payment, and no discharge had been given, by the principal to the agent, from any responsibility growing out of the transaction, the agent, in an action against the vendor of the bill, was not prevented from procuring an order for the arrest of defendant by the Louisiana act of March 28, 1840, section 9, providing that no citizen of any state should be thereafter arrested in Louisiana at the suit of a non-resident creditor, except in cases where it was made to appear that the debtor had absconded from his residence. Conrey *v.* Elbert, 2 La. Ann. 18. So, the fact that three of four commercial partners reside in an adjoining state, and the fourth one resides in Louisiana, and they do business under one name in Louisiana and under another name in the other state, will not prevent a writ of arrest being brought by them against a party upon a note payable to plaintiffs under the name used by their firm in such adjoining state. Broadnax *v.* Thomason, 1 La. Ann. 382.

Under the former practice in New York, when a person applied to a justice of the peace for a warrant against a non-resident of the county, in an action of tort, it was necessary for him to state positively in his affidavit that he was a resident of the county in which the action was brought. Pope *v.* Hart, 35 Barb. (N. Y.) 630, 23 How. Pr. (N. Y.) 215.

13. 3 Bl. Comm. 287.

Covenant.—Under the Maryland act of 1715, the marshal was bound to take sufficient bail for the appearance of defendant in an action of covenant. Winter *v.* Simonton, 2 Cranch C. C. (U. S.) 585, 30 Fed. Cas. No. 17,892.

In an action on a recognizance to procure a writ of error special bail was requirable. Davy *v.* Jackson, 2 Yeates (Pa.) 280.

Bail would not be required to be given by defendant in an action by his immediate indorsee, while another action was pending against him by a more remote indorsee, especially if the name of plaintiff had been stricken from the note by the subsequent indorsee. Johnson *v.* Harris, 1 Cranch C. C. (U. S.) 35, 13 Fed. Cas. No. 7,387.

Rule in action on bonds.— Defendant could not be held to bail for the penalty of a bond, but only for the sum secured by the penalty (Kirk *v.* Strickland, 2 Dougl. 449; Edwards *v.* Williams, 5 Taunt. 247, 1 E. C. L. 134; Hatfield *v.* Linguard, 6 T. R. 217; Patterson *v.* Farran, 3 Rev. Leg. 348), but he might be arrested for sums paid by plaintiff as obligor of an indemnity bond, as for liquidated damages, if the sums plaintiff had been called upon to pay were ascertainable (Anderson *v.* Bell, 2 Cr. & J. 630, 2 Tyrw. 732). Upon a bond conditioned for paying a less sum by instalments, and interest, the obligee might arrest for the aggregate amount of all the instalments and interest accrued before the action was brought, even though a part only of the instalments were due. Talbot *v.* Hodson, 2 Marsh. 527, 7 Taunt. 251, 2 E. C. L. 348.

14. Blanchard *v.* Goss, 2 N. H. 491; Edson *v.* Cheshire, 2 McCord (S. C.) 385; 3 Bl. Comm. 287.

15. See *infra*, II, C, 2, a, (IV).

16. Bonds with collateral conditions.— Appearance bail was not required in actions of debt on bonds with collateral conditions. Nadenbush *v.* Lane, 4 Rand. (Va.) 413; Ruffin *v.* Call, 2 Wash. (Va.) 181. *Compare* Coward *v.* Bohun, 1 Harr. & J. (Md.) 538, wherein it was held that, while the practice of the court was not to require bail in a suit on an appeal bond with a collateral condition, defendant might be held to bail upon plaintiff's making the proper affidavit.

In a joint action against the drawers and indorsers of a negotiable note bail could not be demanded as of right, but could be obtained only from a judge or justice of the peace on the proper affidavit, the liability of the indorser being a collateral undertaking. Hatcher *v.* Lewis, 4 Rand. (Va.) 152.

17. Georgia.—The Georgia act of 1857, providing that when an indorser of a note shall file an affidavit that he apprehends that the payment of the note will devolve upon himself if the maker is not held to bail, "it shall be the duty of the holder of the note immediately to commence suit," etc., does not authorize such indorser to have bail process by filing such affidavit after suit has already been begun by the holder of the note. Redding *v.* Price, 32 Ga. 178, 180.

Iowa.— A petition for alimony is in the nature of a civil proceeding within the Iowa act of Feb. 14, 1844, repealing all acts authorizing the issuance of a capias upon which a person may be arrested in a civil action. Westbrook *v.* Westbrook, 2 Greene (Iowa) 598.

New York.—Notwithstanding the code provision prescribing the cases in which an arrest might be had, a warrant might be issued under the Non-Imprisonment Act of 1831 in

(B) *On Judgments.* Defendant is not, ordinarily, liable to arrest in an action on a judgment obtained in an action authorizing his arrest, whether he was[18] or was not[19] arrested therein, unless the action is on a foreign judgment, in which case he may be arrested[20] even though he was arrested in the original action.[21]

all the cases prescribed by that act. Gregory *v.* Weiner, Code Rep. N. S. (N. Y.) 210.

North Carolina.— In an action brought for the usurpation of a public office, a judge of the supreme court may, upon proof that defendant has received fees or emoluments belonging to the office he is charged with usurping, issue an order for defendant's arrest. Patterson *v.* Hubbs, 65 N. C. 119.

Pennsylvania.—Since the Pennsylvania act of July 12, 1842, abolishing imprisonment for debt in all cases except those especially provided for, a capias for a debt arising *ex contractu* is unauthorized. Pavona *v.* Di Jorio, 23 Pa. Co. Ct. 382, 10 Pa. Dist. 83, 30 Pittsb. Leg. J. N. S. (Pa.) 347; Blanco *v.* Bosch, 3 Wkly. Notes Cas. (Pa.) 171; Blanco *v.* Lauradon, 11 Phila. (Pa.) 368, 33 Leg. Int. (Pa.) 426. The purpose of an arrest under that act is to compel the debtor to give bail in an action on contract in such cases as the act refers to. Gosline *v.* Place, 32 Pa. St. 520.

Rhode Island.— The provision of R. I. Gen. Stat. c. 195, § 8, allowing arrest on any debt contracted before July 1, 1870, does not apply to a balance of account, some of the items of which bear a subsequent date. Corey *v.* Miller, 12 R. I. 337.

United States.— Since the act of congress abolishing imprisonment for debt to the extent of its abolishment by the respective states, no process can be issued to arrest a defendant in a civil suit except under the state law. Cooper *v.* Dungler, 4 McLean (U. S.) 257, 6 Fed. Cas. No. 3,192. *Compare* Gaines *v.* Travis, Abb. Adm. (U. S.) 422, 9 Fed. Cas. No. 5,180, holding that the act of congress of Aug. 23, 1842, authorizing the supreme court to prescribe, regulate, and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, taken in connection with the United States supreme court rules of 1845, suspended the acts of congress of 1839 and 1841, which had abolished imprisonment for debt on process issuing out of the United States courts in all cases where, by the local law, it had been abolished, and that, therefore, parties became liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent state legislation abolishing imprisonment.

Canada.— A capias cannot issue in an action for an account based upon the claim which may exist after the rendering of the account (Gay *v.* Denard, 3 Montreal Super. Ct. 125, 15 Rev. Lég. 585; Phillips *v.* Kurr, 2 Quebec Super. Ct. 444), even though plaintiff in the action claims a definite sum (Gay *v.* Denard, 3 Montreal Super. Ct. 125, 15 Rev. Lég. 585).

18. Thus, a person discharged under the poor-debtors law from imprisonment on execution (Willington *v.* Stearns, 1 Pick. (Mass.) 497), a judgment debtor, discharged for neglect of his creditor to proceed in execution or to pay his board (Barnes *v.* Viall, 6 Fed. 661), or a defendant who has been superseded, for want of being charged in execution within two terms after judgment (Blandford *v.* Foot, Cowp. 72), cannot be arrested in an action brought upon such judgment. But, in Massachusetts, in an action on a judgment founded upon a debt contracted with intent not to pay it, the debtor may be arrested, without notice, under Mass. Pub. Stat. c. 162, § 17 (Way *v.* Brigham, 138 Mass. 384); and, in Ohio, by statute, the court may order defendant to give special bail in an action upon a judgment (Headley *v.* Roby, 6 Ohio 521).

19. McButt *v.* Hirsch, 4 Abb. Pr. (N. Y.) 441. *Contra*, Field *v.* Colerick, 3 Yeates (Pa.) 56. See also Wanzer *v.* De Baun, 1 E. D. Smith (N. Y.) 261, holding that, in an action upon a judgment, defendant may be arrested upon affidavits showing fraud in contracting the original debt, when the fraud was not discovered until after the rendition of judgment.

20. Baxter *v.* Drake, 85 N. Y. 502 [*affirming* 22 Hun (N. Y.) 565, 61 How. Pr. (N. Y.) 365]; Leach *v.* Linde, 73 Hun (N. Y.) 246, 25 N. Y. Suppl. 1042, 57 N. Y. St. 132 [*affirmed* in 142 N. Y. 628, 37 N. E. 565, 60 N. Y. St. 866]; Greenbaum *v.* Stein, 2 Daly (N. Y.) 223; Pitt *v.* Freed, 28 N. Y. Suppl. 863, 60 N. Y. St. 247 [*overruling* 21 N. Y. Suppl. 300, 50 N. Y. St. 265]; Arthurton *v.* Dalley, 20 How. Pr. (N. Y.) 311. See also Sharp *v.* Johnston, 2 Bing. N. Cas. 246, 4 Dowl. P. C. 324, 1 Hodges 298, 5 L. J. C. P. 11, 2 Scott 407, 32 E. C. L. 522, holding that a debtor may be held to bail in England notwithstanding the fact that proceedings were had in Scotland for the same cause of action, such proceedings not resulting in depriving defendant of his liberty there, and the debt being satisfied. *Contra*, Goodrich *v.* Dunbar, 17 Barb. (N. Y.) 644; Fellows *v.* Cooke, 6 Daly (N. Y.) 204 [*reversing* 50 How. Pr. (N. Y.) 95]; Mallory *v.* Leach, 23 How. Pr. (N. Y.) 507.

When judgment is for two claims.— No arrest can be had in an action upon a foreign judgment recovered for two claims, one only of which would have entitled plaintiff to arrest in the original action. Goodale *v.* Finn, 2 Hun (N. Y.) 151.

When no fraud alleged in original action.— An order of arrest may be granted, in an action in New York on a foreign judgment, upon allegations of fraud in the original transaction, even though no fraud was alleged in the action resulting in such judgment. Millbury *v.* Heitzberg, 55 N. Y. Suppl. 743, 28 N. Y. Civ. Proc. 179.

21. Stern *v.* Schlesinger, 5 N. Y. Suppl. 1, 25 N. Y. St. 853; Carter *v.* Hoffman, 2 N. Y. Civ. Proc. 328; Gordon *v.* Lindo, 1 Cranch

(II) *Actions Ex Delicto* — (A) *Generally.* As a general rule, defendant in an action of tort for the recovery of unliquidated damages cannot be held to bail unless some special ground therefor is shown.[22] In some jurisdictions, however, the form of the action carries the right to arrest, and no special ground need be shown;[23] but a plaintiff who may sue either on contract or in tort cannot, by electing to proceed in the latter form, render liable to arrest a defendant who could not be arrested in an action on the contract.[24]

(B) *For Injuries to Person or Character.* As a general rule, defendant in an action for injury to person or character is not liable to arrest,[25] except in cases of mayhem or atrocious battery,[26] or under other special circumstances[27] making

C. C. (U. S.) 588, 10 Fed. Cas. No. 5,616; Aliven *v.* Furnival, 1 Dewl. P. C. 614; Maule *v.* Murray, 7 T. R. 470. *Contra,* Lambert *v.* Moore, 6 N. J. L. 131.

Second arrest.—As the rule forbidding holding to bail twice is founded upon the supposed vexation or oppression thereof, it applies only to two arrests in the same jurisdiction. Gordon *v.* Lindo, 1 Cranch C. C. (U. S.) 588, 10 Fed. Cas. No. 5,616.

22. Jones *v.* Kelly, 17 Mass. 116; 3 Bl. Comm. 292; Brook *v.* Trist, 10 East 358; Goyette *v.* McDonald, 4 Rev. Lég. 538; Pollard *v.* Irving, 2 Rev. Lég. 623 (before the code). *Contra,* Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761, holding that, in the absence of statutory provisions to the contrary, special bail may be required in an action of tort as well as in an action on a contract, and without affidavit as to the true amount of the debt or damages.

23. *Massachusetts.*— Jones *v.* Kelly, 17 Mass. 116.

Pennsylvania.— Rowe *v.* Newton, 5 Pa. Co. Ct. 325; Bager *v.* Radley, 1 Phila. (Pa.) 47, 7 Leg. Int. (Pa.) 50; Bowen *v.* Burdick, 3 Pa. L. J. Rep. 226, 5 Pa. L. J. 113, the last case holding that an action *ex delicto* cannot be commenced by a capias, since the statute requires that plaintiff shall apply to the judge of the court for a warrant of arrest.

Vermont.— Barnes *v.* Tenney, 52 Vt. 557.

Wisconsin.— Harrison *v.* Brown, 5 Wis. 27.

Canada.— Weldon *v.* O'Sullivan, 19 N. Brunsw. 441; Mullin *v.* Frost, 18 N. Brunsw. 463.

24. Levy *v.* Appleby, 1 N. Y. City Ct. 258; Cornog *v.* Delaney, 11 Wkly. Notes Cas. (Pa.) 575; Philadelphia Coal Co. *v.* Huntzinger, 6 Wkly. Notes Cas. (Pa.) 300; McCauley *v.* Salmon, 14 Phila. (Pa.) 131, 37 Leg. Int. (Pa.) 262; Bowen *v.* Burdick, 3 Pa. L. J. Rep. 226, 5 Pa. L. J. 113. *Contra,* Suydam *v.* Smith, 7 Hill (N. Y.) 182. And see Sedgebeer *v.* Moore, Brightly (Pa.) 197, 1 Phila. (Pa.) 116, 7 Leg. Int. (Pa.) 194, holding that this principle has no application where the action is brought to recover damages for a tort distinct and independent of the contract.

25. *Louisiana.*— Folk *v.* Solis, 1 Mart. (La.) 64, libel. But see Block *v.* Bannerman, 10 La. Ann. 1; Wilder *v.* Brush, 7 La. Ann. 657, to the effect that, by statute, defendant may be arrested in an action of damages for personal injuries.

New Jersey.—Benson *v.* Bennett, 25 N. J. L. 166, malicious prosecution.

New York.—Clason *v.* Gould, 2 Cai. (N. Y.) 47, libel.

Pennsylvania.— Duffield *v.* Smith, 6 Binn. (Pa.) 302, false imprisonment. *Compare* Moll *v.* Witmer, 11 Wkly. Notes Cas. (Pa.) 498, holding that an arrest may be had in an action for assault and battery.

United States.—Withers *v.* Thornton, 3 Cranch C. C. (U. S.) 116, 30 Fed. Cas. No. 17,918, libel.

England.— 3 Bl. Comm. 292.

Canada.— O'Connor *v.* Anonymous, (Trin. T., 2 & 3 Vict.) 1 Robinson & J. Ont. Dig. 191.

But see Peareson *v.* Picket, 1 McCord (S. C.) 472, holding that bail may be required in an action of slander.

26. Davis *v.* Scott, 15 Abb. Pr. (N. Y.) 127; 3 Bl. Comm. 292.

27. 3 Bl. Comm. 292.

Assault and battery.— To warrant an order for holding defendant to bail in an action for assault and battery, not only a good cause of action must be shown, but some special reason for holding to bail — as that defendant is a transient person, residing out of the jurisdiction of the court. Davis *v.* Scott, 15 Abb. Pr. (N. Y.) 127; Zimmerman *v.* Chrisman, 7 Hill (N. Y.) 153; Van Vechten *v.* Hopkins, 2 Johns. (N. Y.) 293.

False imprisonment.— Special bail will be refused, in false imprisonment against an officer of a court martial, where defendants have not oppressively exercised their power. Duffield *v.* Smith, 6 Binn. (Pa.) 302.

Malicious prosecution.— In order to warrant an order for bail in an action for malicious prosecution, the affidavit must disclose not only a good cause of action, but some special cause for ordering bail. Benson *v.* Bennett, 25 N. J. L. 166.

Slander and libel.— In actions for slander and libel, except slander of title, bail is not demandable unless special cause is shown by affidavit (Clason *v.* Gould, 2 Cai. (N. Y.) 47; Withers *v.* Thornton, 3 Cranch C. C. (U. S.) 116, 30 Fed. Cas. No. 17,918), as that defendant is a transient person (Van Vechten *v.* Hopkins, 2 Johns. (N. Y.) 293). But an arrest may be had in an action for slander if

it necessary that he shall be kept within the reach of justice.[28] Statutory provisions that defendant may be arrested in an action for an injury to the character or person of plaintiff[29] have, however, been held applicable to actions for assault and battery,[30] criminal conversation,[31] divorce,[32] enticing a married woman's husband from her,[33] libel,[34] malicious prosecution,[35] and seduction.[36]

(c) *For Conversion of, or Injuries to, Property.* At common law, an arrest could be had in an action of trover,[37] and, by statute, defendant's arrest is authorized in an action for an injury to, or the wrongful taking, detention, or conversion of, property.[38]

the slander alleged is gross and injurious — such as impugning a woman's chastity. A. B. *v.* R., 4 Wkly. Notes Cas. (Pa.) 185.

28. 3 Bl. Comm. 292.

29. **Injury resulting in death.**— Defendant is not liable to arrest, in an action by an administrator or personal representative, for injuries to decedent causing his death, as such an action is not for an injury to the person of plaintiff, but is simply a statutory action for the recovery of pecuniary damages. Ryall *v.* Kennedy, 52 How. Pr. (N. Y.) 517; Gibbs *v.* Larrabee, 23 Wis. 495.

30. Schultz *v.* Schultz, 2 N. Y. Civ. Proc. 282 (an action by a married woman against her husband); Hanson *v.* Fowle, 1 Sawy. (U. S.) 497, 11 Fed. Cas. No. 6,041 [*followed* in Wedman *v.* Kendall, 14 Wkly. Notes Cas. (Pa.) 157].

31. Straus *v.* Schwarzwaelden, 4 Bosw. (N. Y.) 627.

32. **Cruel and inhuman treatment.**— In an action by a wife for a limited divorce, on the ground of cruel and inhuman treatment, defendant may be arrested, as such an action is for an injury to the person within the meaning of the code. Jamieson *v.* Jamieson, 11 Hun (N. Y.) 38, 53 How. Pr. (N. Y.) 112; Gardiner *v.* Gardiner, 3 Abb. N. Cas. (N. Y.) 1.

33. Breiman *v.* Paasch, 7 Abb. N. Cas. (N. Y.) 249.

34. Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201 (plaintiff being a corporation); Britton *v.* Richards, 13 Abb. Pr. N. S. (N. Y.) 258.

35. Dempsey *v.* Lepp, 52 How. Pr. (N. Y.) 11.

36. Steinberg *v.* Lasker, 50 How. Pr. (N. Y.) 432; Taylor *v.* North, 3 Code Rep. (N. Y.) 9; Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397; Hoover *v.* Palmer, 80 N. C. 231. *Contra*, Wagner *v.* Lathers, 26 Wis. 436, which draws a distinction between "injury to person" and "injury to personal rights."

37. Schermerhorn *v.* Jones, 1 How. Pr. (N. Y.) 147; Hayes *v.* Jones, 1 Edm. Sel. Cas. (N. Y.) 11; 3 Bl. Comm. 292.

38. Tracy *v.* Griffin, 50 Barb. (N. Y.) 70.

Conversion of check.— Where defendant received and converted a check, knowing that it had been sent to him by mistake and that he had already been paid for the goods which the check was intended to pay for, it was held that he was liable to arrest, in an action to recover the amount of the check, it being an action for an injury to property within the meaning of N. Y. Code Civ. Proc. § 549. Agar *v.* Haines, 14 Daly (N. Y.) 448 [*affirming* 11 N. Y. St. 644]. But, where defendant was arrested in a suit for the conversion of stocks which came into his possession through an assignment which plaintiff claimed to have executed after hastily glancing over it, although he had full opportunity to examine it, it was held, on a motion to vacate the order of arrest, that plaintiff was bound by the assignment and that the order should be vacated. Dixon *v.* Beach, 8 Daly (N. Y.) 284.

Conversion of money.— Where defendant was a depositor in plaintiff's bank and one hundred dollars was paid him, by mistake, in addition to the true balance due him, and, after being informed of the mistake, he refused to return the money, and an action of trover was instituted against him to recover damages for conversion of the funds, it was held that the issuance of a capias was not unlawful under the provisions of the Pennsylvania act of July 12, 1842. Alexander *v.* Goldstein, 13 Pa. Super. Ct. 518.

Damages arising from boycott.— An action to recover damages from those who have combined to injure plaintiff's business by declaring and enforcing a boycott is "an action for an injury to property" within the meaning of N. Y. Code Civ. Proc. § 549, and an order for defendants' arrest may be granted therein. Old Dominion Steam-Ship Co. *v.* McKenna, 30 Fed. 48.

Money lost in gambling.— Under a statute providing for defendant's arrest in an action for wrongfully taking, detaining, or converting property, defendant may be arrested in an action brought for the recovery of money lost in gambling. Stoddard *v.* Burt, 75 Wis. 107, 43 N. W. 737. *Contra*, Tompkins *v.* Smith, 48 N. Y. Super. Ct. 113, 1 N. Y. Civ. Proc. 398, 62 How. Pr. (N. Y.) 499.

When defendant held property as bailee.— In an action for an injury to personal property of plaintiff through the negligence of defendant, the latter may be arrested notwithstanding the fact that his possession was by virtue of a bailment. Keeler *v.* Clark, 18 Abb. Pr. (N. Y.) 154. But see People *v.* Willett, 26 Barb. (N. Y.) 78, 15 How. Pr. (N. Y.) 210, holding that the gist of an action on the custom against an innkeeper, for the value of baggage lost, is his tortious negligence in caring for the property, and that the action is not one for "injuring or wrongfully taking, detaining or converting personal property," within the meaning of the code. Hence, de-

(III) *For Fraud and Deceit.* Statutes regulating imprisonment for debt frequently provide that a defendant who, by fraud and deceit, has procured the making of a contract, may be arrested either in an action on the contract or in an action for damages arising out of the contract.[39]

(IV) *For Recovery of Statutory Penalties.* In an action for the recovery of a statutory penalty or forfeiture plaintiff may arrest defendant when expressly authorized so to do by statute[40] or when the penalty constitutes a debt fraudulently incurred,[41] but not otherwise.[42]

fendant cannot be held to bail unless he is a non-resident, or is about to remove from the state.

Where an unincorporated association in due form orders its treasurer to pay over the money in his hands, and he refuses so to do, he is guilty of a conversion of the funds of the association for which he is liable to arrest in an action brought by its president. Strebe *v.* Albert, 1 N. Y. City Ct. 376.

Includes real property.— Under the provisions of N. Y. Code Civ. Proc. § 549, defendant may be arrested, in an action of trespass to recover damages for a forcible disseizin (Welch *v.* Winterburn, 14 Hun (N. Y.) 518), or to recover the possession of real property, and damages for the unlawful withholding of the same (Merritt *v.* Carpenter, 30 Barb. (N. Y.) 61).

39. *Michigan.*— People *v.* Judge Detroit Super. Ct., 40 Mich. 169.

New Jersey.— Hill *v.* Hunt, 20 N. J. L. 476.

New York.— Bruce *v.* Kelly, 5 Hun (N. Y.) 229; Mathushek Piano Mfg. Co. *v.* Pearce, 21 N. Y. Suppl. 921, 50 N. Y. St. 677; Hazlett *v.* Gill, 19 Abb. Pr. (N. Y.) 353 (holding that proof of defendant's non-residence or intention to depart is unnecessary); Spence *v.* Baldwin, 59 How. Pr. (N. Y.) 375; Bresnehan *v.* Darrin, 7 Alb. L. J. 316. *Compare* McGovern *v.* Payn, 32 Barb. (N. Y.) 83.

North Carolina.— Bahnsen *v.* Chesebro, 77 N. C. 325.

Pennsylvania.— Emerson *v.* Dow, 11 Wkly. Notes Cas. (Pa.) 270; Callagher *v.* Norcross, 7 Phila. (Pa.) 623 (holding that arrest on original process is not authorized when a sale on credit was fraudulently induced); Hopper *v.* Williams, 2 Pa. L. J. Rep. 448, 4 Pa. L. J. 235 (holding that defendant may be arrested, even though plaintiff could have waived the tort and brought assumpsit).

Wisconsin.— Warner *v.* Bates, 75 Wis. 278, 43 N. W. 957.

United States.— Graham *v.* Dominguez, 10 Fed. Cas. No. 5,664.

When defendant not liable to arrest.— Where the grounds upon which an order of arrest is based are "fraud, false and fraudulent representations," and no cause of action for fraud is made out, the order cannot be sustained upon the other ground stated, which is not a cause of action in tort known to the law. Leber *v.* Dietz, 22 Misc. (N. Y.) 524, 49 N. Y. Suppl. 1002.

Where plaintiff paid defendant for part of the latter's business, after watching it for eight days, during which the average daily earnings were thirty-five dollars, it was held that an order of arrest, based upon an alleged fraudulent statement by defendant that the daily earnings were fifty dollars, was properly vacated, as the purchase was made after full knowledge. Cox *v.* Dwyer, 17 N. Y. Suppl. 713, 44 N. Y. St. 270.

One who transfers scrip to which his immediate transferrer had no title is not guilty of a fraud sufficient to warrant his arrest; but one who, receiving scrip which he knows does not belong to himself, forges the name of the true owner thereon and sells it to another, is guilty of a fraud sufficient to authorize an order of arrest in an action by the party to whom his vendee transferred it. Faris *v.* Peck, 40 How. Pr. (N. Y.) 484.

40. New Jersey.— Defendant could be held to bail in an action to recover the penalty for a violation of the act regulating fisheries in the Delaware river. Champion *v.* Pierce, 11 N. J. L. 196.

New York.— Defendant may be arrested in an action brought to recover a fine or penalty. N. Y. Code Civ. Proc. § 549. Thus, an arrest may be had in an action before a justice to recover the penalty for selling adulterated milk. Buffalo *v.* Ray, 1 N. Y. St. 730. But 1 N. Y. Rev. Stat. p. 667, § 32, providing that one purchasing a share in an illegal lottery may recover double the sum paid therefor, is remedial and not penal, and, therefore, does not authorize defendant's arrest (Staub *v.* Myers, 16 N. Y. App. Div. 476, 44 N. Y. Suppl. 954 [*reversing* 18 Misc. (N. Y.) 99, 41 N. Y. Suppl. 831]), and an order of arrest cannot be obtained upon proof that the property for the recovery of which the action is brought was offered for sale in violation of the statute against lotteries, and, therefore, is forfeited to the state, and, through the state, to plaintiff, by virtue of such forfeiture (People *v.* Phillips, etc., Tea Co., 30 Hun (N. Y.) 553).

Vermont.— An action to recover a forfeiture created by statute is not an action arising on a contract within the meaning of Vt. Rev. Laws, § 1477, forbidding arrests in actions on contract. U. S. *v.* Banister, 70 Fed. 44.

41. When penalty is debt fraudulently incurred.— In an action by the United States to recover a penalty for selling matches not stamped, an arrest may be had as in an action for a debt fraudulently incurred. U. S. *v.* Walsh, 1 Abb. (U. S.) 66, Deady (U. S.) 281, 28 Fed. Cas. No. 16,635.

42. Clay *v.* Swett, 4 Bibb (Ky.) 255; Saul *v.* Ailier, 1 Mart. (La.) 21; Oliver *v.* Larzaleer, 5 N. J. L. 605; Dallas *v.* Hendry, 3

b. In Equity. It seems that defendant in a suit in equity may be held to bail when its purpose is the recovery of money,[43] but not otherwise.[44]

3. Grounds — a. Absconding or Leaving State. Many statutes permit the arrest of a debtor who is about to abscond[45] or remove from the state, or leave the jurisdiction of the court, with intent to avoid the payment of his debts.[46] A

N. J. L. 527; U. S. *v.* Mundell, 1 Hughes (U. S.) 415, 27 Fed. Cas. No. 15,834. *Compare* Watts *v.* Taylor, 13 Johns. (N. Y.) 305.

43. Short *v.* Barry, 39 How. Pr. (N. Y.) 315; Ashworth *v.* Wrigley, 1 Paige (N. Y.) 301. But see Com. *v.* Sumner, 5 Pick. (Mass.) 360, holding that, in a suit under Mass. Stat. (1823), c. 140, to compel a partnership accounting, defendant cannot be arrested and held to bail, since such a remedy is not specially authorized, and is not suitable as an equitable remedy, notwithstanding that Mass. Stat. (1817), c. 87, seems to permit holding to bail in equity by providing that, in certain cases, a plea in equity "may be inserted in a writ of attachment and such writ be served as other writs of attachment are by law to be served"— that is, by attachment of property or person.

Arrest pending action.— After a cause has been tried and disposed of as an equitable action, and the issues as to allegations constituting the legal cause of action have been sent to a jury for disposal, defendants as to whom the allegations make a cause of action at law, for which, under the code, an arrest may be had, may be arrested. Hennequin *v.* Clews, 45 N. Y. Super. Ct. 108.

A statute abolishing arrest on mesne process in suits founded upon contracts applies as well to suits in equity as to actions at law. Carter *v.* Porter, 71 Me. 167; People *v.* Speir, 77 N. Y. 144 [*reversing* 12 Hun (N. Y.) 70].

44. **To set aside assignment.**— In a suit in equity, to set aside an assignment on the ground of intent to defraud creditors, defendant is not liable to arrest, as no order can be granted, under N. Y. Code, § 179, except in actions for the recovery of money. People *v.* Kelly, 35 Barb. (N. Y.) 444.

To set aside fraudulent conveyance.— In a proceeding in equity to set aside a conveyance as fraudulent, an arrest of the grantee was held not to be authorized by N. Y. Code, § 179, subs. 4, permitting arrests where fraud was committed in contracting the debt or incurring the obligation to enforce which the action was brought. Fassett *v.* Tallmadge, 37 Barb. (N. Y.) 436.

45. **Who is absconding debtor.**— A debtor about to remove from the state, without the consent of his creditors and without an intention of returning, is *prima facie* an absconding debtor under Oreg. Code, § 106. Norman *v.* Manciette, 1 Sawy. (U. S.) 484, 18 Fed. Cas. No. 10,300.

Necessity of showing present intention.— Where defendant, after his arrest, showed that he had no intention of leaving England at the time when the arrest was made, although he intended to do so about two months later, it was held that the arrest was premature, even though plaintiff's affidavit stated that, in consequence of a commission to examine witnesses abroad, no final judgment could be obtained before the expiration of that period. Pegler *v.* Hislop, 5 Dowl. & L. 223, 1 Exch. 437, 11 Jur. 996, 17 L. J. Exch. 53.

Intention to leave is not act.— N. Y. Code Civ. Proc. § 555, provides that a person prosecuted in a representative capacity cannot be arrested under the provisions thereof except for his personal act. This seems to contemplate more than a mere intention to do an act. A purpose to leave the state, although openly avowed, can hardly be called an act. Genesee River Nat. Bank *v.* Mead, 18 Hun (N. Y.) 303.

46. *California.*— *Ex p.* Fkumoto, 120 Cal. 316, 52 Pac. 726.

Kentucky.— Myall *v.* Wright, 2 Bush (Ky.) 130.

Louisiana.—Armistead *v.* Sanderson, 1 Rob. (La.) 176; Wooster *v.* Salzman, 14 La. 98, the latter case holding that a person residing at a boarding-house, having no other domicile or residence, may be arrested at the suit of the keeper of the boarding-house, upon her affidavit that she fears he may remove, with his effects, out of the jurisdiction of the court.

Maine.— Mason *v.* Hutchings, 20 Me. 77.

New Hampshire.— Stevenson *v.* Smith, 28 N. H. 12.

North Carolina.— Devries *v.* Summit, 86 N. C. 126.

Washington.— Burrichter *v.* Cline, 3 Wash. 135, 28 Pac. 367.

United States.— Norman *v.* Manciette, 1 Sawy. (U. S.) 484, 18 Fed. Cas. No. 10,300.

England.— Larchin *v.* Willan, 7 Dowl. P. C. 11, 1 H. & H. 322, 2 Jur. 970, 8 L. J. Exch. 19, 4 M. & W. 351; McBlair *v.* Weir, 7 Ir. R. C. L. 526; Yorkshire Engine Co. *v.* Wright, 21 Wkly. Rep. 15.

Canada.—Walker *v.* Goldman, 16 Quebec Super. Ct. 466.

An executrix who has rendered an account which has been opposed cannot be arrested, on the opposition and affidavit of a creditor of the estate she administers, on the ground that she will leave the state before her account has been homologated, and without leaving sufficient funds to pay his debt. Mondelli *v.* Russell, 17 La. 537.

When a debtor leaves sufficient property to satisfy the debt for which he is sued, he is not liable to arrest even though he may not leave enough to satisfy all his debts. Carraby *v.* Davis, 6 Mart. N. S. (La.) 163.

In England it must be shown that there is reasonable ground to believe that defendant is about to quit England to avoid plaintiff's action (Harvey *v.* O'Meara, 7 Dowl. P. C. 725,

debtor is not liable to arrest on this ground, however, when his intended departure is in good faith,[47] without intent to defraud his creditors,[48] or when his absence will be temporary only.[49]

b. Concealment of Property Sought to Be Replevied. In some jurisdictions defendant, in an action for the recovery of specific personal property,[50] may be arrested when he has concealed, removed, or disposed of all or a part of the prop-

3 Jur. 629), and that defendant's absence from the country will materially prejudice the creditor in the prosecution of his suit (McBlair *v.* Weir, 7 Ir. R. C. L. 526), or that his absence is likely to last for such a time that he will not be forthcoming after final judgment (Larchin *v.* Willan, 7 Dowl. P. C. 11, 1 H. & H. 332, 2 Jur. 970, 8 L. J. Exch. 19, 4 M. & W. 351).

A person domiciled in Ireland, and about to return to that country after a temporary sojourn in England, is liable to be held to bail as a person about to quit England. Lamond *v.* Eiffe, 3 Q. B. 910, 3 G. & D. 256, 6 Jur. 1038, 12 L. J. Q. B. 12, 43 E. C. L. 1032.

47. As where he intends to leave on business (Myall *v.* Wright, 2 Bush (Ky.) 130; Stevenson *v.* Smith, 28 N. H. 12; Atkinson *v.* Blake, 1 Dowl. N. S. 849, 6 Jur. 1113; Marcotte *v.* Moody, 5 Montreal Leg. N. 359, 11 Rev. Lég. 460; S. S. White Dental Mfg. Co. *v.* Dixon, 3 Quebec 399; Nelson *v.* Lippe, 14 Quebec Super. Ct. 437), or for the purpose of seeking employment elsewhere, or improving his condition (Stevenson *v.* Smith, 28 N. H. 12; Shotton *v.* Lawson, 6 Montreal Super. Ct. 451; Toothe *v.* Frederick, 14 Ont. Pr. 287; Henderson *v.* Duggan, 5 Quebec 364; Seguin *v.* Cartier, 13 Quebec Super. Ct. 346).

48. *Ex p.* Fkumoto, 120 Cal. 316, 52 Pac. 726; Paulet *v.* Antaya, 3 Montreal Leg. N. 154, 10 Rev. Lég. 329; Lagacé *v.* Ayotte, 6 Quebec 88 [*affirming* 5 Quebec 240]; Kellert *v.* Carranza, 4 Rev. de Jur. 318; Senécal *v.* Tranchant, 14 Rev. Lég. 556.

Intent must be proved.— The simple fact that defendant is leaving the country without paying a debt does not, of itself, constitute a fraud, and it is necessary to prove an intent to defraud in order to maintain a capias. Tramblay *v.* Graham, 7 Montreal Super. Ct. 374.

Sufficient showing of intent to defraud.— Where defendant, between the date of the making and maturity of the note upon which the suit was based, received large sums of money and secretly and suddenly abandoned his house before the expiration of his lease thereon, and privately removed his family and household furniture from the state, it was held that sufficient facts were shown to justify his arrest on the ground of his intention to abscond with intent to defraud. Brooklyn Daily Union *v.* Hayward, 11 Abb. Pr. N. S. (N. Y.) 235.

Where a debtor, who, in 1875, had secreted his property and left Canada with intent to defraud, came temporarily into the province in 1882, and was capiased as he was again leaving, it was held that the secretion and departure in 1875, coupled with the intention of again leaving in 1882, were sufficient grounds for the arrest. McFarlane *v.* McNiece, 7 Montreal Leg. N. 398.

Where there was evidence that defendant had said that plaintiff might "go to the devil," and that he would never pay a cent, but would go off to Montana, and his family would follow, it was held that an intention to depart with intent to defraud was sufficiently shown. Valade *v.* Bellehumeur, 2 Montreal Leg. N. 116.

Insufficient showing as to intent.—A debtor is not liable to arrest, on the ground that he is about to remove from the state with intent to defraud his creditors, upon a showing that, ten days before the application for the writ of arrest, he sought to escape a personal interview with an importunate creditor. Devries *v.* Summit, 86 N. C. 126.

The fact that one sued for breach of promise of marriage had told plaintiff that he would go to the United States if she insisted on their marriage before the time agreed upon does not entitle her to a capias ad respondendum against him if no proof is given that he intended to put his threat into execution and thereby defraud her. Walker *v.* Goldman, 16 Quebec Super. Ct. 466.

Presumption as to intent.— An intention to leave the state so as to authorize an arrest will be easily presumed where a fraudulent or suspicious disposal of property is proved. Hudson's Case, 2 Mart. (La.) 172.

49. Myall *v.* Wright, 2 Bush (Ky.) 130; Levi *v.* Levy, 20 La. Ann. 552; Stevenson *v.* Smith, 28 N. H. 12; Ambrois *v.* Malleral, 2 Montreal Leg. N. 159; Palmer *v.* Scott, 18 Ont. Pr. 368. *Compare* Roberts *v.* Page, 13 La. 452; Henshaw *v.* Ladd, 8 La. 512, which cases hold that a debtor who leaves no property behind may be held to bail when he is about to depart from the state, even though his absence will be temporary only, and even though he has established his family residence, and commenced permanent business, within the state.

50. Right to arrest not dependent upon character of cause of action.— The right to arrest defendant, in an action for the recovery of specific personal property, does not arise from the character of the cause of action, but depends upon the question of whether or not he has disposed of the property so that it cannot be found by the sheriff, or with intent to fraudulently deprive plaintiff of it. Jananique *v.* De Luc, 1 Abb. Pr. N. S. (N. Y.) 419.

Does not apply to actions for conversion.— Where the complaint alleges a cause of action for wilfully taking, carrying away, and converting personal property, and demands a

erty,[51] so that it cannot be found or taken by the sheriff, and with intent[52] that it should not be so found or taken, or to deprive plaintiff of the benefit thereof.[53]

c. Fraudulent Acts in Fiduciary Capacity — (1) *In General.* Some statutes authorize the arrest of defendant on the ground that he received, in a fiduciary capacity,[54] money or property belonging to plaintiff, and failed to account therefor.[55]

money judgment, the action is for damages and not to recover specific property, and, hence, does not authorize defendant's arrest on the ground that he has concealed or disposed of property with the intent that it should not be found or taken, or to deprive plaintiff of the benefit thereof. Seymour *v.* Van Curen, 18 How. Pr. (N. Y.) 94.

51. Plaintiff need not take part.— In New York, if a writ of replevin is sued out and the whole of the property claimed is not found, plaintiff is not bound to accept part, but may arrest defendant. Snow *v.* Roy, 22 Wend. (N. Y.) 602. He cannot, however, hold defendant to bail after accepting part of the property, as he must elect whether he will take a portion of the goods only, or the person of defendant. Lowrey *v.* Mansfield, 3 How. Pr. (N. Y.) 88.

52. Materiality of intent.— It must not only appear that the property has been concealed, removed, or disposed of, but that such concealment, removal, or disposal was made with intent that the property should not be found or taken by the sheriff, or with intent to deprive plaintiff of it. Watson *v.* McGuire, 2 Daly (N. Y.) 219; Reimer *v.* Nagel, 1 E. D. Smith (N. Y.) 256, Code Rep. N. S. (N. Y.) 219; Merrick *v.* Suydam, Code Rep. N. S. (N. Y.) 212. To same effect see Roberts *v.* Randel, 3 Sandf. (N. Y.) 707, 5 How. Pr. (N. Y.) 327, 3 Code Rep. (N. Y.) 190. *Compare* Van Neste *v.* Conover, 8 Barb. (N. Y.) 509, 5 How. Pr. (N. Y.) 148, holding that defendant is liable to arrest if the property has been removed, concealed, or disposed of so that replevin is impossible, although no fraud or bad faith is alleged as to such disposition.

When disposition was without anticipation of action.—An intent on the part of one, who, by false representations, induces another to sell him property, to put the property beyond the seller's reach will authorize an order of arrest, the other elements appearing, even though the buyer may not contemplate that an action at law will be commenced to recover the specific property. Lippman *v.* Shapiro, 50 N. Y. Super. Ct. 367.

Disposition before action.— Where defendant acquired property fraudulently and under circumstances justifying a reclamation of it by the vendor, and disposed of it with intent to perfect the fraud and put the property beyond the reach of the vendor, he is liable to arrest, in an action for the recovery of the property, even though such sale, made before the commencement of the action, was to a *bona fide* purchaser. Barnett *v.* Selling, 70 N. Y. 492 [*affirming* 9 Hun (N. Y.) 236].

53. Matter of Farr, 41 Kan. 276, 21 Pac. 273; Myers *v.* Shupeck, 3 N. Y. St. 289; Levy *v.* Salomon, 1 N. Y. St. 207.

54. The words "fiduciary capacity" apply to all contracts based on trust or confidence, and not on credit. Dunaher *v.* Meyer, 1 Code Rep. (N. Y.) 87. They contemplate a case of express trust or confidence (White *v.* McAllister, 1 Code Rep. (N. Y.) 106), a case where confidence is reposed in the integrity of the man rather than in his pecuniary ability (Schudder *v.* Shiells, 17 How. Pr. (N. Y.) 420). The obligation of a surety on a guardian's bond is not fiduciary, within the provisions of the Bankruptcy Act that no debt "created while acting in a fiduciary character, shall be discharged under this act," and, hence, defendant is not liable to arrest in a suit filed on the bond pending his petition in bankruptcy. *Ex p.* Taylor, 1 Hughes (U. S.) 617, 23 Fed. Cas. No. 13,773.

When relations are those of debtor and creditor.— When the facts show that the relations existing between plaintiff and defendant are not of a fiduciary character, but are those of debtor and creditor, defendant is not liable to arrest. German Bank *v.* Edwards, 53 N. Y. 541; Farmers', etc., Nat. Bank *v.* Sprague, 52 N. Y. 605; Decatur *v.* Goodrich, 44 Hun (N. Y.) 3; Buchanan Farm Oil Co. *v.* Woodman, 1 Hun (N. Y.) 639, 4 Thomps. & C. (N. Y.) 193; Goodrich *v.* Dunbar, 17 Barb. (N. Y.) 644; Ramsey *v.* Timayenis, 24 N. Y. Suppl. 76, 54 N. Y. St. 353; Obregon *v.* De Mier, 54 How. Pr. (N. Y.) 390; Angus *v.* Dunscomb, 8 How. Pr. (N. Y.) 14; Grover, etc., Sewing Mach. Co. *v.* Clinton, 5 Biss. (U. S.) 324, 11 Fed. Cas. No. 5,845. *Compare* Obregon *v.* De Mier, 52 How. Pr. (N. Y.) 356.

55. Seidel *v.* Peschkaw, 27 N. J. L. 427; Kelly *v.* Scripture, 9 Hun (N. Y.) 283; Barret *v.* Gracie, 34 Barb. (N. Y.) 20; Panama R. Co. *v.* Robinson, 4 Thomps. & C. (N. Y.) 672; Albany Ins. Co. *v.* McAllister, 11 N. Y. Suppl. 295, 33 N. Y. St. 122; Hirsh *v.* Van der Perren, 10 N. Y. Suppl. 449, 32 N. Y. St. 850; Collins *v.* Harris, 5 N. Y. St. 162; Northern R. Co. *v.* Carpentier, 4 Abb. Pr. (N. Y.) 47; Wheelock *v.* Stewart, 28 How. Pr. (N. Y.) 89; Frost *v.* McCarger, 14 How. Pr. (N. Y.) 131; Travers *v.* Deaton, 107 N. C. 500, 12 S. E. 373; Hirsch *v.* Simpson, 16 Phila. (Pa.) 85, 40 Leg. Int. (Pa.) 4.

In California, an agent who has received money for his principal is not liable to arrest in an action therefor unless it is shown that he was guilty of fraud, as Cal. Const. § 15, art. 1, declares that "no person shall be imprisoned for debt, in any civil action on mesne or final process, unless in cases of fraud." Matter of Holdforth, 1 Cal. 438, 441.

The criterion in every such case is to determine whether the specific moneys received ought, in good faith, to have been kept and paid over to plaintiff, or whether defendant,

(II) *Attorneys, Bankers, and Collecting Agents.* An attorney, banker, or other agent, who collects money for his principal, holds it in a fiduciary capacity and may be arrested in a civil action brought upon his neglect or refusal to account for such money.[56]

(III) *Factors, Brokers, and Other Agents.* Such a statute applies to a factor, broker, or agent who misapplies money which he has received from his principal for a specific purpose,[57] or who fails to account for the net proceeds of

upon receiving such moneys, had the right to use them as his own, holding himself accountable to plaintiff for the debt thus created. Decatur *v.* Goodrich, 44 Hun (N. Y.) 3. To same effect see Simms *v.* Bean, 10 La. Ann. 346.

Claim of third person to money.— The fact that a third person has interposed some claim to money which defendant received in a fiduciary capacity for plaintiff, wherefore defendant refused to pay it over lest he should be liable to such third person, does not affect plaintiff's right to have defendant arrested in an action to recover such money. Gross *v.* Graves, 19 Abb. Pr. (N. Y.) 95.

Fraud committed in another state.— The fact that the fraud for which defendant was arrested was committed in another state is no ground for immunity from arrest. Castree *v.* Kirby, 2 N. Y. Civ. Proc. 334; Powers *v.* Davenport, 101 N. C. 286, 7 S. E. 747.

Intent immaterial.— Where defendant has committed acts which entitle plaintiff to have him arrested in an action for the recovery of money or property received in a fiduciary capacity, the intent with which such acts were committed is immaterial. Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; Durham Fertilizer Co. *v.* Little, 118 N. C. 808, 24 S. E. 664.

Interest on money received.— A defendant who has received money in a fiduciary capacity, which he refuses to pay over, may be arrested as well for the accrued interest thereon as for the principal. People *v.* Clark, 45 How. Pr. (N. Y.) 12.

56. Holt *v.* Streeter, 74 Hun (N. Y.) 538, 26 N. Y. Suppl. 843, 57 N. Y. St. 193; Burhans *v.* Casey, 4 Sandf. (N. Y.) 707; Stoll *v.* King, 8 How. Pr. (N. Y.) 298; Carroll *v.* Montgomery, 128 N. C. 278, 38 S. E. 874; National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16; Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774. *Contra*, Smith *v.* Edmonds, 1 Code Rep. (N. Y.) 86, the court saying that the provision for the arrest of persons receiving money in a fiduciary capacity contemplates only an express trust created by law — such as a trusteeship, executorship, administratorship, guardianship, or assigneeship — and not an implied trust arising from agency or bailment.

Bankers — When liable to arrest.— Where a banker collects notes, received, for collection only, from one with whom he has no account, and converts the proceeds to his own use, he comes within N. Y. Code Civ. Proc. § 549, which provides that a defendant may be arrested in an action to recover money received in a fiduciary capacity and converted by him. Turney *v.* Guthrie, 15 N. Y. Suppl. 679. But, where defendant became plaintiff's banker, under an agreement to receive his deposits, collect his bills, and credit him with the amount, with the understanding that defendant might use the money and would pay plaintiff's drafts on him when presented, and interest on the balances, it was held that he was not liable to arrest as having received in a fiduciary capacity the proceeds of a draft remitted by plaintiff, which he collected on the day of, and just before, his suspension, and after he knew that he would be compelled to suspend. Bussing *v.* Thompson, 6 Duer (N. Y.) 696.

Collection by another creditor.— One who, in collecting a claim of his own, unites with it a claim belonging to another creditor, under an agreement with the latter to account to him for a due proportion of the amount collected, receives such proportion in a fiduciary capacity and is liable to be arrested in an action for not paying it over. Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 319.

Payment by worthless bill.— Where a firm of collecting agents, who had been requested to remit, forwarded a bill upon themselves in lieu of some independent bill or security, and such bill was dishonored, it was held that they were guilty of a breach of trust, warranting an arrest in a civil action against them. Bull *v.* Melliss, 9 Abb. Pr. (N. Y.) 58.

57. Clark *v.* Pinckney, 50 Barb. (N. Y.) 226; Dubois *v.* Thompson, 1 Daly (N. Y.) 309, 25 How. Pr. (N. Y.) 417; Noble *v.* Prescott, 4 E. D. Smith (N. Y.) 139; Johnson *v.* Whitman, 10 Abb. Pr. N. S. (N. Y.) 111. *Compare* Graeffe *v.* Currie, 52 N. Y. Super. Ct. 554 (holding that the mere fact that a broker has received money from transactions for his principal does not establish that fiduciary relation which would justify the principal in demanding the broker's arrest in an action against the latter); McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (holding that, where plaintiff's assignor employed defendant as his broker, to sell for him a certain number of shares of railroad stock not then owned by him, placing in such broker's hands certain sums of money as margins, to secure the latter against loss in case of a rise in the value of the stock, and defendant sold the stock and, in conformity to his instructions, borrowed from a third person the number of shares sold, and delivered them to the purchaser, receiving the price, such money was not received by defendant in a merely fiduciary character, and he was, therefore, not liable to arrest); Hammer *v.* Ladner, 17

property which he has sold on commission,[58] even though the commission be a *del credere* one.[59]

(iv) *Public Officers and Officers of Private Corporations.* It also applies to a public officer[60] or an officer of a private corporation[61] who has

Phila. (Pa.) 315, 41 Leg. Int. (Pa.) 376 (holding that where the affidavit alleged that defendants were employed by plaintiff, for a certain hire, to sell stocks and purchase others with the proceeds, and that defendants sold the stocks, but fraudulently appropriated the proceeds to their own uses, the fraud arose out of an express contract, and, while ground for an application to the judge for a warrant of arrest, it did not authorize a capias ad respondendum, such capias being abolished in every case of fraud originating in a breach of contract).

Refusal to pay back upon revocation of agency.— An agent or attorney, to whom money is paid by his principal for the purpose of making a specific appropriation of it, is liable to arrest upon his refusal to pay it back on demand made before he has made such appropriation of it. Schadle *v.* Chase, 16 How. Pr. (N. Y.) 413.

58. Duguid *v.* Edwards, 50 Barb. (N. Y.) 288 [*reversing* 32 How. Pr. (N. Y.) 254]; Collins *v.* Harris, 5 N. Y. St. 162; Turner *v.* Thompson, 2 Abb. Pr. (N. Y.) 444; Schudder *v.* Shiells, 17 How. Pr. (N. Y.) 420. But where, in accordance with a general custom of the trade, a commission merchant mingled the proceeds of sales with his own funds and paid once a week for all merchandise delivered during the week, whether it had been sold by him or not, it was held that his relation to his principal was not a fiduciary one, authorizing his arrest in a civil action by the principal. Donovan *v.* Cornell, 13 Daly (N. Y.) 339, 9 N. Y. Civ. Proc. 222, 3 How. Pr. N. S. (N. Y.) 525 [*reversing* 8 N. Y. Civ. Proc. 283].

Where factor disregarded instructions.—A factor is not shielded from arrest, in an action for not accounting for and paying over proceeds of sales, by proving that the sales he made were not according to the authority and instructions given by his principal, as the principal has a right to adopt the sales made and claim the proceeds. Standard Sugar Refinery *v.* Dayton, 70 N. Y. 486.

Promissory notes delivered to note-broker.—Where the owner of promissory notes agreed to sell them to a note-broker, and delivered them to the latter without receiving payment therefor, but without agreeing to give credit, and the broker on the same day transferred them to another note-broker, who sold them and converted a large part of the proceeds, it was held, in an action against both, that an order of arrest against the second transferee should be sustained. Robbins *v.* Seithel, 20 How. Pr. (N. Y.) 366.

An employment to sell tickets in a foreign lottery is illegal, and no action can arise out of it. Even money advanced to an agent, by the manager of a lottery, to forward the sale of tickets by him in New York, cannot be recovered. Hence, an order of arrest in such action, on the ground that defendant received money in a fiduciary capacity, is improper. Rolfe *v.* Delmar, 7 Rob. (N. Y.) 80.

Form of action.— A defendant may be arrested in an action for money received, or property embezzled or fraudulently misapplied, as plaintiff's agent, or while he was acting for the plaintiff in a fiduciary capacity — such as a peddler of goods for plaintiff — whether the action is brought on the contract for not accounting and paying over the goods and money to plaintiff, or in tort for the conversion of the goods and money. Ridder *v.* Whitlock, 12 How. Pr. (N. Y.) 208.

When commission is not fixed.— An auctioneer who receives goods for sale, under an agreement that he is to receive for his compensation all over a certain price reserved by the owner, is liable to arrest, as having committed a fraudulent act in a fiduciary capacity, where, upon demand, he fails to pay over the reserved price after sale. Holbrook *v.* Homer, 6 How. Pr. (N. Y.) 86.

59. Wallace *v.* Castle, 14 Hun (N. Y.) 106; Chaine *v.* Coffin, 17 Abb. Pr. (N. Y.) 441; Ostell *v.* Brough, 24 How. Pr. (N. Y.) 274; Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119. *Contra*, Sutton *v.* De Camp, 4 Abb. Pr. N. S. (N. Y.) 483.

60. People *v.* Clark, 45 How. Pr. (N. Y.) 12.

When liability of defendant has been fixed by foreign judgment.— Where an English public officer was sued in New York for the recovery of public money embezzled by him in England, it was held that he might be arrested, and that the fact that, in proceedings in England before a jury, his liability to his government had been fixed at a certain sum did not extinguish the fraudulent character of the original transaction so as to relieve him from liability to arrest. Peel *v.* Elliott, 28 Barb. (N. Y.) 200.

Presumption as to fiduciary relation.— A public officer or agent will be deemed to have received moneys belonging to the government in a fiduciary capacity when it appears that he had no authority to disburse them, but was bound to pay them over on request. Republic of Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634 [*affirming* 11 How. Pr. (N. Y.) 1].

Where officer had delivered property to another according to law.— A public officer is not liable to arrest in an action to secure possession of property which, before the action was brought, he had delivered to a custodian designated by law. Mulvey *v.* Davison, 8 How. Pr. (N. Y.) 111.

61. Crook *v.* Jewett, 12 How. Pr. (N. Y.) 19.

embezzled or misappropriated public or corporate money or property intrusted to him or placed in his custody.

d. Fraudulent Concealment, Removal, or Disposition of Property. Many statutes authorize the arrest of debtors on the ground that they have concealed, removed, or disposed of,[62] or are about to conceal, remove, or dispose of, their property,[63] with intent to defraud their creditors;[64] but such statutes apply only to cases of actual fraudulent intent,[65] and not to cases of mere legal or construc-

62. Concealment of property — What is.— An alienation of property, whether real or personal, by an insolvent debtor, with intent to defraud his creditors, is a concealment authorizing a capias against him (Quebec Bank *v.* Elliott, 16 Quebec Super. Ct. 393); but a debtor is not liable to arrest, on the ground that he "conceals his property so that no attachment or levy can be made," when he merely carries a watch and money on his person according to his custom, in the ordinary course of business and without any fraudulent design (Clement *v.* Dudley, 42 N. H. 367).

Secretion of property.—A fraudulent preferential payment by a debtor constitutes a secretion of his property, authorizing the issuance of a capias ad respondendum against him (Gault *v.* Dussault, 4 Montreal Leg. N. 321; Quebec Bank *v.* Elliott, 16 Quebec Super. Ct. 393; Cooke *v.* Jacobi, 13 Quebec Super. Ct. 433; Nash *v.* Bethume, 16 Rev. Lég. 699; Mackinnon *v.* Keronack, 15 Rev. Lég. 34 [*affirmed* in 15 Can. Supreme Ct. 111, 11 Montreal Leg. N. 351]. *Contra*, Emmanuel *v.* Hagen, 6 Rev. Lég. 209. *Compare* Labranche *v.* Cassidy, 32 L. C. Jur. 95; Vipond *v.* Weldon, 18 Rev. Lég. 422, both holding that fraudulent preferences by an insolvent trader may, according to circumstances, constitute secretions, as does a hypothecation of a debtor's immovables to one of his creditors, with the view of giving the latter a fraudulent preference (Banque de la Nouvelle Ecosse *v.* Lallemand, 19 Rev. Lég. 66); but a payment, made in the ordinary course of business, although it may be, in some sense, a preferential payment, does not (Ferland *v.* Neild, (Q. B. Quebec, Sept. 3, 1877) Consol. Quebec Dig. 279. See also Cushing *v.* Fortin, 1 Quebec Super. Ct. 512). The alienation of real estate does not, of itself, constitute a secretion authorizing a capias (Dumont *v.* Gourt, 7 L. C. Jur. 119), but the fraudulent assignment of real estate does (Gault *v.* Robertson, 21 L. C. Jur. 281 [*affirmed* in (Q. B. Montreal, March 22, 1878) Consol. Quebec Dig. 278]; Langley *v.* Chamberlain, 5 L. C. Jur. 49), as does also the fraudulent disposition of a debtor's goods (Mitcheson *v.* Burnett, 2 Quebec 260; St. Michel *v.* Viddler, 1 Montreal Super. Ct. 163).

63. Includes real property.— Under N. C. Code, § 291, subs. 5, authorizing the arrest of persons disposing of their property with intent to defraud creditors, and N. C. Code, § 3765, subs. 6, providing that, in construing statutes, the word "property" shall include all property, both real and personal, unless manifestly against the legislative intent, a partner who transfers his individual real property in contemplation of insolvency is subject to arrest. Durham Fertilizer Co. *v.* Little, 118 N. C. 808, 24 S. E. 664.

64. Miltenberger *v.* Burgess, 15 La. Ann. 8; Matter of Hicks, 20 Mich. 280; Bromley *v.* People, 7 Mich. 472; Untermeyer *v.* Hutter, 26 Hun (N. Y.) 147; Duncan *v.* Guest, 24 Hun (N. Y.) 639; Bassett *v.* Pitts, 15 Hun (N. Y.) 464; Estell *v.* De Pennevet, 15 Daly (N. Y.) 10, 1 N. Y. Suppl. 275, 17 N. Y. St. 742, 14 N. Y. Civ. Proc. 336; Hinck *v.* Dessar, 3 N. Y. St. 349; Easton *v.* Cardwell, 11 N. Y. Civ. Proc. 301; Wilmerding *v.* Cohen, 8 Abb. Pr. N. S. (N. Y.) 141; Potter *v.* Sullivan, 16 Abb. Pr. (N. Y.) 295 note; Wells *v.* Selling, 53 How. Pr. (N. Y.) 35; Courter *v.* McNamara, 9 How. Pr. (N. Y.) 255; Létang *v.* Renaud, 6 Montreal Super. Ct. 232; Quebec Bank *v.* Elliott, 16 Quebec Super. Ct. 393.

When act was committed in another jurisdiction.— When a debtor, residing in a foreign state or country, who has fraudulently disposed of his property there for the purpose of evading the payment of his debts, places himself within the reach of the process of a court within a jurisdiction where such act furnishes a ground of arrest, he may be arrested therefor. Claflin *v.* Frenkel, 29 Hun (N. Y.) 288, 3 N. Y. Civ. Proc. 109. *Contra*, Blason *v.* Bruno, 33 Barb. (N. Y.) 520, 12 Abb. Pr. (N. Y.) 265, 21 How. Pr. (N. Y.) 112; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 226. *Compare* Bromley *v.* People, 7 Mich. 472.

When debtor can pay part only of his debts. — A debtor may avoid arrest by assigning in trust for all his creditors, and it is no excuse for his failure to pay a part of his debts that he has not sufficient money to pay all of them. C. M. Hapgood Shoe Co. *v.* Saupp, 7 Pa. Super. Ct. 480.

65. People *v.* Kelly, 35 Barb. (N. Y.) 444; Pacific Mut. Ins. Co. *v.* Machado, 16 Abb. Pr. (N. Y.) 451; Watson *v.* McGuire, 33 How. Pr. (N. Y.) 87.

Intent to remove from state.— The fact that a defendant intends to remove from the state will not justify his arrest on the ground that he has removed or disposed of his property, or is about so to do, with intent to defraud his creditors, unless it is coupled with some independent proof of intent to defraud. Flour City Nat. Bank *v.* Hall, 33 How. Pr. (N. Y.) 1; Anonymous, 2 Code Rep. (N. Y.) 51.

tive fraud.[66] In order to constitute a fraudulent disposition of property, authorizing a debtor's arrest, four things must conjoin, namely: the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim;[67] it must have belonged to the debtor;[68] it must have been transferred or disposed of by the debtor,[69] and the act must have been done with intent to defraud his creditors.[70]

e. **Fraudulent Incurring of Obligation or Contracting of Liability** — (i) *In General.* One of the commonest grounds of civil arrest now existing is that defendant fraudulently incurred the obligation or contracted the liability which is the basis of the action.[71] An arrest on this ground is proper only when the

66. People *v.* Kelly, 35 Barb. (N. Y.) 444. *Contra,* Eichenberg *v.* Marcy, 18 R. I. 169, 26 Atl. 46.

Suspicious circumstances insufficient.—Circumstances attending and following the execution of a debtor's assignment of his property, which may be evidence of constructive fraud sufficient to vitiate the assignment, are not evidence *per se* of an actual fraudulent intent, on the part of the debtor, furnishing sufficient ground for his imprisonment in an action against him. Birchell *v.* Strauss, 28 Barb. (N. Y.) 293, 8 Abb. Pr. (N. Y.) 53.

67. Hoyt *v.* Godfrey, 88 N. Y. 669.

68. **The disposition of property belonging to plaintiff** is no ground for defendant's arrest. Gay *v.* Denard, 3 Montreal Super. Ct. 125, 15 Rev. Lég. 585.

Disposition of property belonging to his wife does not authorize a debtor's arrest. Gendron *v.* Lemieux, 12 L. C. Rep. 222.

69. Hoyt *v.* Godfrey, 88 N. Y. 669. See also Scott *v.* Reed, 8 N. Y. Civ. Proc. 269.

70. Miltenberger *v.* Burgess, 15 La. Ann. 8; Hoyt *v.* Godfrey, 88 N. Y. 669; Sherill Roper Air Engine Co. *v.* Harwood, 30 Hun (N. Y.) 9; Watson *v.* Browne, 1 Lehigh Val. L. Rep. (Pa.) 156; Mitlinger *v.* Wetzel, 1 Leg. Rec. (Pa.) 49; Davis *v.* Cardue, 38 S. C. 471, 17 S. E. 247.

Such intent is shown by an assignment (Fitch *v.* McMahon, 103 N. Y. 690, 9 N. E. 497; Wells *v.* Selling, 53 How. Pr. (N. Y.) 35; Com. *v.* Duncan, 1 Pittsb. (Pa.) 207), mortgage (Bailey *v.* Prince, 5 N. Y. Suppl. 896, 24 N. Y. St. 632) or sale (Kern *v.* Rachow, 34 N. Y. Super. Ct. 239, 12 Abb. Pr. N. S. (N. Y.) 352) to a relative, or by shipping the bulk of one's stock obtained on credit to another jurisdiction (McButt *v.* Hirsch, 4 Abb. Pr. (N. Y.) 441; City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397).

Intent to defraud copartner.— Where a partner, with intent to defraud his copartner, withdrew goods belonging to the firm and converted them to his own use, it was held that creditors of the firm were entitled to an order of arrest on the ground that the conversion was with intent to defraud them. Hanover Vulcanite Co. *v.* Nathanson, 38 Hun (N. Y.) 488.

Presumption of fraudulent intent.— In an assignment giving preferences to creditors, the omission of any provision as to the disposition of the surplus, if any, is, at most, only presumptive evidence of fraudulent intent, and is conclusively rebutted by evidence that the preferred debts exceeded the value of the property. Spies *v.* Joel, 1 Duer (N. Y.) 669.

71. Barker *v.* Russell, 11 Barb. (N. Y.) 303; Wanzer *v.* De Baun, 1 E. D. Smith (N. Y.) 261, Code Rep. N. S. (N. Y.) 280; Valentine *v.* Richardt, 6 N. Y. Suppl. 197, 24 N. Y. St. 697, 17 N. Y. Civ. Proc. 289 (procuring personal property by fraud); Wells *v.* Selling, 53 How. Pr. (N. Y.) 35; Hamill *v.* Rawlston, 9 Phila. (Pa.) 52, 29 Leg. Int. (Pa.) 382; Heffner *v.* Kantner, 1 Leg. Chron. (Pa.) 162, 4 Leg. Gaz. (Pa.) 249; Mewster *v.* Spalding, 6 McLean (U. S.) 24, 17 Fed. Cas. No. 9,513.

Embezzlement.— An affidavit alleging the embezzlement, by plaintiff's brokers, of the proceeds of stock sold for him shows an obligation fraudulently incurred, within the meaning of Ohio Rev. Stat. § 5492, and warrants an arrest. Este *v.* Wilshire, 44 Ohio St. 636, 10 N. E. 677. See also London Guaranty, etc., Co. *v.* Geddes, 22 Fed. 639.

Fraud need not be sufficient to avoid contract.— Any fraud committed in contracting the debt or incurring the obligation sued on is sufficient to justify the arrest of defendant, whether or not it is sufficient to avoid the contract. Thus, the acts of buying goods without any agreement for credit, and of getting possession of them with an intent to forthwith convert them into property not capable of being readily reached by execution, or to sell them to a *bona fide* purchaser against whom a stoppage in transit cannot be had, constitute a fraud for which an order of arrest may be issued. Wallace *v.* Murphy, 22 How. Pr. (N. Y.) 414.

Fraud committed in another jurisdiction.— An order of arrest may be granted for fraud in contracting the debt sued on, even though the fraud was committed in another state or country. Freeman *v.* Kolarek, 3 N. Y. St. 283; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 226; City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397; Gosline *v.* Place, 32 Pa. St. 520.

Ratification of agent's fraud.— Where a wife purchases a large quantity of goods in her husband's name, with the expectation and design that they will not be paid for, and they are delivered to the husband's residence, he is liable to arrest for the debt thus created. Stewart *v.* Strasburger, 7 Hun (N. Y.) 337, 51 How. Pr. (N. Y.) 388.

Presumption as to fraud.— A subsequent

fraud was committed before or at the time the obligation was incurred, and not when it was committed subsequently.[72]

(II) *By False and Fraudulent Representations* — (A) *Positive Representations.* Defendant may be arrested as having fraudulently contracted the debt or incurred the liability when he knowingly[73] made false and fraudulent representations which induced plaintiff to enter into a contract with him,[74] to extend him credit,[75] or to part with something of value.[76]

refusal to pay an account will not warrant an inference of fraud in contracting the indebtedness. Vankirk *v.* Staats, 24 N. J. L. 121. So, where defendant entered into an executory agreement with plaintiffs in order to induce them to part with certain property, it was held that defendant's failure to perform the agreement would not raise a presumption that he intended non-performance at the time of the agreement, and that, in the absence of other facts showing a fraudulent intent, the court properly vacated an order of arrest entered against defendant. Steinhardt *v.* Beir, 60 N. Y. Super. Ct. 489, 16 N. Y. Suppl. 609, 42 N. Y. St. 10.

Reparation by debtor.— No arrest will be granted on the ground that a debt incurred in the purchase of goods was fraudulently contracted, if it can be shown that the goods so purchased were subsequently included by the debtor in an assignment for the benefit of his creditors. Artman *v.* Bell, 9 Phila. (Pa.) 237, 32 Leg. Int. (Pa.) 117.

What is not fraud.— Where a debtor delivered as security for a loan several orders drawn by his wife for money yet to become due her, payment of which she afterward stopped, it was held not a case authorizing an order of arrest for a fraudulent act. Isaacs *v.* Gorham, 1 Hilt. (N. Y.) 479.

A bailee is not liable to arrest for breach of his contract, since the statute restricts imprisonment to the cases where the credit extended by plaintiff to defendant was induced by fraud. Levy *v.* Appleby, 1 N. Y. City Ct. 258.

72. *New Jersey.*— Vankirk *v.* Staats, 24 N. J. L. 121. *Compare* Van Wagenen *v.* Coe, 22 N. J. L. 531, wherein it was held that a debtor who gave his creditor a worthless security for an existing debt, falsely representing the security to be good, was guilty of fraud sufficient to hold him to bail.

New York.— Mooney *v.* La Follette, 21 N. Y. App. Div. 510, 48 N. Y. Suppl. 460; Steinhardt *v.* Beir, 60 N. Y. Super. Ct. 489, 16 N. Y. Suppl. 609, 42 N. Y. St. 10; Wheeler *v.* Frenche, 33 N. Y. Super. Ct. 63; Woodruff *v.* Valentine, 19 Abb. Pr. (N. Y.) 93.

Pennsylvania.— Heffner *v.* Kantner, 1 Leg. Chron. (Pa.) 162, 4 Leg. Gaz. (Pa.) 249.

South Carolina.— Davis *v.* Cardue, 38 S. C. 471, 17 S. E. 247.

73. What constitutes knowledge.— On a motion to vacate an order of arrest for fraudulent representations, it was held that if defendant knew the statements he made to be false, or intended to convey the impression that he had actual knowledge of their truth, although he was conscious that he had not, and that they were in fact false, he committed a fraud upon plaintiff; and that if the representation was affirmative, positive, and unqualified, not resting on opinion or belief, it must be regarded as having been designed to convey actual knowledge of its truth. Bishop *v.* Davis, 9 Hun (N. Y.) 342.

Belief in representations.— One who obtained a sale of goods upon credit, by a representation that he was solvent when in fact he was not, is not liable to arrest therefor if he believed his representations to be true at the time he made them. Birchell *v.* Strauss, 28 Barb. (N. Y.) 293, 8 Abb. Pr. (N. Y.) 53; Gaffney *v.* Burton, 12 How. Pr. (N. Y.) 516.

Where one of several representations is false.— A person who makes several representations to another, and thereby induces such other person to sell him on credit, is liable to arrest in an action of debt, although one only of the representations is false, if it was made with intent to deceive and was of such a nature as would materially influence the giving of the credit. Wannemacher *v.* Davis, 2 Sweeny (N. Y.) 272.

74. Madge *v.* Puig, 12 Hun (N. Y.) 15; Boyer *v.* Fenn, 19 Misc. (N. Y.) 128, 43 N. Y. Suppl. 533.

75. False representations as to financial condition.— It is proper to grant an order of arrest upon an affidavit showing that credit was given to defendant on his false representations as to his financial condition. Lamkin *v.* Oppenheim, 86 Hun (N. Y.) 27, 33 N. Y. Suppl. 367, 67 N. Y. St. 233; Whitmore *v.* Van Steenbergh, 2 Thomps. & C. (N. Y.) 668; Wilmerding *v.* Mooney, 11 Abb. Pr. (N. Y.) 283; Freeman *v.* Leland, 2 Abb. Pr. (N. Y.) 479; Scudder *v.* Barnes, 16 How. Pr. (N. Y.) 534.

False representation as to financial condition of third person.— The liability of a defendant in an action for falsely representing to plaintiff the pecuniary ability of a third person is not a debt fraudulently contracted, or an obligation fraudulently incurred, within the meaning of the code provision authorizing an order of arrest. Smith *v.* Corbiere, 3 Bosw. (N. Y.) 634.

76. False representations as to financial condition.— Ballard *v.* Fuller, 32 Barb. (N. Y.) 68; Murphy *v.* Fernandez, 10 Bosw. (N. Y.) 665; Harding *v.* Shannon, 20 How. Pr. (N. Y.) 25.

False representations as to purpose.— A person who borrows money on representations that it is to be used in a certain business in which the latter's husband is to be employed is guilty of fraud in contracting the liability,

(B) *Concealment of the Truth.* Under certain circumstances, the omission of the debtor to disclose material facts may, of itself, constitute a fraud for which he may be arrested[77]— as where he concealed the fact that he was insolvent when contracting a debt or incurring a liability[78] which he did not intend to pay,[79] or could not reasonably expect to pay.[80]

(III) *By Seduction Under Promise to Marry.* It seems that one who seduces a female under promise of marriage may be arrested, in an action for breach of the promise, as having fraudulently incurred the obligation for which the action is brought.[81]

f. Misconduct or Neglect in Office or in Professional Employment. Misconduct or neglect in office[82] or in a professional employment is,[83] in some jurisdictions, a ground of civil arrest.

4. Waiver of Right — a. By Accord and Satisfaction With Debtor. When a creditor, with full knowledge of his debtor's fraud, enters into an agreement with

and is subject to arrest if the money is actually used for an entirely different purpose. Lovell *v.* Martin, 11 Abb. Pr. (N. Y.) 126.

When representation is a mere expression of opinion, as a statement that a check of a third person would be paid on presentation, an arrest is not authorized. Stewart *v.* Potter, 37 How. Pr. (N. Y.) 68.

77. Claflin *v.* Moore, 42 N. Y. Super. Ct. 262.

But an importer who pays less than the true amount of duty on his importations is not liable to arrest in an action to recover the residue, on the ground of having fraudulently contracted the debt as to such residue, since the fraud exists only as to the concealment and not as to the debt, money due the United States for duties on imports being a debt fully contracted immediately upon the importation of the goods. U. S. *v.* Wood, 28 Fed. Cas. No. 16,755*a*.

78. Anonymous, 67 N. Y. 598; Morrison *v.* Garner, 7 Abb. Pr. (N. Y.) 425; Dale *v.* Jacobs, 41 How. Pr. (N. Y.) 94, 10 Abb. Pr. N. S. (N. Y.) 382; Wright *v.* Slinger, 15 Wkly. Notes Cas. (Pa.) 256. *Compare* Bussing *v.* Thompson, 6 Duer (N. Y.) 696, where the concealment was held not fraudulent.

79. **Must be intention to defraud.**— It is not fraudulent *per se* for a person in embarrassed circumstances to buy goods, withholding from the seller information of the actual condition of his business affairs, but there must also exist an intention to cheat the seller, or at least to do an act the necessary result of which would be to cheat him. Morris *v.* Talcott, 96 N. Y. 100 [*reversing* 29 Hun (N. Y.) 426]; Harrisburg Pipe Bending Co. *v.* Welsh, 26 N. Y. App. Div. 515, 50 N. Y. Suppl. 299, 27 N. Y. Civ. Proc. 238.

80. Roebling *v.* Duncan, 8 Hun (N. Y.) 502, holding that, although a banker or trader who is in embarrassed circumstances is not compelled to disclose the fact of his embarrassment to persons dealing with him, yet, if he is at the time hopelessly insolvent, he is guilty of a fraud if, by virtue of his supposed solvency, he contracts an obligation which he cannot reasonably expect to pay.

81. Matter of Sheahan, 25 Mich. 145; Perry *v.* Orr, 35 N. J. L. 295; Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397. *Compare* Moore *v.* Mullen, 77 N. C. 327.

In New York, the statute authorizing the arrest of defendant in an action upon contract, express or implied, where he was guilty of a fraud in contracting or incurring the liability, expressly provides that it shall not apply to an action on a promise to marry. N. Y. Code Civ. Proc. § 549, subs. 4.

82. **Liability for act of subordinate.**— Where the register of the city of New York makes and certifies to an erroneous return to a written requisition for a search in his office, he is liable to arrest in an action to recover damages for such erroneous return, as being guilty of neglect in office within N. Y. Code Civ. Proc. § 549, even though he does not personally make the search or personally certify to the return. Van Schaick *v.* Sigel, 9 Daly (N. Y.) 383.

83. **Failure to account for money received as attorney.**— The receipt by defendant of money, as attorney for plaintiff, no part of which he has paid over, entitles plaintiff, as of course, to an order of arrest for misconduct in professional employment (Gross *v.* Graves, 2 Rob. (N. Y.) 707; Stage *v.* Stevens, 1 Den. (N. Y.) 267); and attorneys of other states are liable in New York to arrest in actions for money collected in their professional capacity (Yates *v.* Blodgett, 8 How. Pr. (N. Y.) 278).

Layman not liable.— Where A employed B, who was not an attorney and counselor at law, and did not hold himself out as such, to establish a claim against the United States and to receive payment for same, and B received the amount but refused to pay it over, and A brought an action against B therefor, it was held that such action was not "for misconduct or neglect in a professional employment" so as to be excepted from the operation of the Michigan statute abolishing imprisonment for debt. Bronson *v.* Newberry, 2 Dougl. (Mich.) 38, 39.

A real estate agency is not a professional employment within Mich. Comp. Laws, § 5734, authorizing arrest for a contract liability arising from misconduct or neglect in professional employment. Pennock *v.* Fuller, 41 Mich. 153, 2 N. W. 176, 32 Am. Rep. 148.

his debtor in the nature of an accord and satisfaction, he thereby waives his right to hold him to bail for the original fraud, in an action brought after the partial or total non-performance of the agreement.[84]

b. By Commencing Action by Summons. At common law, the commencement of an action by summons was a waiver of plaintiff's right to hold defendant to special bail.[85]

c. By Entering Rule of Reference. When a plaintiff enters a rule of reference under a compulsory arbitration act, he thereby waives his right to hold defendant to bail.[86]

d. By Express Stipulation. Plaintiff may also waive his right to hold defendant to bail by express stipulation.[87]

e. By Joinder of Arrestable and Non-Arrestable Causes. As an order of arrest must refer to the whole cause of action presented by the plaintiff's complaint, and not to a part of it only,[88] it has frequently been held that plaintiff waives his right to the provisional remedy of arrest by joining in his complaint a cause of action entitling him to the remedy with one not entitling him thereto,[89]

84. Fritts *v.* Slade, 9 Hun (N. Y.) 145; Merchants' Bank *v.* Dwight, 6 Duer (N. Y.) 659, 13 How. Pr. (N. Y.) 366; Martin *v.* Lynch, 14 Misc. (N. Y.) 47, 35 N. Y. Suppl. 135, 69 N. Y. St. 379; Alliance Ins. Co. *v.* Cleveland, 14 How. Pr. (N. Y.) 408.

The right was deemed to be waived where, prior to the bringing of the action, defendant accepted a confession of judgment from defendant, which was partially enforced by execution thereunder (Fields *v.* Bland, 81 N. Y. 239); where there was a settlement between the parties, plaintiff accepting defendant's notes and certain securities (Nelson *v.* Blanchfield, 54 Barb. (N. Y.) 630); where plaintiff received notes of third persons in settlement of defendant's account, and plaintiff had collected some of the notes and not offered to return the others (Trunninger *v.* Busch, 7 Daly (N. Y.) 124 [*distinguishing* Kelly *v.* Scripture, 9 Hun (N. Y.) 283; Dubois *v.* Thompson, 1 Daly (N. Y.) 309, 25 How. Pr. (N. Y.) 417; Shipman *v.* Shafer, 14 Abb. Pr. (N. Y.) 449]); and where plaintiff had accepted an acknowledgment of indebtedness for the amount and received interest thereon (Murphy *v.* Elder, 4 Wkly. Notes Cas. (Pa.) 212).

The right is not waived by acceptance of a partial performance of an agreement to compromise, as the agreement to accept a lesser amount than the original indebtedness was wholly executory, and was not an accord and satisfaction of the obligation (McDonough *v.* Dillingham, 43 Hun (N. Y.) 493); where plaintiff received payment for a part of the claim (Lambertson *v.* Van Boskerck, 4 Hun (N. Y.) 628); where plaintiff accepted the promissory note of his debtor for money received in a fiduciary capacity, which note was dishonored, and plaintiff was ready to return the note (Shipman *v.* Shafer, 14 Abb. Pr. (N. Y.) 449); where plaintiff accepted part payment, and notes for the residue, the notes being unpaid (Person *v.* Civer, 29 How. Pr. (N. Y.) 432 [*reversing* 28 How. Pr. (N. Y.) 139]); where plaintiff accepted bonds merely as security for his demand (Dubois *v.* Thompson, 1 Daly (N. Y.) 309, 25 How. Pr. (N. Y.) 417), or where the latter agreement was induced by defendant's fraud (Murphy *v.* Fernandez, 10 Bosw. (N. Y.) 665).

85. Thomas *v.* Mann, 4 Dana (Ky.) 452; Withers *v.* Curd, 7 J. J. Marsh. (Ky.) 253. See also Wheeler *v.* Frenche, 33 N. Y. Super. Ct. 63, holding that, where an action is commenced by a summons for a money demand on contract, an order of arrest will not be granted upon affidavits alleging a liability incurred under false representations, as it must be assumed that the complaint, when served, will be for an action *ex contractu*, as required by the summons, and not *ex delicto*, and that, if the complaint should happen to be for a cause *ex delicto*, it would, on motion, be set aside as being a departure from the summons.

Filing a declaration is no waiver of bail. Caton *v.* McCarty, 2 Dall. (Pa.) 141, 1 L. ed. 323.

86. Johnson *v.* McCoy, 1 Miles (Pa.) 89. See also Ruthven *v.* Ruthven, 5 U. C. Q. B. 279; Barry *v.* Eccles, 2 U. C. Q. B. 383, which cases hold that defendant is entitled to be discharged after a reference and an award for plaintiff.

87. McNair *v.* Lane, 2 Mo. 57.

88. Lambert *v.* Snow, 2 Hilt. (N. Y.) 501, 9 Abb. Pr. (N. Y.) 91, 7 How. Pr. (N. Y.) 517.

89. American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; Madge *v.* Puig, 71 N. Y. 608 [*reversing* 12 Hun (N. Y.) 15]; Bowen *v.* True, 53 N. Y. 640; Miller *v.* Scherder, 2 N. Y. 262; Knight *v.* Abell, 48 Hun (N. Y.) 605, 1 N. Y. Suppl. 288, 15 N. Y. St. 989, 15 N. Y. Civ. Proc. 137; Toffey *v.* Williams, 3 Hun (N. Y.) 217, 5 Thomps. & C. (N. Y.) 294; McGovern *v.* Payn, 32 Barb. (N. Y.) 83; Goodale *v.* Finn, 4 Thomps. & C. (N. Y.) 432; Mason *v.* Lambert, 3 Daly (N. Y.) 250; Lambert *v.* Snow, 2 Hilt. (N. Y.) 501, 9 Abb. Pr. (N. Y.) 91, 17 How. Pr. (N. Y.) 517; McDonald *v.* Convis, 13 N. Y. Suppl. 82, 36 N. Y. St. 544; Ely *v.* Steigler, 9 Abb. Pr. N. S. (N. Y.) 35; Pam *v.* Vilmar, 52 How. Pr. (N. Y.) 238; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 226; Brown *v.* Treat, 1 Hill

even though he afterward elects to proceed on the single cause entitling him to the remedy.[90]

f. By Procuring Attachment. Plaintiff is not precluded from procuring defendant's arrest in a civil action by reason of the fact that he has previously attached defendant's goods in another action for the same cause,[91] unless such attachment reached all of defendant's property,[92] or enough thereof to satisfy plaintiff's claim.[93]

D. Who May Be Arrested — 1. In General[94] — a. Corporation Officer. The president of a corporation may be arrested for an act, committed in his official capacity, for which a private individual may be arrested.[95]

b. Non-Residents. While, under some statutes, non-residents are expressly or impliedly exempted from arrest,[96] it has been held that a non-resident may be arrested upon a ground authorized by the *lex fori*, even though he cannot be

(N. Y.) 225. See 4 Cent. Dig. tit. "Arrest," § 3.

Claim and delivery.— In an action for the recovery of specific personal property, the action of plaintiffs in taking proceedings for the claim and delivery, and obtaining thereby possession of a portion of the goods, does not amount to a waiver of the right to issue process to arrest defendants, on the ground that the order of arrest must be applicable to the entire cause of action, and not to a part only, as the delivery of the property under the proceedings of claim and delivery is not decisive of plaintiffs' right, and if they succeed they cannot recover a larger amount than defendants are really bound to pay. Tracy *v.* Veeder, 35 How. Pr. (N. Y.) 209.

Claiming interest.— In an action for the recovery of money collected by a person acting in a fiduciary capacity, plaintiff does not waive his right to hold defendant to bail by claiming interest. People *v.* Clark, 45 How. Pr. (N. Y.) 12.

90. Woods *v.* Armstrong, 29 Misc. (N. Y.) 660, 62 N. Y. Suppl. 759.

91. *Kansas.*— Chapman *v.* H. D. Lee Mercantile Co., 7 Kan. App. 254, 53 Pac. 778.

Louisiana.— Ferguson *v.* Foster, 7 Mart. N. S. (La.) 521.

Michigan.— Johnson *v.* Maxon, 23 Mich. 129.

New York.— Lithaner *v.* Turner, Code Rep. N. S. (N. Y.) 210. See also Rockford, etc., R. Co. *v.* Boody, 56 N. Y. 456, holding that an order of arrest and a warrant of attachment are not so inconsistent in their nature that the allowance of both in the same action will render both void.

Pennsylvania.— Grieb *v.* Kuttner, 135 Pa. St. 281, 26 Wkly. Notes Cas. (Pa.) 323, 19 Atl. 1040.

Vermont.— *In re* Hosley, 22 Vt. 363.

Contra, Peltier *v.* Washington Banking Co., 14 N. J. L. 391.

See 4 Cent. Dig. tit. "Arrest," § 2.

Attachment and arrest on same writ.— Plaintiff cannot have defendant's property attached and his body arrested on the same writ (Trafton *v.* Gardiner, 39 Me. 501; Almy *v.* Wolcott, 13 Mass. 73; Cleft *v.* Hosford, 12 Vt. 296); but, where a writ is against two defendants, one is not exempt from arrest thereunder because his co-defendant's property has been attached (Connor *v.* Madden, 57 Me. 410).

Mechanic's lien.— A creditor suing under the Mechanics' Lien Act of 1875, for a personal recovery against his debtor, is entitled to the debtor's arrest for his fraudulently contracting the debt, as well as the other remedies under N. Y. Code Civ. Proc. § 550, subs. 2. Burbridge *v.* Hart, 54 How. Pr. (N. Y.) 455.

92. Fenstman *v.* Ury, 2 Pearson (Pa.) 357.

93. Chapman *v.* H. D. Lee Mercantile Co., 7 Kan. App. 254, 53 Pac. 778; Ferguson *v.* Foster, 7 Mart. N. S. (La.) 521; People *v.* Tweed, 5 Hun (N. Y.) 382 [*affirmed* in 63 N. Y. 202]. But the fact that, when proceedings under the Michigan Non-Imprisonment Act were commenced, a writ of attachment in favor of the creditor had been levied upon sufficient of the chattels of the debtor to satisfy the debt did not render such proceedings void (Johnson *v.* Maxon, 23 Mich. 129); and it is not a sufficient reason for ordering the discharge, on habeas corpus, of a debtor arrested on mesne process that the creditor had previously commenced another suit against him for the same cause of action and had therein attached his property to the value of more than twice the amount of the debt (*In re* Hosley, 22 Vt. 363).

94. Customs employees.—While public policy forbids the arrest under civil process of an officer of the United States while in the performance of his duty as such, a customs officer is not exempt from arrest, under civil process issued by a state court, by the provisions of U. S. Rev. Stat. (1872), § 5447, prohibiting any person from forcibly assaulting, resisting, opposing, preventing, impeding, or interfering with any officer of the customs, when the arrest was made without such intent and at a time when the officer was not engaged in the performance of his duty. *Ex p.* Murray, 35 Fed. 496.

95. Phillips *v.* Wortendyke, 31 Hun (N. Y.) 192.

96. See *infra*, II, D, 2, a, (VII).

arrested upon such ground in the jurisdiction where he resides[97] or where the contract was made.[98]

e. Partners. One partner who has committed an act furnishing a ground of arrest may be arrested therefor,[99] but his copartners, who neither knew of nor ratified such act, may not.[1] While the individuals composing a partnership may be arrested, the firm may not.[2]

d. Persons Jointly Liable. It has been held that where one of two persons, jointly liable, is subject to arrest on the ground that he is about to leave the state, leaving no property, a capias ad respondendum may be issued against both.[3]

e. Principal For Acts of Agent. Even though a principal is civilly liable for the fraud of his agent, he may not be arrested therefor unless he personally participated in the commission of the fraud, or knowingly ratified it.[4]

2. Persons Privileged and Exempt — a. In General — (1) *Electors.* In some jurisdictions electors are exempt from arrest while in attendance upon, going to, or returning from, elections.[5]

97. Johnson *v.* Whitman, 10 Abb. Pr. N. S. (N. Y.) 111; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 226.

Person acting in fiduciary capacity.— The fact that defendant is a non-resident of the state gives him no immunity from arrest under a statute authorizing the arrest of any person acting in a fiduciary capacity who misapplies the property in his hands. Castree *v.* Kirby, 2 N. Y. Civ. Proc. 334; Powers *v.* Davenport, 101 N. C. 286, 7 S. E. 747.

98. Smith *v.* Spinolla, 2 Johns. (N. Y.) 198; Milne *v.* Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466. *Contra*, Webster *v.* Massey, 2 Wash. (U. S.) 157, 29 Fed. Cas. No. 17,336; Camfranque *v.* Burnell, 1 Wash. (U. S.) 340, 4 Fed. Cas. No. 2,342.

99. Witmark *v.* Herman, 44 N. Y. Super. Ct. 144; Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106; Gregg *v.* Hilsen, 12 Phila. (Pa.) 348, 34 Leg. Int. (Pa.) 20. *Compare* Bard *v.* Naylon, 33 Wkly. Notes Cas. (Pa.) 251, wherein it was held that a partner who was arrested for false representations to plaintiff of the financial condition of his firm, whereby plaintiff was induced to sell goods on credit, should be discharged on common bail, the decision seeming to be based on the ground that such representations did not constitute a deceit upon which a capias might issue.

Selection of one partner mainly responsible.— Though plaintiff's action is against a partnership, he may select for arrest a single member of the firm who is mainly responsible for the acts constituting the ground of arrest. National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16. *Compare* Schwenk *v.* Coffin, 2 N. L. J. 209, holding that, in an action of debt in a district court against partners, a capias cannot be issued against one and a summons against the others, as the statute authorizing such procedure does not apply to the district courts.

1. Hitchcock *v.* Peterson, 14 Hun (N. Y.) 389; Bacon *v.* Kendall, 49 N. Y. Super. Ct. 123; National Bank *v.* Temple, 2 Sweeny (N. Y.) 344, 39 How. Pr. (N. Y.) 432; Scott *v.* Reed, 8 N. Y. Civ. Proc. 269; Hanover Co. *v.* Sheldon, 9 Abb. Pr. (N. Y.) 240; Wetmore *v.* Earle, 9 Abb. Pr. (N. Y.) 58 note; Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106; McNeely *v.* Haynes, 76 N. C. 122; Bassett *v.* Davis, 1 Pa. L. J. Rep. 310, 2 Pa. L. J. 247. *Contra*, Townsend *v.* Bogart, 11 Abb. Pr. (N. Y.) 355; Anonymous, 6 Abb. Pr. (N. Y.) 319 note; Sherman *v.* Smith, 42 How. Pr. (N. Y.) 198; Coman *v.* Reese, 21 How. Pr. (N. Y.) 114. See also Matter of Benson, 60 How. Pr. (N. Y.) 314, holding that although each partner is liable to arrest for the frauds committed by his copartners, even if wholly ignorant of them, yet, upon application by a partner for a discharge under the revised statutes, it being the duty of an opposing creditor to show that the proceeding upon the part of applicant is not just and fair, personal participation in the fraud by applicant is required to be proved in order to justify the court in denying such discharge. See 4 Cent. Dig. tit. "Arrest," § 17.

Sufficient showing of participation.— In an action for goods sold defendants, who were partners, an affidavit for arrest, alleging that defendants were insolvent when each item of plaintiff's account accrued; that each partner ordered some of the items; that defendants knew they were insolvent and obtained a credit with plaintiffs with intent to cheat and defraud them, makes a sufficient showing of fraud on the part of both partners and authorizes the arrest of both. Hitchcock *v.* Peterson, 14 Hun (N. Y.) 389.

Constructive knowledge.— A partner who has only constructive knowledge of a firm trust is subject to arrest for joining in a firm assignment by which the trust property is conveyed to the assignee for other creditors. Durham Fertilizer Co. *v.* Little, 118 N. C. 808, 24 S. E. 664.

2. Faulkner *v.* Whitaker, 15 N. J. L. 438.

3. *Ex p.* Overick, 3 Whart. (Pa.) 175.

4. Hathaway *v.* Johnson, 55 N. Y. 93, 14 Am. Rep. 186; Ellson *v.* Hance, 44 N. Y. App. Div. 296, 60 N. Y. Suppl. 705; Claflin *v.* Frank, 8 Abb. Pr. (N. Y.) 412; Tracy *v.* Veeder, 35 How. Pr. (N. Y.) 209.

5. Coxson *v.* Doland, 2 Daly (N. Y.) 66.

(II) *Females.* Statutes in different jurisdictions variously exempt females from arrest in all civil actions,[6] in certain actions,[7] or except for certain specified causes.[8]

(III) *Freeholders.* Some statutes exempt resident freeholders[9] from arrest in civil actions,[10] provided their land is unencumbered,[11] or, if encumbered, is of sufficient value to pay the encumbrances and satisfy the debt or damages demanded.[12]

(IV) *Judges.* As a judge is always supposed to be attending court, he is generally exempt from arrest under mesne civil process during his term of office.[13]

What constitutes attendance.— Where an elector on the day of electors' meeting, having given in his vote, retired to a house in the neighborhood while the proper officers were counting the votes, it was held that he was attending to the business of the election, and hence exempt from arrest under civil process (Swift *v.* Chamberlain, 3 Conn. 537); but the privilege does not extend to an elector, preparing to go, if he has not actually proceeded on the way (Hobbs *v.* Getchell, 8 Me. 187, 23 Am. Dec. 497).

6. People *v.* Bartow, 27 Mich. 68; Blight *v.* Meeker, 7 N. J. L. 97; Kirkendall *v.* Stevens, 4 Kulp (Pa.) 473; Kent Iron, etc., Co. *v.* Pearson, 3 Pa. Co. Ct. 349. But in South Carolina, the act of 1824, exempting females from arrest on writs of capias ad satisfaciendum, did not exempt them from arrest on bail writs. Desprang *v.* Davis, 3 McCord (S. C.) 16.

7. O'Boyle *v.* Brown, Wright (Ohio) 465, actions on contracts.

8. Thus, under N. Y. Code Civ. Proc. § 553, providing that "A woman cannot be arrested, . . . except in a case where the order can be granted only by the court; or where it appears, that the action is to recover damages for a wilful injury to person, character, or property," it has been held that a female is liable to arrest in a civil action upon a showing that she knowingly bought stolen property (People *v.* Davidson, 3 N. Y. Civ. Proc. 389 note; Muser *v.* Miller, 3 N. Y. Civ. Proc. 388); where she induced plaintiff, by false and fraudulent palming off of worthless securities, to lend her money (Eypert *v.* Bolenius, 2 Abb. N. Cas. (N. Y.) 193); for converting to her use stock certificates which she has aided another to take (Northern R. Co., *v.* Carpentier, 3 Abb. Pr. (N. Y.) 259, 13 How. Pr. (N. Y.) 222); or for concealing property of plaintiff's which she has wilfully detained (Duncan *v.* Katen, 6 Hun (N. Y.) 1 [*affirmed* in 64 N. Y. 625]; Starr *v.* Kent, 2 Code Rep. (N. Y.) 30. *Contra*, Tracy *v.* Leland, 2 Sandf. (N. Y.) 729, 3 Code Rep. (N. Y.) 47 [*disapproved* in Duncan *v.* Katen, 6 Hun (N. Y.) 1]); but not in an action against her for breach of promise to marry (Siefke *v.* Tappey, 3 Code Rep. (N. Y.) 23, or on the ground that she fraudulently contracted the debt which is the basis of the action (Wheeler *v.* Hartwell, 4 Bosw. (N. Y.) 684).

9. **Who is resident freeholder.**— A defendant who went to Georgia on business and bought property there, but had real estate in Pennsylvania upon which his wife and children resided, and who had expressed an intention of selling his property in Georgia and returning, was held to be a resident freeholder of Pennsylvania, entitled to exemption from civil arrest. Penman *v.* Wayne, 1 Dall. (Pa.) 348, 1 L. ed. 169.

10. Hudson *v.* Howell, 1 Dall. (Pa.) 310, 1 L. ed. 151; Henry *v.* Flanagan, 1 Kulp (Pa.) 352; Ingersoll *v.* Campbell, 10 Wkly. Notes Cas. (Pa.) 553; Buckman *v.* Jones, 3 Wkly. Notes Cas. (Pa.) 302; Lynd *v.* Biggs, 1 Pa. L. J. Rep. 18, 1 Pa. L. J. 47. See also Barnard *v.* Field, 1 Dall. (Pa.) 348, 1 L. ed. 170, holding that a capias ad respondendum cannot issue against a freeholder even though plaintiff directs the sheriff to accept defendant's appearance, as defendant would have to be arrested before his appearance could be accepted, and the Act of Assembly expressly directs that the process issued against a freeholder shall be a summons.

Under the former practice in New York, a householder and freeholder, residing in the county, could not be held to bail in an action of tort. Burton *v.* Temple, 1 How. Pr. (N. Y.) 8.

A freeholder does not lose his exemption because the value of his freehold, if unencumbered, is less than plaintiff's demand (Fitler *v.* La Breure, 1 Serg. & R. (Pa.) 363), nor because he is sued in conjunction with a person not exempt (McQuigan *v.* McCarthy, 6 Wkly. Notes Cas. (Pa.) 253; Buckman *v.* Jones, 3 Wkly. Notes Cas. (Pa.) 302. *Contra*, Fife *v.* Keating, 2 Browne (Pa.) 135; Veale *v.* Hoag, 13 Wkly. Notes Cas. (Pa.) 193, 16 Phila. (Pa.) 73, 40 Leg. Int. (Pa.) 170).

The exemption is forfeited when defendant freeholder neglects all notice to put in special bail, even in an action where bail is not demandable as of course (Jack *v.* Shoemaker, 3 Binn. (Pa.) 280), or when judgment against him is obtained before a justice of the peace (Quesnel *v.* Mussi, 1 Dall. (Pa.) 436, 1 L. ed. 212).

11. Hill *v.* Ramsey, 2 Miles (Pa.) 342; Logan *v.* O'Neill, 34 Wkly. Notes Cas. (Pa.) 281; Tesone *v.* Longo, 18 Wkly. Notes Cas. (Pa.) 64; Foy *v.* Simpson, 3 Am. L. J. 522.

12. Logan *v.* O'Neill, 34 Wkly. Notes Cas. (Pa.) 281.

13. Adams *v.* Ackland, 7 U. C. Q. B. 211; 3 Bl. Comm. 288. *Compare* Gratz *v.* Wilson, 6 N. J. L. 419 (holding that a judge of the

He is not exempt, however, in a jurisdiction where the rule has been changed by statute.[14]

(v) *Jurors.* Jurors are protected from arrest while serving as such, and while going to, and returning from, the place of service.[15]

(vi) *Legislators.* Members of congress[16] and of the British parliament[17] are privileged from arrest, except for treason, felony, or breach of the peace, during the sessions of their respective houses, and while going to and returning from such sessions;[18] and the same privilege is enjoyed by the members of nearly, if not all, of the state and territorial legislative bodies.[19]

(vii) *Non-Residents* — (a) *Generally.* While, in some jurisdictions, non-residents may be arrested in civil actions,[20] in others statutes authorizing mesne arrests in civil actions expressly exempt them,[21] and, from the nature

United States supreme court, who has been arrested on a capias ad respondendum in a case of which the federal court has no jurisdiction, is not entitled to be discharged on common bail); Matter of Livingston, 8 Johns. (N. Y.) 351 (holding that a judge is not liable to arrest under process issuing out of his own court, but must be proceeded against by bill); Com. *v.* Ronald, 4 Call (Va.) 97 (holding that judges are exempt from arrest in civil suits during their attendance at court).

14. Secor *v.* Bell, 18 Johns. (N. Y.) 52.

15. Brookes *v.* Chesley, 4 Harr. & M. (Md.) 295; Com. *v.* Huggeford, 9 Pick. (Mass.) 257; McNeil's Case, 3 Mass. 288; Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421; 3 Bl. Comm. 289.

Arrest while on private business during adjournment.— A person who, having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment. Mittleberger *v.* Clark, 5 U. C. Q. B. O. S. 718.

16. U. S. Const. art. 1, § 6.

Delegates from territories.— The privilege from arrest guaranteed by the constitution to members of congress extends as well to delegates from the territories as to senators and representatives from the states, as such delegates are clothed with all of the powers, rights, and privileges of members from the states, except the power to vote. Doty *v.* Strong, 1 Pinn. (Wis.) 84.

Member denied admission.— Although it is eventually decided by congress that a person alleged to be elected is not entitled to a seat, he is protected from arrest until he reaches home, provided he returns as soon as possible after such decision. Dunton *v.* Halstead, 2 Pa. L. J. Rep. 450, 4 Pa. L. J. 237, holding, further, that sickness or want of funds is a valid excuse for a person's failure to return home immediately after the house of representatives has decided that he is not entitled to a seat therein.

17. **By the privilege of peerage,** peers of the realm are at all times privileged from arrest; and, by privilege of parliament, members of the house of commons are privileged, during the sessions of the house, for forty days after prorogation, and for forty days before the next appointed meeting. 1 Bl. Comm. 166; 3 Bl. Comm. 289.

In **New Brunswick** the privilege of members of the house of assembly from arrest is during the session and for forty days before convening and after dissolution. Rennie *v.* Rankin, 6 N. Brunsw. 620.

18. **Going and returning.**— A member of congress is only privileged while at congress, or while actually going to or returning therefrom. Lewis *v.* Elmendorf, 2 Johns. Cas. (N. Y.) 222. The privilege does not extend for forty days before and after a session, but is limited to a reasonable time for going and returning (Hoppin *v.* Jenckes, 8 R. I. 453, 5 Am. Rep. 597), though it is not forfeited by a slight deviation from the route which is most direct (Miner *v.* Markham, 28 Fed. 387).

19. Coxson *v.* Doland, 2 Daly (N. Y.) 66; Gyere *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762.

Arrest within time-limit after return home. — A legislator, who is entitled to exemption from arrest for fourteen days while returning home, will not be discharged if arrested within the fourteen days, but after his return home. Colvin *v.* Morgan, 1 Johns. Cas. (N. Y.) 415.

A member of the house who has been expelled by that body is no longer protected. Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768.

20. See *supra*, II, D, 1, b.

21. Hand *v.* Taliaferro, 1 La. Ann. 26 (holding that the Louisiana act of March 28, 1840, section 9, which declares that no citizen of another state shall be arrested at the suit of a non-resident creditor unless it is made to appear that the debtor has absconded from his residence, authorizes an arrest only where defendant has absconded from his last place of residence, and that a debtor alleged to have absconded from a state in which he resided at the time the debt was contracted, but who is shown to have since resided for several years in another state, cannot be arrested); Elgie *v.* Butt, 26 Ont. App. 13; Smith *v.* Smith, 9 Ont. Pr. 511 (both cases holding that a foreigner who contracts a debt in the country of his domicile, and then goes to Ontario to stay temporarily, cannot be arrested there in an action on such debt, when, in good faith, he is about to leave the

of their provisions, other statutes have been held to be inapplicable to non-residents.[22]

(B) *Decoyed Within Jurisdiction.* A defendant decoyed within the jurisdiction of a court by the trick, device, fraud, or false representations of plaintiff, cannot be lawfully arrested on mesne civil process.[23] This rule applies in a case

province for the purpose of returning home); Frear *v.* Ferguson, 2 Chamb. (U. C.) 144 (holding that it is contrary to the policy of the Ontario laws of arrest to permit one foreigner to follow another into that province and arrest him for a debt contracted abroad). *Compare* Palmer *v.* Rodgers, 6 U. C. L. J. 188, holding that the mere fact that both plaintiff and defendant are foreigners does not of itself warrant the setting aside of an arrest.

Rule limited to citizens of other states of Union.—The Louisiana act of March 18, 1847, amending the act of March 28, 1840, section 9, exempting from arrest in Louisiana (except in certain cases) a "citizen of another state," applies only to citizens of other states of the Union, and not to citizens of foreign countries. The evil intended to be remedied, and the popular acceptation of the words "citizens of another state," show such to be the correct interpretation of the statute. Block *v.* Bannerman, 10 La. Ann. 1; New Orleans Canal, etc., Co. *v.* Schroeder, 7 La. Ann. 615; Absolom *v.* Callum, 6 La. Ann. 536.

The rule is limited to transient non-residents, and where the debtor has absconded from his own country to Ontario and does not intend to return, or intends to go to some other country, his creditors may follow and arrest him in Ontario. Butler *v.* Rosenfeldt, 8 Ont. Pr. 175. See also Blumenthal *v.* Solomon, 2 Ont. Pr. 51 (where defendant applied to be discharged from arrest for a debt contracted abroad, upon his affidavit that both plaintiff and he were foreigners; that he had come to the province very lately and had neither residence nor home in the province, but it was not shown under what circumstances or for what purpose he had come, whether as a transient visitor or with the intention of becoming a resident, and the application was refused); Brett *v.* Smith, 1 Ont. Pr. 309 (where plaintiff, a merchant living in Toronto, arrested defendant, lately from England, on a bill executed by him there, and the arrest was moved against on the ground that defendant was in Ontario for a temporary purpose only, and on business, but plaintiff gave reasons for believing that defendant had absconded from England to avoid proceedings there on the same bill, and the judge refused to vacate the arrest). Nor can defendant rely on a change of residence to a foreign country, so as to avoid the law of arrest to which he was subject in Ontario at the time he incurred the debt upon which the action was brought, when that change of residence was effected by a fraudulent flight to avoid arrest. Kersterman *v.* McLellan, 10 Ont. Pr. 122.

22. Thus, a statute authorizing the arrest of a debtor on the ground that he is about to leave the state to avoid the payment of his debts, has been held to apply only to a citizen of the state who is intending to remove therefrom with the intent alleged, and not to a debtor, residing in another state, returning, or intending to return, home. Stevenson *v.* Smith, 28 N. H. 12; McKay *v.* Ray, 63 N. C. 46. *Contra*, Tallamon *v.* Cardenas, 14 La. Ann. 509; Rutland Bank *v.* Barker, 27 Vt. 293; Vergennes Bank *v.* Barker, 27 Vt. 243.

23. *Connecticut.*— Hill *v.* Goodrich, 32 Conn. 588.

Illinois.—Wanzer *v.* Bright, 52 Ill. 35.

New York.— Smith *v.* Meyers, 1 Thomps. & C. (N. Y.) 665; Goupil *v.* Simonson, 3 Abb. Pr. (N. Y.) 474.

Vermont.— Steele *v.* Bates, 2 Aik. (Vt.) 338, 16 Am. Dec. 720.

England.— Stein *v.* Valkenhuysen, E. B. & E. 65, 4 Jur. N. S. 411, 27 L. J. Q. B. 236, 96 E. C. L. 65.

See 4 Cent. Dig. tit. "Arrest," § 30.

Fraudulent representations.— Where defendant, a citizen of another state and president of an insolvent corporation, notified plaintiffs, residents of New York city and creditors of the corporation, that a meeting of the corporation's creditors would be held on a certain day, and plaintiffs replied by asking defendant to call on them before he went to the meeting, it was held that defendant, while in the city in response to such letter, was exempt from arrest at plaintiffs' instance, even though he did not arrive until after the date originally fixed for the meeting, and though plaintiffs swear that they had no intetion of arresting him until after they had conversed with him, when they found his statements very unsatisfactory. Higgins *v.* Dewey, 14 N. Y. Suppl. 894, 39 N. Y. St. 94, 27 Abb. N. Cas. (N. Y.) 81 [*affirming* 13 N. Y. Suppl. 570, 34 N. Y. St. 692].

Use of force.— Where a private detective, without a warrant, forcibly seized defendant for the purpose of detaining him until the order of arrest could be served on him by the proper officer, it was held that, though the order was subsequently served while defendant was detained on a charge of assault committed in breaking away from the detective, there was an abuse of process for which the order should be set aside. Harland *v.* Howard, 57 Hun (N. Y.) 113, 10 N. Y. Suppl. 449, 32 N. Y. St. 871, 872. But an immigrant compelled to land first at Castle Garden, who is served before landing with a New York order of arrest, cannot claim exemption on the ground that he was forcibly brought within the jurisdiction of the court. Ziporkes *v.* Chmelniker, 15 N. Y. St. 215.

where plaintiff has employed either civil[24] or criminal[25] process, merely and solely for the purpose of detaining or bringing defendant within the jurisdiction of the court.

(VIII) *PEACE-OFFICERS.* Sheriffs and other peace-officers are exempt from arrest while engaged in the actual performance of their duty,[26] but not at other times.[27]

(IX) *SOLDIERS.* Private soldiers and non-commissioned officers in the actual service of the United States[28] are exempt from arrest,[29] but commissioned officers are not.[30]

24. Thus, where defendant, who is subject to an arrest under an attachment, cannot be found, and his creditor opposes his application for a discharge under the Insolvent Act, and obtains an order for his personal examination, for the express purpose of compelling him to appear in order that he may arrest him, defendant, on appearing, will be exempt from arrest. Snelling *v.* Watrous, 2 Paige (N. Y.) 314.

25. Benninghoff *v.* Oswell, 37 How. Pr. (N. Y.) 235; Addicks *v.* Bush, 1 Phila. (Pa.) 19, 7 Leg. Int. (Pa.) 7, 1 Troub. & H. Pr. (Pa.) 253; Wells *v.* Gurney, 8 B. & C. 769, 15 E. C. L. 378; Glennie *v.* Ross, 3 Ont. Pr. 281.

Extradition.— A defendant who has been brought within the jurisdiction of the court by means of extradition proceedings, had solely for the purpose of holding him to bail in a civil action, and not for trial on the criminal charge, is not liable to arrest in the civil action (Lagrave's Case, 14 Abb. Pr. N. S. (N. Y.) 333 note, 45 How. Pr. (N. Y.) 301; Underwood *v.* Fetter, 6 N. Y. Leg. Obs. 66); but he is not exempt from civil arrest when the extradition proceedings were had in good faith and for the purpose of bringing him to trial on a criminal charge (Nichols *v.* Goodheart, 5 Ill. App. 574; Browning *v.* Abrams, 51 How. Pr. (N. Y.) 172; Williams *v.* Bacon, 10 Wend. (N. Y.) 636. *Contra*, Bacharach *v.* Lagrave, 1 Hun (N. Y.) 689 [*reversing* 15 Abb. Pr. N. S. (N. Y.) 272, 47 How. Pr. (N. Y.) 73]).

26. Welby *v.* Beard, Taylor (U. C.) 304; 3 Bl. Comm. 288. See also Scott *v.* Clark, Trin. T. (1831) 181, holding that sheriffs, being required by a rule of court to attend court every term, are privileged from arrest when they come to Fredericton during term, and the particular cause of their so coming will not be inquired into.

Deputy sheriffs are not exempt from arrest under civil process under a statute which names sheriffs only. George *v.* Fellows, 58 N. H. 494.

Policemen.— The exemption from arrest of policemen "whilst actually on duty," under the Metropolitan Police Act, section 34, means the exemption at all times of the superintendent of police and the captains, "since they are always on duty;" but patrolmen must be actually on duty in order to be exempt. Hart *v.* Kennedy, 14 Abb. Pr. (N. Y.) 432, 23 How. Pr. (N. Y.) 417.

United States marshals are not exempt from personal arrest and imprisonment in civil cases. Wilcox *v.* Buckingham, 2 Day (Conn.) 304; Parsons *v.* Stanton, 2 Day (Conn.) 300.

27. Coxson *v.* Doland, 2 Daly (N. Y.) 66; Hill *v.* Lott, 10 How. Pr. (N. Y.) 46; Morgan *v.* Eckart, 1 Dall. (Pa.) 295, 1 L. ed. 144. *Contra*, Avery *v.* Wetmore, Kirby (Conn.) 48, holding that the privilege of a sheriff exists during his continuance in office.

28. Militia.— By the Militia Act of 1794, no one can be served with any process, except for treason, felony, or breach of the peace, while at, or going to or from any muster. Gregg *v.* Summers. 1 McCord (S. C.) 461.

Effect of muster into service of United States.— Where the statute of a state exempts men enlisted in the military forces of the state from arrest on civil process while under military duty, a member of the state militia does not lose the privilege of the exemption by the fact that he is mustered into the service of the United States. People *v.* Campbell, 40 N. Y. 133.

29. *Ex p.* Harlan, 39 Ala. 563; Coxson *v.* Doland, 2 Daly (N. Y.) 66; Moses *v.* Mellett, 3 Strobh. (S. C.) 210. See also Wright *v.* Quinn, 1 Yeates (Pa.) 163, holding that the Pennsylvania act of Jan. 2, 1778, declaring that no soldier shall be arrested for a debt under fifty dollars, is in full force, although the war with Great Britain has ceased.

Effect of enlistment on previous arrest.— The act of congress of Dec. 12, 1812, providing that no soldier should be arrested on civil process after enlistment, did not relieve by enlistment a debtor already under arrest on capias ad respondendum. *Ex p.* Field, 5 Am. L. J. 474.

When preëxisting debt was assigned after enlistment.— Under the act of congress of March 16, 1812, section 23, declaring that no private, etc., shall be arrested for debts contracted after enlistment, a private cannot be arrested at the suit of the assignee of several claims against him, if the assignment was made subsequent to enlistment, even though the debts were contracted prior to enlistment, as the cause of action accrued to the assignee after enlistment. Matter of Roode, 2 Wheel. Crim. (N. Y.) 541.

30. *Ex p.* Harlan, 39 Ala. 563; White *v.* Lowther, 3 Ga. 397 (holding that a lieutenant in a company raised under the act of congress of Feb. 11, 1847, is not exempt from arrest on civil process under the Georgia statute of 1818, exempting the militia from

(x) *Suitors*—(A) *In Civil Causes.* Parties to civil actions, while in actual attendance upon the courts,[31] and while going to and returning[32] from the courts, are exempt from arrest under civil process,[33] even though they have no writs of

arrest when in actual service, as he is in the service of the United States and not that of Georgia); Moses *v.* Mellett, 3 Strobh. (S. C.) 210. See also Larchin *v.* Willan, 7 Dowl. P. C. 11, 1 H. & H. 332, 2 Jur. 970, 8 L. J. Exch. 19, 4 M. & W. 351, holding that it is not a sufficient excuse to prevent the granting of a capias that defendant is an officer in the army and is going abroad to join his regiment.

In the militia, however, the fact that defendant was arrested on civil process while discharging his duty as an officer of the militia at a muster may be successfully pleaded in abatement of the writ (Murphy *v.* McCombs, 33 N. C. 274); but the lieutenant of a county is not privileged from arrest while soliciting commissions for officers of the militia before the executive council, where the council has not required his attendance (Morgan *v.* Eckart, 1 Dall. (Pa.) 295, 1 L. ed. 144), nor can a militia officer, when out of the state, claim exemption from arrest under civil process upon the ground that he is on his way, under the orders of his commanding officer, to perform certain duties within the state, since the moment he leaves the state he is without the jurisdiction of his commanding officer (Manchester *v.* Manchester, 6 R. I. 127).

34. **What constitutes attendance.**—A person who comes from a distant state to defend a suit for divorce, the hearing of which is passed from day to day without any new assignment, on account of the wife's illness, is "in attendance" on the court (Ellis *v.* Degarmo, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560), as is a party while he is at his lodgings during the continuance of the court at which the trial will take place (Hurst's Case, 4 Dall. (U. S.) 387, 1 L. ed. 878, 1 Wash. (U. S.) 186, 12 Fed. Cas. No. 6,924); but a suitor who finds it unnecessary to attend personally to his suit, and remains at home and confides it to his attorney, is not privileged from arrest (Gray *v.* Ayres, Tapp. (Ohio) 164), nor is one who is within the jurisdiction of a court, which is not in session, for the completion of a contract of sale (Monroe *v.* St. Clair Cir. Judge, 125 Mich. 283, 84 N. W. 305).

32. **A slight deviation or loitering in going or returning will not cause one to forfeit his exemption,** as where a suitor whose cause is removed to another court stops to announce the removal to opposing counsel (Salhinger *v.* Adler, 2 Rob. (N. Y.) 704); but the exemption will be forfeited where the suitor stops for the purpose of attending the funeral of a son (Chaffee *v.* Jones, 19 Pick. (Mass.) 260).

33. *Georgia.*— Henegar *v.* Spangler, 29 Ga. 217, holding that non-resident suitors are exempt.

Indiana.— Crocker *v.* Duncan, 6 Blackf. (Ind.) 278.

Massachusetts.— Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; McNeil's Case, 3 Mass. 288.

Michigan.— People *v.* Judge Detroit Super. Ct., 40 Mich. 729.

New Jersey.— Harris *v.* Grantham, 1 N. J. L. 165.

New York.— Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Schlesinger *v.* Foxwell, 1 N. Y. City Ct. 461.

North Carolina.— Hammerskold *v.* Rose, 52 N. C. 629.

Ohio.— Gray *v.* Ayres, Tapp. (Ohio) 164.

Pennsylvania.— U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Caldwell *v.* Dixey, 3 Pa. Co. Ct. 532.

Rhode Island.— Ellis *v.* Degarmo, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560.

South Carolina.— Sadler *v.* Ray, 5 Rich. (S. C.) 523 (wherein defendant was arrested and summoned to appear at Chester, and, while on his way there, was arrested on the same cause of action and summoned to appear at York, the first suit having been discontinued without his knowledge, and it was held that when last arrested he was privileged from arrest); Hunter *v.* Cleveland, 1 Brev. (S. C.) 167.

Vermont.— Scott *v.* Curtis, 27 Vt. 762.

Virginia.— Com. *v.* Ronald, 4 Call (Va.) 97; Richards *v.* Goodson, 2 Va. Cas. 381.

United States.— Larned *v.* Griffin, 12 Fed. 590, 21 Am. L. Reg. 672; McFerran *v.* Wherry, 5 Cranch C. C. (U. S.) 677, 16 Fed. Cas. No. 8,792.

England.— 3 Bl. Comm. 289.

Canada.— Baldwin *v.* Slicer, 4 U. C. Q. B. O. S. 131.

See 4 Cent. Dig. tit. "Arrest," § 22.

Person under bail in another civil action.— A person who is about to attend a case in court in which he has been arrested is privileged from arrest in another suit which he is then attending. Steinmetz *v.* Wade, 3 Wkly. Notes Cas. (Pa.) 187.

When surrendered by bail in another action.—When a defendant is in actual custody, having been surrendered by his bail in one suit while in town for the purpose of attending a second suit against him, he cannot, in a third suit, plead exemption from arrest as a suitor in the second suit, as he was lawfully in custody on the surrender of his bail, and, of course, could not attend the second suit even if the trial was going on. Davis *v.* Cummins, 3 Yeates (Pa.) 387. See also Sun Mut. Ins. Co. *v.* McDougal, 23 Fed. Cas. No. 13,618, holding that a person arrested in a civil suit, and going to another state in virtual custody of his bail, may be there ar-

protection.[34] This privilege extends to all proceedings judicial in their nature, whether taking place in court or not.[35]

(B) *In Criminal Causes.* It has been generally held that a person is not privileged from arrest while in custody under criminal process,[36] or while attending or returning from his trial on a criminal charge.[37]

(XI) *Witnesses.* A witness attending in good faith any legal tribunal in obedience to a subpœna, or other process or order compelling his attendance, is exempt from civil arrest while going, attending, and returning,[38] even though he

rested in another civil suit if his bail voluntarily relinquish all claim to his detention.

Arrest in action wherein co-defendant was previously arrested.—In an action of assumpsit against two defendants, where one of them only was arrested originally, it was held that the other was protected from a subsequent arrest in the same suit while going to, attending, and returning from the trial. Taft *v.* Hoppin, Anth. N. P. (N. Y.) 255.

34. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Schlesinger *v.* Foxwell, 1 N. Y. City Ct. 461; Larned *v.* Griffin, 12 Fed. 590, 21 Am. L. Reg. 672.

35. People *v.* Judge Detroit Super. Ct., 40 Mich. 729.

Arbitration proceedings.— A party to a suit, attending a trial thereof before arbitrators, is privileged from arrest. Webb *v.* Carter, 9 Lanc. Bar (Pa.) 65; Spence *v.* Stewart, 3 East 89; Moore *v.* Booth, 3 Ves. Jr. 350; *Ex p.* Temple, 2 Ves. & B. 391.

Bankruptcy and insolvency proceedings.— A petitioner in bankruptcy is privileged from arrest on civil process pending the proceedings on his petition to be declared a bankrupt (*In re* Kimball, 2 Ben. (U. S.) 38, 14 Fed. Cas. No. 7,767; U. S. *v.* Dobbins, 25 Fed. Cas. No. 14,971; *Ex p.* Mifflin, 17 Fed. Cas. No. 9,537), but the facts necessary to make out a case for protection must be shown otherwise than by the oath of the party who claims it (*Ex p.* Mifflin, 17 Fed. Cas. No. 9,537). So, too, a creditor of a deceased insolvent is privileged from arrest on civil process while attending a meeting of commissioners appointed by the judge of probate to examine claims against the estate. Wood *v.* Neale, 5 Gray (Mass.) 538.

Reference.— A party attending a reference is entitled to privilege from arrest the same as when attending a trial, but such privilege does not, necessarily, extend to the time when the referees report. Clark *v.* Grant, 2 Wend. (N. Y.) 257; Vincent *v.* Watson, 1 Rich. (S. C.) 194. See also Steinmetz *v.* Wade, 3 Wkly. Notes Cas. (Pa.) 187, holding that a party to a divorce suit is privileged from arrest while attending a hearing before the examiner.

Proceedings before legislative committee.— A resident of another state, who is, in good faith, in attendance on a legislative committee solely for the purpose of presenting and testifying to a claim he has against the commonwealth, and with the intention of returning home without unnecessary delay, is not liable to arrest under civil process while so attending and returning. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

Proceedings contesting legality of prior arrest.— Where defendant suffered default on his motion for discharge from arrest on the ground that he was arrested on a general election day, and it was reopened on condition that he should appear on the day for which the hearing of the motion was set and submit to an examination as to the matters set forth in the motion papers; and, though then out of the court's jurisdiction, he voluntarily appeared at the time fixed, was discharged, and rearrested as he was leaving the courthouse, it was held that he was privileged from arrest as a suitor. Petrie *v.* Fitzgerald, 1 Daly (N. Y.) 401.

36. Proctor *v.* Walker, 12 Ind. 660; Palmer *v.* Rodgers, 6 U. C. L. J. 188. *Contra,* Com. *v.* Brown, 1 Browne (Pa.) 72, the court saying that any other rule would permit "any creditor to snatch the most abandoned criminal from punishment by instituting a suit against him and supporting him under the Bread Act as long as he lives."

37. Lucas *v.* Albee, 1 Den. (N. Y.) 666; Moore *v.* Green, 73 N. C. 394, 21 Am. Rep. 470; Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747; Key *v.* Jetto, 1 Pittsb. (Pa.) 117; Scott *v.* Curtis, 27 Vt. 762. *Contra,* Bours *v.* Tuckerman, 7 Johns. (N. Y.) 538; Brass *v.* Vandegrift, 23 Wkly. Notes Cas. (Pa.) 270; *In re* Barton, 3 Pa. Co. Ct. 334, 18 Phila. (Pa.) 508, 44 Leg. Int. (Pa.) 216; Treichler *v.* Hauck, 2 Woodw. (Pa.) 19. See also Baldwin *v.* Branch Cir. Judge, 48 Mich 525, 12 N. W. 686, holding that where appearance bail has been accepted from one arrested on a criminal warrant issued by a justice, he cannot, pending his release on bail, be arrested on a civil capias for the same matter, at the suit of the same complainant.

38. *Maine.*— Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598.

Maryland.— Brookes *v.* Chesley, 4 Harr. & M. (Md.) 295.

Massachusetts.— Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; McNeil's Case, 3 Mass. 288.

New Jersey.— Rogers *v.* Bullock, 3 N. J. L. 109.

New York.— Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Sanford *v.* Chase, 3 Cow. (N. Y.) 381 (arbitration proceedings); Norris *v.* Beach, 2 Johns. (N. Y.) 294; Schlesinger *v.* Foxwell, 1 N. Y. City Ct. 461.

has no writ of protection;[39] but a witness who attends voluntarily is not so exempt[40] unless he has come from another state for such purpose.[41]

b. Waiver of Privilege and Necessity of Claiming. Exemption from arrest is a personal privilege,[42] which the privileged person may waive,[43] and which he

North Carolina.— Ballinger *v.* Elliott, 72 N. C. 596.

Pennsylvania.— U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147 (wherein it is said that while, originally, the privilege of a witness embraced only attendants on courts, it has extended itself in process of time to every case where the attendance is a duty in conducting any proceedings of a judicial nature, as commissions of bankruptcy, a judge at his chambers, etc.); Wilson *v.* Byrd, 14 Wkly. Notes Cas. (Pa.) 438.

Rhode Island.— Eliason's Petition, 19 R. I. 117, 32 Atl. 166.

South Carolina.— Huntington *v.* Schultz, Harp. (S. C.) 452, 18 Am. Dec. 660.

Vermont.— *Ex p.* Hall, 1 Tyler (Vt.) 274.

Virginia.— Com. *v.* Ronald, 4 Call (Va.) 97.

United States.— Smythe *v.* Banks, 4 Dall. (U. S.) 329. 1 L. ed. 854, 22 Fed. Cas. Am. L. Reg. 672.

England.— 3 Bl. Comm. 289.

Canada.—Burke *v.* Sutherland, 3 N. Brunsw. No. 13,134; Larned *v.* Griffin, 12 Fed. 590, 21 166.

See 4 Cent. Dig. tit. "Arrest," § 21.

Duration of exemption.—The privilege does not extend throughout the term or while the witness is engaged in his private business after he is discharged from the obligation of the subpœna. Smythe *v.* Banks, 4 Dall. (U. S.) 329, 1 L. ed. 854, 22 Fed. Cas. No. 13,134. And, where the court adjourned on Friday until Monday, without reaching the case for which defendant had been notified to attend as a witness, and on Saturday he took a pleasure-trip to another city and was there served with process, it was held that he could not claim a witness' privilege from arrest. Rex *v.* Piatt, 3 Wkly. Notes Cas. (Pa.) 187.

39. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Schlesinger *v.* Foxwell, 1 N. Y. City Ct. 461; Larned *v.* Griffin, 12 Fed. 590, 21 Am. L. Reg. 672. *Compare* May *v.* Shumway, 16 Gray (Mass.) 86, 77 Am. Dec. 401; *Ex p.* McNeil, 6 Mass. 264; *Ex p.* Hall, 1 Tyler (Vt.) 274.

40. *Ex p.* McNeil, 6 Mass. 264 (even though he has a writ of protection); Rogers *v.* Bullock, 3 N. J. L. 109; Hardenbrook's Case, 8 Abb. Pr. (N. Y.) 416 (holding that, where a witness attended a trial pursuant to a subpœna and was examined, and, on a subsequent day, attended by request of counsel, the last attendance was voluntary and he was, therefore, not privileged from arrest); Cole *v.* McClellan, 4 Hill (N. Y.) 59 (holding that where defendant had not been served with a subpœna and was not attending as a witness, he could not claim a witness' privilege from arrest, even though he was examined as a witness the day after the arrest was made).

Contra, U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Wilson *v.* Byrd, 14 Wkly. Notes Cas. (Pa.) 438.

41. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; May *v.* Shumway, 16 Gray (Mass.) 86, 77 Am. Dec. 401; Ballinger *v.* Elliott, 72 N. C. 596; Eliason's Petition, 19 R. I. 117, 32 Atl. 166.

42. Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598; Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421; People *v.* Judge Detroit Super. Ct., 40 Mich. 729; Woods *v.* Davis, 34 N. H. 328; Petrie *v.* Fitzgerald, 1 Daly (N. Y.) 401; Leal *v.* Wigram, 12 Johns. (N. Y.) 88. But see Hunter *v.* Cleveland, 1 Brev. (S. C.) 167, holding that a witness' privilege from arrest is a privilege of the court, and not of the party.

Co-defendant of privileged person.—Where one of two joint and several obligors is a member of the legislature, his privilege from arrest does not extend to his co-obligor in an action against them, as the privilege is not to be extended by implication. Gibbes *v.* Mitchell, 2 Bay (S. C.) 406. But see Faulkner *v.* Whitaker, 15 N. J. L. 438, holding that if a person enters into a contract with two others, one of whom he knows cannot be sued by warrant or capias, he thereby extends the exemption from such process to the other.

43. *Illinois.*— Wilson *v.* Nettleton, 12 Ill. 61.

Maine.— Smith *v.* Jones, 76 Me. 138. 49 Am. Rep. 598; Chase *v.* Fish, 16 Me. 132.

Massachusetts.— Brown *v.* Getchell, 11 Mass. 11.

Michigan.—Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421.

New Hampshire.—Woods *v.* Davis, 34 N. H. 328.

New Jersey.— Barcklow *v.* Hutchinson. 32 N. J. L. 195 (as by failure to claim privilege in proper manner); Faulkner *v.* Whitaker, 15 N. J. L. 438.

New York.— Stewart *v.* Howard, 15 Barb. (N. Y.) 26 (as by giving notice of retainer in the cause and demanding a copy of the complaint); Petrie *v.* Fitzgerald, 1 Daly (N. Y.) 401; Randall *v.* Crandall, 6 Hill (N. Y.) 342 (by plea in bar); Leal *v.* Wigram, 12 Johns. (N. Y.) 88.

Pennsylvania.—Gyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762; Green *v.* Bonaffon, 2 Miles (Pa.) 219.

Vermont.— Wood *v.* Kinsman, 5 Vt. 588.

Virginia.— Prentis *v.* Com., 5 Rand. (Va.) 697, 16 Am. Dec. 782.

United States.—Gracie *v.* Palmer, 8 Wheat. (U. S.) 699, 5 L. ed. 719, as by voluntary appearance.

Canada.—Gillespie *v.* Forgarty, 3 N. Brunsw. 162.

See 4 Cent. Dig. tit. "Arrest," § 32.

must claim at an appropriate stage of the proceedings,[44] either by motion[45] or by plea in abatement.[46]

E. Jurisdiction to Grant—1. In General. The granting of an order of arrest is usually considered as a judicial act, and consequently is one which can be performed only by a judicial officer[47] of competent jurisdiction,[48] in the

Defendant does not waive his exemption by moving to reduce the special bail, as such action does not constitute an appearance (Dobson *v.* Fitzpatrick, 2 Wkly. Notes Cas. (Pa.) 186), or by filing an answer to the merits with a plea in abatement, based on the privilege (Larned *v.* Griffin, 12 Fed. 590, 21 Am. L. Reg. 672), or by giving bail to procure his release therefrom (Farmer *v.* Robbins, 47 How. Pr. (N. Y.) 415; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Desuian *v.* Zefcak, 22 Pa. Co. Ct. 77; Washburn *v.* Phelps, 24 Vt. 506; Larned *v.* Griffin, 12 Fed. 590, 21 Am. L. Reg. 672. *Contra,* Stewart *v.* Howard, 15 Barb. (N. Y.) 26; Fletcher *v.* Baxter, 2 Aik. (Vt.) 224. See also Jacobs *v.* Stevens, 57 N. H. 610, which holds that when a privileged person voluntarily gives bail he thereby recognizes and submits to the jurisdiction of the court); and a witness' privilege is not waived by his coming within the jurisdiction of the court to have his deposition taken before a competent officer (Stone *v.* Sommerick, 2 Pa. Co. Ct. 309).

44. *Delaware.*— Kizer *v.* Downey, 1 Harr. (Del.) 530, holding that, if a freeholder is arrested on a capias, he must object to it before going to trial.

Maine.—Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598.

Massachusetts.— Brown *v.* Getchell, 11 Mass. 11.

Michigan.— Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421.

Pennsylvania.—Gyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762, holding that, where neither defendant nor his attorney suggests the privilege, this amounts to a waiver, by which the party is forever concluded.

Virginia.— Prentis *v.* Com., 5 Rand. (Va.) 697, 15 Am. Dec. 782.

Claim to arresting officer.— A privileged person should claim his exemption to the officer making the arrest (Farmer *v.* Robbins, 47 How. Pr. (N. Y.) 415); but mere silence at the time of the arrest is not, of itself, a waiver of the exemption (Swift *v.* Chamberlain, 3 Conn. 537). But, as a sheriff is bound to execute process valid on its face and issued by a court of competent jurisdiction, it is his duty to arrest, under such process, one who claims to be privileged from arrest, and to take him before the court or officer issuing the process, in order that he may raise and present the question of his privilege. Tarlton *v.* Fisher, 2 Dougl. 671.

45. Armstrong *v.* Ayres, 19 Conn. 540; Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Prentis *v.* Com., 5 Rand. (Va.) 697, 16 Am. Dec. 782.

Person arrested in two cases.— If a suitor is arrested in two cases, in one of which he is privileged from arrest and in the other he is not, a motion to discharge him entirely from custody should be overruled. Crocker *v.* Duncan, 6 Blackf. (Ind.) 278.

Sufficient claim of privilege.— A capias ad respondendum will be quashed where defendant's affidavit alleges that he is a freeholder, describes the property with particularity, and denies the existence of any encumbrances. Jacobs *v.* Bety, 2 Wkly. Notes Cas. (Pa.) 127.

46. *Illinois.*— Wilson *v.* Nettleton, 12 Ill. 61.

Kentucky.— Legrand *v.* Bedinger, 4 T. B. Mon. (Ky.) 539.

Michigan.—Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421, holding that a motion to quash is not a proper method of raising the question of defendant's privilege.

New Hampshire.— Hubbard *v.* Sanborn, 2 N. H. 468.

Vermont.— Wood *v.* Kinsman, 5 Vt. 588.

Virginia.— Prentis *v.* Com., 5 Rand. (Va.) 697, 16 Am. Dec. 782.

47. Weingerter *v.* White, 5 La. Ann. 487; *In re* Bergen, 2 Hughes (U. S.) 513, 3 Fed. Cas. No. 1,338.

In Kansas the clerk may issue an order of arrest, but has no power to do so in the absence of the affidavit and undertaking required by statute. Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.

48. **In the District of Columbia** a justice of the peace in Alexandria county was held to have no power to issue a capias ad respondendum or warrant of arrest for a small debt before judgment. *Ex p.* Minor, 2 Cranch C. C. (U. S.) 404, 17 Fed. Cas. No. 9,643.

In New Jersey the order may be made by any judge or commissioner to whom the affidavit may be exhibited. McKernan *v.* McDonald, 27 N. J. L. 541.

In New York a county judge may grant an order to hold to bail, even though the action is triable in another county and plaintiff's attorneys reside there (Kennedy *v.* Simmons, 4 Thomps. & C. (N. Y.) 82); and the term "county judge" as used in this connection was held to apply to a judge of the court of common pleas of the city of New York (People *v.* Donohue, 15 Hun (N. Y.) 446), and to a local officer elected to discharge the duty of surrogate in a county where there is an acting county judge and surrogate (Seymour *v.* Mercer, 13 How. Pr. (N. Y.) 564).

In Pennsylvania, under the act of July 8, 1885, a warrant of arrest for fraud may be issued only in the county where the fraud has been committed (Weber *v.* Goldenberg, 20 Phila. (Pa.) 194, 48 Leg. Int. (Pa.) 24); but this has been held to mean, in the case of a defaulting executor in Ohio, who has removed to Pennsylvania, the county

granting or refusing of which such officer acts in the exercise of his sound discretion.[49]

2. Waiver of Objections to Jurisdiction. An objection to the jurisdiction of an officer issuing a writ or order of arrest is not waived by consent to a continuance.[50]

F. Proceedings to Obtain Arrest — 1. Application For Order or Writ — a. Necessity For. As a general rule,[51] a court or judicial officer has no jurisdiction to order the arrest of a defendant in a civil action unless the facts author-

in which such defendant can be legally sued (Miller *v.* Summers, 13 Pa. Super. Ct. 127, 17 Lanc. L. Rev. 345). Under this act the warrant may be executed in any county of the state. Halpin *v.* Kimball, 9 Kulp (Pa.) 405. Since the application for a warrant of arrest under the act of July 12, 1842, must be made to a judge of the court where the suit is brought, a judge of the court of common pleas has no authority to issue a warrant on a transcript filed therein, of a judgment of a magistrate, for the purpose of creating a lien. Wraith *v.* Van Dewater, 2 Pars. Eq. Cas. (Pa.) 251. An alderman or justice of the peace has no power to issue a warrant of arrest under the act to punish fraudulent debtors, which provides that a warrant may issue when certain facts are established to the satisfaction of the court. Wood *v.* Bell, 1 Pittsb. (Pa.) 180.

In England the power to arrest is specially given to a single judge, and not to the court (Harvey *v.* O'Meara, 7 Dowl. P. C. 725, 3 Jur. 629); and an application for a capias ad respondendum cannot be made to the courts at Westminster, but may be made to a single judge sitting there (Barnett *v.* Craw, 1 Dowl. N. S. 774, 6 Jur. 421; Bentley *v.* Berrey, 4 Jur. 1018, 7 M. & W. 146).

In Canada, where a judge's order is necessary to hold to bail, an arrest cannot be made in an action in a district court (Ferris *v.* Dyer, 5 U. C. Q. B. O. S. 5; Smith *v.* Jarvis, (Hil. T., 3 Vict.) 1 Robinson & J. Ont. Dig. 191), and a magistrate cannot cause the arrest of a party without first summoning him to appear before him (Croukhite *v.* Sommerville, 3 U. C. Q. B. 129).

Allegation of citizenship in federal court. — An affidavit to hold to bail, in a suit in a circuit court of the United States, need not state that plaintiff is a citizen of a state other than that in which the suit is brought, or an alien, such allegations not being necessary to give the court jurisdiction. Cooper *v.* Dungler, 4 McLean (U. S.) 257, 6 Fed. Cas. No. 3,192.

49. Johnson *v.* Morton, 94 Mich. 1, 53 N. W. 816; Clarke *v.* Lourie, 82 N. Y. 580; Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201; Davis *v.* Scott, 15 Abb. Pr. (N. Y.) 127; National Bank *v.* Temple, 39 How. Pr. (N. Y.) 432; Lapeous *v.* Hart, 9 How. Pr. (N. Y.) 541; *Ex p.* Taylor, 14 How. (U. S.) 3, 14 L. ed. 302; *In re* Bergen, 2 Hughes (U. S.) 513, 3 Fed. Cas. No. 1,338; Stein *v.* Valkenhuysen, E. B. & E. 65, 4 Jur. N. S. 411, 27 L. J. Q. B. 236, 96 E. C. L. 65.

Discretion as to requiring further evidence. — It is a matter entirely within the discretion of the court to examine a party making an affidavit for an order of arrest, or to require other evidence as to the debt, even though the debt is positively sworn to in the affidavit to hold to bail, but the necessity of so doing must appear from the face of the affidavit itself. Oliver *v.* Parish, 2 Wash. (U. S.) 462, 18 Fed. Cas. No. 10,500.

Doubtful question of law. — An order of arrest in a civil case should not be granted, where the propriety of granting it is dependent upon a doubtful and important question of law. Cormier *v.* Hawkins, 69 N. Y. 188.

Information and belief. — Although an order of arrest should not be granted on assertions made on information only, stated generally, yet it is, to a certain extent, a matter of discretion with the officer granting the order how far he relies upon the statements of the party making the assertions, for, even if affiant furnishes the name of his informant and states his means of knowledge, it will still be but hearsay (Wolfe *v.* Brouwer, 5 Rob. (N. Y.) 601); and the extent to which the nature and sources of information upon which the order is sought must be disclosed is within the discretion of the judge to whom the application is made (Smith *v.* Frank, 2 Rob. (N. Y.) 626).

Review in collateral proceeding. — The sufficiency of the evidence necessary to justify the issuance of a warrant for the arrest of a fraudulent debtor, under Mich. Comp. Laws, § 5390, cannot be inquired into in a collateral proceeding. Johnson *v.* Maxon, 23 Mich. 129.

50. Pike *v.* McMullin, 66 Vt. 121, 28 Atl. 876.

51. Defendant may be held to special bail without an affidavit of debt in an action on a bond, bill of exchange, or note, it being necessary only that the court should be satisfied of the existence of a subsisting debt, of which a bond, bill, or note is *prima facie* evidence (Anonymous, 4 Harr. & M. (Md.) 159); and, in an action on a judgment, the same rule has been applied (Headley *v.* Roby, 6 Ohio 521). See also McFarlan *v.* McJinsey, 6 Blackf. (Ind.) 85 (holding that a writ of capias ad respondendum may issue in case of defendant's non-residence, without an affidavit of that fact being filed); Taylor *v.* Knox, 1 Dall. (Pa.) 158, 1 L. ed. 80 (holding that 12 Geo. I, c. 29, requiring an affidavit to hold to bail, was not in force in Pennsylvania before the Revolution).

izing the arrest are presented by a proper affidavit,[52] which is usually made by plaintiff,[53] and it has been held that a writ of arrest issued without such affidavit is void, and not merely voidable.[54]

b. Who May Make. While it is usual for the plaintiff himself to make the affidavit,[55] it has been held in some jurisdictions that it may be made by a third person having knowledge of the facts — as, for instance, by plaintiff's agent,[56] or

52. A sworn complaint may properly be regarded as an affidavit where the cause of action and grounds of arrest are identical. Palmer *v.* Hussey, 59 N. Y. 647 [*affirming* 65 Barb. (N. Y.) 278]; U. S. *v.* Griswold, 5 Sawy. (U. S.) 25, 26 Fed. Cas. No. 15,266; U. S. *v.* Walsh, 1 Abb. (U. S.) 66, Deady (U. S.) 281, 28 Fed. Cas. No. 16,635.

Examined copies of affidavit filed in the court of bankruptcy may be used. Pearce *v.* Martin, 16 Jur. 270.

Oral oath.— Under a statute providing that if, previous to commencing a suit, plaintiff shall make oath that there is danger of losing his claim unless defendant be held to bail, the justice shall issue a warrant, a written affidavit is not required; and where the justice administered an oath, the presumption is that he required all the averments prescribed by law. Outlaw *v.* Davis, 27 Ill. 467.

Judgment debtor's examination.—When the examination of a judgment debtor, under N. Y. Code, § 292, discloses ground for arrest, it may be used as the basis of an application for an order of arrest in a subsequent action upon the judgment. McButt *v.* Hirsch, 4 Abb. Pr. (N. Y.) 441.

Treasury department's certificate of defalcation.— In an action upon an informal bond given by a marshal, payable to the president of the United States and his successors, instead of to the United States, the federal court will hold defendant to bail upon a certificate of defalcation from the treasury department. Jackson *v.* Simonton, 4 Cranch C. C. (U. S.) 12, 13 Fed. Cas. No. 7,146. *Compare* U. S. *v.* Smith, 5 Cranch C. C. (U. S.) 484, 27 Fed. Cas. No. 16,331, holding that a certificate in the usual form, by the officers of the treasury of the United States, that a certain balance is due by defendant to the United States, is not sufficient cause for special bail.

53. *Delaware.*— Black *v.* Seal, 6 Houst. (Del.) 541.

Kentucky.— Pauer *v.* Simon, 6 Bush (Ky.) 514.

Louisiana.— Merritt *v.* Openheim, 9 La. Ann. 54.

New Jersey.— Beatty *v.* Ivins, 3 N. J. L. 210.

New York.— Broadhead *v.* McConnell, 3 Barb. (N. Y.) 175; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. (N. Y.) 186; Money *v.* Tobias, 12 Johns. (N. Y.) 422. *Compare* Arnold *v.* Thomas, 1 How. Pr. (N. Y.) 246.

Ohio.— Spice *v.* Steinruck, 14 Ohio St. 213.

Oregon.— Norman *v.* Zieber, 3 Oreg. 197.

Tennessee.— Posey *v.* McCubbins, 5 Yerg. (Tenn.) 234.

United States.— Leonard *v.* Caskin, Bee (U. S.) 146, 15 Fed. Cas. No. 8,257.

Canada.— Hotte *v.* Currie, 22 L. C. Jur. 34; Casavant *v.* Patenaude, 3 Rev. Lég. 446.

See 4 Cent. Dig. tit. "Arrest," § 50.

54. Pauer *v.* Simon, 6 Bush (Ky.) 514; Broadhead *v.* McConnell, 3 Barb. (N. Y.) 175; Spice *v.* Steinruck, 14 Ohio St. 213; Norman *v.* Zieber, 3 Oreg. 197. *Contra,* Read *v.* McLellan, 6 N. Brunsw. 3.

55. See *supra,* II, F, 1, a.

Affidavit by one plaintiff.—An affidavit, for the arrest of a debtor on mesne process, which is required to be made by plaintiff, or some person in his behalf, may be made by one of two or more joint plaintiffs in behalf of plaintiffs (Gorgorian *v.* Prood, 167 Mass. 31, 44 N. E. 1069), and authority to make an affidavit for a civil warrant in a suit commenced before a justice for the wrongful conversion of goods belonging to plaintiff will be presumed where the affidavit is made by one of two plaintiffs who were cotenants of the property converted (Deitz *v.* Groesbeck, 32 Mich. 303. *Compare* Bourassa *v.* Brosseau, 14 L. C. Rep. 23).

An infant plaintiff who is competent to testify at the trial may, it seems, make the affidavit. Proweeder *v.* Lewis, 11 Misc. (N. Y.) 109, 31 N. Y. Suppl. 996, 65 N. Y. St. 90, 24 N. Y. Civ. Proc. 299.

56. *Alabama.*— *Ex p.* Harlan, 39 Ala. 563, by wife for husband.

Arkansas.— Sutton *v.* Hays, 17 Ark. 462.

Illinois.— Wilson *v.* Nettleton, 12 Ill. 61.

Maine.— Lewiston Co-operative Soc. No. 1 *v.* Thorpe, 91 Me. 64, 39 Atl. 283, for corporation by president thereof.

Michigan.— Fruitport Tp. *v.* Dickerman, 90 Mich. 20, 51 N. W. 109.

South Carolina.— McWorter *v.* Reid, 1 Hill (S. C.) 368; Treasurers *v.* Barksdale, 1 Hill (S. C.) 272.

England.— Short *v.* Campbell, 3 Dowl. P. C. 487, 1 Gale 60.

Canada.— Moisic Iron Co. *v.* Olsen, 18 L. C. Jur. 29 (for corporation by president thereof); Upper Canada Bank *v.* Allain, 5 L. C. Rep. 318, 4 R. J. R. Q. 365 (bookkeeper of branch bank); Chretien *v.* McLane, 3 Rev. de Leg. 348 (by wife for husband).

Contra, Morford *v.* Herrin, 3 Dana (Ky.) 602; Merritt *v.* Openheim, 9 La. Ann. 54; Absolom *v.* Callum, 6 La. Ann. 536.

See 4 Cent. Dig. tit. "Arrest," § 51.

Affidavit by mere employee.—Under an act requiring an affidavit for a capias ad respondendum to be made by "plaintiff, his agent or attorney," an affidavit made by one merely in the employ of plaintiff is not sufficient. Bromley *v.* Joseph, 3 Whart. (Pa.) 10.

attorney.[57] In a proper case, moreover, it seems that it may be made by even an indifferent third person.[58]

c. Who May Take. In the absence of statutory provisions to the contrary,[59] an affidavit to hold to bail may be made before any officer authorized to take other affidavits,[60] even though such officer is plaintiff's attorney,[61] provided the affidavit is made before commencement of suit.[62]

d. May Be Made When. An affidavit to hold to bail may be made before the issuance of the process by which the action is begun;[63] but as oath of a sub-

57. *Arkansas.*— Sutton *v.* Hays, 17 Ark. 462. *Contra, Ex p.* Hartley, 5 Ark. 32, under an earlier statute.

Georgia.— Erek *v.* Odena, 20 Ga. 579.

Maine.— Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

Michigan.— Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564.

Pennsylvania.— C. M. Hapgood Shoe Co. *v.* Saupp, 7 Pa. Super. Ct. 480.

Canada.— McDonald *v.* Thompson, 31 N. Brunsw. 574; Boston Woven Hose Co. *v.* Fenwick, 6 Quebec Super. Ct. 487 (holding that an attorney *ad litem* cannot make the affidavit).

Contra, Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968; Merritt *v.* Openheim, 9 La. Ann. 54; Absolom *v.* Callum, 6 La. Ann. 536.

58. Gorgorian *v.* Prood, 167 Mass. 31, 44 N. E. 1069; C. M. Hapgood Shoe Co. *v.* Saupp, 7 Pa. Super. Ct. 480; Miller *v.* Wheaton, 2 Cranch C. C. (U. S.) 41, 17 Fed. Cas. No. 9,595; Pieters *v.* Luytjes, 1 B. & P. 1; Brown *v.* Davis, 1 Chit. 161, 18 E. C. L. 98; King *v.* Turner, 1 Chit. 58, 18 E. C. L. 45; Short *v.* Campbell, 3 Dowl. P. C. 487, 1 Gale 60.

In an action by the assignees of a bankrupt a positive affidavit made by the bankrupt for his assignees is sufficient (Tucker *v.* Francis, 4 Bing. 142, 12 Moore C. P. 347, 13 E. C. L. 439), and so is a positive affidavit made by the clerk of the assignees' attorney (Anonymous, 1 Chit. 38, 18 E. C. L. 35).

Affidavit by accomplice.— In an action for the conversion of bonds by robbery, an affidavit against defendant, made by an accomplice, will be considered on a motion to vacate an order of arrest, in view of a rule that the testimony of an accomplice may, even when unsupported and uncorroborated, sustain a conviction. Royal Ins. Co. *v.* Noble, 5 Abb. Pr. N. S. (N. Y.) 54.

59. Justice of the peace.— The Alabama statute of 1823 which provides that defendant in certain actions shall not be held to bail unless plaintiff makes oath "before some judge, justice of the peace, or the clerk who may issue the process, that the defendant is indebted," etc., does not limit the authority of justices of the peace to administer such oath to cases within their jurisdiction. Wykoff *v.* Taylor, 2 Stew. & P. (Ala.) 105, 107.

Notary public.— Since Me. Rev. Stat. c. 32, § 3, authorizes a notary public to administer oaths in all cases where a justice of the peace may act, a creditor who desires to arrest his debtor in an action may take the necessary oath before a notary public instead of before a justice of the peace as required by chapter 113, authorizing such arrest. Duncan *v.* Grant, 86 Me. 212, 29 Atl. 987. But an affidavit for a debtor's arrest before judgment, under Ohio Rev. Stat. § 5481, sworn to before a notary, is insufficient, as it must be sworn to before a judge, a clerk of the court, or a justice of the peace. Williams *v.* Raitze, 7 Ohio N. P. 614, 8 Ohio Dec. 695.

United States commissioner.— While the pleadings, practice, and forms of the United States courts should conform as nearly as possible to the practice in the state courts, a commissioner of the United States may take the verification of an affidavit for a defendant's arrest on mesne process, even though the state code requires it to be taken by a judge of a court of the state, or the clerk thereof, or a justice of the peace. Fulton *v.* Gilmore, 2 Flipp. (U. S.) 260, 9 Fed. Cas. No. 5,154.

The clerk of the district court is not competent to take an ordinary affidavit to hold to bail. State *v.* Westcoat, 2 Brev. (S. C.) 431.

60. Commissioner.— An affidavit of debt for a capias, to be issued out of the town of Portland civil court, may be sworn before a commissioner for taking affidavits to be read in the supreme court. Waterbury *v.* Nixon, 18 N. Brunsw. 373.

Superior court judge.— An affidavit sworn before a superior court judge in any judicial district is sufficient to authorize the issuance of a capias in any other district. Caverhill *v.* Frigon, 9 Quebec Super. Ct. 539.

An affidavit made in a foreign country, which is duly authenticated by the certificate of a British consul, is sufficient to authorize a judge in New Brunswick to grant an order for bail. Drake *v.* Wentworth, (Hil. T. 1834) Stevens N. Brunsw. Dig. 24.

See, generally, AFFIDAVITS.

61. McLean *v.* Weeks, 61 Me. 277; Reg. *v.* Steadman, 12 N. Brunsw. 368.

62. Adams *v.* Mills, 3 How. Pr. (N. Y.) 219; Burger *v.* Beamer, 3 U. C. Q. B. 179; Brett *v.* Smith, 1 Ont. Pr. 309; Demill *v.* Easterbrook, 10 U. C. L. J. 246. *Compare* McManus *v.* Wells, 29 N. Brunsw. 449, holding that an affidavit to hold to bail after the commencement of an action by a writ of summons, and before judgment, may be sworn before plaintiff's attorney.

63. King *v.* Reg., 14 Q. B. 31, 3 Cox C. C. 561, 13 Jur. 742, 18 L. J. Q. B. 253, 68 E. C. L. 31; Hargreaves *v.* Hayes, 5 E. & B. 272, 1 Jur. N. S. 521, 24 L. J. Q. B. 281, 85 E. C. L. 272. See also Clark *v.* Kent Cir. Judge, 125

sisting debt at the time of the suing out of the process is essential,[64] a defendant cannot be held to special bail on an affidavit made a long time prior to the application for the process.[65]

e. May Be Made Where. An affidavit to hold to bail may be made in a jurisdiction other than the one where the arrest is to be made;[66] but in such case it must conform to all the requirements of the *lex fori*, or the court will be without jurisdiction to issue the process sought.[67]

f. Form of Affidavit[68] — (i) *In General.* The affidavit need not specify where it was taken,[69] nor, where made by a third person, need it disclose deponent's means of knowledge where its statements are positive and not on information and belief.[70] It should be verified,[71] should disclose the capacity to take affidavits of the person before whom it is sworn,[72] and should state that no previous application has been made.[73] Such affidavits should be strictly construed,[74] but an affidavit otherwise good is not vitiated by an error in spelling[75] or

Mich. 449, 84 N. W. 629, holding that an affidavit sworn on the day preceding the issuance of the writ is good.

64. Collier *v.* Hague, 2 Str. 1270.

Affidavit before maturity of debt.— A debtor cannot be arrested on an affidavit made before the debt is due, under La. Stat. (1807), c. 1, § 22. Whetton *v.* Townsend, 1 Mart. (La.) 188.

65. Corrin *v.* Millington, 2 Miles (Pa.) 267 (a year); Collier *v.* Hague, 2 Str. 1270 (nearly three years).

66. Francis *v.* Howard, 115 Mass. 236 (another county); Walker *v.* Bamber, 8 Serg. & R. (Pa.) 61 (a foreign country); Hess *v.* Lawrence, 30 N. Brunsw. 427 (another province); Drake *v.* Wentworth, (Hil. T. 1834) 1 Stevens N. Brunsw. Dig. 24 (a foreign country). *Compare* Bramhall *v.* Seavey, 28 Me. 45; Reid *v.* Brummitt, 1 Brev. (S. C.) 16 (which cases hold that the affidavit cannot be made before the magistrate of another state); Spragella *v.* Bruno, 1 Mill (S. C.) 279 (which holds that an affidavit, made before a notary public in another state and certified under his notarial seal, without any authentication showing his official character and capacity to administer oaths, is not sufficient to hold a defendant to special bail in South Carolina).

67. Harris *v.* Durkee, 50 N. Y. Super. Ct. 202; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Nesbitt *v.* Pym, 7 T. R. 376, note *c*.

68. For forms of affidavit see the following cases:

Illinois.— McKinley *v.* Rising, 28 Ill. 337.

Michigan.— Pease *v.* Pendell, 57 Mich. 315, 23 N. W. 827; Wilcox *v.* Ismon, 34 Mich. 268.

Nebraska.— *Ex p.* Davis, 17 Nebr. 436, 23 N. W. 361.

North Carolina.— Paige *v.* Price, 78 N. C. 10.

Ohio.—Hockspringer *v.* Ballenburg, 16 Ohio 304.

Pennsylvania.— Kohlhaas *v.* Veit, 162 Pa. St. 108, 29 Atl. 349; Nevins *v.* Merrie, 2 Whart. (Pa.) 499.

England.— Cresswell *v.* Lovell, 8 T. R. 418; Mackenzie *v.* Mackenzie, 1 T. R. 716.

69. Benson *v.* Bennett, 25 N. J. L. 166; Peltier *v.* Washington Banking Co., 14 N. J. L. 257.

70. Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564; Holliday *v.* Lawes, 3 Bing. N. Cas. 541, 5 Dowl. P. C. 485, 1 Jur. 151, 4 Scott 354, 32 E. C. L. 252; Andrioni *v.* Morgan, 4 Taunt. 231; Halifax Banking Co. *v.* Smith, 25 N. Brunsw. 610.

Affidavits by third persons have been held sufficient which stated that defendant is indebted in such a sum, as deponent computes it (Moultby *v.* Richardson, 2 Burr. 1032); that defendant "is indebted as appears by an account stated and under the defendant's own hand" (Anonymous, 1 Wils. C. P. 21); that "the defendant is indebted in 20 *l*, according to the bill delivered by the plaintiff to the defendant" (Williams *v.* Jackson, 3 T. R. 575); that defendant is indebted on a bill of exchange "as appears by such bill" (Bright *v.* Purrier, Buller N. P. 269, 3 Burr. 1687; Rollin *v.* Mills, 1 Wils. C. P. 279); that defendant is indebted to plaintiff in certain sums and that deponent is better and more strongly assured that the said sums of money are due by means of deponent's having transmitted to him certain documents which he has in his custody (Brown *v.* Phepoe, 3 Dougl. 370, 26 E. C. L. 244).

71. Kelly's Application, 10 Abb. Pr. (N. Y.) 208.

Affirmation.— An order to hold to bail was held to have been properly granted on an affirmation, made by a Quaker in New York, properly verified before the city recorder. Smith *v.* Lawrence, 3 U. C. Q. B. O. S. 18.

72. Howard *v.* Brown, 4 Bing. 393, 6 L. J. C. P. O. S. 9, 1 M. & P. 22, 13 E. C. L. 556 [*citing* Rex *v.* Hare, 13 East 189, 1 M. & P. 22]. See, generally, Affidavits.

This is sufficiently done by the use of terms which permit the court to recognize its officer. Montgomery *v.* Lyster, 8 Quebec 375.

73. Schachne *v.* Kayser, 66 How. Pr. (N. Y.) 395.

74. Snedden *v.* Gunn, 16 Pa. Co. Ct. 47; Robinson *v.* Holt, Hempst. (U. S.) 426, 20 Fed. Cas. No. 11,955.

75. Thus, it is no ground for setting aside an arrest that the word "malicious" is spelled with a "t" instead of a "c" in the affidavit. Gardener *v.* Morrison, (Hil. T., 4 Vict.) 1 Robinson & J. Ont. Dig. 197.

by a slight error in grammar which does not render its meaning obscure or ambiguous.[76]

(II) *Averments as to Parties* — (A) *As to Deponent.* The deponent's name must be set out in the affidavit to hold to bail,[77] and, where the affidavit is made by a person other than plaintiff, it should state his relation to the latter.[78] It is not essential to state deponent's residence or place of abode,[79] though, under the earlier English practice, the affidavit was fatally defective if it omitted either deponent's addition,[80] or his place of abode.[81]

(B) *As to Defendant.* An affidavit which fails to name in its body a known defendant[82] is insufficient;[83] but, except in cases where the right to arrest is depend-

76. Thus, to justify the arrest of one of two joint debtors, the affidavit is sufficient even though it contains the pronoun in the plural instead of the singular form (McNamara *v.* Garrity, 78 Me. 418, 6 Atl. 668), and in an affidavit for the arrest of joint debtors it is not necessary to allege the belief that each of them is about to take the property away. An allegation that "they" are about to do it is sufficient. Cates *v.* Noble, 33 Me. 258. So, where there are two defendants, an affidavit which states that "the defendants has property" is regarded as being merely erroneous grammatically, and includes both defendants. Abbott *v.* Tucker, 4 Allen (Mass.) 72.

77. Richardson *v.* Northrope, Taylor (U. C.) 331 (holding that deponent's name must be set forth in the affidavit in words at length); Westover *v.* Burnham, (Trin. T., 3 & 4 Vict.) 1 Robinson & J. Ont. Dig. 197 (holding that deponent's christian names must be given in full).

A trifling inaccuracy in this respect will not, of itself, however, vitiate the affidavit, as where the affidavit referred to plaintiff in one part as "Antoine T." and in another as the "said Francois T." (Turcas *v.* Rogers, 2 Mart. N. S. (La.) 655), or where the affidavit referred to plaintiff by the name of "Gesser" but was signed by him as "Gasser" (Gesser *v.* Braunfeld, 13 Wkly. Notes Cas. (Pa.) 209).

78. Upper Canada Bank *v.* Allain, 5 L. C. Rep. 318, 4 R. J. R. Q. 265. *Compare* Hogan *v.* Hoskins, 12 L. C. Rep. 84.

79. Benson *v.* Bennett, 25 N. J. L. 166; Peltier *v.* Washington Banking Co., 14 N. J. L. 257.

80. Collins *v.* Goodyer, 2 B. & C. 563, 9 E. C. L. 248; D'Argent *v.* Vivant, 1 East 330; Jarrett *v.* Dillon, 1 East 18; Polleri *v.* De Souza, 4 Taunt. 154.

It was sufficient addition to describe deponent as "merchant" (Vaissier *v.* Alderson, 3 M. & S. 165) or "manufacturer" (Smith *v.* Younger, 3 B. & P. 550).

81. Collins *v.* Goodyer, 2 B. & C. 563, 9 E. C. L. 248; D'Argent *v.* Vivant, 1 East 330; Polleri *v.* De Souza, 4 Taunt. 154.

A clerk of plaintiff may state his place of abode to be the office where he is employed the greater part of the day, although at night he sleeps at another place, as the words "place of abode" do not, necessarily, mean the place where the deponent sleeps, the object of the rule being to ascertain the place where deponent is most usually to be found, and not the place to which he retires merely for the purpose of rest. Haslope *v.* Thorne, 1 M. & S. 103.

A foreigner whose residence is abroad, and who only landed in England for the purpose of making an affidavit to hold defendant to bail in an action where such foreigner was plaintiff, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was made. Bouhet *v.* Kittoe, 3 East 154.

Street not necessary.— In an affidavit to hold to bail, if the deponent is described "as of the City of London," it is sufficient even though the street or square is not given. Vaissier *v.* Alderson, 3 M. & S. 165. So, where the affidavit for a capias describes plaintiff as "of the City of Kingston, Canada, West," it is a sufficient indication of his domicile. Macfarlane *v.* Béliveau, 9 L. C. Rep. 261.

82. An unknown defendant may be designated by description. Pindar *v.* Black, 4 How. Pr. (N. Y.) 95, 2 Code Rep. (N. Y.) 53.

83. The words "the defendant," "the said defendant," or "the said defendants," are insufficient. Hunt *v.* Lesh, 6 Pa. Dist. 290; Snedden *v.* Gunn, 16 Pa. Co. Ct. 47; Hower *v.* Bennet, 15 Pa. Co. Ct. 557. See also Hitchcock *v.* Baker, 2 Allen (Mass.) 431, holding that an affidavit for the arrest of the "defendant" on a writ against two defendants, which fails to show which defendant is intended, is insufficient to authorize the arrest of either.

Inaccuracy in name.— An affidavit is not vitiated by reason of a slight error in the spelling of defendant's name. Gesser *v.* Braunfeld, 13 Wkly. Notes Cas. (Pa.) 209; Joutras *v.* Dunlop, 7 L. C. Rep. 420, 5 R. J. R. Q. 330. See also Hughes *v.* Sutton, 3 M. & S. 178, wherein an affidavit that "R. Sutton is indebted to the plaintiff for money paid and laid out to the use of the said R. Jackson" was held sufficient, the name "R. Jackson" not having been mentioned before, the court saying there was nothing to satisfy the word "said" unless Jackson were rejected. *Compare*, however, Waters *v.* Joyce, 1 D. & R. 150, 16 E. C. L. 24 (wherein it was held that an affidavit to hold to bail, referring to defendant in one place as "Edward Joyce" and in another as "George Page Edward Joyce," was insufficient, as it might raise an inference that another person was jointly in-

ent thereon, it is not necessary that the affidavit should state defendant's residence or where he has his domicile.[84]

(III) *AVERMENTS AS TO GROUNDS FOR ISSUANCE*—(A) *In General.* The affidavit should state positively the facts relied upon by plaintiff to establish his right to the remedy he seeks;[85] and facts,[86] not mere conclusions of law or fact,[87]

debted with defendant to plaintiff); Botsford *v.* Stewart, (Easter T., 11 Geo. IV) 1 Robinson & J. Ont. Dig. 197 (wherein an arrest was set aside because defendant, whose name was Patrick, was called Peter in the affidavit and writ).

Use of full christian name.— In an action upon a bill of exchange the affidavit must not state defendant's christian name merely by initials, even though he may have so signed the bill. Reynolds *v.* Hankin, 4 B. & Ald. 536, 6 E. C. L. 591.

84. Hanney *v.* Boehner, 14 La. Ann. 859; Benson *v.* Bennett, 25 N. J. L. 166; Peltier *v.* Washington Banking Co., 14 N. J. L. 257. *Compare* Byard *v.* Read, Taylor (U. C.) 413, holding that an affidavit describing defendant's residence as at Canandaigua, State of New ("York" being omitted), was insufficient.

Presumption as to residence.— In an affidavit for an arrest defendant will, if no residence is stated, be presumed to be a resident of the state where the action is brought. Robinson *v.* Holt, Hempst. (U. S.) 426, 20 Fed. Cas. No. 11,955.

Exemption by non-residence.— If a person who is arrested upon an affidavit which does not state his residence is exempt by reason of his non-residence, he must plead the exemption in order to take advantage of it. Hanney *v.* Boehner, 14 La. Ann. 859.

85. *California.*— McGilvery *v.* Morehead, 2 Cal. 607.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

Louisiana.— Herwig *v.* Beach, 15 La. Ann. 261.

Michigan.— Luton *v.* Palmer, 70 Mich. 152, 38 N. W. 13; De Long *v.* Briggs, 47 Mich. 624, 11 N. W. 412.

New Jersey.—Vankirk *v.* Staats, 24 N. J. L. 121; Kinney *v.* Mnloch, 17 N. J. L. 334. But, if sufficient facts to justify the arrest are set out in the affidavit, it is no objection that the statement commences with the words "for that," as they constitute a positive averment and are equal to "because;" but if the statement commences with the words "for that, whereas," the affidavit is not sufficient, as the statement is not a positive averment, but a statement by way of recital merely. Benson *v.* Bennett, 25 N. J. L. 166.

New York.—Wells *v.* Sisson, 14 Hun (N. Y.) 267; Mosher *v.* People, 5 Barb. (N. Y.) 575; Jordan *v.* Harrison, 13 N. Y. Civ. Proc. 445; Kelly's Application, 10 Abb. Pr. (N. Y.) 208; Satterlee *v.* Lynch, 6 Hill (N. Y.) 228.

Pennsylvania.— Towers *v.* Kingston, 1 Browne (Pa.) 33; Boyle *v.* Grady, 1 Wkly. Notes Cas. (Pa.) 313.

United States.— Postley *v.* Higgens, 2 McLean (U. S.) 493, 19 Fed. Cas. No. 11,304; Wright *v.* Cogswell, 1 McLean (U. S.) 471, 30 Fed. Cas. No. 18,074; Travers *v.* Hight, 2 Cranch C. C. (U. S.) 41, 24 Fed. Cas. No. 14,151; Smith *v.* Watson, 1 Cranch C. C. (U. S.) 311, 22 Fed. Cas. No. 13,124.

England.— Champion *v.* Gilbert, 4 Burr. 2126; Pomp *v.* Ludvigson, 2 Burr. 655; Van Masel *v.* Julian, 1 Wils. C. P. 231.

Canada.—Walt *v.* Barber, 6 Brit. Col. 461.

An averment that the facts are stated in the complaint is insufficient, even if the facts there stated are sufficient. McGilvery *v.* Morehead, 2 Cal. 607. *Contra,* Passebon *v.* His Creditors, 9 La. 189.

Source of information.— It is only when an affidavit for an order of arrest states facts on information and belief, and not where the facts are positively sworn to, that affiant is required to state the source of his information. Pierson *v.* Freeman, 77 N. Y. 589; Postley *v.* Higgens, 2 McLean (U. S.) 493, 19 Fed. Cas. No. 11,304; Maguire *v.* Rockett, 3 Quebec 347.

Sufficiently positive allegation.— An allegation in an affidavit for an order of arrest that certain representations made by defendant for the purpose of obtaining credit were false, as deponent has since learned, may be regarded as a positive allegation of falsity, and not as one on information and belief only. Cummings *v.* Woolley, 16 Abb. Pr. (N. Y.) 297 note.

86. *Michigan.*—De Long *v.* Briggs, 47 Mich. 624, 11 N. W. 412; People *v.* Wayne Cir. Judge, 36 Mich. 334; People *v.* McAllister, 19 Mich. 215.

New Jersey.— McGrath *v.* Riley, (N. J. 1900) 47 Atl. 58.

New York.— Harrisburg Pipe Bending Co. *v.* Welsh, 26 N. Y. App. Div. 515, 50 N. Y. Suppl. 299, 27 N. Y. Civ. Proc. 238; Wells *v.* Sisson, 14 Hun (N. Y.) 267; Thorpe *v.* Waddingham, 3 Daly (N. Y.) 275; Perry *v.* Smith, 9 N. Y. St. 728; Dreyfus *v.* Otis, 54 How. Pr. (N. Y.) 405; Loder *v.* Phelps, 13 Wend. (N. Y.) 46 (holding that the mere allegation that plaintiff believes he will be in danger of losing his debt unless a warrant issues is not sufficient of itself).

Ohio.— Spice *v.* Steinruck, 14 Ohio St. 213 (holding that an order issued on a defective affidavit is void); Messenger *v.* Lockwood, 1 Ohio Dec. (Reprint) 433; Clark *v.* Pullman, 1 Ohio Dec. (Reprint) 135.

Oregon.— Barton *v.* Saunders, 16 Oreg. 51, 11 Pac. 921, 8 Am. St. Rep. 261, holding that process issued on defective affidavit is voidable only, and not absolutely void.

Pennsylvania.— Philadelphia Coal Co. *v.* Huntzinger, 6 Wkly. Notes Cas. (Pa.) 300, 12 Phila. (Pa.) 544, 35 Leg. Int. (Pa.) 482.

87. *California.*— *Ex p.* Fkumoto, 120 Cal. 316, 52 Pac. 726.

must be stated. The facts, moreover, must be such as would be admissible as evidence on a trial of the cause.[88]

(B) *On Information and Belief.* As a general rule, the facts must be averred by affiant as of his own knowledge,[89] and not upon information or belief,[90]

Delaware.— Thomas *v.* Colvin, 1 Marv. (Del.) 106, 27 Atl. 829.

Michigan.— People *v.* McAllister, 19 Mich. 215.

New Jersey.— McGrath *v.* Riley, (N. J. 1900) 47 Atl. 58.

New York.— Thorpe *v.* Waddingham, 3 Daly (N. Y.) 275; Markey *v.* Diamond, 1 Misc. (N. Y.) 97, 20 N. Y. Suppl. 847, 49 N. Y. St. 348 [*affirming* 19 N. Y. Suppl. 181, 46 N. Y. St. 283]; Thompson *v.* Best, 4 N. Y. Suppl. 229, 21 N. Y. St. 103; Perry *v.* Smith, 9 N. Y. St. 728; Satterlee *v.* Lynch, 6 Hill (N. Y.) 228.

Oregon.— Barton *v.* Saunders, 16 Oreg. 51, 16 Pac. 921, 8 Am. St. Rep. 261.

Pennsylvania.— Philadelphia Coal Co. *v.* Huntzinger, 6 Wkly. Notes Cas. (Pa.) 300, 12 Phila. (Pa.) 544, 35 Leg. Int. (Pa.) 482.

England.— Jacks *v.* Pemberton, 5 T. R. 552.

Canada.—Warren *v.* Morgan, 9 L. C. Rep. 305; Demill *v.* Easterbrook, 10 U. C. L. J. 246.

What are not mere conclusions.— An affidavit for arrest does not violate the rule that facts, not conclusions, must be stated, if the allegations therein would be sufficient to make out a *prima facie* case in a criminal trial. Pease *v.* Pendell, 57 Mich. 315, 23 N. W. 827. An allegation that the property obtained from plaintiff was her separate and individual property is not an allegation of a mere conclusion of law within the rule requiring such affidavits to state facts, and not conclusions. Lippman *v.* Petersburgh, 10 Abb. Pr. (N. Y.) 254.

88. Sheridan *v.* Briggs, 53 Mich. 569, 19 N. W. 189; Truax *v.* Pennsylvania R. Co., 56 N. J. L. 277, 27 Atl. 1063; McKernan *v.* McDonald, 27 N. J. L. 541; Schwenk *v.* Coffin, 2 N. J. L. J. 209. *Compare* Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 15 How. Pr. (N. Y.) 48, holding that there is no necessity that the papers, presented as the basis of an application for an order of arrest on the ground of fraud, should make out every fact entering into the fraud by evidence which would be competent to establish it on the trial of the cause.

In an action in the federal circuit court for the District of Columbia, upon an account, the affidavit to hold to bail must be as certain and positive as is required by Md. Acts (1729), c. 20, to make an account admissible in evidence. Travers *v.* Hight, 2 Cranch C. C. (U. S.) 41, 24 Fed. Cas. No. 14,151; Smith *v.* Watson, 1 Cranch C. C. (U. S.) 311, 22 Fed. Cas. No. 13,124.

The unsupported affidavit of plaintiff is competent to establish the facts authorizing the arrest, as well as the existence and the amount of the indebtedness. Painter *v.* Houston, 28 N. J. L. 121. *Contra*, Hill *v.* Hunt, 20 N. J. L. 476.

Affidavit by one who died before bringing of action.— In an action brought by an executor, an order of arrest will not be granted upon an affidavit made by plaintiff's testator before his death, and entitled in an action he proposed to bring against defendant, even though upon the same or similar causes of action as those set forth in plaintiff's complaint, as defendant could never cross-examine the deponent. Mason *v.* Lambert, 3 Daly (N. Y.) 250.

89. Sanford *v.* Pyne, 13 La. 303; Park *v.* Pyne, 13 La. 212; Stensrud *v.* Delamater, 56 Mich. 144, 22 N. W. 272; Sheridan *v.* Briggs, 53 Mich. 569, 19 N. W. 189; Badger *v.* Reade, 39 Mich. 771; Brown *v.* Kelley, 20 Mich. 27; Proctor *v.* Prout, 17 Mich. 473; Roumania Banque Agricole *v.* Ungureanu, 53 N. Y. App. Div. 254, 65 N. Y. Suppl. 892. *Compare* Herwig *v.* Beach, 15 La. Ann. 261, holding that it is not sufficient for a creditor to swear that all the facts and allegations in his petition are true, to the best of his knowledge and belief, but that he must swear positively to the debt, and to his belief of the truth of the other allegations in his petition.

Circumstances from which facts may be deduced.— The affidavit must show personal knowledge of the facts by affiant, or state circumstances from which the facts must, necessarily, be deduced. Marble *v.* Curran, 63 Mich. 283, 29 N. W. 725.

Sufficient showing of knowledge.— An allegation that defendant said to a certain police officer that deponent stole defendant's wheel and he wanted her locked up, and then and there falsely and maliciously caused deponent to be arrested by said police officer on said charge, sufficiently shows that affiant of her own personal knowledge knows the facts stated in the affidavit. Wright *v.* Wayne Cir. Judge, 119 Mich. 499, 78 N. W. 545.

When the lack of deponent's knowledge is apparent from the face of the affidavit, it is insufficient (Finlay *v.* De Castroverde, 68 Hun (N. Y.) 59, 22 N. Y. Suppl. 716, 52 N. Y. St. 228), even though he swears that the facts are stated upon the personal knowledge of affiant (Harman *v.* Brotherson, 1 Den. (N. Y.) 537; Hart *v.* Grant, 8 S. D. 248, 66 N. W. 322).

90. *California.*— *Ex p.* Fkumoto, 120 Cal. 316, 52 Pac. 726; *In re* Vinich, 86 Cal. 70, 26 Pac. 528.

Michigan.— Meddaugh *v.* Williams, 48 Mich. 172, 12 N. W. 34.

New York.— People *v.* Snaith, 57 Hun (N. Y.) 332, 10 N. Y. Suppl. 589, 32 N. Y. St. 568; Mosher *v.* People, 5 Barb. (N. Y.) 575; Ammon *v.* Kellar, 21 Misc. (N. Y.) 442, 47 N. Y. Suppl. 595 [*reversing* 20 Misc. (N. Y.) 728, 46 N. Y. Suppl. 1089]; Markey *v.* Diamond, 1 Misc. (N. Y.) 97, 20 N. Y. Suppl. 847, 49 N. Y. St. 348 [*affirming* 19

or hearsay.[91] From their nature, however, it is permissible to make some averments upon information and belief;[92] but, in such case, the affidavit must show the source of affiant's knowledge or the foundation of his belief, in order that the court may judge if it is well founded.[93]

N. Y. Suppl. 181, 46 N. Y. St. 283]; Satow *v.* Reisenberger, 25 How. Pr. (N. Y.) 164; Seely *v.* Crosby, 2 How. Pr. (N. Y.) 230.

Ohio.— Penrose *v.* Evans, Tapp. (Ohio) 172.

Pennsylvania.— Young *v.* Corder, 2 Miles (Pa.) 155; Towers *v.* Kingston, 1 Browne (Pa.) 33; Boyle *v.* Grady, 1 Wkly. Notes Cas. (Pa.) 313. *Compare* Com. *v.* Green, 185 Pa. St. 641, 40 Atl. 96 (holding that an affidavit of plaintiff "to the best of his knowledge, information, and belief," will support a warrant of arrest); C. M. Hapgood Shoe Co. *v.* Saupp, 7 Pa. Super. Ct. 480 (holding that an affidavit is sufficient when the averments made on information and belief are set forth with great particularity, and are sufficient, if unexplained, to raise a *prima facie* presumption against defendant).

England.— Claphamson *v.* Bowman, 2 Str. 1226.

Canada.—Sayre *v.* Williams, 29 N. Brunsw. 531.

See 4 Cent. Dig. tit. "Arrest," § 54.

When it is alleged that defendant has admitted the grounds to be true, an affidavit which states sufficient grounds of arrest, but is based on information and belief, is sufficient. Hirsh *v.* Van der Perren, 10 N. Y. Suppl. 449, 32 N. Y. St. 850.

When affiant's knowledge appears from the face of the affidavit it is sufficient even though the allegations are expressed to be made according to the "best knowledge and belief" of affiant. Brooklyn Daily Union *v.* Hayward, 11 Abb. Pr. N. S. (N. Y.) 235.

91. Moyle *v.* Haire, 97 Mich. 636, 57 N. W. 191; Bornstein *v.* Harding, 16 N. Y. Suppl. 91, 40 N. Y. St. 868.

92. As, for instance, the amount of damages sustained by plaintiff (Nevins *v.* Merrie, 2 Whart. (Pa.) 499); defendant's non-residence (Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132); defendant's fraud in contracting debt (Matoon *v.* Eder, 6 Cal. 57); false and fraudulent representations by defendant (Whitlock *v.* Roth, 10 Barb. (N. Y.) 78, 5 How. Pr. (N. Y.) 143); fraudulent removal and disposition of property (Paige *v.* Price, 78 N. C. 10); defendant's concealment of property (Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132); want of probable cause in preferring an indictment (Mitchell *v.* Henderson, 1 Hill (S. C.) 294); defendant's intention (Mosher *v.* People, 5 Barb. (N. Y.) 575); his intention to remove or abscond (Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132; Askenheim *v.* Colegrave, 2 Dowl. & L. 642, 9 Jur. 117, 14 L. J. Exch. 113, 13 M. & W. 620; Gibbons *v.* Spalding, 2 Dowl. N. S. 811, 7 Jur. 21, 12 L. J. Exch. 185, 11 M. & W. 173; Willis *v.* Snook, 5 Jur. 579, 8 M. & W. 147. *Contra,* Seely *v.* Crosby, 2 How. Pr. (N. Y.) 230; Hinman *v.* Wilson, 2 How. Pr. (N. Y.) 27; Matter of Faulkner, 4 Hill (N. Y.) 598; Auge *v.* Mayrand, 21 L. C. Jur. 216, the first three cases holding that an affidavit alleging, upon information and belief, defendant's intention to abscond or remove is insufficient, and the last case holding that such an affidavit, alleging defendant's intention to secrete "his movable property and effects," is defective). *Compare* Bates *v.* Rowley, 11 Phila. (Pa.) 210, 211, 33 Leg. Int. (Pa.) 202, holding that an affidavit, upon information and belief, that the debtor has "rights in action, money and evidences of debt, which he unjustly refuses to apply," etc., is too general to authorize a warrant of arrest.

Sufficient averment of belief.— La. Code Prac. art. 223, requires the creditor to swear "he verily believes" the facts stated in his affidavit, but these words are not sacramental. To swear he "suspects" and "fears" his debtor is about to depart is sufficient. Passebon *v.* His Creditors, 9 La. 189.

Insufficient averment of knowledge and belief.— An affidavit in which plaintiff merely stated that, "to the best of his belief the defendant was about to quit the commonwealth," was held insufficient. It should have been "to the best of the deponent's knowledge and belief," although the statute has the words "knowledge or belief." Diehl *v.* Perie, 2 Miles (Pa.) 47, 48. See also Bromley *v.* Joseph, 3 Whart. (Pa.) 10.

Necessity of showing what is alleged on information.— It is of great importance that the original affidavit upon which an order of arrest is granted should be candidly and carefully drawn, and state correctly what is alleged on information and what of deponent's personal knowledge. Moore *v.* Calvert, 9 How. Pr. (N. Y.) 474.

93. *Michigan.*— Shaw *v.* Ashford, 110 Mich. 534, 68 N. W. 281; Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160; Luton *v.* Palmer, 70 Mich. 152, 38 N. W. 13.

New York.— Finlay *v.* De Castroverde, 68 Hun (N. Y.) 59, 22 N. Y. Suppl. 716, 52 N. Y. St. 228; Blason *v.* Bruno, 33 Barb. (N. Y.) 520, 12 Abb. Pr. (N. Y.) 265, 21 How. Pr. (N. Y.) 112; Whitlock *v.* Roth, 10 Barb. (N. Y.) 78, 5 How. Pr. (N. Y.) 143; Ammon *v.* Kellar, 21 Misc. (N. Y.) 442, 47 N. Y. Suppl. 595 [*reversing* 20 Misc. (N. Y.) 728, 46 N. Y. Suppl. 1089]; Markey *v.* Diamond, 19 N. Y. Suppl. 181, 46 N. Y. St. 283; Thompson *v.* Best, 4 N. Y. Suppl. 229, 21 N. Y. St. 103; Jordan *v.* Harrison, 13 N. Y. Civ. Proc. 445; De Weerth *v.* Feldner, 16 Abb. Pr. (N. Y.) 295, S. C. *sub nom.* De Nierth *v.* Sidner, 25 How. Pr. (N. Y.) 419; Dreyfus *v.* Otis, 54 How. Pr. (N. Y.) 405; Cook *v.* Roach, 21 How. Pr. (N. Y.) 152; Bell *v.* Mali, 11 How. Pr. (N. Y.) 254.

(c) *As to Cause of Action* — (1) IN GENERAL. When plaintiff's right to hold a defendant to bail is dependent upon the cause of action, it is essential that the affidavit should disclose positively the existence of a good cause of action.[94] The rule has been applied to actions for breach of contract,[95] breach of marriage promise,[96]

North Carolina.— Wilson *v.* Barnhill, 64 N. C. 121.

North Dakota.—Kaeppler *v.* Red River Valley Nat. Bank, 8 N. D. 406, 79 N. W. 869.

South Dakota.— Hart *v.* Grant, 8 S. D. 248, 66 N. W. 322.

England.— Graham *v.* Sandrinelli, 4 Dowl. & L. 317, 16 L. J. Exch. 67, 16 M. & W. 191; Gibbons *v.* Spalding, 2 Dowl. N. S. 811, 7 Jur. 21, 12 L. J. Exch. 185, 11 M. & W. 173.

Canada.— Auge *v.* Mayrand, 21 L. C. Jur. 216; Cameron *v.* Brêga, 10 L. C. Jur. 88; Cornell *v.* Merrill, 1 L. C. Rep. 357, 3 R. J. R. Q. 38; McCallum *v.* Perkins, 16 N. Brunsw. 185; Jenkins *v.* McFee, 16 N. Brunsw. 41; Gilbert *v.* Stiles, 13 Ont. Pr. 121; Mitchell *v.* Benn, 16 Rev. Lég. 431; Mullarky *v.* Phaneuf, 9 Rev. Lég. 529; Chrétien *v.* McLane, 3 Rev. de Lég. 548. *Contra,* Hotte *v.* Currie, 22 L. C. Jur. 34; Lachance *v.* Gauthier, 6 Montreal Super. Ct. 279; McManus *v.* Wells, 29 N. Brunsw. 449; Drapeau *v.* Pacaud, 6 Quebec 140; Casavant *v.* Patenaude, 3 Rev. Lég. 446.

See 4 Cent. Dig. tit. "Arrest," § 54 *et seq.*

It is sufficient to name deponent's informant, without specifying other reasons of belief (McRae *v.* Miller, 28 L. C. Jur. 268); and an affidavit which shows facts sufficient to satisfy the mind of the judge is sufficient even though it does not disclose the name of deponent's informant (Milligan *v.* Mason, 17 L. C. Jur. 159; McInnes *v.* Macklin, 6 U. C. L. J. 14).

Must state name of informant and why his affidavit was not obtained (Rolder *v.* Gonzalez, 25 N. Y. App. Div. 96, 48 N. Y. Suppl. 1015; Markey *v.* Diamond, 19 N. Y. Suppl. 181, 46 N. Y. St. 283; Jordan *v.* Harrison, 13 N. Y. Civ. Proc. 445; Bell *v.* Mali, 11 How. Pr. (N. Y.) 254), and it is insufficient for affiant to state merely that he was unable to obtain the affidavit of his informant (Martin *v.* Gross, 56 N. Y. Super. Ct. 512, 4 N. Y. Suppl. 337, 22 N. Y. St. 439, 16 N. Y. Civ. Proc. 235).

Insufficient statement of source of information.— An affidavit made by the receiver of a corporation upon information and belief insufficiently states affiant's sources of information when it merely refers to affidavits made by the person whose arrest is sought, an examination of certain other writings signed by him, and an inspection of an inventory of the corporation. Matter of Van Amee, 8 N. Y. Suppl. 219, 29 N. Y. St. 198.

Documents.— Where affiant states certain facts upon information and belief, derived from certain documents, he should annex such documents to the affidavit, or produce them in court. Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160; Finlay *v.* De Castroverde, 68 Hun (N. Y.) 59, 22 N. Y. Suppl. 716, 52 N. Y. St. 228; De Weerth *v.* Feldner, 16 Abb. Pr. (N. Y.) 295, S. C. *sub nom.* De Nierth *v.* Sidner, 25 How. Pr. (N. Y.) 419. On the other hand, it is unnecessary to produce documentary evidence of facts stated in the affidavit as of affiant's own knowledge. Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160.

94. No formal allegation to that effect is necessary, however, when the affidavit contains a statement of facts showing the existence of a cause of action (National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16), and it is not necessary to state "that an action has been, or is about to be commenced" (Pindar *v.* Black, 4 How. Pr. (N. Y.) 95, 2 Code Rep. (N. Y.) 53).

Action barred by limitation.— The affidavit does not show a sufficient cause of action if it shows that the action is barred by the statute of limitations. Pratt *v.* Page, 18 Wis. 337.

When order obtained after verdict.— Where plaintiff does not seek the arrest of defendant until after obtaining a verdict against him, the affidavit should state as the cause of action the claim for which the action was brought. McManus *v.* Wells, 29 N. Brunsw. 449.

When defect not jurisdictional.— A defect in the statement of the cause of action in an affidavit to hold to bail in a justice's court does not go to the jurisdiction of the justice to try the cause, even though defendant took the objection at the trial and his objection was there overruled. O'Keefe *v.* Delaney, 31 N. Brunsw. 299.

In Georgia it is not necessary that the affidavit should set forth or describe the cause of action, it being sufficient if plaintiff complies with the statutory requirements of oath to the amount claimed and apprehension of the loss of the debt, or some part thereof, unless defendant is held to bail. Montigue *v.* Leatr, 7 Ga. 366.

95. Nevins *v.* Merrie, 2 Whart. (Pa.) 499.

96. Snedden *v.* Gunn, 16 Pa. Co. Ct. 47, 25 Pittsb. Leg. J. N. S. 364; Parke *v.* Bolivar, 1 Troub. & H. Pr. (Pa.) 306. *Compare* Weaver *v.* Cline, 12 Pa. Co. Ct. 363, wherein it was held that an affidavit which failed to aver that plaintiff had offered to marry defendant, and asked him to marry her, was sufficient.

Presumption of marriage.— In an action for a breach of promise to marry, where plaintiff stated in her affidavit to hold to bail that the parties had cohabited as husband and wife, representing themselves as married to each other, and had had born to them five children, it was held that plaintiff had raised a presumption of marriage which, unless repelled by proof, would defeat the action, and she was therefore not entitled to an order of arrest. Durand *v.* Durand, 2 Sweeny (N. Y.) 315.

conversion,[97] criminal conversation,[98] debt,[99] deceit,[1] libel,[2] malicious prosecution,[3]

97. People *v.* Wayne Cir. Judge, 36 Mich. 334.

98. Seely *v.* Crosby, 2 How. Pr. (N. Y.) 230.

Affidavit held sufficient.— An affidavit to hold to bail in an action for a criminal conversation with plaintiff's wife, which stated that she had been taken away from plaintiff about two years previously, and that plaintiff had only recently discovered that she had been living ever since with defendant in adultery, but omitted any positive averment that she was plaintiff's wife when she was taken away, or that defendant had committed adultery with her, was held sufficient. Bullock *v.* Jenkins, 20 L. J. Q. B. 90, 1 L. M. & P. 645.

99. Parker *v.* Ogden, 2 N. J. L. 136.

1. *California.*— *In re* Vinich, 86 Cal. 70, 26 Pac. 528.

Michigan.—Terrill *v.* Grove, 2 Mich. N. P. 3.

New York.— People *v.* Snaith, 57 Hun (N. Y.) 332, 10 N. Y. Suppl. 589, 32 N. Y. St. 568; Wells *v.* Sisson, 14 Hun (N. Y.) 267; Bishop *v.* Davis, 9 Hun (N. Y.) 342; Schwenk *v.* Naylor, 49 N. Y. Super. Ct. 98.

South Carolina.— National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16.

South Dakota.— Hart *v.* Grant, 8 S. D. 248, 66 N. W. 322.

The averment that a wrong impression was intentionally conveyed by defendant is, in some cases, sufficient. Bishop *v.* Davis, 9 Hun (N. Y.) 342.

Sufficient showing of cause of action.— Where the affidavit set forth that defendant falsely and fraudulently represented himself to be superintendent of one who was constructing a railroad, and as authorized to hire men and teams for him at three dollars and fifty cents per day; that free transportation would be furnished from K to B, where accommodations and shelter would be furnished at one dollar per day; that, relying upon these representations, plaintiff went with his team to B, but was there informed that defendant had no authority to hire men and teams; that his contract would not be recognized, and that only two dollars and twenty-five cents per day would be paid; and that plaintiff worked for awhile for this sum and then returned, it was held that the affidavit, although not as clearly framed as was desirable, was sufficient. Lamper *v.* Roberts, 83 Mich. 547, 47 N. W. 440.

A *prima facie* case is made where the affidavit sets forth that plaintiff paid certain drafts upon the request of defendant, who represented the holder to be responsible, and that it subsequently developed that the drafts were forged. Clews *v.* Raphael, 4 Thomps. & C. (N. Y.) 664.

Insufficient showing of cause of action.— An affidavit alleging that defendant falsely represented that stock of a certain company was not overissued, whereby plaintiff was induced to purchase certain shares in 1853, and that the overissues were made between June, 1853, and June, 1854, does not show that there was an overissue when the representation was made and "that a sufficient cause of action exists" as required by N. Y. Code, § 181, to justify an arrest. Bell *v.* Mali, 11 How. Pr. (N. Y.) 254.

Presumption as to cause of action.— If the affidavits show a cause of action in the nature of an action on the case, for obtaining goods from plaintiffs by fraud, the fact that they also allege that the action is brought to recover the price of goods sold does not warrant an inference that the complaint will not state a cause of action for obtaining goods by fraud. Townsend *v.* Bogart, 11 Abb. Pr. (N. Y.) 355.

Non-residence and absconding.— Under the amendment of 1863 to subdivision 4, section 179 of the code, it was not necessary, in an action "brought to recover damages for fraud and deceit," to aver that defendant was a non-resident, or about to depart from the state; and an order of arrest would not be vacated upon affidavits denying, not the fraud complained of, but only the intention to leave the state. Hazlett *v.* Gill, 4 Rob. (N. Y.) 627.

2. Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201; Beach *v.* Wade, 3 Wkly. Notes Cas. (Pa.) 219; Holland *v.* Dealy, 13 Phila. (Pa.) 79, 36 Leg. Int. (Pa.) 479. *Compare* Stettinius *v.* Orme, 4 Cranch C. C. (U. S.) 342, 22 Fed. Cas. No. 13,386, holding that, where the affidavit is positive as to the damages sustained, it is not a valid objection thereto that the speaking of the words is averred on information and belief.

Translation of words spoken.— The alleged slanderous words must be set out in the language in which they were spoken, and it is insufficient to give merely the English version of words alleged to have been spoken in the German language. E—— *v.* R——, 12 Pa. Co. Ct. 274.

3. Vanderpool *v.* Kissam, 4 Sandf. (N. Y.) 715; Grimes *v.* Davison, 2 Abb. N. Cas. (N. Y.) 457; Aarons *v.* Dunseith, 11 Pa. Co. Ct. 208; Walker *v.* Curran, 1 Phila. (Pa.) 113, 7 Leg. Int. (Pa.) 187; Pratt *v.* Page, 18 Wis. 337. *Compare* Fraser *v.* Gerrie, 2 Rev. Crit. 477, wherein it was held that it is not essential that the affidavit should allege the conclusion of the prosecution when it appears that defendant is about to leave the country.

Failure to deny charge.— Where plaintiff, in an action for malicious prosecution in having him arrested on the charge that he received stolen goods, knowing them to be stolen, failed to allege in his affidavit that he did not know that the goods were stolen, it was held that the affidavit was fatally defective. Aarons *v.* Dunseith, 11 Pa. Co. Ct. 208. But where defendant's affidavit for plaintiff's arrest insufficiently averred facts entitling

replevin,[4] slander,[5] trespass,[6] and trover.[7] As a rule, if the existence of a sufficient cause of action is shown, entitling plaintiff to an arrest, no special cause of arrest need be stated.[8] It has been held, however, that the affidavit must disclose some special cause for holding defendant to bail in actions for libel or slander.[9]

him to the order of arrest, it was held that plaintiff, in his affidavit for arrest in an action of malicious prosecution in procuring his arrest, need not aver that the allegations in defendant's affidavit were untrue. Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160.

4. Muller *v.* Perrin, 14 Abb. Pr. N. S. (N. Y.) 95.

5. *Michigan.*— Graham *v.* Cass Cir. Judge, 108 Mich. 425, 66 N. W. 348.

New York.— Adams *v.* Mills, 3 How. Pr. (N. Y.) 219.

Pennsylvania.— Vanderslice *v.* Spear, 2 Miles (Pa.) 392; Trianoviski *v.* Kleinschmidt, 20 Wkly. Notes Cas. (Pa.) 296, 4 Pa. Co. Ct. 298; Barnett *v.* Stains, 20 Wkly. Notes Cas. (Pa.) 274; Kasper *v.* Newhouser, 14 Wkly. Notes Cas. (Pa.) 128; Taylor *v.* Ashworth, 2 Wkly. Notes Cas. (Pa.) 370; Boyle *v.* Grady, 1 Wkly. Notes Cas. (Pa.) 313; Sargent *v.* Miller, 1 Woodw. (Pa.) 438.

South Carolina.— Peareson *v.* Picket, 1 McCord (S. C.) 472.

United States.— Lanstraaz *v.* Powers, 1 Cranch C. C. (U. S.) 42, 14 Fed. Cas. No. 8,078.

6. **Trespass quare clausum fregit.**— Shaw *v.* Ashford, 110 Mich. 534, 68 N. W. 281.

Trespass vi et armis.— Leonard *v.* Erlanger, 17 Wkly. Notes Cas. (Pa.) 13; Diehl *v.* Forthuber, 16 Wkly. Notes Cas. (Pa.) 227; Wedman *v.* Kendall, 14 Wkly. Notes Cas. (Pa.) 157; Brown *v.* Esquirrel, 12 Wkly. Notes Cas. (Pa.) 421.

An affidavit against two defendants to hold to bail for an assault and battery must show that the parties acted in concert. Hence, an allegation of a distinct assault by each, though on the same day, is not sufficient. Jackson *v.* Cheney, 2 Wkly. Notes Cas. (Pa.) 569.

The precise amount of damages sustained by plaintiff need not be stated in the affidavit. Cummer *v.* Moyer, 57 Mich. 375, 24 N. W. 110; Pontingen *v.* Williams, 1 Browne (Pa.) 206; Towers *v.* Kingston, 1 Browne (Pa.) 33. *Contra*, Mecklin *v.* Caldwell, 1 Cranch C. C. (U. S.) 400, 16 Fed. Cas. No. 9,388.

When facts showing a good cause of action are stated, it is unnecessary to aver that the assault was *vi et armis* or *contra pacem*. Leonard *v.* Erlanger, 17 Wkly. Notes Cas. (Pa.) 13.

7. *Kansas.*— Bryan *v.* Congdon, 54 Kan. 109, 37 Pac. 1009.

Michigan.— Wilcox *v.* Ismon, 34 Mich. 268; Deitz *v.* Groesbeck, 32 Mich. 303.

New Jersey.—Seidel *v.* Peschkaw, 27 N. J. L. 427.

New York.— Panama R. Co. *v.* Robinson, 2 Hun (N. Y.) 381; Sherlock *v.* Sherlock, 7 Abb. Pr. N. S. (N. Y.) 22.

Pennsylvania.— Cary *v.* Henry, 2 Miles (Pa.) 295; Craven *v.* Coates, 14 Wkly. Notes Cas. (Pa.) 90; Mangaletti *v.* McMillan, 10 Pa. Co. Ct. 239.

England.— Woolley *v.* Thomas, 7 T. R. 550; Clarke *v.* Cawthorne, 7 T. R. 321.

Canada.— Busby *v.* Winchester, 28 N. Brunsw. 419.

Use of technical language.— An affidavit stating that defendant is "indebted to the plaintiff in trover" is bad, as so technical a word as "trover" should not be used in an affidavit to hold to bail. Hubbard *v.* Pacheco, 1 H. Bl. 218.

Manner in which defendant obtained possession must be shown. Tucker *v.* Hough, 24 Wkly. Notes Cas. (Pa.) 91; Hurlburt *v.* Sharp, 18 Wkly. Notes Cas. (Pa.) 137. *Compare* Cary *v.* Henry, 2 Miles (Pa.) 295, holding that an affidavit averring property in plaintiff, possession of defendant, refusal to deliver, and the conversion, is sufficient although it does not set forth in detail the circumstances under which defendant obtained possession of the property, its particular kind and value, and the manner in which defendant applied it to his own purpose.

A specific identification of the property must be contained. Hurlburt *v.* Sharp, 18 Wkly. Notes Cas. (Pa.) 137.

Negativing defense.—It is not necessary to negative any possible defense. Deitz *v.* Groesbeck, 32 Mich. 303; Wandelt *v.* Burnett, 22 Misc. (N. Y.) 315, 49 N. Y. Suppl. 109 [*affirming* 21 Misc. (N. Y.) 791, 47 N. Y. Suppl. 1150].

8. Logan *v.* Lawshe, 62 N. J. L. 567, 41 Atl. 751; Wert *v.* Strouse, 38 N. J. L. 184; Straus *v.* Schwarzwaelden, 4 Bosw. (N. Y.) 627; Baker *v.* Swackhamer, 5 How. Pr. (N. Y.) 251, 3 Code Rep. (N. Y.) 248.

9. Norton *v.* Barnum, 20 Johns. (N. Y.) 337; Clason *v.* Gould, 2 Cai. (N. Y.) 47. As that plaintiff has sustained special damages (Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201; McCauley *v.* Smith, 4 Yeates (Pa.) 193; Zeller *v.* Katzengroh, 12 Pa. Co. Ct. 451; Scott *v.* Crum, 1 Pearson (Pa.) 196; Allman *v.* Kensel, 3 Ont. Pr. 110), though the amount of special damages need not be specified (Charles *v.* Holmes, 1 Browne (Pa.) 297); or was charged with a gross crime (Jewell *v.* Staats, 3 Harr. (Del.) 96; McCauley *v.* Smith, 4 Yeates (Pa.) 193; Walker *v.* Walker, 13 Wkly. Notes Cas. (Pa.) 110. But see Scott *v.* Crum, 1 Pearson (Pa.) 196, wherein the court refused to hold defendant to special bail in the absence of a showing of special damages, although the alleged charge against plaintiff, a woman, was fornication); or that defendant is about to leave the jurisdiction of the court

The disclosure in the affidavit of such special cause is also necessary in actions for trespass.[10]

(2) As to Indebtedness — (a) Existence of — aa. *In General.* In an action of debt the affidavit to hold to bail must show clearly and positively the existence of a debt[11] which is actually due and payable.[12] It must also be clearly shown by

(Scott *v.* Crum, 1 Pearson (Pa.) 196; Doyne *v.* Barker, 4 Cranch C. C. (U. S.) 475, 7 Fed. Cas. No. 4,055).

10. Perry *v.* Wing, 3 How. Pr. (N. Y.) 13, as that defendant is about to leave the country.

11. *California.*— *In re* Vinich, 86 Cal. 70, 26 Pac. 528.

Delaware.— Read *v.* Randel, 2 Harr. (Del.) 327.

Louisiana.—Penrice *v.* Crothwaite, 11 Mart. (La.) 537.

Michigan.— Matter of Lee, 49 Mich. 629, 14 N. W. 683.

New Jersey.— Parker *v.* Ogden, 2 N. J. L. 136.

New York.— Satterlee *v.* Lynch, 6 Hill (N. Y.) 228.

Ohio.— Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132.

Pennsylvania.— Kohlhaus *v.* Veit, 34 Wkly. Notes Cas. (Pa.) 40.

South Carolina.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

United States.— Nelson *v.* Cutter, 3 McLean (U. S.) 326, 17 Fed. Cas. No. 10,104; Robinson *v.* Holt, Hempst. (U. S.) 426, 20 Fed. Cas. No. 11,955; Wright *v.* Cogswell, 1 McLean (U. S.) 471, 30 Fed. Cas. No. 18,074.

England.— Macpherson *v.* Lovie, 1 B. & C. 108, 2 D. & R. 69, 8 E. C. L. 47; Champion *v.* Gilbert, 4 Burr. 2126; Pomp *v.* Ludvigson, 2 Burr. 655; Wheeler *v.* Copeland, 5 T. R. 364.

Canada.— Prior *v.* Nelson, Taylor (U. C.) 176.

But see Davis *v.* Dorr, 30 Vt. 97, holding that, in an action on contract, the affidavit need not aver in direct terms that defendant is indebted to plaintiff.

See 4 Cent. Dig. tit. "Arrest," § 63.

Omission to annex an account referred to in the affidavit is not material where the debt is positively sworn to. Pike River Mills Co. *v.* Priest, 15 Montreal Leg. N. 360.

12. *Indiana.*— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

New Jersey.— Parker *v.* Ogden, 2 N. J. L. 136.

Rhode Island.— Farrow *v.* Dutcher, 19 R. I. 715, 36 Atl. 839.

South Carolina.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

United States.— Hill *v.* Myers, 5 Cranch C. C. (U. S.) 484, 12 Fed. Cas. No. 6,496; Jolly *v.* Rankin, 1 Cranch C. C. (U. S.) 372, 13 Fed. Cas. No. 7,440.

England.— Smith *v.* Kendal, 7 D. & R. 232, 16 E. C. L. 282; Mackenzie *v.* Mackenzie, 1 T. R. 716.

Canada.— Clarke *v.* Clarke, 1 U. C. Q. B. 395. *Compare* Willett *v.* Brown, 8 Ont. Pr. 468, wherein the court refused to discharge defendant even though it was doubtful whether the debt was actually due at the time of the arrest, and even though the judge who granted the order for the writ would not have done so if all the facts had been before him.

It is sufficiently averred that the debt is due when the affidavit states that defendant was indebted to plaintiff, in trust for deponent, under a deed by which defendant had covenanted to pay "at certain times, and on certain events now past and happened." Barnard *v.* Neville, 3 Bing. 126, 10 Moore C. P. 475, 11 E. C. L. 70.

Bills and notes.— When the action is based on a bill or note, the affidavit must show that the instrument is past due (Edwards *v.* Dick, 3 B. & Ald. 495, 5 E. C. L. 288 [*overruling* Davison *v.* March, 1 B. & P. N. R. 157]; Holcombe *v.* Lambkin, 2 M. & S. 475), and still unpaid (Phillips *v.* Turner, 1 C. M. & R. 597, 3 Dowl. P. C. 163, 5 Tyrw. 196; Crosby *v.* Clarke, 5 Dowl. P. C. 62, 2 Gale 77, 1 M. & W. 296; Andruss *v.* Ritchie, Draper (U. C.) 6; Smith *v.* Sullivan, Taylor (U. C.) 493); and a statement that the account "is now due and unpaid" will not supply the omission of an allegation of default by the acceptor of a bill (Jones *v.* Collins, 6 Dowl. P. C. 526, 2 Jur. 374, 1 W. W. & H. 187). The affidavit is sufficient when it states that the instrument was due and payable at a day then past, without specifying the day (Elstone *v.* Mortlake, 1 Chit. 648, 18 E. C. L. 353; Irving *v.* Heaton, 4 Dowl. P. C. 638, 2 Scott 798; Masters *v.* Billing, 3 Dowl. P. C. 751; Lambert *v.* Wray, 3 Dowl. P. C. 169, 1 C. M. & R. 576, 5 Tyrw. 195; Shirley *v.* Jacobs, 3 Dowl. P. C. 101, 1 Scott 67; Weedon *v.* Medly, 2 Dowl. P. C. 689; Bradshaw *v.* Saddington, 7 East 94, 3 Smith K. B. 117; Humphries *v.* Winslow, 2 Marsh. 231, 6 Taunt. 531, 1 E. C. L. 740; Walmesley *v.* Dibdin, 4 M. & P. 10; Maynard *v.* Reynolds, W. W. & D. 394; Pawson *v.* Hall, 1 Ont. Pr. 294); but is insufficient when it does not contain such statement, and neither specifies the date or maturity of the instrument nor alleges that it was payable on demand (Kirk *v.* Almond, 3 Cr. & J. 354, 1 Dowl. P. C. 318, 2 Tyrw. 316; Machu *v.* Fraser, 2 Marsh. 483, 7 Taunt. 171, 2 E. C. L. 311; Jackson *v.* Yate, 2 M. & S. 148; Bill *v.* Rogers, 12 Price 194; Ross *v.* Hurd, 1 Ont. Pr. 158; Racey *v.* Carman, 3 U. C. L. J. 204). Averments of notice, presentment, and default are unnecessary when the action is against the person primarily liable (Osborne *v.* Pennell, 4 Moore & S. 431); but, in an action against one secondarily liable such averments are necessary (Hopkinson *v.* Salembier, 7 Dowl. P. C. 493, 3 Jur. 538, 5 M. & W. 423; Simpson *v.* Dick, 3 Dowl. P. C. 731; Nicholson *v.* Nowlin, 16 N. Brunsw. 210; Ross *v.* Balfour, 5 U. C.

the affidavit that such indebtedness is due and payable to plaintiff[13] by defendant,[14]

Q. B. O. S. 683. *Compare* Witham *v.* Gompertz, 2 C. M. & R. 736, 4 Dowl. P. C. 382, 1 Gale 301, 1 Tyrw. & G. 6, wherein it was held that it was sufficient for an affidavit to allege a default, without averring a presentment or notice). If the note is drawn and payable in a foreign country, by the law of which presentment at the place of payment is not necessary to be proved as a condition precedent to plaintiff's right to sue, it must be so stated in the affidavit. Cushing *v.* Gordon, 11 N. Brunsw. 524.

Demand and refusal to pay.— It is not necessary to state that defendant has been asked to pay the debt, and has refused to do so. Hasset *v.* Mulcahey, 6 L. C. Rep. 15, 4 R. J. R. Q. 474.

Qualification of positive oath.— In an affidavit made by plaintiff's agent (plaintiff himself being abroad) wherein the debt on a judgment is positively sworn to, the subsequent statement that the judgment is still in force and unsatisfied, "as this deponent verily believes," will not vitiate the affidavit. Bland *v.* Drake, 1 Chit. 165, 18 E. C. L. 100.

13. Kohlhaas *v.* Veit, 162 Pa. St. 108, 34 Wkly. Notes Cas. (Pa.) 527, 29 Atl. 349 [*reversing* 14 Pa. Co. Ct. 191, 3 Pa. Dist. 141]; Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

In an action for goods sold and delivered, the affidavit is fatally defective unless it avers that the goods were sold and delivered by plaintiff. Benedict *v.* Whartenby, 2 Miles (Pa.) 131; Taylor *v.* Forbes, 11 East 315; Cathrow *v.* Hagger, 8 East 106; Perks *v.* Severn, 7 East 194; Fenton *v.* Ellis, 1 Marsh. 535, 6 Taunt. 192, 1 E. C. L. 572; McDonnell *v.* Kelly, 4 U. C. Q. B. 394; Diamond *v.* Cartwright, 22 U. C. C. P. 494.

Money had and received.—An affidavit that defendant is indebted to plaintiff for money had and received by defendant, for and on account of plaintiff, and at his request, but not stating that it was received to plaintiff's use, is insufficient. Kelly *v.* Curzon, 4 A. & E. 622, 1 Hurl. & W. 678, 31 E. C. L. 278.

In action by partners.— An affidavit for a debt stated therein to be due A and B is good, even though plaintiffs are partners and are not stated to be so in the affidavit. Bodfield *v.* Padmore, 5 B. & Ad. 1095, 27 E. C. L. 459.

14. **An express averment of the defendant's personal indebtedness** should be contained in the affidavit (Alexander *v.* McLachlan, 1 L. C. Jur. 5; Hall *v.* Zernichon, 4 Quebec 268); but its omission is not fatal if the affidavit otherwise discloses a personal indebtedness (Sheridan *v.* Hennessey, 23 L. C. Jur. 212; Lampson *v.* Smith, 7 L. C. Rep. 425, 5 R. J. R. Q. 334).

In an action for goods sold and delivered, the affidavit must show positively sale and delivery to defendant (Benedict *v.* Whartenby, 2 Miles (Pa.) 131; Handley *v.* Franchi, L. R. 2 Exch. 34, 36 L. J. Exch. 32, 15 L. T. Rep. N. S. 252, 15 Wkly. Rep. 158; Bell *v.* Thrupp, 2 B. & Ald. 596, 1 Chit. 331, 18 E. C. L. 184; Taylor *v.* Forbes, 11 East 315; Cathrow *v.* Hagger, 8 East 106; Perks *v.* Severn, 7 East 194; Young *v.* Gatien, 2 M. & S. 603; McDonnell *v.* Kelly, 4 U. C. Q. B. 394; Diamond *v.* Cartwright, 22 U. C. C. P. 494. But see Maguire *v.* Rockett, 3 Quebec 347, holding that the affidavit need not show that the sale and delivery were made to defendant when they are alleged to have been made at his instance and request. Moreover, since the passage of 1 & 2 Vict. c. 110, § 3, an affidavit which states that the goods were sold to defendant need not state also that they were delivered. Bell *v.* Thrupp, 2 B. & Ald. 596, 1 Chit. 331, 18 E. C. L. 184; Lascar *v.* Morioseph, 1 Bing. 357, 8 Moore C. P. 366, 8 E. C. L. 546; Hopkins *v.* Vaughan, 12 East 398; Hargreaves *v.* Hayes, 5 E. & B. 272, 1 Jur. N. S. 521, 24 L. J. Q. B. 281, 85 E. C. L. 272); but it is not necessary to allege that the sale and delivery were at defendant's request (Kelly *v.* Kintzing, 2 Miles (Pa.) 181). However, an affidavit for money lent, for goods sold and delivered, and for work and labor done, is insufficient if it fails to state that it was "at the instance and request of defendant," even though it states that it was "to and for his use, and on his behalf," as, for all that such affidavit shows, the goods may have been sold and delivered to a third person for defendant's use, without the latter being acquainted with the transaction. Durnford *v.* Messiter, 5 M. & S. 446.

Sale to third person.— An affidavit that defendant is justly indebted to plaintiff in a certain sum, for goods sold and delivered to a third person, upon the written guaranty of defendant, is sufficient to hold the latter to bail (Laverty *v.* Snelling, 3 Cranch C. C. (U. S.) 290, 14 Fed. Cas. No. 8,124); but an affidavit for the price of goods, guaranteed by defendant, which fails to show the terms of the sale, or that the time for payment has expired, is bad (Angus *v.* Robilliard, 2 Dowl. P. C. 90). And an affidavit for goods sold and delivered to, and for money paid and laid out for, the wife of defendant before his intermarriage with her, no request being stated, is insufficient (Gray *v.* Shepherd, 3 Dowl. P. C. 442).

In an action for work and labor done and materials furnished, it is essential that the affidavit should state that the work and labor were done for, and the materials furnished to, defendant (Bell *v.* Thrupp, 2 B. & Ald. 596, 1 Chit. 331, 18 E. C. L. 184; Young *v.* Gatien, 2 M. & S. 603; Diamond *v.* Cartwright, 22 U. C. C. P. 494), but this is sufficiently shown by an averment that the work was done by plaintiff for defendant as his servant (Bliss *v.* Atkins, 1 Marsh. 317 note, 5 Taunt. 756, 1 E. C. L. 387), or that defendant is indebted for money paid, laid out, and expended, and wages due to plaintiff for his services on board the defendant's ship, without an express statement that the debt is due from defendant (Symonds *v.* Andrews, 1

and further that the indebtedness is one for which an arrest may be lawfully made.[15]

bb. *By Reference to Books or Papers.* As a general rule an affidavit is insufficient which only avers the debt to be due as appears by a certain instrument or book to which reference is made, as such averment is not a positive oath of indebtedness;[16] but, in an action by an executor, administrator, or assignee of a bankrupt,

Marsh. 317, 5 Taunt. 751, 1 E. C. L. 384). It is not necessary to aver "at defendant's request." Crane *v.* Fish, 2 Miles (Pa.) 165; Anonymous, 1 Chit. 292, 18 E. C. L. 162; Brown *v.* Garnier, 2 Marsh. 83, 6 Taunt. 389, 1 E. C. L. 667; Joutras *v.* Dunlop, 7 L. C. Rep. 420, 5 R. J. R. Q. 330. *Contra,* Hall *v.* Brush, (Trin. T., 3 & 4 Vict.) 1 Robinson & J. Ont. Dig. 194.

In an action for money lent, the affidavit must show that the money was lent to defendant (Smith *v.* Stevens, 3 Tyrw. 219; Diamond *v.* Cartwright, 22 U. C. C. P. 494); but this requirement is met by an affidavit which recites facts showing that such was the case, even though it does not contain the express recital that the money was "lent to the defendant" (Bennett *v.* Dawson, 4 Bing. 609, 1 M. & P. 594, 13 E. C. L. 658). It is not sufficient, however, to state that defendant was "indebted to the plaintiff in 245*l* for money lent by plaintiff to defendant for the use of another, and for which the defendant promised to be accountable, and to repay, or cause to be secured to the plaintiff," it not appearing in the affidavit but that the money had been secured according to the agreement. Jacks *v.* Pemberton, 5 T. R. 552. An affidavit that A and B are indebted for money lent to A has been held sufficient to authorize the arrest of A. Ellerby *v.* Walton, 2 Ont. Pr. 147.

In an action for money paid to and for the use of defendant, it is necessary to aver that it was so done at the instance or request of defendant. McCanles *v.* Frederickson, 2 Miles (Pa.) 132; Pitt *v.* New, 8 B. & C. 654, 3 M. & R. 129, 15 E. C. L. 323; Marshall *v.* Davison, 2 Tyrw. 315. *Contra,* Berry *v.* Fernandes, 1 Bing. 338, 8 Moore C. P. 332, 8 E. C. L. 537; Harrison *v.* Turner, 4 Dowl. P. C. 72, 1 Hurl. & W. 346.

Money had and received for plaintiff.—In an affidavit to hold to bail it is sufficient to state that defendant is indebted to plaintiff in a certain sum for "money had and received on account of the plaintiff," without adding "received by the defendant," as it could not be said that defendant is indebted to plaintiff unless the money has been received by defendant. Coppinger *v.* Beaton, 8 T. R. 338.

Under agreement for purchase of land.—An affidavit stating that defendant is indebted to plaintiff by virtue of articles of agreement, by which the latter agreed to sell and the former to purchase certain lands, and that defendant has been let into possession in pursuance of the agreement, is insufficient unless it states that a conveyance has been tendered to defendant. Young *v.* Dowlman, 2 Y. & J. 31.

In action upon award.—Where there was a submission to two arbitrators, with power in them to name an umpire if they could not agree, provided the umpire made his award on or before a certain day, and the arbitrators named an umpire, who made an award in plaintiff's favor, but after the time limited had expired, and plaintiff held defendant to bail without stating in his affidavit that the time had expired, it was held that defendant was not entitled to be discharged on common bail, as the affidavit on its face disclosed a good and sufficient cause of action against him, and showed *prima facie* that defendant was properly held to bail. Masel *v.* Angel, 6 D. & R. 15, 16 E. C. L. 251. But an affidavit stating defendant to be indebted to plaintiff generally on a bond conditioned for the performance of an award, which award directed F to pay a sum of money upon demand, was held defective where it did not appear that defendant was indebted, and no demand was expressed to have been made upon the bond. Armstrong *v.* Stratton, 1 Moore C. P. 110, 7 Taunt. 405, 2 E. C. L. 421.

In an action for the hire of a berth on board plaintiff's vessel an allegation that it was let by plaintiff to defendant at his request, was held sufficient without showing actual enjoyment. Shepherd *v.* O'Brien, 5 Dowl. P. C. 173, 2 Gale 120, 1 M. & W. 601.

In an affidavit for the agistment of cattle it must be alleged that they were agisted at the request of defendant. Smith *v.* Heap, 4 Dowl. P. C. 11, 2 Hurl. & W. 89.

15. Sawtelle *v.* Jewell, 34 Me. 543; Parker *v.* Ogden, 2 N. J. L. 136; Chambers *v.* Ward, 1 Dowl. P. C. 139; Chevalier *v.* King, 2 Montreal Super. Ct. 185.

16. Bartleman *v.* Smarr, 2 Cranch C. C. (U. S.) 16, 2 Fed. Cas. No. 1,074 (an annexed account); Bright *v.* Purrier, Buller N. P. 269, 3 Burr. 1687; Jennings *v.* Martin, 3 Burr. 1447 (an agreement); Rios *v.* Belifante, 2 Str. 1209 (an affidavit made abroad); Heathcote *v.* Goslin, 2 Str. 1157 (a bottomry bond); Williams *v.* Jackson, 3 T. R. 575 (a bill of exchange); Powell *v.* Portherch, 2 T. R. 55 (the master's allocatur); Walt *v.* Barber, 6 Brit. Col. 461 (an affidavit); Hodgson *v.* Oliva, 3 Rev. de Lég. 349 (plaintiff's books).

But in a suit brought by the commonwealth against a collector of tolls, an affidavit to hold to bail, made by a public auditing officer, averring the indebtedness of defendant in a stated sum, for tolls, etc., belonging to

an affidavit by plaintiff, averring the indebtedness as appears by the books of the testator, intestate, or bankrupt, is sufficient provided it also avers deponent's belief that the debt is due.[17]

(b) Amount. It must also show the exact amount of the indebtedness claimed by plaintiff;[18] but, if an affidavit is good as to one distinct sum stated in it, and

the commonwealth, received by him and unpaid, as appears by accounts kept in the public departments, it was held that the affidavit was sufficient, as the case formed an exception to the general rule because of the impossibility of one public officer making a positive affidavit of an indebtedness to the commonwealth when the accounts are kept in different public departments. Com. *v.* Fritz, 2 Miles (Pa.) 336. And it has been held that, when the application for the capias is made *pendente lite*, the affidavit is sufficient even though the debt is indicated only by a reference to the declaration filed in the cause. Malo *v.* Labelle, 2 L. C. Jur. 194.

17. Lowe *v.* Mayson, 3 McCord (S. C.) 313; McLaughlin *v.* Johns, 1 Cranch C. C. (U. S.) 372, 16 Fed. Cas. No. 8,871; Tonna *v.* Edwards, 4 Burr. 2283; Barclay *v.* Hunt, 4 Burr. 1992 (holding that an affidavit of indebtedness made by the assignees as appears to them by the last examination of the bankrupt, and as they verily believe, and that they have not received the debt, or any part of it, but believe it to be still due, is sufficient); Harrison *v.* Turner, 4 Dowl. P. C. 72, 1 Hurl. & W. 346; Swayne *v.* Crammond, 4 T. R. 176.

Necessity of averring belief.— But an affidavit which simply refers to the books and omits the averment of the deponent's belief is insufficient. Garnham *v.* Hammond, 2 B. & P. 298; Lowe *v.* Farley, 1 Chit. 92, 18 E. C. L. 63; Walrond *v.* Fransham, 2 Str. 1219; Sheldon *v.* Baker, 1 T. R. 87.

Effect of administrator's affidavit as estoppel.—In an action by an administrator where he states facts showing a special cause of action, he is not thereby estopped to abandon such special cause and resort to proof under the general counts at the trial, when he subsequently discovers that the information at his command at the time he made the affidavit was incorrect. Read *v.* Randel, 2 Harr. (Del.) 500.

The co-assignee of a debt arising out of bills of exchange may hold a defendant to bail upon his own affidavit, swearing positively as to all the facts which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees. The same principle which allows such an affidavit in an action by an executor, or an assignee of a bankrupt, applies to an action of this nature. Cresswell *v.* Lovell, 8 T. R. 418.

18. *Georgia.*— Davidson *v.* Carter, 9 Ga. 501.

Louisiana.—Weeks *v.* Trask, 1 Mart. (La.) 117.

New Jersey.— Vankirk *v.* Staats, 24 N. J. L. 121.

Ohio.— Herf *v.* Shulze, 10 Ohio 263.

Pennsylvania.— Hewitt *v.* Nicholson, 2 Miles (Pa.) 322; Crane *v.* Fish, 2 Miles (Pa.) 165. *Compare* Nevins *v.* Merrie, 2 Whart. (Pa.) 499, wherein it was held that although the cause of action must be positively sworn to, the amount in which defendant is indebted may be set forth to the best of plaintiff's knowledge and belief.

South Carolina.— Rosenberg *v.* McKain, 3 Rich. (S. C.) 145; Tobias *v.* Wood, 1 McMull. (S. C.) 103.

United States.— Robinson *v.* Holt, Hempst. (U. S.) 426, 20 Fed. Cas. No. 11,955.

Canada.— Pawson *v.* Hall, 1 Ont. Pr. 294; Norton *v.* Latham, (Mich. T., 3 Vict.) 1 Robinson & J. Ont. Dig. 193.

See 4 Cent. Dig. tit. "Arrest." § 63.

In Arkansas, an affidavit in an action on a writing obligatory, stating that the action was "founded on a real subsisting debt; and this affiant verily believes that the sum of six hundred dollars as bail will not be more than will satisfy the debt and costs," was held to be sufficient under the territorial statute. Hughes *v.* Martin, 1 Ark. 455, 460.

In foreign attachment, an affidavit that the garnishee has in his possession money or effects of defendant, without stating the amount or value thereof, is insufficient to hold the garnishee to special bail. Benkard *v.* Clements, 2 Miles (Pa.) 284.

Bills of exchange.— An affidavit that defendant is indebted in a stated sum for principal moneys due upon a bill of exchange, without stating the sum for which the bill was drawn, is bad. Fowell *v.* Petre, 5 A. & E. 818, 5 Dowl. P. C. 276, 2 Hurl. & W. 379, 2 N. & P. 227, 31 E. C. L. 839; Robins *v.* Grant, W. W. & D. 373. *Compare* Robbins *v.* Upton, 5 Cranch C. C. (U. S.) 498, 20 Fed. Cas. No. 11,886, holding that in a suit on a protested bill of exchange the federal court does not require an affidavit of the amount due.

Promissory notes.— An affidavit stating that defendant is justly indebted to plaintiff in a certain sum by promissory note, describing it, sufficiently sets out the amount of the indebtedness. Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564; Rosenberg *v.* McKain, 3 Rich. (S. C.) 145; Tobias *v.* Wood, 1 McMull. (S. C.) 103. An affidavit for several different notes need not state the aggregate sum, but the amount of each note must be stated. The dates of the notes should be set out in words, but figures will not make the affidavit defective. Ross *v.* Hurd, 1 Ont. Pr. 158.

this is an arrestable amount, it is no objection that it is bad as to another sum

Distinguishment of principal and interest. — Where an affidavit states defendant to be indebted in three hundred and four pounds, four shillings, seven pence, "principal and interest," by virtue of an indenture covenanting to pay three hundred pounds, the respective amounts of principal and interest are sufficiently distinguished. Jones *v.* Collins, 6 Dowl. P. C. 526, 2 Jur. 374, 1 W. W. & H. 187. See also Drake *v.* Harding, 4 Dowl. P. C. 34, 1 Hurl. & W. 364, holding that when the affidavit states the amount with certainty it is unnecessary to distinguish how much is due for principal and how much for interest.

Contract and covenant.— In special actions for non-performance of contracts, and in covenant, plaintiff must state the amount of his damage in positive terms, and must set forth in his affidavit the material circumstances of the case. Pontigen *v.* Williams, 1 Browne (Pa.) 206.

On account — Sufficient showing of amount. —An affidavit is sufficient as to amount where it avers a debt of a certain sum, as per bill of items, though the bill foots up a larger amount (Paul *v.* Ward, 21 Ind. 211); where, when made by plaintiff and his clerk to effect that defendant was indebted to plaintiff in a certain sum, part of which was for money lent, and the rest of the principal sum for the balance which defendant owed on settlement, the precise amount of which could not be stated because defendant suddenly left without coming to any settlement, and that defendant, on being required to pay, did not deny the debt or the amount (Cammann *v.* Hind, 1 Whart. (Pa.) 320); where annexed to an account, to the effect that it "is just and true as stated, and no part thereof has been paid, except what is credited" (Clarke *v.* Druet, 4 Cranch C. C. (U. S.) 142, 5 Fed. Cas. No. 2,850); where, in an action on account for money lent, it states "that the above account, as stated, is just and true, and that the plaintiff has not received any part, parcel, or satisfaction for the same," even though it does not state that defendant has received no security (Young *v.* Moriaty, 2 Cranch C. C. (U. S.) 42, 30 Fed. Cas. No. 18,167); where it states that defendant is justly indebted to plaintiff for a certain amount of goods for rent (Greenleaf *v.* Cross, 1 Cranch C. C. (U. S.) 400, 10 Fed. Cas. No. 5,777), or where it states that plaintiff had furnished goods to the amount of two thousand pounds to A, for whom defendant undertook to be answerable, and that A had since failed, and paid four shillings on the pound only, and that one thousand pounds remained due to plaintiff (Collins *v.* Wallis, 11 Moore C. P. 248, 22 E. C. L. 606). But an affidavit stating that defendant owes plaintiff a certain sum, except so far as defendant might have an account against him for goods furnished, is insufficient (Weeks *v.* Trask, 1 Mart. (La.) 117), as is one that defendant was indebted in one thousand pounds "under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, which balance is due and unpaid," without stating that the balance was one thousand pounds (Hatfeild *v.* Linguard, 6 T. R. 217).

Action for unliquidated damages.— Where the affidavit discloses a cause of action for unliquidated damages, it should specify the amount of damage sustained. Bullock *v.* Jenkins, 20 L. J. Q. B. 90, 1 L. M. & P. 645.

Separate counts relating to one amount.— An affidavit for a capias is not void for uncertainty because it sets out several causes of indebtedness for a like amount (as in a declaration with the common counts) so long as it is clear that the allegations all relate to one and the same sum of money. Pike River Mills Co. *v.* Priest, 15 Montreal Leg. N. 360. *Compare* Barry *v.* Eccles, 2 U. C. Q. B. 383, 384, holding that an affidavit for a certain sum, stated to be due as a distinct sum for each of three causes of action, but concluding "that the said sum of £613 is still due and owing to this deponent," was insufficient.

Distinguishment of amounts due on different accounts.— In an affidavit for a certain sum of money had and received, it is not necessary to distinguish or specify how much is due on each account. Hague *v.* Levi, 9 Bing. 595, 1 Dowl. P. C. 720, 2 Moore & S. 729, 23 E. C. L. 720. This rule has been applied also to an affidavit for money lent, paid, or on an account stated (Tannahill *v.* Mosier, 2 U. C. Q. B. O. S. 483; Black *v.* Adams (Easter T., 3 Vict.) 1 Robinson & J. Ont. Dig. 195), and to an affidavit for goods sold and delivered, and upon an executed contract for the delivery of certain lumber (McIntyre *v.* Brown, 4 U. C. L. J. 85. *Compare* Mackenzie *v.* Reid, 1 U. C. Q. B. 396, holding that an affidavit on a promissory note, and also for goods sold, not specifying the amount due on each account, or whether the goods sold formed the consideration of the note, was insufficient).

Kind of money.— Where an affidavit, made before a British consul, in a foreign country, stated that defendant was indebted to plaintiff in a certain number of pounds sterling, it was held that it was insufficient, as it did not appear with certainty whether defendant was indebted in British or Irish sterling money. It ought to have said "pounds sterling, English." Pickardo *v.* Machado, 4 B. & C. 886, 7 D. & R. 478, 10 E. C. L. 844. So, where the debt is foreign money, its value in English currency must be shown in the affidavit. Storie *v.* Ball, 2 Chit. 16, 18 E. C. L. 478. *Compare* Pawson *v.* Hall, 1 Ont. Pr. 294 (holding that an affidavit that defendant is indebted in the sum of five hundred and sixty pounds, sterling money, on a bill of exchange, drawn, etc., for the payment of five hundred and sixty pounds, not saying of what money, was sufficient); Montreal Bank *v.* Brown, 17 L. C. Rep. 144 (where, on a

stated in it, unless it appears that the process was issued for the whole amount, and not for the former sum only.[19]

(c) MANNER OF CREATION — aa. *In General.* Not only must the existence and amount of indebtedness be shown but it is essential that the affidavit to hold to bail should disclose the nature of indebtedness[20] and manner in which it was created.[21]

motion to quash a writ of capias on the ground that there was no sufficient statement of the debt, inasmuch as it was stated to be due in sterling money, it was held that the amount due may be legally so stated, as the value of the pound sterling was fixed by the Canadian Currency Act); Hall *v.* Zernichon, 4 Quebec 268 (holding that it is sufficient for the affidavit to state the amount due in dollars, without any qualification as to its particular currency).

Variance between affidavit and verdict.— The law does not require that an affidavit to hold to bail should be of the exact amount which may be eventually found due, for the verdict cannot alter the regularity of the former proceedings. Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

19. Cunliffe *v.* Maltass, 7 C. B. 695, 6 Dowl. & L. 723, 13 Jur. 751, 18 L. J. C. P. 233, 62 E. C. L. 695; Jones *v.* Collins, 6 Dowl. P. C. 526, 2 Jur. 374, 1 W. W. & H. 187; Caunce *v.* Rigby, M. & H. 363, 3 M. & W. 67. See also Cushing *v.* Gordon, 11 N. Brunsw. 524; Ross *v.* Hurd, 1 Ont. Pr. 158 (which cases hold that an affidavit of debt, alleging several distinct and separate causes of action, some of which are well stated and others not so, is not bad altogether, but that in such case the bail will be reduced to the sum properly stated); Green *v.* Hatfield, 12 L. C. Rep. 115 (holding that an affidavit may contain several different averments of debt inconsistent with one another, and is not void because one of them is insufficient).

20. Comly *v.* Goldsmith, 2 Miles (Pa.) 133; Eicke *v.* Evans, 2 Chit. 15, 18 E. C. L. 477; Cope *v.* Cooke, 3 Dougl. 467; Brook *v.* Trist, 10 East 358; Cooke *v.* Dobree, 1 H. Bl. 10; Rolland *v.* Guilbault, 12 L. C. Jur. 276; Polleri *v.* De Souza, 4 Taunt. 154; Jacks *v.* Pemberton, 5 T. R. 552; Hall *v.* Zernichon, 4 Quebec 268. *Contra*, Barbee *v.* Holder, 24 Tex. 225.

Where the debt arises out of a written or sealed instrument, the affidavit need not set out the debt or other particulars, if it shows distinctly the nature of the debt and the instrument upon which it accrued. Clarke *v.* Clarke, 3 U. C. L. J. 149. See also Day *v.* Hackley, 2 Cranch C. C. (U. S.) 251, 7 Fed. Cas. No. 3,679, holding that, in order to hold defendant to bail in an action of debt upon a bond, the bond need not be produced until oyer is demanded, if there is a sufficient affidavit of debt.

Account stated.— An affidavit for money due from defendant to plaintiff "on an account stated between them" is sufficient (Balmano *v.* May, 6 Dowl. P. C. 306, 2 Jur. 109; Debenham *v.* Chambers, 6 Dowl. P. C. 101), even though it does not contain the words "and settled" (Tyler *v.* Campbell, 3 Bing. N. Cas. 675, 5 Dowl. P. C. 632, 3 Hodges 79, 1 Jur. 310, 4 Scott 384, 32 E. C. L. 312). *Compare* Kerrick *v.* Davies, 1 Dowl. N. S. 347, 7 Jur. 1013, 9 M. & W. 22 (holding that an affidavit that defendant was indebted "on the balance of an account, for goods sold and delivered by the plaintiff to the defendant," is sufficient, without stating that it was an account stated between the parties); Jones *v.* Collins, 6 Dowl. P. C. 526, 2 Jur. 374, 1 W. W. & H. 187 (holding that an allegation of debt "for the balance of account" or "for the balance of principal money on a bill of exchange," is defective unless it states that the balance was on an account stated).

21. Comly *v.* Goldsmith, 2 Miles (Pa.) 133; Peck *v.* Van Evour, 1 Nott & M. (S. C.) 580, note *a*; Vance *v.* Findly, 1 Nott & M. (S. C.) 578; Cooke *v.* Dobree, 1 H. Bl. 10; Hurtubise *v.* Bourret, 23 L. C. Jur. 130, 2 Montreal Leg. N. 54; Kenny *v.* Keown, 9 L. C. Jur. 104. *Contra*, Debien *v.* Marsan, 14 L. C. Rep. 89.

Bills and notes.— An affidavit which states that defendant is indebted to plaintiff in a certain sum by promissory note (describing the note) sufficiently sets out the manner in which the indebtedness accrued (Rosenberg *v.* McKain, 3 Rich. (S. C.) 145; Tobias *v.* Wood, 1 McMull. (S. C.) 103. See also Lowe *v.* Mayson, 3 McCord (S. C.) 313); but in an action by the indorsee of a bill or note, the affidavit must show by whom the instrument was indorsed, and it is insufficient to state that it was "duly indorsed" (McTaggart *v.* Ellice, 4 Bing. 114, 12 Moore C. P. 326, 13 E. C. L. 426; Lewis *v.* Gompertz, 2 Cr. & J. 352, 1 Dowl. P. C. 319; Woolley *v.* Escudier, 2 Moore & S. 392).

Interest.— When interest is claimed, the affidavit must show the existence of a contract for the payment thereof (Visger *v.* Delegal, 2 B. & Ad. 571, 1 Dowl. P. C. 333, 22 E. C. L. 240; Neale *v.* Snoulten, 2 C. B. 320, 3 Dowl. & L. 442, 9 Jur. 1058, 15 L. J. C. P. 48, 52 E. C. L. 320; Callum *v.* Leeson, 2 Cr. & M. 406, 2 Dowl. P. C. 381, 4 Tyrw. 266; Drake *v.* Harding, 4 Dowl. P. C. 34, 1 Hurl. & W. 364; Forster *v.* Blizzard, 35 Can. L. J. 88; Simonds *v.* Simonds, 7 N. Brunsw. 468. *Compare* Hutchinson *v.* Hargrave, 1 Bing. N. Cas. 369, 1 Scott 269, 27 E. C. L. 679 (holding that an affidavit that defendant was indebted in a certain sum for money paid to and for his use, and at his request, and for interest due and owing from and agreed to be paid by defendant to plaintiff, for and in respect thereof, is sufficient); Boddington *v.* Woodley, 1 Jur. 960, W. W. & D. 581 (wherein it was held that a contract to pay interest was sufficiently stated

It is further essential that the right of plaintiff to maintain the action,[22] and the

in an affidavit which set forth an indenture of mortgage containing a covenant for the payment of interest); Jenkins *v.* Arnold-Fortescue, 19 Can. L. T. 42 (holding that, under the Bills of Exchange Act, the interest upon a dishonored bill is liquidated damages, and that a person liable therefor may be arrested upon an affidavit which does not set forth an express agreement to pay interest). It must also set out the particulars of such agreement. Brook *v.* Trist, 10 East 358.

Action on award.— In an action on an award, the affidavit should state the fact of the submission to arbitration, and the making of the award, and that the money was due at a day past (Anonymous, 1 Dowl. P. C. 5. *Compare* Jenkins *v.* Law, 1 B. & P. 365, holding that an affidavit "for damages awarded and for costs and expenses taxed and allowed" is sufficiently certain, as it will be inferred that the award and taxation are such as will support an action); but an affidavit on an award, directing money to be paid upon a judgment, not alleging a demand, is insufficient (Driver *v.* Hood, 7 B. & C. 494, 1 M. & R. 324, 14 E. C. L. 224).

In an action on a bond, the affidavit must show the condition of the bond (Bosanquet *v.* Fillis, 4 M. & S. 330); but a statement that defendant was indebted "for principal and interest due on a bond" was held sufficient to show that such bond was conditioned for the payment of money, without setting forth the condition (Byland *v.* King, 1 Moore C. P. 24, 7 Taunt. 275, 2 E. C. L. 361).

Breach of agreement.— An affidavit on articles of agreement should state the consideration (Walker *v.* Gregory, 1 Dowl. P. C. 24), and a breach of the articles (Stephens *v.* Meguire, 6 N. J. L. 152; Stinton *v.* Hughes, 6 T. R. 13), and must show that the sum claimed is stipulated damages, and not merely a penalty. Stating that defendant bound himself in a certain sum to perform a certain agreement, and that he had neglected and refused to perform his part, is insufficient (Wildey *v.* Thornton, 2 East 409).

22. Bills and notes.— In an action on a bill or a note it is necessary that the affidavit should show how it is held by plaintiff, and how he became entitled to recover upon it (Philadelphia Loan Co. *v.* Isaac, 2 Miles (Pa.) 145; Balbi *v.* Batley, 1 Marsh. 424, 6 Taunt. 25, 1 E. C. L. 491), and it is not sufficient for plaintiff to describe himself as indorsee, without stating by whom the instrument was indorsed to him (Glass *v.* Baby, 1 Ont. Pr. 274). It is sufficient, however, to describe a note as being "for the payment to" instead of "payable to" plaintiff (Pawson *v.* Hall, 1 Ont. Pr. 294), and it is not necessary that deponent should describe himself as indorsee, if he traces title to himself (James *v.* Trevanion, 5 Dowl. P. C. 275, 2 Hurl. & W. 332), nor need plaintiff state in his affidavit that he is the holder of the bill at the time of making the affidavit (Brett *v.* Smith, 1 Ont. Pr. 309). *Compare* Bauerle *v.* Fox, 22 Pa. Co. Ct. 3, 8 Pa. Dist. 45 (holding that, where the holder of commercial paper arrests the maker as a fraudulent debtor, it is not necessary to set forth the manner in which the affiant became the owner of the note, or what became of the collateral alleged to be given therewith, or who holds the same); Elstone *v.* Mortlake, 1 Chit. 648, 18 E. C. L. 353; Bradshaw *v.* Saddington, 7 East 94, 3 Smith K. B. 117; Machu *v.* Fraser, 2 Marsh. 483, 7 Taunt. 171, 2 E. C. L. 311 (holding that an affidavit stating defendant to be indebted to plaintiff on a bill of exchange drawn by defendant is sufficient even though it does not show the character in which plaintiff is entitled to sue).

In an action upon a money bond the affidavit must show to whom the bond was executed. Case *v.* McVeigh, (Trin. T., 3 & 4 Vict.) 1 Robinson & J. Ont. Dig. 194.

In an action by a physician, for services performed and medicine supplied, the affidavit is insufficient if it fails to allege that plaintiff is a duly registered physician. Jones *v.* Gress, 25 U. C. Q. B. 594; Turner *v.* Connolly, 35 Can. L. J. 540.

In action by assignee of claim.— Where a person gave his promissory note to a partnership and, subsequently, one member of the firm died and the partnership business was continued under the same firm-name by the surviving partner and the dead partner's widow, and thereafter the new partnership sued the maker on the note and he was arrested on a writ of capias ad respondendum, the affidavit upon which it was issued being made by the surviving partner, who swore that he was a member of the firm, and that defendant was indebted to the firm on the note, but no mention was made of the note having been given to the old firm, it was held, on a motion to discharge the defendant from custody, that the affidavit was insufficient, as it did not disclose that plaintiffs composed a new and different firm from the one in existence when the cause of action accrued. Lenz *v.* Kirschberg, 6 Brit. Col. 533. But where the affidavit stated that defendant was indebted to plaintiff in a certain sum, part of which was for work and labor done and performed by plaintiff for defendant, and the balance of which was the amount of a claim transferred to plaintiff by another, by a deed of assignment or transfer, before a notary, it was held, on a motion to quash the capias, that, notwithstanding that no notice of such transfer had been given to defendant except by the service of process in the action, it was sufficient to support the writ. Quinn *v.* Atcheson, 4 L. C. Rep. 378, 4 R. J. R. Q. 203.

In an action by an administratrix and her husband on a bond given to the intestate, it is no objection to the affidavit that defendant is alleged to be indebted to both of plaintiffs, and that the affidavit omits to state that the deceased died intestate, or to whom the sum mentioned in the condition is made payable, the same degree of precision not being re-

character in which defendant is liable[23] be disclosed by appropriate averments on the part of plaintiff.

bb. *Time and Place.* It seems that, when the affidavit is positive as to the existence of the debt, it is unnecessary that it should specify either when[24] or where[25] the indebtedness was created.

(D) *As to Special Grounds* — (1) IN GENERAL. When the action is such that it does not carry with it the right to arrest defendant, the affidavit to hold to bail must disclose positively[26] not only a good cause of action, but some special cause for ordering bail;[27] but need not disclose more than one such

quired in an affidavit to hold to bail as in a declaration. Coppin *v.* Potter, 10 Bing. 441, 2 Dowl. P. C. 785, 4 Moore & S. 272, 25 E. C. L. 210.

Action by trustee of insolvent.— Where an account is due to a person who has been discharged under an insolvent law, and an action is brought thereon by his trustee, defendant will not be held to bail upon the insolvent's affidavit that such account is correct and that no part thereof has been received by him, in the absence of an affidavit made by the trustee that he has received no part thereof. Way *v.* Selby, 2 Cranch C. C. (U. S.) 44, 29 Fed. Cas. No. 17,302.

When right is dependent upon foreign law. — In an action brought in England, an affidavit that defendant is indebted to plaintiff "as liquidator (duly appointed by the law of France) of an estate," is defective for not showing that plaintiff, as such liquidator, is, by the law of France, entitled to sue. Tenon *v.* Mars, 8 B. & C. 638, 3 M. & R. 38, 15 E. C. L. 315. But an affidavit that A is indebted to B for goods sold and delivered in Holland, and that the debt has been assigned to C according to the laws of that country, and that the assignee of a debt may sue the debtor according to the laws of Holland, "as deponent is informed and believes," is sufficient to hold defendant to bail in England. Seuerhop *v.* Schmanuel, 4 D. & R. 180, 16 E. C. L. 192.

23. Humphries *v.* Winslow, 6 Taunt. 531, 2 Marsh. 231, 1 E. C. L. 740. But an affidavit for principal and interest on a bill of exchange, drawn and accepted by defendant, and payable to deponent at a day past, is sufficient even though it does not state who is the drawer. Harrison *v.* Rigby, 6 Dowl. P. C. 93, 1 Jur. 897, M. & H. 362, 3 M. & W. 66.

24. Sheridan *v.* Hennessey, 23 L. C. Jur. 212; Hurtubise *v.* Bourret, 23 L. C. Jur. 130, 2 Montreal Leg. N. 54; Caverhill *v.* Frigon, 9 Quebec Super. Ct. 539; Maguire *v.* Rockett, 3 Quebec 347.

25. Sheridan *v.* Hennessey, 23 L. C. Jur. 212; Hurtubise *v.* Bourret, 23 L. C. Jur. 130, 2 Montreal Leg. N. 54; Debien *v.* Marsan, 14 L. C. Rep. 89; Hemken *v.* Slayton, 7 Montreal Super. Ct. 418; Caverhill *v.* Frigon, 9 Quebec Super. Ct. 539. *Contra*, Brisson *v.* McQueen, 7 L. C. Jur. 70; Sheridan *v.* Pingree, 17 Quebec Super. Ct. 310.

26. **Probable existence of ground.**— It is not enough that such facts point to the probability of the fraud. Gillett *v.* Thiebold, 9 Kan. 427. See also Lester *v.* Blodgett, 2 How. Pr. (N. Y.) 110.

Grounds stated in alternative.— An affidavit to hold to bail which affirms that defendant "has fraudulently conveyed, or is about fraudulently conveying, his estate," is bad for uncertainty, though either of the grounds, distinctly alleged, would have been sufficient under the statute. Wade *v.* Judge, 5 Ala. 130. And an affidavit which states the essential elements of a ground of arrest in the disjunctive, instead of in the conjunctive, form, is bad for uncertainty. McMaster *v.* Robertson, 21 L. C. Jur. 161; Ostell *v.* Peloquin, 20 L. C. Jur. 48; Talbot *v.* Donnelly, 11 L. C. Rep. 5; Gannon *v.* Wright, 5 Montreal Leg. N. 404.

27. *Alabama.*— Wade *v.* Judge, 5 Ala. 130.

Georgia.—Where a statute requires a plaintiff who seeks to hold a defendant to bail to swear "to the amount claimed," and that he apprehends its loss "if the defendant be not held to bail," it is sufficient if he swears that "the defendant is indebted to him" in the said sum sworn to, and that "he apprehends the loss of said sum unless the defendant is held to bail." Sugar *v.* Sackett, 13 Ga. 462.

Illinois.— The affidavit must either show by facts stated that defendant has been guilty of fraud, or must state facts raising a strong presumption that he has been guilty of fraud. It is insufficient to simply show the existence of the debt and to aver that plaintiff is in danger of losing the benefit of whatever demand he may recover unless defendant shall be held to bail. Parker *v.* Follensbee, 45 Ill. 473; Gorton *v.* Frizzell, 20 Ill. 291; Stafford *v.* Low, 20 Ill. 152; Matter of Smith, 16 Ill. 347.

Kansas.— Hauss *v.* Kohlar, 25 Kan. 640.

Michigan.— An application for arrest to a circuit court commissioner under the Fraudulent Debtors Act must make out facts amounting to a *prima facie* case of fraud. Matter of Teachout, 15 Mich. 346.

New York.— Brooks *v.* McLellan, 1 Barb. (N. Y.) 247; Thorpe *v.* Waddingham, 3 Daly (N. Y.) 275. But the affidavit need not state in so many words that the case is one of those mentioned in section 179 of the code, though it must appear from the facts stated that such is the case. Pindar *v.* Black, 4 How. Pr. (N. Y.) 95, 2 Code Rep. (N. Y.) 53.

Pennsylvania.— An affidavit for a warrant of arrest in a civil case under the act of July 12, 1842, abolishing imprisonment for debt, must state facts sufficient to bring the case

cause.[28] When the application is addressed to the discretion of a judicial officer, it is not necessary that the affidavit should contain a conclusion negativing any vexations or malicious motive on the part of plaintiff.[29]

(2) Absconding or Leaving State or Place of Abode. It has been held that in the affidavit to hold to bail the deponent must make use of either the exact words of the statute, or of words equivalent thereto,[30] when it is sought to arrest defendant on the ground that, with intent to defraud his creditors,[31] the

under some proviso of that act (Bates *v.* Rowley, 11 Phila. (Pa.) 210, 33 Leg. Int. (Pa.) 202; Heffner *v.* Kantner, 1 Leg. Chron. (Pa.) 162, 4 Leg. Gaz. (Pa.) 249), and must set out that a suit has been commenced, and sufficiently identify such suit (Heffner *v.* Kantner, 1 Leg. Chron. (Pa.) 162, 4 Leg. Gaz. (Pa.) 249).

United States.— Robinson *v.* Holt, Hempst. (U. S.) 426, 20 Fed. Cas. No. 11,955.

Canada.— Wingate Chemical Co. *v.* Smith, Stevens Quebec Dig. 274.

Sufficiency of affidavit.— An affidavit for an arrest is sufficient when it alleges the specific fraudulent representations under which the liability was incurred, makes a general allegation as to the fraudulent disposition of the debtor's property, and states that the debtor has made a general assignment for the benefit of creditors, with preferences. Achelis *v.* Kalman, 60 How. Pr. (N. Y.) 491. But an order of arrest cannot be maintained in an action on contract, upon allegations that defendant is about to remove from the state with intent to defraud his creditors, and that he fraudulently withholds and conceals his property with a like intent. Toole *v.* De Goicouria, 36 How. Pr. (N. Y.) 127.

28. Sutton *v.* Hays, 17 Ark. 462.

29. McLachlan *v.* Wiseman, 5 U. C. Q. B. O. S. 333; Lee *v.* McClure, 3 U. C. Q. B. 39; Weldon *v.* O'Sullivan, 19 N. Brunsw. 441 [*approving* Mullin *v.* Frost, 18 N. Brunsw. 463]. *Compare* Star Kidney Pad Co. *v.* McCarthy, 23 N. Brunsw. 83, wherein it was held that, in an action by an incorporated company, an affidavit negativing the purpose of vexing or harassing defendant, made by plaintiff's attorney, was insufficient, and that such an affidavit should have been made by plaintiff's agent.

30. State Bank *v.* Hervey, 21 Me. 38; Choate *v.* Stevens, Taylor (U. C.) 449 (holding that an affidavit "that the plaintiff had reason to believe," instead of is apprehensive "that the defendant was about to depart this province, without paying," etc., is insufficient).

31. **Necessity of allegation of intent to defraud.**— Under Mass. Stat. (1857), c. 141, § 17, no person can be arrested on mesne process for intent to leave the state if the affidavit of the creditor, "that he believes that the defendant has property not exempt from being taken on execution," omits to add: "which he does not intend to apply to the payment of the plaintiff's claim," or to state, not only that the creditor believes, but that he "has reason to believe the defendant has property." Stone *v.* Carter, 13 Gray (Mass.) 575.

An affidavit that defendant is "about to leave the State" is insufficient as a basis for a warrant of arrest. It ought to add: "with an intent to defraud his creditors as the affiant believes," and then set forth the grounds of such belief, so as to show some probable cause. Wilson *v.* Barnhill, 64 N. C. 121.

An affidavit that a debtor is "about to remove out of the state to defraud his creditors" is not equivalent to an affidavit that he is about to remove his person out of the state "with intent thereby to defraud his creditors," required by statute to authorize the issuance of a capias ad respondendum. State *v.* Robinson, 1 Ohio Dec. (Reprint) 483, 10 West. L. J. 159.

In an affidavit to hold to bail on the ground that defendant is about to leave the province the omission of the words "with intent to defraud his creditors generally and the plaintiff in particular" is fatal. Ford *v.* Léger, 21 L. C. Jur. 191; Lamarche *v.* Lebrocq, 1 L. C. Rep. 215, 2 R. J. R. Q. 465. But the words "intent to defeat," instead of "intent to defraud," as prescribed by statute, have been held sufficient. Laing *v.* Slingerland, 12 Ont. Pr. 366.

Must show facts.— It is not sufficient for a creditor, applying for an order of arrest under Ont. Rev. Stat. c. 80, § 1, to show the existence of a debt and that the debtor is about to quit Ontario, but he must show some other fact or circumstance which, coupled with these facts, points to an intent to defraud. Whether or not there is good and probable cause for believing that the intent to defraud exists is a question of fact. Phair *v.* Phair, 19 Ont. Pr. 67 [*following* Shaw *v.* McKenzie, 6 Can. Supreme Ct. 181; Toothe *v.* Frederick, 14 Ont. Pr. 287].

Sufficient showing of intent.— An affidavit contains sufficient grounds for belief of defendant's departure, with fraudulent intent, if it avers that defendant refuses to pay the sum sworn to be due, that the vessel of which he is master is immediately about to sail to Europe, and that defendant is to sail therein. Lefebvre *v.* Tullock, 5 L. C. Rep. 42, 4 R. J. R. Q. 287. But an affidavit which simply alleges that defendant, who resided in the United States, was on the point of immediately leaving the province to go to the United States, was held to disclose no intention of fraud. Larocque *v.* Clarke, 4 L. C. Rep. 402, Montreal Cond. Rep. 83, 4 R. J. R. Q. 212. See also Canada Paper Co. *v.* Bannatyne, 23 L. C. Jur. 261; Hurtubise *v.* Bourret, 23 L. C. Jur. 130, 2 Montreal Leg. N. 54.

Presumption as to intent.— Where a cred-

latter intends or is about[32] either to leave,[33] remove from,[34] depart from,[35] or

itor by affidavit satisfies the judge that there is good and probable cause for believing that his debtor is about to quit the province unless he is forthwith apprehended, the inference is raised that he is about to do so with intent to defraud. Coffey *v.* Scane, 22 Ont. App. 269 [*affirming* 25 Ont. 22].

Allegation of removal of property not essential.— An affidavit for an order of arrest under Cal. Code Civ. Proc. § 479, authorizing the arrest of a person about to leave the state with intent to defraud his creditors, need not, in order show that defendant's departure is with such purpose, allege that he is about to remove any of his assets or property. *Ex p.* Bernard, (Cal. 1886) 12 Pac. 487.

32. "Intends" not equivalent of "about." — An affidavit that defendant "intends" to abscond is not a compliance with the requirement that there should be an affidavit that defendant is "about" to abscond. Guilleaume *v.* Miller, 14 Rich. (S. C.) 118.

Must show present intention.— A capias cannot be issued, in an action on contract, upon an affidavit of defendant's intention to abscond, such affidavit having been filed sixty days previously (Pike *v.* McMullin, 66 Vt. 121, 28 Atl. 876. See also Bowers *v.* Flower, 3 Ont. Pr. 62); but it is essential that the affidavit should allege that the debtor's departure will be immediate (Wilson *v.* Ray, 4 L. C. Rep. 159, 4 R. J. R. Q. 127; Hawkes *v.* Caffrey, 2 Montreal Leg. N. 159; Lambe *v.* Read, 14 Rev. Lég. 344).

33. Statement of defendant.— An allegation that defendant himself stated that he was leaving for California has been held to be sufficient to justify the issuance of a capias. Benjamin *v.* Wilson, 1 L. C. Rep. 351, 3 R. J. R. Q. 34. But see Campbell *v.* McCormick, 1 How. Pr. (N. Y.) 251, holding that where plaintiff, in his affidavit to hold to bail, stated that he believed, from a conversation with defendant, that the latter intended to leave the country, it was insufficient because of its failure to state what the conversation was, or what defendant said as to his leaving the country.

"Unless he be arrested."— When plaintiff is required to swear that defendant is about to leave the province unless he be arrested, an affidavit which omits the words "unless he be arrested" is insufficient. Spain *v.* Manning, 28 Nova Scotia 437.

Intention to leave "Province of Canada."— An affidavit was insufficient which alleged that defendant was about to depart from the "Province of Quebec," where, by statute, it should be from the "Province of Canada." Doyer *v.* Walsh, 3 Montreal Leg. N. 304; Maury *v.* Durand, 1 Montreal Super. Ct. 347. But see Swift *v.* Jones, 6 U. C. L. J. 63 (holding that an affidavit showing facts satisfying the judge that defendant, unless apprehended, is forthwith about to leave, is sufficient even though it is only sworn that defendant is about to leave Upper Canada); Senécal *v.* Hart, 1 Montreal Super. Ct. 371 (holding that there is no uncertainty in the allegation in an affidavit for a capias "that the defendant is about to leave immediately the province of Canada, comprising the provinces of Ontario and Quebec, with the intention of defrauding his creditors in general, and the plaintiff in particular"). Since the confederation, an affidavit alleging that defendant is immediately about to leave the "Province of Canada" is incorrect. Lefebvre *v.* Delorimier, 19 L. C. Jur. 102. But see Moisic Iron Co. *v.* Olsen, 18 L. C. Jur. 29 (holding that an affidavit is not bad because it states that the debtor is about to leave the "Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a point within the limits of the former province of Canada); Milligan *v.* Mason, 17 L. C. Jur. 159 (holding that, in an affidavit made since the confederation, the allegation that defendant is about to leave the "Province of Canada" will be held to mean that part of the Dominion formerly called the province of Canada).

34. Insufficient allegation of belief.— An affidavit in an action of tort, made in behalf of plaintiff therein, that deponent believes, and has reason to believe, that defendant "intends to leave the state, so that execution, if obtained, cannot be served upon him," is insufficient to authorize an arrest under a statute permitting arrest upon oath that the deponent "has reason to believe that the defendant is likely to remove beyond the jurisdiction of the court." Wood *v.* Melius, 8 Allen (Mass.) 434. *Compare* Florance *v.* Camp, 5 La. 280, holding that an affidavit stating plaintiff's belief that defendant is about to "leave the state," instead of "remove from the state," is sufficient.

Must show that removal will defeat remedy.— An affidavit to hold one of several defendants to bail must show that the removal of the person or property of defendant sought to be held to bail will defeat the remedy after judgment. Briddle *v.* Vest, 1 B. Mon. (Ky.) 173.

Grounds of belief — Necessity of showing. — Where an arrest is sought on the ground that plaintiff believes that defendant "is about to remove from the state" the affidavit must allege the facts upon which the belief is founded, in order that the court may judge of its reasonableness. Toutain *v.* His Creditors, 14 La. 336; Wood *v.* Harrell, 74 N. C. 338. See also Desha *v.* Solomons, 12 La. 272.

35. The affidavit must state that the debtor is about "to establish his residence beyond the limits of this state" and "that the demand in the writ is, or the principal part thereof, due" plaintiff, in those words or their equivalent, or an arrest under the writ would be illegal. State Bank *v.* Hervey, 21 Me. 38. It must also set forth with certainty that the debtor is possessed of property or means exceeding the amount required for his own immediate support, and that he is about to depart and take with him that property or

abscond from[36] either the state or from his usual place of abode within the state.[37]

(3) Cessation of Payments by Trader. When an arrest is sought on the ground that defendant, a trader, is notoriously insolvent, the affidavit should disclose facts showing that defendant is a trader;[38] that he is insolvent;[39] that he has ceased his payments;[40] and that he has refused to make an assignment of his property for the benefit of his creditors.[41]

(4) Fraudulent Acts in Fiduciary Capacity. It has been held that when plaintiff seeks to arrest defendant on the ground that the latter has misapplied, converted, or failed to account for money or property which he has received for or from plaintiff in a fiduciary capacity, the affidavit must state facts showing defendant's receipt of the money or property in such fiduciary capacity, and his fraudulent misapplication or conversion of the same.[42] Where, however, such

means, and reside beyond the limits of the state. Proctor *v.* Lothrop, 68 Me. 256; Sargent *v.* Roberts, 52 Me. 590; Shaw *v.* Usher, 41 Me. 102; Furbish *v.* Roberts, 39 Me. 104; Sawtelle *v.* Jewell, 34 Me. 543; Bramhall *v.* Seavey, 28 Me. 45; Whiting *v.* Trafton, 16 Me. 398.

An arrest of a debtor on mesne process, made under a creditor's sworn certificate that he was "about to depart and reside beyond the limits of this State with property or means of ——— own" (omitting the word "his"), was held to be illegal, as the statute was not thereby strictly complied with. Bailey *v.* Carville, 62 Me. 524.

Plaintiff's loss of remedy.— An affidavit for a capias which deposes that the departure of defendant "may" deprive plaintiff of his recourse, instead of "will" deprive him, is defective. Ford *v.* Léger, 21 L. C. Jur. 191; Stevenson *v.* Robertson, 21 L. C. Jur. 102; Boyd *v.* Freer, 15 L. C. Jur. 109. *Compare* Piché *v.* Bernier, 10 Quebec 351, holding that the statement that the departure of defendant will cause plaintiff to lose his debt and to suffer damages is equivalent to the allegation that it will make him lose his recourse, and is therefore sufficient.

36. "Leave" not equivalent of "abscond." — An affidavit for an arrest which states that defendant is about "to leave" does not charge that defendant is an absconding debtor. Norman *v.* Zieber, 3 Oreg. 197; Aiken *v.* Richardson, 15 Vt. 500. *Contra*, Norman *v.* Manciette, 1 Sawy. (U. S.) 484, 18 Fed. Cas. No. 10,300, holding that an affidavit for arrest alleging that a debtor is about "to leave" the state, with intent to delay, hinder, and defraud his creditors, is sufficient under the Oregon statute authorizing arrests in cases of absconding debtors. And see McLeran *v.* Shearer, 33 Vt. 230, holding that, under Vt. Laws (1852), No. 3, p. 4, concerning the arrest of persons in actions on contract, which repealed the Vermont act of 1851 on the same subject, the affidavit necessary in order to warrant the arrest of a citizen of another state need only aver that he is about to "leave" the state, and not that he is about to "abscond" or "remove," as is required by the act of 1851.

"Remove" not equivalent of "abscond."— An affidavit that defendants intend "to remove" from the limits of the state is insufficient to authorize their arrest on the ground that they are about to abscond. Barry *v.* Iseman, 14 Rich. (S. C.) 129, 91 Am. Dec. 262.

Reason for belief.— An affidavit for a capias setting forth that affiant has reason to believe, and does believe, that defendant is about to abscond or remove from the state, is sufficient, without an averment that the reason for such belief is a good one. Phillips *v.* Wood, 31 Vt. 322. See also Scane *v.* Coffey, 15 Ont. Pr. 112.

37. "Place of abode" insufficient.— Under Del. Laws, vol. 15, c. 180, authorizing the issuance of a writ of capias ad respondendum in a civil action, upon plaintiff's affidavit that defendant has absconded or is about to abscond "from the place of his usual abode," an affidavit that he is about to abscond "from his place of abode" is insufficient. Thomas *v.* Colvin, 1 Marv. (Del.) 106, 27 Atl. 829.

38. Parent *v.* Trudel, 13 Quebec 136.

39. Hamel *v.* Coté, 11 L. C. Rep. 446; Parent *v.* Trudel, 13 Quebec 136.

40. Nevelle *v.* Carrière, 10 Montreal Leg. N. 28; Parent *v.* Trudel, 13 Quebec 136.

41. Hamel *v.* Coté, 11 L. C. Rep. 446; Parent *v.* Trudel, 13 Quebec 136.

42. Necessity of showing fraud.— An affidavit for the arrest of an administrator who has been charged with assets to a certain amount is insufficient if it does not show fraud in the misapplication of the funds by the administrator. Melvin *v.* Melvin, 72 N. C. 384.

Necessity of showing that money is due.— An affidavit stating that plaintiff gave to defendant, who was a broker, certain sums as margin in the sale of oil; that defendant was requested to close the transaction, and promised to do so, and to settle his accounts and return such margin, but failed to do so, and converted the same, does not show that anything is due plaintiff, and, hence, will not sustain an order of arrest. Martin *v.* Gross, 56 N. Y. Super. Ct. 512, 4 N. Y. Suppl. 337, 22 N. Y. St. 439, 16 N. Y. Civ. Proc. 439.

An affidavit was held sufficient which alleged that plaintiff forwarded a note to de-

facts are stated, it is not vitally necessary for the deponent to describe defendant's offense in apt words.[43]

(5) Fraudulent Concealment or Disposition of Goods. An affidavit to hold to bail on the ground that defendant has concealed, secreted,[44] removed, or disposed of, his property, or is about to do so, with intent to defraud his creditors, must state facts tending to establish the existence of the alleged intent,[45] and must specifically describe the property in question.[46]

(6) Fraudulent Incurring of Obligation or Contracting of Liability. In order to hold defendant to bail for fraudulently incurring the obligation[47] or contracting the liability which is the basis of the action,[48] the affidavit must state facts[49] showing that defendant,[50] with intent to defraud plaintiff,[51] knowingly[52] made false and fraudulent representations,[53] whereby he induced or procured plain-

fendant for collection, and that the latter collected part thereof, which he converted to his own use, and that, without authority, he accepted a note, which he refused to surrender to plaintiff, since it showed an unlawful conversion of plaintiff's property (Clark *v.* Kent Cir. Judge, 125 Mich. 449, 84 N. W. 629), as was one alleging that defendant was the agent of plaintiff, and that, as such, he collected money which he "fraudulently and unlawfully converted to his own use, with intent to defraud and cheat the plaintiff" (Powers *v.* Davenport, 101 N. C. 286, 7 S. E. 747).

43. Republic of Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634.

44. Secretion of property.— An affidavit for a capias which merely alleges that defendant has secreted his property is insufficient. It is necessary to allege that he has secreted, is secreting, and is about to secrete his property (Trudeau *v.* Renaud, 17 Rev. Lég. 647, 34 L. C. Jur. 102), which must be his property and effects generally, and not merely his "movable property or effects" (Hurtubise *v.* Leriche, 13 L. C. Jur. 83), and to allege facts showing the time, place, and circumstances of the act or acts of secretion referred to (Weinrobe *v.* Solomon, 7 Montreal Leg. N. 109; Archer *v.* Douglass, 10 Quebec Super. Ct. 42), and showing that the secretion has taken place since the creation of the indebtedness (McAllen *v.* Ashby, 4 Montreal Leg. N. 50. *Compare* Trenholme *v.* Hart, 16 Rev. Lég. 318, holding that the affidavit need not state the time when the secretion took place); but it is not necessary to allege "that the plaintiff will be deprived of his recourse against the defendant unless he has a capias against him" (Trenholme *v.* Hart, 16 Rev. Lég. 318).

45. *In re* Vinich, 86 Cal. 70, 26 Pac. 528; Tennent *v.* Weymouth, 25 Kan. 21; Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259; Gillett *v.* Thiebold, 9 Kan. 427; Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160; Stensrud *v.* Delamater, 56 Mich. 144, 22 N. W. 272; Vredenburgh *v.* Hendricks, 17 Barb. (N. Y.) 179; Muller *v.* Perrin, 14 Abb. Pr. N. S. (N. Y.) 95; Hathorn *v.* Hall, 4 Abb. Pr. (N. Y.) 227; Gale *v.* McAllister, 2 How. Pr. (N. Y.) 272; Matter of Clark, 9 N. Y. Leg. Obs. 57. *Compare* Hughes *v.* Person, 63 N. C. 548 (holding that when an affidavit is based upon affiant's apprehension of some future fraudulent act by defendant, it must specify the grounds of the apprehension; but that, where the affidavit relies upon an act already done, it need state it only in general terms, it being unnecessary to specify how it was done, although it would be prudent to do so when the facts are known); Hockspringer *v.* Ballenburg, 16 Ohio 304 (holding that, under the statute authorizing the debtor's arrest on affidavit of a creditor "that the debtor is about to dispose of his property with intent to defraud his creditors," an affidavit in the words of the statute is sufficient); Berger *v.* Smull, 39 Pa. St. 302 (holding that an affidavit, disclosing the nature and amount of the debt and charging that defendant has property which he fraudulently conceals and unjustly refuses to apply to the payment of his indebtedness, and that he has removed and disposed of large amounts of property to defraud his creditors, is sufficient to authorize the issuance of a warrant of arrest).

46. Moller *v.* Aznar, 11 Abb. Pr. N. S. (N. Y.) 233.

47. Alleging that defendant fraudulently incurred the obligation is broader than that he fraudulently contracted the debt. It includes an action in the nature of damages, and, though the latter words are left out of the order, plaintiff may sue in a pure action for damages. *In re* Sternberger, 10 N. J. L. J. 48.

48. Action must be on the fraud.— An order of arrest cannot be granted, in an action of contract founded upon a fraud, when the affidavit contains no allegation that plaintiff rescinds the contract and proceeds upon the fraud alone, and it does not appear what the allegations of the complaint are. Lawrence *v.* Foxwell, 49 N. Y. Super. Ct. 278.

49. Smith *v.* Jones, 4 Rob. (N. Y.) 655; Phelps *v.* Maxwell, 2 Abb. N. Cas. (N. Y.) 459; Messenger *v.* Lockwood, 1 Ohio Dec. (Reprint) 433.

50. Smith *v.* Jones, 4 Rob. (N. Y.) 655.

51. Painter *v.* Houston, 28 N. J. L. 121; Smith *v.* Jones, 4 Rob. (N. Y.) 655; Hart *v.* Cooper, 129 Pa. St. 297, 24 Wkly. Notes Cas. (Pa.) 358, 18 Atl. 122.

52. Smith *v.* Jones, 4 Rob. (N. Y.) 655; Thorpe *v.* Waddingham, 3 Daly (N. Y.) 275.

53. Smith *v.* Jones, 4 Rob. (N. Y.) 655.

tiff[54] to part with something of value[55] or to surrender some right.[56] It must also enumerate the particular representations so made and must point out the respect in which they were false, a general allegation of falsity being insufficient.[57]

(IV) *Entitling in Court or Cause.* It is no objection to an affidavit to hold to bail that it is not entitled in the court wherein it is filed;[58] nor is it necessary that it should be entitled as of a cause.[59]

(V) *Defects* — (A) *In General* — (1) Amendments. The court may, in its discretion, permit plaintiff to amend the affidavit to hold to bail,[60] unless the defect is jurisdictional.[61]

(2) Aider by Other Affidavits. It has been held that where the affidavit is defective plaintiff will not be permitted to supply deficiencies or cure defects in such original affidavit to hold to bail either by the filing of a supplemental affidavit[62]

54. Smith *v.* Jones, 4 Rob. (N. Y.) 655; Phelps *v.* Maxwell, 2 Abb. N. Cas. (N. Y.) 459.

Time as essential element.— An affidavit for arrest must contain facts from which the commissioner may legally infer fraudulent conduct of defendant at the time of contracting whereby plaintiff was deceived. Vankirk *v.* Staats, 24 N. J. L. 121.

55. For sufficient showing in this respect see Parker *v.* Follensbee, 45 Ill. 473; McLeod *v.* Wayne Cir. Judge, 125 Mich. 344, 84 N. W. 281; Hatch *v.* Saunders, 66 Mich. 181, 33 N. W. 178; *Ex p.* Davis, 17 Nebr. 436, 23 N. W. 361; Hubbard *v.* Richardson, 31 N. Y. App. Div. 520, 52 N. Y. Suppl. 35; Wright *v.* Maseras, 56 Barb. (N. Y.) 521. *Compare* Lee *v.* Corn, 2 Misc. (N. Y.) 463, 21 N. Y. Suppl. 1073, 51 N. Y. St. 157 [*affirmed* in 3 Misc. (N. Y.) 634, 22 N. Y. Suppl. 1130, 51 N. Y. St. 945]; Artman *v.* Bell, 9 Phila. (Pa.) 237, 32 Leg. Int. (Pa.) 117.

56. Painter *v.* Houston, 28 N. J. L. 121.

57. Smith *v.* Jones, 4 Rob. (N. Y.) 655; Draper *v.* Beers, 17 Abb. Pr. (N. Y.) 163.

58. Peltier *v.* Washington Banking Co., 14 N. J. L. 257; Molloy *v.* Shaw, 5 Ont. Pr. 250 [*following* Ellerby *v.* Walton, 2 Ont. Pr. 147]. *Contra,* Allman *v.* Kensel, 3 Ont. Pr. 110. And see Swift *v.* Jones, 6 U. C. L. J. 63, holding that, where the order for bailable process was made upon two affidavits, one entitled in the queen's bench and the other not in any court, and a process afterward issued from the common pleas, the arrest should be set aside.

Not entitled at all.— It has been held that the affidavit may be entitled in a court or cause, or one of them, or may be altogether without a title. Damer *v.* Busby, 5 Ont. Pr. 356. But see Molling *v.* Poland, 3 M. & S. 157, wherein it was held that an affidavit not entitled in any court, and only with the words "by the court" written at the bottom of the jurat, was insufficient.

Affidavit sworn before commissioner.— An affidavit to hold to bail, sworn before a commissioner, need not be entitled in any court. Urquhart *v.* Dick, 2 Dowl. P. C. 17; Kennet, etc., Canal Co. *v.* Jones, 7 T. R. 451; Ellerby *v.* Walton, 2 Ont. Pr. 147. See also Bland *v.* Drake, 1 Chit. 165, 18 E. C. L. 100; Ferguson *v.* Mahon, W. W. & D. 605, which hold that an affidavit not entitled in the court, but purporting on its face to have been sworn before one of its officers, is sufficient.

59. For the reason that no cause is really pending when the affidavit is made, the affidavit being the basis upon which the action is commenced. Hatch *v.* Saunders, 66 Mich. 181, 33 N. W. 178. *Compare* Pindar *v.* Black, 4 How. Pr. (N. Y.) 95, 2 Code Rep. (N. Y.) 53, which holds that, while an affidavit for arrest should not be entitled in a cause, the fact that it is so entitled is not fatal, because it does not affect the substantial rights of the adverse party. In England, however, the rule formerly was that an affidavit entitled in a cause was bad. Green *v.* Redshaw, 1 B. & P. 227; Hollis *v.* Brandon, 1 B. & P. 36. See also Clarke *v.* Cawthorne, 7 T. R. 321.

Where there is a cause pending, the affidavit must be entitled in it. Brown *v.* Palmer, 3 U. C. Q. B. 110. See also Glass *v.* Colcleugh, (Easter T., 3 Vict.) 1 Robinson & J. Ont. Dig. 192, holding that, where an arrest was made under the statute allowing an arrest under an alias writ on a testatum writ issued to a different district, the affidavit was rightly entitled in the cause.

60. Chapman *v.* H. D. Lee Mercantile Co., 60 Kan. 858, 56 Pac. 749 [*affirming* 7 Kan. App. 254, 53 Pac. 778]; Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075; Robertson *v.* Coulton, 9 Ont. Pr. 16.

Amendment after service of writ.— Where the officer before whom an affidavit for a capias before judgment is sworn omits to sign the jurat, the court will not grant leave to affix the signature after the issuance and service of the writ. Dubois *v.* Persillier, 6 Montreal Super. Ct. 269.

61. Harris *v.* Durkee, 50 N. Y. Super. Ct. 202, 5 N. Y. Civ. Proc. 376; Farrow *v.* Dutcher, 19 R. I. 715, 36 Atl. 839.

62. Parker *v.* Ogden, 2 N. J. L. 136; Martin *v.* Vanderlip, 3 How. Pr. (N. Y.) 265, 1 Code Rep. (N. Y.) 41; Norton *v.* Barnum, 20 Johns. (N. Y.) 337; Heathcote *v.* Goslin, 2 Str. 1157; Jacks *v.* Pemberton, 5 T. R. 552.

Aider by complaint.— Where the summons and complaint were served, and were before the judge upon an application for an order of arrest, based upon affidavit, it was held that plaintiff was entitled to refer to the complaint, if verified, in support of the order,

or by referring to another affidavit filed in another cause against the same defendant.[63]

(3) Waiver by Defendant. By voluntarily putting in special bail or pleading to the merits, or doing any other act which adopts the process under which he was arrested, defendant waives all objections to the sufficiency and form of the affidavit to hold to bail,[64] unless it is so defective as to be absolutely void.[65]

(B) *Material Erasures and Interlineations.* A defendant cannot be held to special bail on an affidavit which contains material erasures and interlineations.[66]

where the affidavit proved defective. Turner *v.* Thompson, 2 Abb. Pr. (N. Y.) 444; Brady *v.* Bissell, 1 Abb. Pr. (N. Y.) 76.

In the English court of common pleas the practice was to allow a supplemental affidavit for the purpose of explaining ambiguities in the original affidavit, but for no other purpose. Green *v.* Redshaw, 1 B. & P. 227. But see Garnham *v.* Hammond, 2 B. & P. 298, wherein plaintiff, an executor, whose original affidavit stated the debt to be due "as appears by the testator's books," without adding "and which the deponent believes to be true," was allowed to swear to his belief in a supplemental affidavit.

63. Benson *v.* Bennett, 25 N. J. L. 166.

64. *California.*— Matoon *v.* Eder, 6 Cal. 57.

Delaware.—Houston *v.* Sedgewick, 8 Houst. (Del.) 132, 9 Houst. (Del.) 113, 32 Atl. 12, 43 Am. St. Rep. 165.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

Kentucky.— Morton *v.* Herault, Hard. (Ky.) 203.

Michigan.— Maxwell *v.* Deens, 46 Mich. 35, 8 N. W. 561. *Compare* Brown *v.* Kelley, 20 Mich. 27.

Ohio.— Smith *v.* Madison, 7 Ohio 236; Brooke *v.* Thorpe, 1 Ohio Dec. (Reprint) 169.

England.— Spencer *v.* Newton, 6 A. & E. 630 note, 1 N. & P. 823, W. W. & D. 232, 33 E. C. L. 336; Chapman *v.* Snow, 1 B. & P. 132; D'Argent *v.* Vivant, 1 East 330; Jones *v.* Price, 1 East 81; Norton *v.* Danvers, 7 T. R. 375; Hussey *v.* Wilson, 5 T. R. 254.

Canada.— Halifax Banking Co. *v.* Smith, 25 N. Brunsw. 610; McIntosh *v.* Burnett, 16 N. Brunsw. 253; McPhelim *v.* Larson, 9 N. Brunsw. 71; Barrow *v.* Capreol, 2 Ont. Pr. 95; Palmer *v.* Rodgers, 6 U. C. L. J. 188. *Compare* Read *v.* McLellan, 6 N. Brunsw. 3, holding that, by pleading to the action after the intervention of a term, defendant waives an irregularity consisting of plaintiff's omission to file an affidavit to hold to bail within the required time; but that he does not waive such irregularity by entering special bail, for the reason that he cannot object to the want of the affidavit until after entry of bail.

In New York, under the present practice, a defendant is not precluded by giving special bail from questioning the sufficiency of the original affidavit to sustain the order of arrest. Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9, 42 How. Pr. (N. Y.) 201. Under the earlier practice, however, a defendant, who put in special bail without objection, could not, in the absence of fraud, subsequently object that the affidavit upon which the order of arrest was founded was insufficient. Stewart *v.* Howard, 15 Barb. (N. Y.) 26.

Delay.— Two months' delay in making an objection to an affidavit that it is not sworn before a proper commissioner is not a waiver of it. Sharp *v.* Johnson, 2 Bing. N. Cas. 246, 4 Dowl. P. C. 324, 1 Hodges 298, 2 Scott 407, 29 E. C. L. 522.

An undertaking to "cause special bail in this action to be put in for the defendant in due course of law" is not a waiver of any objection to the affidavit. Glass *v.* Baby, 1 Ont. Pr. 274.

By demanding a declaration or applying for particulars defendant does not waive a defect in the affidavit to hold to bail. Hodgson *v.* Dowell, 3 M. & W. 284.

Pleading after denial of motion.—By pleading to the merits, defendant does not waive the defects in an affidavit for his arrest if he has already moved to quash the proceedings and the motion has been denied. Warren *v.* Crane, 50 Mich. 300, 15 N. W. 465.

An action for malicious arrest is not a waiver of objections to the affidavit upon which the arrest was made. Pawson *v.* Hall, 1 Ont. Pr. 294.

The want of a proper affidavit to hold to bail must be taken advantage of before judgment. Gore *v.* Murray, 1 Bibb (Ky.) 270.

65. Hauss *v.* Kohlar, 25 Kan. 640; Matter of Stephenson, 32 Mich. 60; Hussey *v.* Wilson, 5 T. R. 254; Weatherbe *v.* Whitney, etc., Coal Co., 30 Nova Scotia 104.

In such case objection may be made even after trial, judgment and execution, the affidavit being jurisdictional in its character. Hauss *v.* Kohlar, 25 Kan. 640.

Improper joinder of defendants.— Where several persons have separately incurred penalties for printing illegal schemes of a lottery, and an action is brought against them, under the statute, for the recovery of such penalties, a separate affidavit to hold to bail must be made and filed against each of them, and, if they are all joined in one affidavit, the irregularity is not waived by their putting in bail. Goodwin *v.* Parry, 4 T. R. 577.

Omission of venue.— An affidavit which has no venue is a nullity, and the court has no jurisdiction to grant an order of arrest upon it. Such an affidavit is, therefore, not amendable. Saril *v.* Payne, 4 N. Y. Suppl. 897, 24 N. Y. St. 486 [*overruling* 1 N. Y. Suppl. 15].

66. Gesser *v.* Braunfeld, 13 Wkly. Notes Cas. (Pa.) 209; Agnew *v.* Dubois, 8 Wkly.

g. Filing. While it is the better practice to file[67] the affidavit before the issuance of the process for arrest, it seems that it is not imperative that this should be done unless the statute authorizing the remedy so directs.[68]

2. Complaint or Petition — a. Allegations as to Ground of Arrest. In some jurisdictions the complaint or petition must contain allegations showing plaintiff's right to arrest defendant, when the ground of arrest and the cause of action are identical;[69] but this is not necessary where the right to arrest is independent of the cause of action.[70] When the complaint must set out the ground upon which

Notes Cas. (Pa.) 406; Boyle *v.* Grady, 1 Wkly. Notes Cas. (Pa.) 313.

Immaterial erasures and interlineations.— The rule is otherwise where the erasures and interlineations are not material (Sedgebeer *v.* Moore, Brightly (Pa.) 197), even though they are not noted in the jurat (Gesser *v.* Braunfeld, 13 Wkly. Notes Cas. (Pa.) 209).

67. What constitutes filing.— Under the Vermont statute requiring that the affidavit for the issuance of a capias be filed with the magistrate, it is sufficient if it is left with the magistrate or lodged in his office (Phillips *v.* Wood, 31 Vt. 322); but it is not a sufficient filing to slip the affidavit under the door of the magistrate's office when no one is in the office (Whitcomb *v.* Cook, 39 Vt. 585).

68. Wert *v.* Strouse, 38 N. J. L. 184.

In Alabama it is not important at what time it is filed, provided it is filed before the order for bail. Magee *v.* Erwin, 5 Stew. & P. (Ala.) 54.

In New Jersey the affidavit must be filed before the issuance of the writ in an action of contract, but need not be so filed in an action of tort. Wert *v.* Strouse, 38 N. J. L. 184. *Compare* Stowe *v.* Hassler, 7 N. J. L. J. 204. Under the earlier New Jersey practice the statute required that in all cases the affidavit should be filed before the issuance of the process. Parker *v.* Ogden, 2 N. J. L. 136.

In Vermont the statute requires that the affidavit should be filed before the issuance of the process. Muzzy *v.* Howard, 42 Vt. 23; Whitcomb *v.* Cook, 39 Vt. 585; Parkhurst *v.* Pearsons, 30 Vt. 705.

In New Brunswick the affidavit should be filed within the time limited for entering the cause, and, unless it is so filed, defendant is entitled to be discharged on common bail unless plaintiff's neglect is most satisfactorily accounted for. *Compare* Read *v.* McLellan, 6 N. Brunsw. 3, holding that, in general, it is sufficient if the affidavit is filed within thirty days after the term at which the writ is returnable.

69. Harland *v.* Howard, 57 Hun (N. Y.) 113, 10 N. Y. Suppl. 449, 32 N. Y. St. 869, 871, 872 (money received in a fiduciary capacity); Hecht *v.* Levy, 20 Hun (N. Y.) 53; Rowe *v.* Patterson, 48 N. Y. Super. Ct. 249; Shidlovsky *v.* Cashman, 20 Misc. (N. Y.) 404, 45 N. Y. Suppl. 1041; Hanson *v.* Langan, 9 N. Y. Suppl. 625, 30 N. Y. St. 828 [*affirmed* in 16 N. Y. Suppl. 383, 38 N. Y. St. 1023] (fraud in contracting debt or incurring liability); Lennon *v.* Brandt, 4 N. Y. Suppl. 2, 21 Abb. N. Cas. (N. Y.) 257 (fraudulent disposition of property); Straus *v.* Kreis, 6 N. Y. Civ. Proc. 77, 67 How. Pr. (N. Y.) 275; Howard *v.* Howard, 9 Quebec 172 (secretion of property).

Replevin.— An order of arrest in replevin will be set aside where the complaint does not allege that the chattel or a part thereof has been concealed so that it cannot be found or taken by the sheriff, and with intent that it shall not be found or taken as provided by N. Y. Code Civ. Proc. § 549, such allegations being jurisdictional. Michaelis *v.* Towne, 59 N. Y. Suppl. 721.

Aider of defects by affidavit.— If the complaint is defective in setting up a cause of action, its infirmities cannot be aided by the allegations of the affidavit (Saratoga Gas, etc., Co. *v.* Hazard, 55 Hun (N. Y.) 251, 7 N. Y. Suppl. 844, 27 N. Y. St. 588 [*affirmed* in 121 N. Y. 677, 24 N. E. 1095, 30 N. Y. St. 1016]); but even though fraud is not sufficiently set forth in the complaint to justify an arrest, an order of arrest will be granted where the evidence offered by the affidavits in support of the motion for the order tends to show extrinsic facts amounting to a fraud (Fitch *v.* McMahon, 103 N. Y. 690, 9 N. E. 497).

Demanding bail.— Bail need not be demanded in the petition. Eshom *v.* Lamb, 2 Mart. N. S. (La.) 219 (holding that bail may be demanded in a supplemental petition); Labarre *v.* Durnford, 10 Mart. (La.) 180.

70. Bowery Nat. Bank *v.* Duryee, 74 N. Y. 491 [*affirming* 55 How. Pr. (N. Y.) 88; *reversing* 54 How. Pr. (N. Y.) 450]; Arnold *v.* Shapiro, 29 Hun (N. Y.) 478; Taylor *v.* Fass, 14 Hun (N. Y.) 166; Sloane *v.* Livermore, 14 Hun (N. Y.) 29, 55 How. Pr. (N. Y.) 85; Donovan *v.* Cornell, 8 N. Y. Civ. Proc. 283; Segelken *v.* Meyer, 5 N. Y. Civ. Proc. 1; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. (N. Y.) 186; Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315; Mather *v.* Hannaur, 55 How. Pr. (N. Y.) 1; Thompson *v.* Friedberg, 54 How. Pr. (N. Y.) 519; Williams *v.* Norton, 54 How. Pr. (N. Y.) 509; Dreyfus *v.* Otis, 54 How. Pr. (N. Y.) 405; Frost *v.* McCarger, 14 How. Pr. (N. Y.) 131; Secor *v.* Roome, 2 Code Rep. (N. Y.) 1.

Need not be proved if alleged.— In cases where the right to arrest depends upon facts extrinsic to the cause of action, such facts need not be alleged in the complaint, and if alleged are immaterial to the cause of action, and need not be proved upon the trial. Segelken *v.* Meyer, 94 N. Y. 473.

the arrest is sought it is essential that it should allege facts tending to prove the existence of such ground,[71] and showing plaintiff's right to maintain the action.[72] On the other hand, where sufficient facts are set out it is not essential that the complaint should specifically describe, in apt words, the statutory ground relied upon.[73]

b. Allegations as to Damages. When an arrest is sought in an action of replevin, on the ground that defendant has concealed the property to recover which the action is brought, it is necessary that the complaint should allege the value of such property.[74] But, where the ground alleged for defendant's arrest is that he was guilty of a fraud in incurring the liability, it is not necessary that the complaint should seek or allege damages by reason of the fraud.[75]

c. Variance Between Affidavit and Complaint. A material variance between the allegations of the affidavit to hold to bail and those of the complaint is fatal to plaintiff's right to arrest.[76]

71. McBride *v.* Langan, 10 N. Y. Suppl. 552, 554, 18 N. Y. Civ. Proc. 201; Hanson *v.* Langan, 9 N. Y. Suppl. 625, 30 N. Y. St. 828 [*affirmed* in 16 N. Y. Suppl. 383, 38 N. Y. St. 1023]; Lennon *v.* Brandt, 4 N. Y. Suppl. 2, 21 Abb. N. Cas. (N. Y.) 257. *Contra*, Elwell *v.* Russell, 29 N. Y. App. Div. 436, 51 N. Y. Suppl. 964; Valentine *v.* Richardt, 6 N. Y. Suppl. 197, 24 N. Y. St. 697, 17 N. Y. Civ. Proc. 289. *Compare* Duncan *v.* Guest, 24 Hun (N. Y.) 639, decided prior to the amendment of 1886 to N. Y. Code Civ. Proc. § 549, holding that, in order to justify an order of arrest, based on defendant's fraudulent disposition of property, the complaint need not set forth the particular fraudulent acts, as the alleged fraud is an extrinsic fact which arose subsequently to the cause of action.

For sufficient showing of grounds see Barry *v.* Calder, 48 Hun (N. Y.) 449, 1 N. Y. Suppl. 586, 16 N. Y. St. 295, 15 N. Y. Civ. Proc. 14 [*affirmed* in 111 N. Y. 684, 19 N. E. 285, 19 N. Y. St. 931]; Elligood *v.* De Festetics, 8 N. Y. St. 851.

72. Thus, where a complaint in an action for conversion alleged that plaintiff deposited with defendant for safekeeping certain mining stock, and that defendant accepted the custody of said stock and agreed to keep it for plaintiff, subject to his orders and instructions, it was held that an order of arrest granted in the case should be vacated, as the complaint did not allege that plaintiff owned the stock. Wright *v.* Field, 64 How. Pr. (N. Y.) 117.

73. Moffatt *v.* Fulton, 132 N. Y. 507, 30 N. E. 992, 44 N. Y. St. 853 [*reversing* 56 Hun (N. Y.) 337, 9 N. Y. Suppl. 771, 31 N. Y. St. 154]; Cohen *v.* Rothschild, 19 Misc. (N. Y.) 356, 43 N. Y. Suppl. 509. *Contra*, Genin *v.* Schwenk, 62 Hun (N. Y.) 574, 17 N. Y. Suppl. 34, 42 N. Y. St. 818; Harland *v.* Howard, 57 Hun (N. Y.) 113, 10 N. Y. Suppl. 449, 32 N. Y. St. 869, 871, 872; Hillis *v.* Bleckert, 53 Hun (N. Y.) 499, 6 N. Y. Suppl. 405, 25 N. Y. St. 553, 17 N. Y. Civ. Proc. 254; Bartlett *v.* Sutorious, 9 N. Y. Suppl. 2, 29 N. Y. St. 60; Bartlett *v.* Sutorious, 6 N. Y. Suppl. 406, 25 N. Y. St. 629, 17 N. Y. Civ. Proc. 259 [*affirmed* in 119 N. Y. 660, 23 N. E. 1150, 29 N. Y. St. 994]; Wilbur *v.* Allen, 5 N. Y. Suppl. 746.

Description of offense held insufficient.— In an action to recover possession of personal property wrongfully detained by defendant, or its value, with damages for its detention, where the complaint does not contain the allegation required by N. Y. Code Civ. Proc. § 549, to authorize an order of arrest in such an action, that the property "has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff," etc., an order of arrest cannot be sustained under the provision of the same section that defendant may be arrested in an action "to recover damages for . . . an injury to property, including the wrongful taking, detention or conversion of personal property." Hough *v.* Folmsbee, 59 Hun (N. Y.) 148, 150, 13 N. Y. Suppl. 221, 36 N. Y. St. 708, 20 N. Y. Civ. Proc. 111 [*reversing* 12 N. Y. Suppl. 309], and, in an action for replevin of goods alleged to have been bought by defendant from plaintiff under false representations as to his business, the allegation of the complaint that defendant "wrongfully took" the goods for which the action is brought does not, necessarily, imply a fraudulent taking so as to set forth such an extrinsic fact as is required to give plaintiff the right to have defendant arrested under N. Y. Code Civ. Proc. § 550, subd. 1, specifying the fraud for which defendant may be subjected to arrest in civil actions. Fitch *v.* McMahon, 103 N. Y. 690, 9 N. E. 497.

74. Morton *v.* Chesley, 3 N. Y. App. Div. 446, 38 N. Y. Suppl. 252, 73 N. Y. St. 861, 25 N. Y. Civ. Proc. 230 [*affirming* 16 Misc. (N. Y.) 172, 37 N. Y. Suppl. 1065, 74 N. Y. St. 364].

75. Hoboken Beef Co. *v.* Loeffel, 4 N. Y. Suppl. 798, 16 N. Y. Civ. Proc. 394, 23 Abb. N. Cas. (N. Y.) 93.

76. Wickes *v.* Harmon, 12 Abb. Pr. (N. Y.) 476, 21 How. Pr. (N. Y.) 462; Rogers *v.* Rogers, 4 Johns, (N. Y.) 485. *Compare* Stelle *v.* Palmer, 7 Abb. Pr. (N. Y.) 181 (holding that it is no ground for vacating an order of arrest that the case made by the complaint varies from that made by the affidavit, if the affidavits are of themselves sufficient and dis-

d. Amendment. It seems that the court will permit the amendment of the complaint when, after the filing thereof, an arrest is sought on a ground which should be alleged in the complaint,[77] or when the complaint states conclusions instead of facts.[78] Where allegations of fraud are inserted in a complaint for the purpose of having defendant arrested, but no arrest is procured, the allegations will be stricken out on motion.[79]

3. UNDERTAKING — a. Necessity and Purpose. It is a rule of almost universal application that plaintiff is not entitled to have defendant in a civil action arrested until he has executed a bond or undertaking,[80] with good and sufficient sureties,[81]

close a ground of arrest which is consistent with the allegations of the complaint); Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315 (holding that the fact that, subsequent to the granting of an order of arrest, the form of the summons in an action of arrest was amended, changing it from a summons for a money demand to a summons for specific relief, neither impaired the effect of the order, nor afforded a ground for vacating it, as the order of arrest was procured upon affidavits showing the existence of a cause of action, and not upon the pleadings).

Variance held immaterial.—Where the complaint alleged that defendant, while acting as attorney for plaintiff's testator, received money for investment; that defendant did not make the investment, or pay the money to testator, or to any one for his benefit, and that plaintiff had demanded payment, which defendant refused, to plaintiff's damage, and an order of arrest in the action recited the ground therefor as for a conversion of money embezzled or fraudulently misapplied by defendant while attorney for plaintiff's testator, it was held that there was no variance, since the cause of action as stated led only to the conclusion that defendant was an embezzler. Quail *v.* Nelson, 39 N. Y. App. Div. 18, 56 N. Y. Suppl. 865. So, when an affidavit for arrest declares the cause of action to be a certain promissory note, it is no variance therefrom for the complaint to contain a second count on another note (Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585), and, where the affidavit stated that defendant was indebted to plaintiff as indorser of a bill of exchange and the declaration was on a foreign bill, it was held that there was no variance (Phillips *v.* Don, 6 Dowl. & L. 527, 13 Jur. 445, 18 L. J. Q. B. 104).

77. Davis *v.* Robinson, 10 Cal. 411; Lennon *v.* Brandt, 4 N. Y. Suppl. 2, 21 Abb. N. Cas. (N. Y.) 257. *Compare* Humphrey *v.* Hayes, 94 N. Y. 594, holding that the New York act of 1879, which amended N. Y. Code Civ. Proc. § 549, by authorizing an arrest in an action where fraud was alleged in the complaint, and providing that, where such an allegation was made, it must be proved, did not apply to actions previously commenced, and that, therefore, where, after the commencement of an action, defendant was arrested upon affidavits charging fraud, it is neither necessary to amend the complaint by inserting allegations of fraud, nor to prove the fraud on the trial.

78. McBride *v.* Langan, 10 N. Y. Suppl. 554, 18 N. Y. Civ. Proc. 201; Hanson *v.* Langan, 9 N. Y. Suppl. 625, 30 N. Y. St. 828 [*affirmed* in 16 N. Y. Suppl. 383, 38 N. Y. St. 1023], the latter case holding that the amendment should be permitted where the complaint states a sufficient cause of action and the affidavit filed with it states in detail the facts constituting the alleged fraud.

79. Lee *v.* Elias, 3 Sandf. (N. Y.) 736, Code Rep. N. S. (N. Y.) 116.

80. Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110; Squire *v.* Flynn, 8 Barb. (N. Y.) 169, 2 Code Rep. (N. Y.) 117; Courter *v.* McNamara, 9 How. Pr. (N. Y.) 255.

Action in forma pauperis.— The express provision of N. C. Code Civ. Proc. § 152, relating to arrests, that "before making the order the judge should require" an undertaking with sureties, excludes any implication that a plaintiff who is allowed to sue *in forma pauperis* can have an order of arrest without giving the undertaking required from ordinary suitors. Rowark *v.* Homesley, 68 N. C. 91.

In action brought by United States.— In an action brought by a private person to recover a penalty or damages for making a false claim against the United States, under U. S. Rev. Stat. (1872), §§ 3490–3493, the United States is the plaintiff and defendant may be arrested and held to bail without an undertaking or covenant by plaintiff, as provided by a state code. U. S. *v.* Griswold, 5 Sawy. (U. S.) 25, 26 Fed. Cas. No. 15,266.

Undertaking executed after arrest.— When the undertaking required by statute is not given until after the arrest, but is executed by the sureties with full knowledge of the attendant facts and circumstances, and without objection as to the time of its execution, they will not, afterward, be heard to complain. Vanderberg *v.* Connoly, 18 Utah 112, 54 Pac. 1097.

81. **A plaintiff cannot become surety** on his own undertaking for an order of arrest. Perry *v.* Smith, 9 N. Y. St. 728.

Failure of surety to swear to ownership of property.— Where the surety neglects to swear that, exclusive of the property exempt from levy and sale under execution, he is worth the amount specified in the affidavit, such affidavit is defective and the order of arrest will be set aside. Thompson *v.* Friedberg, 54 How. Pr. (N. Y.) 519.

In New York, under the former practice, it was within the discretion of the judge to require surety (Courter *v.* McNamara, 9

in the form[82] and amount[83] prescribed by law, conditioned for the payment of costs[84] and the damages which defendant may sustain by reason of the arrest.[85]

How. Pr. (N. Y.) 255), and, in the exercise of this discretion, he had the right, if he saw fit, to require only one surety (Sieff *v.* Shausenburgh, 10 Abb. Pr. (N. Y.) 477 note; Courter *v.* McNamara, 9 How. Pr. (N. Y.) 255), and the undertaking was not insufficient if signed by the sureties only, and not by plaintiff (Askins *v.* Hearns, 3 Abb. Pr. (N. Y.) 184 [*disapproving* Richardson *v.* Craig, 1 Duer (N. Y.) 666]; Bellinger *v.* Gardner, 2 Abb. Pr. (N. Y.) 441, 12 How. Pr. (N. Y.) 381); and the judge's exercise of discretion on this point could not be called in question on a motion to discharge the order of arrest (Bellinger *v.* Gardner, 2 Abb. Pr. (N. Y.) 441, 12 How. Pr. (N. Y.) 381). Under the present practice the execution of an undertaking is a condition precedent to the granting of an order of arrest, except where the action is brought for a cause specified in N. Y. Code Civ. Proc. § 549, subs. 3; and there must be two sureties (N. Y. Code Civ. Proc. § 559); but where an undertaking is duly signed by two sureties it is not invalidated by the fact that plaintiff himself also signed it (O'Shea *v.* Kohn, 33 Hun (N. Y.) 114).

82. What is sufficient bond.—Where, on an application for defendant's arrest on the ground of non-residence, under N. Y. Code Civ. Proc. § 551, plaintiff gives bond, which is accepted and approved by the presiding judge, such bond complies with section 560, requiring it to be in such form and amount as the court shall prescribe. Ensign *v.* Nelson, 49 Hun (N. Y.) 215, 1 N. Y. Suppl. 685, 17 N. Y. St. 66, 14 N. Y. Civ. Proc. 438, 21 Abb. N. Cas. (N. Y.) 321 [*affirmed* in 112 N. Y. 674, 20 N. E. 416, 20 N. Y. St. 982].

83. N. Y. Code Civ. Proc. § 559, provides that such undertaking "shall be in a sum at least equal to one-tenth of the amount of bail required by the order" (Bauer *v.* Schevitch, 11 N. Y. Civ. Proc. 433), and an order of arrest is void for want of jurisdiction in the judge to grant it where he failed to require an undertaking from the plaintiff in the amount required, though the error is waived by defendant and cured by the court where, after the arrest, defendant obtains an order to show cause, in which he claims relief in the alternative either that the order of arrest should be vacated and set aside for irregularity, and on the merits, or that the amount of bail required in the order be reduced, upon which application the bail is reduced to an amount bringing plaintiff's undertaking within the requirements of the code (Godfrey *v.* Pell, 49 N. Y. Super. Ct. 206, 4 N. Y. Civ. Proc. 448).

84. The costs intended to be secured by the undertaking are not the costs of the original action, for which defendant may recover judgment if successful, but only such costs, up to the specified amount, awarded to defendant, as accrue from the arrest, or in proceedings necessitated thereby. Sutorius *v.* North, 1 Misc. (N. Y.) 298, 20 N. Y. Suppl. 726, 48 N. Y. St. 694 [*affirming* 13 N. Y. Suppl. 557, 36 N. Y. St. 873, 20 N. Y. Civ. Proc. 162]. See also Sperry *v.* Hellman, 13 N. Y. Suppl. 899, 37 N. Y. St. 258, 20 N. Y. Civ. Proc. 218, holding that the undertaking is intended to secure indemnity to an arrested defendant only to the extent to which he may have been inconvenienced and may have suffered expenses over defendants not arrested, and that where two defendants, one only of whom was arrested, have recovered a joint judgment for costs in the original action, the arrested defendant cannot recover such costs in an action on the undertaking.

Costs on new trial.— The undertaking includes costs incurred on an application for a new trial as well as those incurred in the trial itself. Hence, in an action for the penalty, where plaintiffs in the original suit had paid the costs of the application for a new trial as well as those of the trial, their sureties were properly allowed credit therefor upon the amount of the penalty of the bond. Furber *v.* McCarthy, 12 N. Y. Suppl. 794, 36 N. Y. St. 212, 20 N. Y. Civ. Proc. 229.

85. Protection of debtor from abuse of process.— The undertaking is required for the purpose of protecting the debtor against an abuse of the power of arrest. Squire *v.* Flynn, 8 Barb. (N. Y.) 169, 2 Code Rep. (N. Y.) 117.

Extent of liability after payment of costs. — When an undertaking is conditioned in a certain sum for the payment of all costs that may be awarded defendant, and all damages which he may sustain by reason of the arrest, the sureties after payment of the costs are liable for damages only to the extent of the difference between the costs paid and the amount specified in the bond, as "all costs" and "all damages" must be taken in conjunction. Sutorius *v.* Dunstan, 59 N. Y. Super. Ct. 166, 13 N. Y. Suppl. 601, 36 N. Y. St. 685, 20 N. Y. Civ. Proc. 241; Spang *v.* Patterson, 23 Misc. (N. Y.) 536, 52 N. Y. Suppl. 678.

Mental anguish and physical illness — Attorney's fees.— In an action on the undertaking for damages for an unwarranted arrest in a civil action, the jury may consider as elements in assessing damages the mental anguish and physical illness caused by the arrest and imprisonment, and also customary attorney's fees in procuring defendant's discharge. Vanderberg *v.* Connoly, 18 Utah 112, 54 Pac. 1097. But, where a defendant was arrested and the complaint was subsequently dismissed by default, it was held that the dismissal of the action ended his liability to arrest therein and that he was not entitled to damages for expenses for counsel fees thereafter incurred by him when the suit was re-

b. Indorsement of Judge's Approval. Where the undertaking is required to be approved by the judge who grants the order of arrest, the order will be vacated if the undertaking is not indorsed with such approval.[86]

c. Amendment. An undertaking which is defective in form or insufficient in amount may be amended.[87]

d. Effect of Setting Aside Order. When an order setting aside an arrest is irregular and is itself set aside, the undertaking to procure the arrest is not thereby rendered invalid.[88]

G. Process — 1. Necessity of Obtaining Judicial Order.[89] While, under the earlier practice, plaintiff could in many cases hold defendant to bail as of course,[90] under the modern practice it is, usually, necessary to procure a judicial order for that purpose[91] from a court or judicial officer.[92]

2. Time of Issuance — a. Capias Ad Respondendum. A capias ad respondendum may not be sued out pending an action, as defendant is already in court.[93]

b. Order of Arrest. With respect to the time for obtaining an order of arrest it has been held that it may be obtained only after the commencement of the action [94]

opened and prosecuted to an appeal by the sureties upon the undertaking for his arrest. Sperry *v.* Hellman, 13 N. Y. Suppl. 899, 37 N. Y. St. 258, 20 N. Y. Civ. Proc. 218.

Damages for disgrace.—In an action against the sureties on an undertaking for an order of arrest, damages for disgrace cannot be recovered as in an action against the principal for false imprisonment. Krause *v.* Rutherford, 45 N. Y. App. Div. 132, 60 N. Y. Suppl. 1047.

Interest on judgment.—Where the condition of an undertaking is to pay all costs and damages which may be awarded defendant by reason of his arrest in a civil suit, interest will attach to a judgment therein in favor of defendant as a legitimate item of damages. Furber *v.* McCarthy, 12 N. Y. Suppl. 794, 36 N. Y. St. 212, 20 N. Y. Civ. Proc. 229.

In action against several defendants.— An undertaking to hold to bail conditioned that "the plaintiff in said action will pay all costs which may be awarded to the defendants or either of them, and all damages which they or either of them may sustain by reason of the arrest," is not sufficient, since it does not stipulate to pay the damages which each of defendants might recover by reason of the arrest. Bauer *v.* Schevitch, 11 N. Y. Civ. Proc. 433, 434.

86. Newell *v.* Doran, 21 How. Pr. (N. Y.) 427.

87. Irwin *v.* Judd, 20 Hun (N. Y.) 562; Bellinger *v.* Gardner, 2 Abb. Pr. (N. Y.) 441, 12 How. Pr. (N. Y.) 381; Pember *v.* Schaller, 58 How. Pr. (N. Y.) 511.

This may be done by the substitution of a proper undertaking. Bauer *v.* Schevitch, 11 N. Y. Civ. Proc. 433.

88. Cummings *v.* Woolley, 16 Abb. Pr. (N. Y.) 297 note.

89. For form of order to hold to bail see 18 L. C. Jur. 29.

90. Sutton *v.* Hays, 17 Ark. 462; Champion *v.* Pierce, 11 N. J. L. 196; Spaulding *v.* Shepard, 2 How. Pr. (N. Y.) 272; Ely *v.* Lyons, 18 Wend. (N. Y.) 644; Bunting *v.* Brown, 13 Johns. (N. Y.) 425; Mickle *v.* Baker, 2 McCord (S. C.) 250.

In an action for breach of promise defendant could not be held to bail without a judge's order. Bromley *v.* Town, 1 Hill (N. Y.) 373.

In a joint action against the maker and indorser of a note, bail could not be demanded as of right, but could be obtained only by order of a court, on a proper affidavit. Hatcher *v.* Lewis, 4 Rand. (Va.) 152.

When bail was required on a penal statute not expressly allowing it, it was necessary for plaintiff to have an order of the court or of a judge therefor. Brookfield *v.* Jones, 8 N. J. L. 311.

91. Order not process.— An order of arrest signed by the judge and complying with the requirements of Cal. Code Civ. Proc. § 481, is not open to the objection that it is process, and therefore must, under Cal. Const. art. 6, § 18, be issued in the name of the state. Dusy *v.* Helm, 59 Cal. 188. See also Ellis *v.* Gee, 5 N. C. 445, holding that a paper writing, upon which a constable arrests a debtor and imprisons him, which does not run in the name of the state and is not directed to any ministerial officer, and does not purport to be signed by a justice of the peace, cannot be deemed judicial process.

92. Perry *v.* Orr, 35 N. J. L. 295; State *v.* Dunn, 25 N. J. L. 214; Squire *v.* Flynn, 8 Barb. (N. Y.) 169, 2 Code Rep. (N. Y.) 117; Hobsen *v.* Anderson, 19 Wkly. Notes Cas. (Pa.) 360; Blanco *v.* Bosch, 3 Wkly. Notes Cas. (Pa.) 171.

93. Darlington *v.* Irwin, Morr. (Iowa) 421.

May issue from the common pleas court in term-time, returnable forthwith. Crider *v.* Hammel, Tapp. (Ohio) 49.

94. What is commencement of action.— Under the provision of the New York code that a warrant of arrest shall not issue until the suit is commenced, a suit is not commenced until the summons has been served personally or by publication. Lee *v.* Averill, 2 Sandf. (N. Y.) 621, 1 Sandf. (N. Y.) 731, 1 Code Rep. (N. Y.) 73. See, however, Dunaher *v.* Meyer, 1 Code Rep. (N. Y.) 87, holding that an order of arrest may be issued before service of summons and complaint.

wherein it is sought and that it must be obtained before final judgment in such action.[95]

3. CONTENTS. A writ, warrant, or order of arrest should state the grounds upon which the arrest is to be made,[96] and, where the order is granted judicially, should show the exercise of the necessary judicial functions.[97] The process is usually required to state the sum in which defendant is to be held to bail,[98] and

Where an action is commenced by the filing of a complaint as well as by the issuance of a summons, a court has no jurisdiction to grant an order of arrest until after the complaint has been filed, even though a summons has been issued. *Ex p.* Cohen, 6 Cal. 318.

When fraud must be alleged in complaint. — Under N. Y. Code Civ. Proc. § 549, subs. 4, allowing defendant's arrest "where it is alleged in the complaint that the defendant was guilty of a fraud," an arrest cannot be had before the existence of a complaint in the action. A. F. Engelhardt Co. *v.* Benjamin, 2 N. Y. App. Div. 91, 37 N. Y. Suppl. 531, 73 N. Y. St. 147. See also Straus *v.* Kreis, 6 N. Y. Civ. Proc. 77, 67 How. Pr. (N. Y.) 275, holding that, if no complaint is presented with the motion for arrest and the affidavits do not aver what its allegations are, an order of arrest cannot lawfully issue. *Contra*, Hall *v.* Conger, 7 N. Y. Civ. Proc. 53, 1 How. Pr. N. S. (N. Y.) 88, holding that it is not necessary that a complaint should be submitted, or that the contents of the complaint should be stated in an affidavit, or that any complaint should be in existence at the time such order is granted, as a condition precedent to the granting thereof.

95. Thornhill *v.* Cristmas, 10 Rob. (La.) 543; Lee *v.* Elias, 3 Sandf. (N. Y.) 736, Code Rep. N. S. (N. Y.) 116; Houston *v.* Walsh, 79 N. C. 35; Yorkshire Engine Co. *v.* Wright, 21 Wkly. Rep. 15.

Order held obtained before judgment.—Under section 183 of the code, providing that the order of arrest, as a provisional remedy, may only be obtained after judgment, if, after judgment has been recovered by default, defendant obtains and avails himself of leave to come in and defend, he is liable to arrest upon an order, although the judgment awarded final process against him, and the condition of his being let in was that the judgment should stand as security. By taking this course defendant elected to treat the action as still undetermined, and is estopped from availing himself of the judgment as a determination of the action which would preclude the provisional remedy of arrest. Mott *v.* Union Bank, 38 N. Y. 18 [*affirming* 8 Bosw. (N. Y.) 591]; Union Bank *v.* Mott, 9 Abb. Pr. (N. Y.) 106, 17 How. Pr. (N. Y.) 353 [*affirming* 8 Abb. Pr. (N. Y.) 150, 16 How. Pr. (N. Y.) 525]. So, where, after trial of an action and the decision of the court, but before judgment, an order of arrest was granted upon affidavits establishing fraud *prima facie*, and was issued and served, it was held that it was in time. Humphrey *v.* Hayes, 94 N. Y. 594.

96. Brigham *v.* Este, 2 Pick. (Mass.) 420; Patterson *v.* Parker, 2 Hill (N. Y.) 598; 3 Bl. Comm. 287. But see Kinney *v.* Muloch, 17 N. J. L. 334 (holding that it is no ground for discharge on common bail of a defendant held to bail in a large sum, that no specific cause of action is stated in the writ; it being sufficient if it is stated in the affidavit to hold to bail); C. M. Hapgood Shoe Co. *v.* Saupp, 7 Pa. Super. Ct. 480 (holding that, if a warrant issued under the Pennsylvania act of July 12, 1842, is in the precise form prescribed by the act, it is not defective in that it omits a part of the affidavit, where, at the time it was executed, a copy of the affidavit was given defendant).

Grounds stated with proviso.— Where a magistrate, in his certificate, after setting forth facts upon which an arrest would be authorized by law, added a recital that: "I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset," it was held that the certificate was sufficient, as the right to arrest after sunset was the only purpose for which the magistrate's order was necessary. Stewart *v.* Griswold, 134 Mass. 391.

Grounds stated in alternative.—Under N. Y. Gen. Rules Prac. Rule 13, providing that every order of arrest shall briefly state the grounds upon which it is granted, an order of arrest reciting the ground as conversion of money embezzled or fraudulently misapplied is not defective as being in the alternative, since the ground covers only one offense. Quail *v.* Nelson, 39 N. Y. App. Div. 18, 56 N. Y. Suppl. 865.

Matters in addition to grounds.— When an order of arrest sufficiently states the grounds upon which it is granted, it is not vitiated by reason of the fact that it also states matters which are not made grounds for its issuance. Ross *v.* Wigg, 6 N. Y. Civ. Proc. 268 note.

97. Thus, an order made by the justice or commissioner must show upon its face that he has considered and decided upon the evidence of fraud submitted to him, and that the proof was to his satisfaction. Perry *v.* Orr, 35 N. J. L. 295; Hill *v.* Hunt, 20 N. J. L. 476.

Sufficiency of showing.— A magistrate's certificate authorizing the arrest of a debtor is not invalid because it states that he is "satisfied, upon the evidence," instead of (in the language of the statute) he is "satisfied that there is reasonable cause to believe" that the charge made in the affidavit is true. May *v.* Hammond, 144 Mass. 151, 10 N. E. 751.

98. For approved form of order in this respect see New York Cent., etc., R. Co. *v.* Shepherd, 10 N. Y. Civ. Proc. 153.

Bail less than might be required.— It is no objection to the validity of an order of arrest

should show when[99] and whence[1] it issued, by whom it is to be executed,[2] and the person who is to be arrested thereunder.[3] It has been held, however, that it is not necessary that it should recite all the facts that confer jurisdiction, if they appear affirmatively in some anterior part of the proceedings,[4] and it seems that if it is otherwise in proper form, it is sufficient, even though it has not the signature of the officer issuing it.[5]

4. INDORSEMENTS. In some jurisdictions the amount sworn to be due,[6] and in

that the sum in which defendant is required to be held to bail is a less sum than plaintiff might under the statute have inserted. The error being in favor of defendant, he cannot object to it. Tracey *v.* Veeder, 35 How. Pr. (N. Y.) 209; Campbell *v.* Wood, 1 Ont. Pr. 199.

99. Rennie *v.* Bruce, 2 Dowl. & L. 946, 9 Jur. 507, 14 L. J. Q. B. 207.

An alias capias must be tested of the term to which the original was returnable. U. S. *v.* Parker, 2 Dall. (U. S.) 373, 1 L. ed. 421, 27 Fed. Cas. No. 15,992.

1. Rennie *v.* Bruce, 2 Dowl. & L. 946, 9 Jur. 507, 14 L. J. Q. B. 207.

Judge's order.— An order of arrest in a civil case, made by a judge out of court, should not, in form, be an order of the court, or purport to be made in court. Lachenmeyer *v.* Lachenmeyer, 26 Hun (N. Y.) 542.

Sheriff's warrant.— It is not necessary that a sheriff's warrant, issued upon a capias ad respondendum, should specify the court out of which the process issued. Astley *v.* Goodyear, 2 Cr. & M. 682, 2 Dowl. P. C. 619, 3 L. J. Exch. 210, 4 Tyrw. 414.

2. Rex *v.* Osmer, 5 East 304, 1 Smith K. B. 555, wherein it was held that the warrant ought to be directed to a proper, known officer, as, if it were directed to any stranger, it might be resisted for want of knowledge that the party is an officer of the court.

In New Jersey a warrant in a civil suit, issued by an alderman of the city of Perth Amboy, must be directed to a constable of the city, and must be executed within the city limits. Dunham *v.* Solomon, 16 N. J. L. 50.

In New York an order of arrest made by the marine court of the city of New York, under the New York act of 1872 regulating procedure in that court, which act substituted an order for a warrant of arrest, was properly directed to, and served by, a marshal of the city of New York. Matter of Ott, 13 Abb. Pr. N. S. (N. Y.) 293.

Writ directed to officers and their assistants.— Where the commissioners of bankruptcy issued a warrant to apprehend a bankrupt, and directed the warrant to "John Adams and William Smith, our messengers, and their assistants," etc., it was held that the warrant did not justify the apprehension of the bankrupt by any one who was not in the presence, actual or constructive, of J. A. or W. S., and that, therefore, B., who was the assistant of W. S. in his business of a sheriff's officer, was not justified in apprehending the bankrupt in the absence of W. S. and J. A., even though he had the warrant in his possession. Rex *v.* Whalley, 7 C. & P. 245, 32 E. C. L. 594.

Writ directed to "sheriffs" instead of to "sheriff."— A capias which was directed to the "sheriffs" instead of to the "sheriff" of Middlesex was held to be irregular. Moore *v.* Magan, 4 Dowl. & L. 267, 16 L. J. Exch. 57, 16 M. & W. 95.

3. Shadgett *v.* Clipson, 8 East 328, the court saying that process ought regularly to describe the party against whom it is meant to be issued, and that the arrest of one person cannot be justified under a writ sued out against another, unless such person is as well known by the one name as the other.

When alias may not issue.— When a capias ad respondendum issues against the wrong person as defendant, and he appears and takes issue, the proper person cannot be brought in on an alias writ. Brittin *v.* Shloss, 9 Wkly. Notes Cas. (Pa.) 510.

4. Norman *v.* Zieber, 3 Oreg. 197. *Compare* Lutterloh *v.* Powell, 2 N. C. 455, wherein it was held that a constable could not arrest unless it expressly appeared in the warrant that the sum demanded was over five pounds.

5. Wibright *v.* Wise, 4 Blackf. (Ind.) 137; Ensign *v.* Nelson, 49 Hun (N. Y.) 215, 1 N. Y. Suppl. 685, 17 N. Y. St. 66, 14 N. Y. Civ. Proc. 438, 21 Abb. N. Cas. (N. Y.) 321 [*affirmed* in 112 N. Y. 674, 20 N. E. 416].

Signature of attorney.— Under N. Y. Code Civ. Proc. §§ 561, 562, the order of arrest must be subscribed by the attorney; and the statute is imperative. Thompson *v.* Friedberg, 54 How. Pr. (N. Y.) 519.

Copy of writ served.— It is no objection to an arrest that the copy of the writ served contains neither the name of the clerk of the crown nor a mark to show that the original was issued by the proper authority, and was sealed. Carrol *v.* Light, 1 Ont. Pr. 137.

6. Applies to all actions.— In all cases of mesne process, the clerk must indorse upon the writ the cause of action and the amount sworn to be due, as the same may be stated in the affidavit to hold to bail. Weaver *v.* Russell, 18 Ohio 497; Herf *v.* Shulze, 10 Ohio 263; Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79.

Applies only to actions of contract.— The Judiciary Act of 1799, authorizing the taking of bail and requiring the sum sworn to be indorsed on the writ, applies only to actions of contract. Thornton *v.* Pass, 26 Ga. 108.

Effect of variance between affidavit and writ.— In an action on a promissory note, when plaintiff's affidavit for arrest sets forth the debt as four hundred and twelve dollars

others the affidavit to hold to bail,[7] must be indorsed on the writ. When the writ is a capias ad respondendum, it should be indorsed with the order to hold to bail, if there is one.[8]

5. AMENDMENT. A writ, warrant, or order which is voidable merely may be amended;[9] but one which is void may not.[10]

6. ALTERATION. The alteration of a writ after its issuance renders it void.[11]

7. RETURN — a. Form. The manner and form in which an officer shall return mesne process under which he has made an arrest are usually prescribed by local statutes or rules of practice.[12]

and fifty cents, "with interest," and the amount indorsed on the writ is four hundred and sixty-eight dollars and fifty cents, it will be considered a variance entitling defendant to his discharge, although the debt, with interest added, in fact amounted to four hundred and sixty-eight dollars and fifty cents. Jennings *v.* Sledge, 3 Ga. 128.

A sheriff's warrant must be indorsed with the amount of the debt claimed in the same manner as the writ is required to be. Steele *v.* Lameux, 5 U. C. Q. B. O. S. 154. See also Ross *v.* Webster, 5 U. C. Q. B. 570, holding that an arrest by a constable, on mesne process directed to the sheriff, is not legal unless the affidavit of the debt is annexed to the process.

7. Janes *v.* Miller, 21 N. H. 371; Malone *v.* Ryan, 14 R. I. 614. But see Haynes *v.* Saunders, 11 Cush. (Mass.) 537 (holding that, under Mass. Rev. Stat. c. 90, § 111, the affidavit necessary for the arrest of a person in an action of contract need not be indorsed upon the writ); Marsh *v.* Bancroft, 1 Metc. (Mass.) 497 (holding that it is not necessary that the writ of arrest should have indorsed thereon a certification that the proper oath was taken to authorize its issuance).

Such indorsement upon a different writ is insufficient. Kidder *v.* Farrar, 20 N. H. 320.

8. Terrill *v.* Grove, 2 Mich. N. P. 3. *Compare* Wert *v.* Strouse, 38 N. J. L. 184; Carler *v.* Drake, 10 Wend. (N. Y.) 618, which hold that, while it is usual and proper to indorse the order to hold to bail on the capias, such indorsement is not indispensable, and that it may be on a separate paper, provided the authority exists and is in the possession of the officer, or under his control.

9. **Amendments have been permitted** to writs which were defective because of failure of attorney to subscribe (Mather *v.* Hannaur, 55 How. Pr. (N. Y.) 1), misnomer of defendant (Stuber *v.* Schuartz, 1 N. Y. City Ct. 110), error as to name of chief justice in teste (Brown *v.* Aplin, 1 Cow. (N. Y.) 203), teste at wrong place (Raymond *v.* Hinman, 4 Cow. (N. Y.) 41), being made returnable at wrong place (McConkey *v.* Glen, 1 Cow. (N. Y.) 141), failure to run in name of state (Ilsley *v.* Harris, 10 Wis. 95), failure to indorse with amount claimed (Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79), indorsement upon writ of smaller sum than real amount of debt (Plock *v.* Pacheco, 1 Dowl. N. S. 380, 9 M. & W. 342), issuance of capias after action in form formerly used for commencement of action (Robertson *v.* Coulton, 9 Ont. Pr. 16), and variance between writ and copy (Damer *v.* Busby, 5 Ont. Pr. 356).

10. Learnard *v.* Bailey, 111 Mass. 160; Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648; Miller *v.* Gregory, 4 Cow. (N. Y.) 504; Rennie *v.* Bruce, 2 Dowl. & L. 946, 9 Jur. 507, 14 L. J. Q. B. 207.

11. Amadon *v.* Mann, 3 Gray (Mass.) 467; Housin *v.* Barrow, 6 T. R. 122. See also Burslem *v.* Fern, 2 Wils. C. P. 47, holding that a sheriff's warrant on a capias, filled up by an attorney after the writ is signed and sealed, is bad.

12. **New York.**—Rule 6 of the general rules of practice of the supreme court, in so far as it directs the sheriff to file the order of arrest with the clerk, may be disregarded, as it is in conflict with section 193 of the code, which prescribes that such order shall be delivered to plaintiff or his attorney. Forward *v.* French, 52 How. Pr. (N. Y.) 88.

Pennsylvania.— The officer is not required to make return into the office or to the court whence the process issued, but executes the warrant by arresting defendant, bringing him before the judge, and keeping him in custody until he is discharged. Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

Insufficient evidence of service.— An indorsement of a recognizance of bail on a capias ad respondendum returned to the clerk's office, defendant not being a party to the recognizance, is no evidence of service of the writ. Miller *v.* Bottorff, 6 Blackf. (Ind.) 30.

What return necessary to authorize alias.— Where a capias ad respondendum was served after the return-day, it was held that the sheriff ought to have returned *non est inventus* in order to authorize the issuing of an alias; and, where the alias had issued without the return of *non est inventus* (the first writ having been served after the return-day thereof and returned according to the fact), it was held sufficient, but the sheriff was ordered to alter the return. Wilder *v.* Grimke, 2 Brev. (S. C.) 261.

When return may be amended.— Where a sheriff, who had arrested a defendant in a civil action and taken bail for his appearance, made an immediate return that he had taken defendant into custody as required by statute, and thereafter defendant voluntarily surrendered himself to the sheriff before return-day, and, while so in custody, was dis-

b. Time. Except where the rule has been changed by statute,[13] the process must be made returnable, and must be returned on the first day of the term next succeeding the one at which it was tested.[14]

8. Waiver of Objections by Defendant. A defendant does not waive his objections to a void writ by giving bail,[15] appearing,[16] or pleading to the merits;[17] but he does waive objections to a merely irregular or voidable writ by taking any of such steps.[18]

charged under the insolvent laws, it was held that the sheriff should be permitted to amend his return to show such discharge. Dalbey *v.* Lowenstein, 34 N. J. L. 465.

13. In New York an order of arrest issued as a provisional remedy under the code may be made returnable within a specified period after the arrest of defendant. It is not essential to name a day certain. Continental Bank *v.* De Mott, 8 Bosw. (N. Y.) 696.

14. People *v.* Kent County Cir. Judge, 38 Mich. 308; Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648; Simmerman *v.* Clevenger, (N. J. 1886) 5 Atl. 273; *Ex p.* Root, 4 Cow. (N. Y.) 548; Miller *v.* Gregory, 4 Cow. (N. Y.) 504.

Direction as to return held sufficient.— A capias which directs the sheriff to bring the person named therein before the court "on the seventh day of October, A. D. 1879, that being the first day of the next succeeding term," sufficiently shows that it is returnable on the first day of the next term of court, even though such term does not begin on October 7th. People *v.* Kent Cir. Judge, 41 Mich. 722, 49 N. W. 924.

An alias capias must be made returnable to the next ensuing term. U. S. *v.* Parker, 2 Dall. (U. S.) 373, 1 L. ed. 421, 27 Fed. Cas. No. 15,992.

When writ is void.— A writ of mesne process commanding the arrest of defendant, returnable after an intervening term, is void. Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648.

Writ made returnable in vacation.— The common-law rule that a capias issued on an order to hold defendant to bail must be made returnable not later than the next term is still in force and is not repealed by section 41 of the Practice Act, providing that the courts shall be open for the return of such writs without restriction, which merely has the effect of allowing such writs to be made returnable in vacation also. Simmerman *v.* Clevenger, (N. J. 1886) 5 Atl. 273. *Compare* Leigh *v.* Alpaugh, 24 N. J. L. 629 (wherein it was held that a capias ad respondendum, returnable in vacation, was void); Miller *v.* Gregory, 4 Cow. (N. Y.) 504 (holding that a capias ad respondendum not bailable, returnable out of term, is void).

Writ issued in vacation.— A capias ad respondendum issued in vacation must be made returnable to the first day of the next term of court. Shirley *v.* Hagar, 3 Blackf. (Ind.) 225.

A rule on the sheriff to return a capias ad respondendum will be denied, on the ground of laches, when it appears that the application was not made until the fourth term after the return-day. Johnson *v.* McCoy, 1 Miles (Pa.) 89.

15. Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110; Leigh *v.* Alpaugh, 24 N. J. L. 629.

16. Pike *v.* McMullin, 66 Vt. 121, 28 Atl. 876.

17. Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110; Leigh *v.* Alpaugh, 24 N. J. L. 629.

18. *Kansas.*— Howe Mach. Co. *v.* Lincoln, 24 Kan. 123, holding that, where a constable gave an order of arrest, issued by a justice, to defendant, and made his return upon a copy which did not bear the name of the justice, defendant waived all objections by coming before the justice and admitting that he was under arrest and subject to his jurisdiction.

Kentucky.— Gore *v.* Murray, 1 Bibb (Ky.) 270, holding that the want of an indorsement of the species of action on the writ must be taken advantage of before judgment.

New Jersey.— Logan *v.* Lawshe, 62 N. J. L. 567, 41 Atl. 751, holding that, where less than fifteen days intervened between the teste of a capias and the day of its return, and defendant appeared and filed special bail, such alleged defect was thereby waived.

Ohio.— Smith *v.* Madison, 7 Ohio 236, holding that, by failing to object promptly after the return, a defendant waives the right to object to a writ because of a trifling misnomer.

Oregon.— Neimitz *v.* Conrad, 22 Oreg. 164, 29 Pac. 548, holding that, where a defendant who has been arrested under civil process which is merely irregular or voidable, and not void, appears and puts in bail without moving to set the process aside, he waives all defects therein.

Pennsylvania.—Shannon *v.* Madden, 1 Phila. (Pa.) 254, 8 Leg. Int. (Pa.) 162, holding that the irregularity of arresting defendant on a capias for a simple breach of contract is waived when defendant, without objection, proceeds to a hearing on the merits.

England.— Davis *v.* Watkins, 12 L. J. Q. B. 293, holding that, after a lapse of twenty days, the court will not discharge a defendant out of custody on the ground that his addition was not indorsed on the capias, unless he shows circumstances to excuse the delay.

Canada.— Robertson *v.* Beers, 7 Brit. Col. 76.

But in New York, under N. Y. Code, § 204, as amended in 1858, a motion to vacate an order of arrest may be made at any time before judgment, notwithstanding the fact that

H. Manner and Place of Making Arrest — **1. What Constitutes.** In order to effect an arrest, the officer must, in some unequivocal manner, acquire and exercise control of the person sought to be arrested.[19] The usual manner of doing this is by a manual touching or seizure of his body;[20] but a manual touching is not necessary in all cases.[21]

2. Making Known Authority. A known officer, acting within his jurisdiction, need not show his warrant in making an arrest;[22] but he should inform the party arrested of the cause thereof.[23] A special deputy, or an officer appointed for the purpose of making a particular arrest, should show his warrant on demand.[24]

3. Right to Summon Assistance. In making an arrest under civil process it is the duty of an officer to summon sufficient assistance to enable him to effect his purpose.[25]

defendant has given and perfected bail (Warren *v.* Wendell, 13 Abb. Pr. (N. Y.) 187; Wickes *v.* Harmon, 12 Abb. Pr. (N. Y.) 476, 21 How. Pr. (N. Y.) 462). *Compare* Coles *v.* Hannigan, 8 Daly (N. Y.) 43, holding that, where an action is begun in a district court of the city of New York by a warrant of arrest, issued on grounds extrinsic to the cause of action, defendant admits that the warrant was rightly issued if he fails to move to vacate the arrest), though under the former practice, it was held that, where a capias ad respondendum was returnable on Sunday, putting in bail, though without knowledge of the defect, was a waiver of it (Wright *v.* Jeffrey, 5 Cow. (N. Y.) 15).

19. Lawson *v.* Buzines, 3 Harr. (Del.) 416; State *v.* Buxton, 102 N. C. 129, 8 S. E. 774; Huntington *v.* Shultz, Harp. (S. C.) 452, 18 Am. Dec. 660 (merely delivering to defendant a copy of the capias not sufficient); Berry *v.* Adamson, 6 B. & C. 528, 13 E. C. L. 242, 2 C. & P. 503, 9 D. & R. 558, 12 E. C. L. 700 (where a sheriff's officer, to whom a warrant against a person was delivered, sent a message to such person and asked him to fix a time to call and give bail, and the one by whom the message was sent delivered the message, but did not take the warrant with him, and did not tell the person that he came to arrest him, and the person fixed a time, attended, and gave bail, it was held that there was no arrest); George *v.* Radford, 3 C. & P. 464, 14 E. C. L. 665 (merely reading warrant not sufficient); Russen *v.* Lucas, 1 C. & P. 153, R. & M. 26, 12 E. C. L. 98; Robins *v.* Hender, 3 Dowl. P. C. 543, 1 Hurl. & W. 204 (merely watching defendant not sufficient).

Bare words will not constitute an arrest, but if the bailiff touches the person it is an arrest. Horner *v.* Battyn, Buller N. P. 62.

20. *Delaware.*—Lawson *v.* Buzines, 3 Harr. (Del.) 416.

Massachusetts.—Whithead *v.* Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672, holding that an officer effects an arrest by laying his hand upon a person, whom he has authority to arrest, for the purpose of arresting him, even though he may not succeed in stopping or holding him.

North Carolina.—State *v.* Buxton, 102 N. C. 129, 8 S. E. 774.

South Carolina.— McCracken *v.* Ansley, 4 Strobh. (S. C.) 1.

England.—3 Bl. Comm. 288; Horner *v.* Battyn, Buller N. P. 62.

21. When a man submits peaceably, a manual touching is not necessary.

Massachusetts.—Mowry *v.* Chase, 100 Mass. 79.

New Hampshire.— Emery *v.* Chesley, 18 N. H. 198.

New York.—Gold *v.* Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

North Carolina.— State *v.* Buxton, 102 N. C. 129, 8 S. E. 774.

South Carolina.— McCracken *v.* Ansley, 4 Strobh. (S. C.) 1.

England.— Horner *v.* Battyn, Buller N. P. 62. See also Wood *v.* Lane, 6 C. & P. 774, 25 E. C. L. 683.

Canada.— See Morse *v.* Teetzel, 1 Ont. Pr. 369.

Defendant sick in bed.— Where a sheriff's officer goes with a capias to a person, whom he finds ill in bed, and tells him that, unless he delivers up certain property or finds bail, he must either take him or leave a man with him, this is a sufficient restraint of the person to amount to an arrest, even though there is no actual contact. Grainger *v.* Hill, 1 Arn. 42, 4 Bing. N. Cas. 212, 2 Jur. 235, 3 Scott 561, 33 E. C. L. 675.

Defendant locked in room.— An arrest may also be made without touching the person where the bailiff goes into a room and tells a person he arrests him, and locks the door. 3 Bl. Comm. 288 [*citing* Williams *v.* Jones, Cas. t. Hardw. 298].

22. Arnold *v.* Steeves, 10 Wend. (N. Y.) 514; State *v.* Kirby, 24 N. C. 201; State *v.* Curtis, 2 N. C. 543.

23. State *v.* Curtis, 2 N. C. 543.

24. Arnold *v.* Steeves, 10 Wend. (N. Y.) 514; State *v.* Kirby, 24 N. C. 201; State *v.* Curtis, 2 N. C. 543.

Effect of refusal to show authority.— If a special bailiff, appointed by the sheriff to serve process, refuses to show his authority when demanded, the person arrested is not lawfully in custody. Hill *v.* Lowry, Tapp. (Ohio) 181.

25. Wright *v.* Keith, 24 Me. 158.

A constable who is resisted in the service of

4. Right to Break Doors — a. Outer Doors. An officer has no right to break an outer door[26] or window of a residence for the purpose of entering and arresting, under civil process, its lawful occupant,[27] or any member of his household,[28] except upon pursuit after an escape from arrest.[29] He may, however, break an outer door or window of a residence for the purpose of arresting one who has no legal domicile therein.[30]

b. Inner Doors. It has been held, however, that after having gained peaceable entrance at the outer door of a house,[31] an officer may break inner doors for the purpose of making an arrest under civil process,[32] even though defendant is not

a capias ad respondendum may raise the power of the county for his assistance in the same manner as the sheriff may on writs of mesne process directed to him. Comfort *v.* Com., 5 Whart. (Pa.) 437.

The coroner may call to his aid the power of the county in a proper case in executing an order of arrest in a civil action in which the sheriff is a party. Slater *v.* Wood, 9 Bosw. (N. Y.) 15.

A sheriff is bound to provide such a force as will enable him to effect an arrest under a capias ad respondendum in spite of any resistance which he may have reason to anticipate. Howden *v.* Standish, 6 C. B. 504, 6 Dowl. & L. 312, 12 Jur. 1052, 18 L. J. C. P. 33, 60 E. C. L. 504. *Compare* Buckminster *v.* Applebee, 8 N. H. 546, holding that, when an arrest has been made on mesne process, a return of the arrest and of a rescue is a good return, as the officer is not required to raise the power of the county in the service of mesne process.

Arrest by assistant.— When a bailiff summons assistance for the purpose of making an arrest under civil process, the arrest may be made by the person whom he calls to his assistance, and it is not necessary that the bailiff should be actually in sight, it being sufficient if he is near at hand and acting in the arrest (Blatch *v.* Archer, Cowp. 63), and such an arrest is valid even though the appointment be by parol (Com. *v.* Field, 13 Mass. 321).

26. What is outer door.— Where defendant's house stood in a stable-yard, which was surrounded by a wall, and there was a gate at the foot of a staircase, at the top of which there was a door across part of a gallery which led to plaintiff's chamber, the under part of the house being a stable, it was held that an officer was not justified in breaking open such door after he had gained admittance into the yard. Hopkins *v.* Nightingale, 1 Esp. 99.

27. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Gordon *v.* Clifford, 28 N. H. 402; Wells *v.* Gurney, 8 B. & C. 769, 15 E. C. L. 378; 3 Bl. Comm. 288; Lee *v.* Gansel, Cowp. 1, Lofft 374. *Compare* Hawkins *v.* Com., 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147 (holding that an officer in making an arrest in a civil case may not break open the outer door of defendant's residence without first requesting that it be opened, and disclosing his purpose); Phillips *v.* Ronald, 3 Bush (Ky.) 244, 96 Am. Dec. 216 (holding, under the Kentucky statute, that a sheriff who has a writ of arrest, for the purpose of executing it, may, at any time, whether night or day, break into any house or inclosure, after having given the proper notice).

Forcible entrance after expulsion.— Where a sheriff's officer, in the execution of a bailable writ, peaceably obtained entrance through the outer door, but, before he could make an actual arrest, was forcibly expelled from the house and the outer door was fastened against him, and he obtained assistance, forced open the outer door, and made the arrest, it was held that he was justified in so doing, and that a demand of reëntry was not required under the circumstances. Aga Kurhboolie Mahomed *v.* Reg., 3 Moore P. C. 164.

28. To whom protection extends.— This protection extends to all who have for the time being a legal domicile in the house, such as the occupant's children, domestic servants, permanent boarders, or lodgers. Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Gordon *v.* Clifford, 28 N. H. 402.

29. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; 4 Bl. Comm. 288; Anonymous, Lofft 390.

30. Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Gordon *v.* Clifford, 28 N. H. 402; Lee *v.* Gansel, Cowp. 1, Lofft 374.

31. Lee *v.* Gansel, Cowp. 1, Lofft 374; Lloyd *v.* Sandilands, 2 Moore C. P. 207.

Admittance under false pretenses.—It is no objection that a bailiff gains admittance under false pretenses. Rex *v.* Backhouse, Lofft 61.

32. Fitch *v.* Loveland, Kirby (Conn.) 380; Williams *v.* Spencer, 5 Johns. (N. Y.) 352; Lee *v.* Gansel, Cowp. 1, Lofft 374; Lloyd *v.* Sandilands, 2 Moore C. P. 207.

Where defendant has let part of house.— Where a person lets out part of his house and reserves for himself and occupies an inner room, an officer who has entered through the open outer door is justified in breaking open the inner door in order to arrest defendant. Fitch *v.* Loveland, Kirby (Conn.) 380; Williams *v.* Spencer, 5 Johns. (N. Y.) 352.

Lodgers.— The privilege of the outer door belongs only to one door and not to others, although there are several separate apartments containing lodgers. Hence, an officer in the execution of mesne process may break open the door of a lodger after having gained peaceable entrance at the outer door of the house. Lee *v.* Gansel, Cowp. 1, Lofft 374.

Breaking inner doors at night.— Where the front door of defendant's house was generally

therein at the time,[33] provided he first states his purpose, and demands, and is refused, admittance.[34]

5. MAY BE MADE WHERE. An officer has no right to make an arrest under civil process beyond the limits either of his own jurisdiction,[35] or those of the officer or court issuing the process,[36] except on fresh pursuit after an escape.[37] In some jurisdictions defendant in a civil action may not be arrested in a county other than the one in which he resides.[38]

6. SERVICE OF PROCESS AND ACCOMPANYING PAPERS. A capias ad respondendum, writ of arrest, or order of arrest is usually served[39] by arresting the person named therein,[40] reading the writ to him,[41] and delivering to him copies of the writ,[42]

kept fastened, and the usual entrance was through the back door, and the sheriff, having entered in the night by the back door while it was open, broke open the door of an inner room in which defendant was with his family, and arrested him, the arrest was held lawful. Hubbard *v.* Mace, 17 Johns. (N. Y.) 127.

33. Ratcliffe *v.* Burton, 3 B. & P. 223. *Compare* Johnson *v.* Leigh, 1 Marsh. 565, 6 Taunt. 246, 1 E. C. L. 598, holding that an officer cannot justify breaking the inner doors of the house of a stranger upon suspicion that a defendant is there, in order to search for him for the purpose of arresting him on mesne process.

34. Ratcliffe *v.* Burton, 3 B. & P. 223; Lloyd *v.* Sandilands, 2 Moore C. P. 207.

35. Lawson *v.* Buzines, 3 Harr. (Del.) 416; Dunham *v.* Solomon, 16 N. J. L. 50; Page *v.* Staples, 13 R. I. 306. *Compare* Trudeau *v.* Renaud, 34 L. C. Jur. 102, 17 Rev. Lég. 647; Laurence *v.* Chaudiere, 17 L. C. Jur. 83, which holds that a bailiff of the district of Montreal, charged with the execution of a capias, may execute the writ in another district.

36. *In re* Baum, 61 Kan. 117, 58 Pac. 958; Hammond *v.* Taylor, 3 B. & Ald. 408, 5 E. C. L. 239 (holding that an arrest in the city of London on a bill of Middlesex was irregular, even though it took place on the verge of the county of Middlesex, if there was no dispute as to the boundaries); Lefebvre *v.* Boudreau, 2 Montreal Super. Ct. 9.

37. Page *v.* Staples, 13 R. I. 306.

38. Moak *v.* De Forrest, 5 Hill (N. Y.) 605. See also Cape Sable Co.'s Case, 3 Bland (Md.) 606, holding that a citizen may be sued or arrested by civil process only in the county where he resides, but may be taken by an attachment from a high court of chancery anywhere within the state. *Compare* Weber *v.* Goldenberg, 48 Leg. Int. (Pa.) 24 (holding that warrants of arrest for fraud may be served in another county); Gordon *v.* Lindo, 1 Cranch C. C. (U. S.) 588, 10 Fed. Cas. No. 5,616; Thompson *v.* Lacy, 1 Cranch C. C. (U. S.) 79, 23 Fed. Cas. No. 13,965 (which hold that an inhabitant of Alexandria county, D. C., may be arrested in Washington county without a *non est* in Alexandria county, if no writ was issued against him in Alexandria county).

39. **Who may serve.**— Under the laws of Wisconsin, a son of plaintiff may be authorized as a "suitable person, not being a party to the action," to serve a warrant of arrest against defendant in a civil case. Mudrock *v.* Killips, 65 Wis. 622, 28 N. W. 66.

Time of issuance and service.— The capias must be issued and served within seven days after the warrant is obtained if the capias is issued upon the same material as the warrant, and, if not so issued and served, the capias and warrant are both void. This rule does not apply to a capias obtained upon fresh materials, which need not be executed within the above-mentioned time. Masters *v.* Johnson, 8 Exch. 63, 21 L. J. Exch. 253.

40. **Arrest and discharge of privileged person.**— Where an officer arrests a suitor who is attending court and discharges him on account of his privilege, there is no legal service of the writ. Wheeler *v.* Barry, 6 Vt. 579.

When arrest improper.— A capias ad respondendum issued by a justice of the peace, without an affidavit, against a person not a resident and householder of his county, operates as a summons and does not justify an arrest and imprisonment. Kreger *v.* Osborn, 7 Blackf. (Ind.) 74. See also State *v.* Kirby, 24 N. C. 201.

41. Fulcher *v.* Lyon, 4 Ark. 449; McNab *v.* Bennett, 66 Ill. 157, in the latter case the court saying that it is essential.

42. Fulcher *v.* Lyon, 4 Ark. 449; Scott *v.* Heffernan, 5 U. C. Q. B. O. S. 321. But see Pixley *v.* Berrien Cir. Judge, 121 Mich. 629, 80 N. W. 797; Courter *v.* McNamara, 9 How. Pr. (N. Y.) 255; Keeler *v.* Belts, 3 Code Rep. (N. Y.) 183 (which cases hold that an omission to serve a copy of the writ at the time of the arrest is an irregularity only, and does not render the service void); McNeice *v.* Weed, 50 Vt. 728 (holding that delivering a copy is wholly a matter between the officer and defendant).

Order served after arrest.— It is sufficient to serve a copy of the writ immediately after an arrest, and if defendant refuses to take such copy he cannot afterward object that it was not served upon him. McNider *v.* Martin, 1 Ont. Pr. 205.

When service of copy unnecessary.— Where a debtor has been discharged from custody on deposit of the debt and costs, it is unneces-

affidavit to hold to bail,[43] and plaintiff's undertaking to procure the arrest,[44] as may be required by statute.

I. Disposition of Prisoner — 1. IN GENERAL. It is the duty of the arresting officer to make such lawful disposition of the person arrested as the process may direct,[45] the usual direction being that the prisoner shall be forthwith carried before the judge or other officer who issued the process.[46]

2. COMMITMENT TO PRISON. A prisoner in the custody of an arresting officer under mesne process,[47] who has failed or refused to give bail,[48] may be committed[49]

sary to serve him with a copy of the capias, even though, at the time the capias issued, he was in custody under another warrant at the suit of a third person. Eld *v.* Vero, 8 Exch. 655, 17 Jur. 737, 22 L. J. Exch. 276.

43. Davis *v.* Jaffe, 17 Wkly. Notes Cas. (Pa.) 107, 17 Phila. (Pa.) 223, 42 Leg. Int. (Pa.) 500, 1 Pa. Co. Ct. 166. But see Barker *v.* Cook, 40 Barb. (N. Y.) 254, 16 Abb. Pr. (N. Y.) 83, 25 How. Pr. (N. Y.) 190, holding that if no copy, or paper purporting to be a copy, of the affidavit, is served by the sheriff upon arresting defendant, such omission is an irregularity merely, and does not entitle defendant to his discharge.

A delay in serving such copy until after the officer has made his return does not, necessarily, vitiate the service. Pixley *v.* Berrien Cir. Judge, 121 Mich. 629, 80 N. W. 797; Ilsley *v.* Harris, 10 Wis. 95.

44. Mather *v.* Hannaur, 55 How. Pr. (N. Y.) 1, wherein it was held, however, that the failure of the sheriff to deliver such copy was only an irregularity, not entitling defendant to his discharge. See also Leopold *v.* Poppenheimer, 1 Code Rep. (N. Y.) 39, holding that service of a copy of the undertaking is unnecessary.

45. **Under 32 Geo. II, c. 28,** no officer could carry a person whom he had arrested to any tavern, alehouse, or other public-house, or to the private house of such officer, or of any tenant or relation of his, without the free and voluntary consent of the person arrested; nor could he carry such person to any jail or prison within twenty-four hours from the time of the arrest unless such person refused to be carried to some safe and convenient dwelling-house of his own nomination or appointment, provided such dwelling was not the house of the person arrested. Gordon *v.* Laurie, 9 Q. B. 60, 11 Jur. 98, 16 L. J. Q. B. 98, 58 E. C. L. 60; Barsham *v.* Bullock, 10 A. & E. 23, 2 P. & D. 241, 37 E. C. L. 37; Silk *v.* Humphery, 4 A. & E. 959, 31 E. C. L. 417; Simpson *v.* Renton, 5 B. & Ad. 35, 2 L. J. K. B. 157, 2 N. & M. 52, 27 E. C. L. 25; Summers *v.* Moseley, 2 Cr. & M. 477, 4 Tyrw. 158; Dewhirst *v.* Pearson, 1 Cr. & M. 365, 1 Dowl. P. C. 664, 3 Tyrw. 243; Pitt *v.* Middlesex, 1 Dowl. P. C. 201, 4 M. & P. 726.

46. Hynes *v.* Jungren, 8 Kan. 391 (holding that the direction must be obeyed even though the prisoner is arrested while intoxicated); Weber *v.* Goldenberg, 20 Phila. (Pa.) 194, 48 Leg. Int. (Pa.) 24. But see Germain *v.* Poulain, 17 Quebec 324.

When magistrate is without his jurisdiction.— Where a person arrested on civil process wished to go immediately before the magistrate who signed the writ, who was at the time absent in another county, it was held that it was the duty of the officer not to comply with the request, as the magistrate had no jurisdiction over the proceedings while out of his county; and that, pending an examination, the officer was justified in committing his prisoner to jail for safe-keeping. Whitcomb *v.* Cook, 38 Vt. 477.

Process not made returnable before particular justice.— If a warrant under the Non-Imprisonment Act be made returnable generally before one of the justices of the court whence it issued, instead of before the particular justice who issued it, the defect, if such it is, does not render the warrant void. Latham *v.* Westervelt, 16 Barb. (N. Y.) 421.

47. **Constructive custody.**— A defendant who is arrested under civil process in an action of malicious trespass, and who asks and obtains time to plead, and who is not detained in actual custody during the time given him for pleading, although he has not given bail, is constructively in the custody of the arresting officer during such time, and, at the option of the officer, may be actually confined at any time. Warren *v.* Crane, 50 Mich. 300, 15 N. W. 465.

Duration of custody.— Where an officer arrests a debtor on a writ, pursuant to the provisions of Me. Stat. (1831), c. 520, and takes him before two justices of the peace and of the quorum, it is the duty of such officer to detain the debtor under arrest until he shall be discharged by the justices or be again committed to his custody by their mittimus. Wilson *v.* Gillis, 15 Me. 55.

Treatment of prisoner.— An officer may allow reasonable liberty to a debtor in custody; and, as between him and the debtor, the latter cannot complain, provided there is no abandonment of the arrest. Butler *v.* Washburn, 25 N. H. 251.

48. Dunham *v.* Solomon, 16 N. J. L. 50; 3 Bl. Comm. 290.

49. **What constitutes commitment.**—Under Vt. Gen. Stat. c. 33, § 61, a commitment to jail consists of a delivery of the person to the keeper of the jail, within the same, and a delivery to the jailer of an attested copy of the writ by virtue of which the commitment is made, with the officer's return of commitment. Until then the debtor's right, under sections 78 and 80, to be taken on request to the magistrate continues, even after a lodgment in, and incomplete commitment to, jail. Kenerson *v.* Bacon, 41 Vt. 573.

to prison,[50] pending the hearing of his application for discharge;[51] or when his application has been withdrawn[52] or denied,[53] or when it is impossible to take him forthwith before a proper judicial officer.[54]

J. Motions For Defendant's Relief — 1. Propriety of Respective Remedies — a. In General. When a writ, warrant, or order of arrest is defective or void, defendant's proper course is to move to quash or vacate it, or set it aside;[55] but when the process is regular on its face, but the arrest is, for any reason, improper, the general rule is that defendant may move only for his discharge from arrest, without disturbing the process.[56] In some jurisdictions, however, defendant is

Commitment held sufficient.— Where a mittimus from two justices of the peace and of the quorum committing a debtor shows regular proceedings on the part of the magistrates, it is a sufficient authority to the officer and the prison-keeper to detain such debtor. Cordis *v.* Sager, 14 Me. 475. See also Gosline *v.* Place, 32 Pa. St. 520; Com. *v.* McCabe, 22 Pa. St. 450.

Who may sign commitment.— Where a person is arrested under a warrant of arrest, and his petition for discharge under the insolvent laws is refused by the court, it is not necessary that the judge who issued the warrant should sign the commitment, it being competent for any judge of the court to sign it, as it is issued by the court and not by one judge alone. Marks *v.* Drovers' Nat. Bank 114 Pa. St. 490, 6 Atl. 774.

50. Taking to prison.— After an arrest which requires a prisoner to be committed, it is the duty of the officer to take him to jail as soon as he reasonably can. The officer is to judge of the hour at which he will start and of the propriety of starting on account of the state of the weather, and of the personal restraint necessary to secure the prisoner. Butler *v.* Washburn, 25 N. H. 251.

Maintenance in prison.— Neither plaintiff nor the sheriff is bound, at common law, to maintain a defendant confined in jail under civil process. McClain *v.* Hayne, 1 Treadw. (S. C.) 212.

Duration of imprisonment.— A debtor who has been arrested and imprisoned under the Debtors Act, on the ground that his absence from England will prejudice plaintiff "in the prosecution of his action," cannot be kept in prison after final judgment has been signed. Hume *v.* Druyff, L. R. 8 Exch. 214, 42 L. J. Exch. 145, 29 L. T. Rep. N. S. 64.

51. *In re* Foot, 31 Vt. 505.

52. Rogers *v.* Stevens, 45 N. H. 478.

53. Spencer *v.* Hilton, 10 Wend. (N. Y.) 608; Gosline *v.* Place, 32 Pa. St. 520.

54. Whitcomb *v.* Cook, 38 Vt. 477.

55. Davis *v.* McCormick, 3 Pa. L. J. Rep. 221, 5 Pa. L. J. 86. *Compare* Ely *v.* Lyons, 18 Wend. (N. Y.) 644, holding that when a person has been arrested on an illegal order to hold to bail issued by a recorder, if the recorder had authority to issue an order to hold to bail, defendant's proper course is to apply to the recorder to discharge or vacate the order; but, if the recorder had no power to make the order, defendant should make a direct motion to the supreme court to be discharged from arrest. See also *infra*, II, J, 1, b.

Nature of motion.— An application to the court to set aside an order of arrest is an original motion, and not an application to revise the discretion exercised by the judge. Lamond *v.* Eiffe, 3 Q. B. 910, 3 G. & D. 256, 6 Jur. 1038, 12 L. J. Q. B. 12, 43 E. C. L. 1032. It is not, however, a preferred motion, when made after defendant has been discharged on bail. Cummings *v.* Woolley, 16 Abb. Pr. (N. Y.) 297 note.

What constitutes vacation of order.—Where an order was made for defendant's arrest in attachment proceedings, and he was arrested and held to bail, but the proceedings against the person of defendant were dropped, plaintiffs contenting themselves with a money judgment only, it was held that the order of arrest was, in effect, vacated by the entry of final judgment, without adjudging relief by seizure of the person of defendant. Burrichter *v.* Cline, 3 Wash. 135, 28 Pac. 367.

56. *Indiana.*—Dumont *v.* Wright, 6 Blackf. (Ind.) 540.

Kentucky.— *Contra,* Legrand *v.* Bedinger, 4 T. B. Mon. (Ky.) 539.

Michigan.— People *v.* Judge Detroit Super. Ct., 40 Mich. 729.

New Hampshire.— *Contra,* Hubbard *v.* Sanborn, 2 N. H. 468.

New Jersey.—Vankirk *v.* Staats, 24 N. J. L. 121.

New York.— Higgins *v.* Dewey, 14 N. Y. Suppl. 894, 39 N. Y. St. 94, 27 Abb. N. Cas. (N. Y.) 81 [*affirming* 13 N. Y. Suppl. 570, 34 N. Y. St. 692]; Hart *v.* Kennedy, 15 Abb. Pr. (N. Y.) 290, 24 How. Pr. (N. Y.) 425.

Pennsylvania.— Lisansky *v.* Gerzog, 2 Pa. Dist. 220. *Compare* Steinmetz *v.* Wade, 3 Wkly. Notes Cas. (Pa.) 187.

South Carolina.— Sadler *v.* Ray, 5 Rich. (S. C.) 523; Hunter *v.* Cleveland, 1 Brev. (S. C.) 167.

Vermont.— Booraem *v.* Wheeler, 12 Vt. 311.

Wisconsin.— See Warner *v.* Bates, 75 Wis. 278, 43 N. W. 957.

United States.— Read *v.* Chapman, Pet. C. C. (U. S.) 404, 20 Fed. Cas. No. 11,605.

England.—Burness *v.* Guiranovich, 7 Dowl. & L. 235, 4 Exch. 520, 19 L. J. Exch. 110. *Compare* Hopkinson *v.* Salembier, 7 Dowl. P. C. 493, 3 Jur. 538, 5 M. & W. 423.

Arrest of female.— In Hatheway *v.* Jones, 20 Ark. 109, it was held that, where a writ of attachment against a female defendant is

entitled to have the order of arrest vacated upon showing the non-existence of the grounds upon which it was issued.[57] In jurisdictions where defendant may move on the merits to vacate an order of arrest, he may do so as well when the cause of action and ground of arrest are identical[58] as when the order was issued upon facts extrinsic to the cause of action.[59]

b. Motion to Vacate Order of Arrest. An order of arrest will be vacated when the proceedings in relation thereto are fatally defective,[60] unless a motion

irregular, in that it contains a capias clause (females being exempt from arrest in civil cases), but is, in other respects, regular, defendant's motion to quash the writ should be allowed to the extent only of quashing the capias clause.

57. Cross Shoe Mfg. Co. *v.* Gardner, 1 Kan. App. 570, 42 Pac. 266; Torrey *v.* Waters, 23 N. Y. Suppl. 1145, 53 N. Y. St. 402; Shaugnessy *v.* Chase, 7 N. Y. St. 293; Fitch *v.* McMahon, 3 N. Y. St. 147; Roulhac *v.* Brown, 87 N. C. 1.

In an action for breach of promise to marry, where defendant sought his discharge from arrest upon affidavits admitting the promise, but denying the breach, and offering to marry plaintiff, which offer plaintiff rejected, it was held that the order of arrest should be discharged. Bonn *v.* Bloch, 13 N. Y. Civ. Proc. 275.

Presumption that order was vacated on merits.— Where an order vacating an order of arrest shows that the pleadings and affidavits on both sides were read upon the hearing of the motion, and there is nothing to indicate that the motion was based upon an irregularity, the presumption is that the order of arrest was vacated on the merits. Allaire *v.* Kalfon, 20 N. Y. App. Div. 546, 47 N. Y. Suppl. 969.

When complaint shows arrest unauthorized. — Under N. Y. Code Civ. Proc. § 558, authorizing the vacating of an order of arrest, if it appears by the complaint that the case is not one for which an arrest is given, it must affirmatively appear in the complaint that the case is one in which an arrest could not be had in any event, under sections 549 and 550. Sloane *v.* Livermore, 14 Hun (N. Y.) 29. But an order of arrest granted upon a ground extrinsic to the cause of action will be vacated where the complaint subsequently served is in the ordinary form for goods sold and delivered, since section 558 applies only to cases where it affirmatively appears by the complaint that the cause is not one in which an arrest is authorized. Williams *v.* Norton, 54 How. Pr. (N. Y.) 509. To same effect see Muklan *v.* Doty, 20 How. Pr. (N. Y.) 236.

When defendant has counter-claim.— It is no ground for vacating an order of arrest, or discharging from custody a defendant in an action brought to recover the value of chattels converted by defendant, that he has a claim against plaintiff for a larger amount than that sued for. Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27.

58. Liddell *v.* Paton, 7 Hun (N. Y.) 195; Robbins *v.* Falconer, 43 N. Y. Super. Ct. 363; Donovan *v.* Cornell, 13 Daly (N. Y.) 339, 8 N. Y. Civ. Proc. 283; Stromberg *v.* Maister, 68 N. Y. Suppl. 392; Sniffen *v.* Parker, 8 N. Y. Civ. Proc. 393; Royal Ins. Co. *v.* Noble, 5 Abb. Pr. N. S. (N. Y.) 54. *Contra,* Nelson *v.* Blanchfield, 54 Barb. (N. Y.) 630; Ely *v.* Mumford, 47 Barb. (N. Y.) 629; Barret *v.* Gracie, 34 Barb. (N. Y.) 20; Swift *v.* Wylie, 5 Rob. (N. Y.) 680; Merwin *v.* Playford, 3 Rob. (N. Y.) 702; Rieben *v.* Francis, 29 Misc. (N. Y.) 676, 62 N. Y. Suppl. 851; Geller *v.* Seixas, 4 Abb. Pr. (N. Y.) 103; People *v.* Clark, 45 How. Pr. (N. Y.) 12; Faris *v.* Peck, 40 How. Pr. (N. Y.) 484; Frost *v.* McCarger, 14 How. Pr. (N. Y.) 131; Courter *v.* McNamara, 9 How. Pr. (N. Y.) 255.

59. Hoy *v.* Duncan, 33 N. Y. Super. Ct. 555; Jananique *v.* De Luc, 1 Abb. Pr. N. S. (N. Y.) 419; Geller *v.* Seixas, 4 Abb. Pr. (N. Y.) 103.

60. Bondy *v.* Collier, 13 Misc. (N. Y.) 15, 33 N. Y. Suppl. 996, 67 N. Y. St. 847, 2 N. Y. Annot. Cas. 28 [*reversing* 11 Misc. (N. Y.) 443, 32 N. Y. Suppl. 221, 65 N. Y. St. 419]; Gordon *v.* Fox, 11 N. Y. Suppl. 5, 18 N. Y. Civ. Proc. 291 (in which there was nothing to show the amount for which defendant should be held to bail); Jones *v.* Platt, 60 How. Pr. (N. Y.) 73 (in which the affidavit upon which the order was founded was made upon information and belief, without stating the source of such information; the application was made *ex parte,* and the moving affidavit did not state whether any previous application had been made; the order of arrest and the undertaking were not indorsed with the office address or place of business of plaintiff's attorney; the order of arrest was not subscribed by plaintiff's attorney; and but one surety made affidavit of justification); Davis *v.* Jaffe, 1 Pa. Co. Ct. 166, 17 Wkly. Notes Cas. (Pa.) 107, 17 Phila. (Pa.) 223, 42 Leg. Int. (Pa.) 500 (in which a copy of the affidavit was not delivered to defendant till the day after the service of the warrant, and was then delivered by an unofficial person, and not by the officer serving the warrant, and one of the copies was not certified by the judge).

Rule when no arrest has been made.— Ind. Rev. Stat. pp. 671, 673, providing that no writ of capias ad respondendum shall be delivered by any clerk until the order to hold to bail has been obtained and indorsed on the writ, applies only to cases where an arrest is to be made; and, where no arrest is made, an indorsement that no bail is required is no

to vacate is not an appropriate method of raising defendant's objection.[61] On the other hand, the order will not be vacated because of a mere irregularity which may be corrected by amendment.[62] So, where the original papers are not defective, an order of arrest will not be vacated because of defects in the copies of the papers served on defendant at the time of the arrest.[63] It has also been held that it is no ground for rescinding an order for a capais that plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained.[64]

c. Motion to Be Discharged From Custody, or on Common Bail — (I) *Upon Extension of Claim.* Where, after the issuance of an order of arrest, the claim upon which it issued is extended under a valid agreement, defendant is entitled to be discharged.[65]

(II) *Upon Payment of Debt and Costs.* If the debt and costs in an action have been paid to plaintiff, defendant is entitled to be discharged,[66] no matter by whom the payment is made.[67]

(III) *Upon Disproving Ground Upon Which Arrest Was Made.* Defendant is entitled to be discharged from arrest when he has effectually disproved the existence of the ground upon which he was arrested.[68]

ground for quashing the writ, as in such case the capias is, substantially, a summons. Linn *v.* Schmall, 8 Blackf. (Ind.) 94.

61. When plea in abatement is proper.— Want of jurisdiction, because defendant resides in a different parish, cannot be offered as a ground for the dissolution of the order to hold to bail. It must be taken advantage of by a plea in abatement, or on the trial of the cause. Simpson *v.* Burnett, 2 Mart. (La.) 243. A capias ad respondendum will not be set aside on a motion based on defendant's affidavit that the name by which the suit was begun was not plaintiff's true name. The objection, if raised at all, must be raised by plea in abatement. Watson *v.* Watson, 47 Mich. 427, 11 N. W. 227.

When defendant's recourse is against sheriff.— A defendant, arrested for fraudulently concealing property sought to be taken in replevin, cannot have the order of arrest vacated on the ground that the replevin bond is insufficient, his recourse being against the sheriff. Manley *v.* Patterson, 3 Code Rep. (N. Y.) 89.

62. Gladden *v.* Dozier, 71 Ga. 380 (wherein the clerk attached the original affidavit to hold to bail, in an action of trover, to the declaration and process, instead of a copy thereof as prescribed by statute); Webber *v.* Moritz, 11 Abb. Pr. (N. Y.) 113 (wherein plaintiff's husband, who was not a proper party, was joined with plaintiff); Ballouhey *v.* Cadot, 3 Abb. Pr. N. S. (N. Y.) 122 (wherein the christian name of plaintiff was not stated in the papers upon which the order of arrest was obtained); Folkard *v.* Fitzstubbs, 1 F. & F. 376 (wherein the capias erroneously stated the christian name of the judge, and contained surplusage in the statement of his title).

63. Havana Bank *v.* Moore, 5 Hun (N. Y.) 624; Barker *v.* Cook, 40 Barb. (N. Y.) 254, 16 Abb. Pr. (N. Y.) 83, 25 How. Pr. (N. Y.) 190; Petschaft *v.* Lubow, 27 Misc. (N. Y.) 50, 57 N. Y. Suppl. 251. *Compare* Moore *v.* Magan, 4 Dowl. & L. 267, 16 L. J. Exch. 57, 16 M. & W. 95, holding that, where there was an irregularity in the capias and in the copy served, although the court might amend the writ, they had no power over the copy, and that defendant was ehtitled to his discharge even though the writ was amended, on the ground of variance between it and the copy.

64. Burns *v.* Chapman, 5 C. B. N. S. 481, 5 Jur. N. S. 19, 28 L. J. C. P. 6, 7 Wkly. Rep. 89, 94 E. C. L. 481.

65. Foxell *v.* Fletcher, 11 Hun (N. Y.) 643.

66. Claim of larger amount after payment. — Where defendant paid the amount claimed when the order of arrest was issued, and, after the payment, plaintiff amended his complaint and claimed a larger amount, and sought to still hold defendant, it was held that, as defendant had paid the amount for which the order was obtained, he could not be held under that order because of the amendment of the complaint and increase of plaintiff's demand. Lawrence *v.* Kohlman, 5 N. Y. L. Bul. 41.

67. Rimmer *v.* Turner, 3 Dowl. P. C. 601.

68. Barker *v.* Warren, 46 N. H. 124; Mott *v.* Jerome, 7 Cow. (N. Y.) 518; Burns *v.* Chapman, 5 C. B. N. S. 481, 5 Jur. N. S. 19, 7 Wkly. Rep. 89, 94 E. C. L. 481; Copeland *v.* Child, 7 Jur. 506, 22 L. J. Q. B. 279.

Non-existence at time of motion.—A debtor arrested under mesne process, upon an affidavit charging that he conceals his property and is about to leave the state to avoid the payment of his debts, will be discharged from arrest on motion at the return term if it appears that he does not then attempt to conceal his property and does not intend to leave the state, even though it also appears that the alleged cause of arrest existed when the arrest was made. California Wine Co. *v.* Murray, 62 N. H. 597; Stammers *v.* Hughes, 18 C. B. 527, 2 Jur. N. S. 572, 25 L. J. C. P. 247, 86 E. C. L. 527; Pegler *v.* Hislop, 5 Dowl. & L. 223, 1 Exch. 437, 11 Jur. 996, 17

(iv) *Upon Taking Oath Not to Leave State, and the Like.* By statute in some jurisdictions, a defendant who is in actual custody[69] is entitled to be discharged upon taking oath that he does not intend to leave the state,[70] or has no property within the state subject to execution;[71] or upon making, under oath, a true and full disclosure of his affairs and surrendering his property for the benefit of his creditors.[72]

(v) *Upon Plaintiff's Negligent Delay in Proceeding.* Defendant is entitled, on motion, to be discharged from arrest or on common bail when plaintiff has negligently[73] failed to take, within the time prescribed by law, the proper steps required of him in the conduct and trial of the action.[74] In like manner,

L. J. Exch. 53; Donegan *v.* Short, 12 Ont. Pr. 589.

Proof of inability to produce property.— Proof by defendant, in an action of trover, held in custody, of his inability to produce the property, is not made by the statute one of the grounds of his discharge. He may have sold the property and put the money in his pocket, and then have placed it out of his power to produce it. The production of the property, or entering into the bond with good security for the eventual condemnation money, are the only terms prescribed by the statute upon which the court is authorized to discharge defendant from custody. Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495.

When complaint alleges no fraud.— Where defendant has been arrested on mesne process under a complaint which contains no averment of fraud, and execution has been returned unsatisfied, and no execution has been issued against the body, defendant will be discharged. Harris *v.* Cone, 10 How. Pr. (N. Y.) 259.

69. Defendant voluntarily discharged by plaintiff.— A defendant is not entitled to take the oath under the Insolvent Debtors Act after he has been voluntarily discharged by plaintiff, even though he has given bond for the prison limits and has filed his schedule. Clarke *v.* Simpson, 1 McMull. (S. C.) 286.

70. Rogers *v.* Stevens, 45 N. H. 478; *In re* Foot, 31 Vt. 505.

Second application.— A magistrate has no authority to entertain the application of a debtor, arrested on mesne process, to take the oath that he had not intended to leave the state, after a similar application has once been heard and refused (Henshaw *v.* Cotton, 127 Mass. 60), even though the decision on the first application was by default, upon the debtor's failure to appear (Collins *v.* Hardy, 160 Mass. 317, 35 N. E. 862).

71. Goldsmith *v.* Lang, 25 Ala. 486; Coleman *v.* Dickerson, 10 Ga. 551; Horton *v.* Weiner, 124 Mass. 92.

72. *Alabama.*— Hutchisson *v.* Governor, 23 Ala. 809 [*overruling* Morrow *v.* Weaver, 8 Ala. 288].

Connecticut.—Wolcott *v.* Johnson, 5 Conn. 202.

New Jersey.— Dalbey *v.* Lowenstein, 34 N. J. L. 465; Reford *v.* Cramer, 30 N. J. L. 250; Brush's Case, 6 N. J. L. 404.

New York.— People *v.* Bancker, 5 N. Y. 106; Coffin *v.* Gourlay, 20 Hun (N. Y.) 308; People *v.* O'Brien, 54 Barb. (N. Y.) 38; *In re* Caamano, 8 N. Y. Civ. Proc. 29.

Virginia.— Levy *v.* Arnsthall, 10 Gratt. (Va.) 641.

Canada.— Bruckert *v.* Moher, 21 L. C. Jur. 26; Beste *v.* Berastain, 20 N. Brunsw. 106; Ogilvie *v.* Farnan, 17 Rev. Lég. 471.

Debtor of United States.— The act of congress of 1798, authorizing the secretary of the treasury to discharge imprisoned poor debtors of the United States, does not prevent a debtor imprisoned at the suit of the government from obtaining his discharge under the state insolvency laws, where the action was brought under the act of congress of March 2, 1867, adopting, in proceedings in the federal court, the state laws as to discharge, the remedies being cumulative. U. S. *v.* Tetlow, 2 Lowell (U. S.) 159, 28 Fed. Cas. No. 16,456.

In action of deceit.— A defendant in an action of deceit, committed upon mesne process for want of bail, is not entitled to be discharged from jail upon taking the poor debtors' oath, under the provisions of R. I. Rev. Stat. c. 198, §§ 1, 16. Matter of Payton, 7 R. I. 153.

Necessity of making full disclosure.— A defendant is not excused from making a full disclosure by the fact that he has been decreed a bankrupt. Marr *v.* Clark, 56 Me. 542. See also Dow *v.* True, 19 Me. 46.

For form of oath see *Ex p.* Ridgill, 5 Rich. (S. C.) 427.

73. Penalty for negligence.— Where plaintiffs have been guilty of gross negligence in failing to enter judgment and charge defendant in execution, they may be required, upon denial of defendant's motion for discharge from arrest, to stipulate to waive any objections to defendant's taking the benefit of the fourteen-day act, and that defendant be allowed to be discharged under that act upon giving the usual notice. Carter *v.* Loomis, 2 Abb. Pr. N. S. (N. Y.) 295.

Showing of reasonable cause by plaintiff.— On defendant's application to be discharged from arrest upon the ground of the negligent failure of plaintiff to enter judgment within the prescribed time, plaintiff may show reasonable cause for the delay as well if defendant is actually in custody as if he is simply under arrest, but not in custody. Knight *v.* Vanderbilt, 18 N. Y. Suppl. 810, 45 N. Y. St. 759.

74. Delay must appear affirmatively.— In order to entitle a person arrested in a civil

defendant is entitled to his discharge when plaintiff has negligently[75] failed to charge him in execution within the prescribed time.[76]

(VI) *Upon Giving Prison-Bounds Bond.* As a general rule, a defendant actually in custody,[77] who is unable or unwilling to give bail for his appearance, is entitled to gain the liberties of the prison upon giving a good and sufficient bond,[78] conditioned that he will not depart beyond the limits of the established prison bounds.[79] This privilege is usually withheld, however, from one who is imprisoned for fraud.[80]

action to be discharged before judgment on account of plaintiff's unreasonable delay, facts affirmatively establishing the unreasonable delay must be set forth in the application. Howell *v.* Taussig, 9 N. Y. St. 384, 12 N. Y. Civ. Proc. 252.

This rule has been applied where plaintiff failed to appear (Dunham *v.* Solomon, 16 N. J. L. 50), asked an adjournment (Pope *v.* Hart, 35 Barb. (N. Y.) 630, 23 How. Pr. (N. Y.) 215), failed to file his declaration (Judson *v.* Jones, 12 Wend. (N. Y.) 209. *Aliter* at common law. Branson *v.* Shinn, 9 N. J. L. 1; Hind *v.* Thompson, 2 Miles (Pa.) 345; Turner *v.* Parker, 2 Dowl. & L. 444), or to enter judgment within the time prescribed (Corley *v.* Griffin, 36 N. Y. Super. Ct. 515. See also Carter *v.* Loomis, 2 Abb. Pr. N. S. (N. Y.) 295).

75. There must have been a negligent omission to issue execution, and not an omission from necessity. New York Guaranty, etc., Co. *v.* Gleason, 53 How. Pr. (N. Y.) 122.

Showing of reasonable cause by plaintiff.— While defendant is not entitled to his discharge on the ground that plaintiff has failed to charge him in execution, if plaintiff shows reasonable cause for such failure, the fact that an appeal has been taken from the judgment is not such reasonable cause as to prevent defendant from being discharged where the proceedings have not been stayed. Havemeyer Sugar Refining Co. *v.* Taussig, 12 N. Y. Civ. Proc. 247. See also Lampmann *v.* Smith, 7 N. Y. Suppl. 922, 17 N. Y. Civ. Proc. 19.

76. Thayer *v.* Minchin, 5 Me. 325; Gellar *v.* Baer, 12 N. Y. Civ. Proc. 433; Havemeyer Sugar Refining Co. *v.* Taussig, 12 N. Y. Civ. Proc. 247; Green *v.* Garrett, 3 Munf. (Va.) 339. *Compare* Smith *v.* Knapp, 30 N. Y. 581, holding that such delay entitles defendant to a supersedeas, but that, unless he applies for such remedy, he is still, legally, in custody.

In New York defendant is not entitled to move for his discharge on this ground until he has first moved to compel plaintiff to charge him in execution. Carter *v.* Loomis, 2 Abb. Pr. N. S. (N. Y.) 295.

Presumption authorizing discharge.—In the absence of any statute directly authorizing the discharge of a defendant under arrest who is not charged in execution within a certain time after judgment, the court may assume that his discharge was contemplated by law and should be granted unless plaintiff, within a reasonable time, should charge in execution. U. S. *v.* Griswold, 6 Sawy. (U. S.) 255, 11 Fed. 807.

77. Necessity of actual custody.— A bond given for the prison limits is void unless defendant is actually in prison, and that fact is recited in the bond. Lytle *v* Davies, 2 Ohio 277.

78. The penalty in a prison-bounds bond, given by one imprisoned under mesne process, must be in double the amount for which the officer is directed to make attachment. Whiting *v.* Putnam, 17 Mass. 175.

A joint bond for the prison limits given by a debtor, where there are several writs in different actions, is void. Lytle *v.* Davies, 2 Ohio 277.

In New York, in an action for the recovery of specific personal property, where defendant was arrested for concealing the property to prevent it being taken under the writ, and the order of arrest directed that defendant be held to bail in a certain sum, the bail required should be according to the terms of N. Y. Code Civ. Proc. §§ 147, 150, providing that a person arrested in a civil action may be admitted to the liberties of the jail upon delivering to the sheriff a bond conditioned to remain a prisoner until discharged, and not the undertaking prescribed for the discharge of defendant by N. Y. Code Civ. Proc. § 575, conditioned to deliver the chattel to plaintiff if the delivery is adjudged, and to pay any sum recovered against defendant in the action. Horowitz *v.* Olenick, 62 N. Y. App. Div. 283, 70 N. Y. Suppl. 1116.

79. *Maine.*— Holmes *v.* Chadbourne, 4 Me. 10.

Massachusetts.— Whiting *v.* Putnam, 17 Mass. 175.

New York.— Boucicault *v.* Boucicault, 21 Hun (N. Y.) 431, 59 How. Pr. (N. Y.) 131.

Ohio.— Lytle *v.* Davies, 2 Ohio 277.

South Carolina.— Poole *v.* Vernon, 2 Hill (S. C.) 667; Creyton *v.* Dickerson, 3 McCord (S. C.) 438.

Effect of violation of prison bounds.— The provision, in the Prison Bounds Act, that a prisoner is not entitled to his discharge if, since his confinement, he has gone without the prison walls applies as well to a prisoner confined under mesne as to one confined under final process. Blease *v.* Farrow, 9 Rich. (S. C.) 46.

80. Arrants *v.* Dunlap, Cheves (S. C.) 27.

What fraud will deprive prisoner of privilege.— If a party who has conveyed land in trust to pay his debts subsequently conveys the land to another, it is such a fraud as will deprive him from taking the benefit of the Prison Bounds Act, as it tends to hinder or delay his creditors. Wiley *v.* Lawson, 7 Rich.

(VII) *Upon Expiration of Term For Which Imprisonment Is Lawful.* Where there is a statute limiting the duration of imprisonment under mesne civil process, one who is entitled to relief thereunder may obtain it by moving for his discharge.[81]

(VIII) *Upon Rendition of Final Judgment.* Mesne process under which an arrest has been made continues in force until the award and issuance of final process, and is not terminated by final judgment.[82]

2. Before Whom May Be Made. As a general rule, it is not essential that a motion to vacate an order of arrest should be made before the judge who granted the order.[83]

(S. C.) 152. But the payment of a debt on the day a defendant is arrested is not such an undue preference of one creditor to another as will deprive defendant of the benefit of the Prison Bounds Act even though the property assigned was not sufficient to pay plaintiff's debt. Creyton *v.* Dickerson, 3 McCord (S. C.) 438.

81. U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 331, 7 L. ed. 441.

Statute applying only to final process.— N. Y. Code Civ. Proc. § 111, limiting imprisonment under any execution or other mandate against the person to a period of not longer than six months, has no application to imprisonment under mesne process. Levy *v.* Salomon, 105 N. Y. 529, 12 N. E. 53; Dalon *v.* Kapp, 11 N. Y. Civ. Proc. 58, 18 Abb. N. Cas. (N. Y.) 233 note; People *v.* Grant, 10 N. Y. Civ. Proc. 174 note, 18 Abb. N. Cas. (N. Y.) 220; Warshauer *v.* Webb, 10 N. Y. Civ. Proc. 169; New York Cent., etc., R. Co. *v.* Shepherd, 10 N. Y. Civ. Proc. 153. *Compare* Wright *v.* Grant, 11 N. Y. Civ. Proc. 407, 18 Abb. N. Cas. (N. Y.) 451, holding that a person arrested and released on bail is not entitled to apply for his discharge from arrest under N. Y. Code Civ. Proc. § 111, as amended in 1886, as the provisions thereof all relate to those imprisoned within the jail walls or within the jail liberties.

82. State *v.* Judge Fourth City Ct., 37 La. Ann. 385; State *v.* Orleans Parish, 31 La. Ann. 799; *In re* Kindling, 39 Wis. 35. Hence, a debtor who has been legally arrested and imprisoned for debt under a writ issued in a civil suit cannot, by confessing judgment, acquire the right to be discharged from arrest. State *v.* Judge Fourth City Ct., 37 La. Ann. 385; State *v.* Orleans Parish, 31 La. Ann. 799.

83. Jordan *v.* Harrison, 13 N. Y. Civ. Proc. 445; Dunaher *v.* Meyer, 1 Code Rep. (N. Y.) 87; Johnson *v.* Kennedy, 4 Dowl. P. C. 345, 2 Scott 419.

Under N. Y. Code Civ. Proc. § 568, providing that, when an order of arrest is granted by a judge out of court, a motion to vacate may be made before any other judge of the same court, taken in connection with section 769, which declares that motions in a case triable in the first district must be made in that district, a motion to vacate an order of arrest made out of court by a judge of the first district cannot be made before another judge unless he is within that district. Sutton *v.* Sabey, 22 Hun (N. Y.) 557.

In North Carolina a judge may hear a motion to vacate an order of arrest anywhere within the district that his duties require him to be, whether or not he is within the county where the action in connection with which the order is made is triable. But, if defendant demands a jury trial on the issues raised by the conflicting affidavits on a motion to dismiss the warrant of arrest, as he is allowed to do by statute, the judge is compelled to remand the motion to the county where the action is pending, in order that the issues so arising may be tried at the first term of court. Parker *v.* McPhail, 112 N. C. 502, 16 S. E. 848.

Defendant's motion to be discharged from arrest because of plaintiff's failure to enter judgment within the required time may be made to any judge of the court in which the action was commenced. Sumner *v.* Osborn, 22 Hun (N. Y.) 13. But see Morch *v.* Raubitschek, 159 Pa. St. 559, 33 Wkly. Notes Cas. (Pa.) 567, 28 Atl. 369.

A judge in chambers has no power to set aside an order of arrest, but may order the release of defendant. Hogan *v.* Gordon, 2 L. C. Jur. 161; Damer *v.* Busby, 5 Ont. Pr. 356; Emmanuel *v.* Hagens, 6 Rev. Lég. 209; Canadian Bank of Commerce *v.* Browne, 6 Rev. Lég. 26. See also Judson *v.* Jones, 12 Wend. (N. Y.) 209.

Relief because of privilege from arrest.— While a defendant who was arrested while privileged or exempt because of attendance upon judicial proceedings should seek redress at the hands of the court whence the process issued, he has a right to apply for that purpose to any court of competent jurisdiction. People *v.* Judge Detroit Super. Ct., 40 Mich. 729. See also *In re* Glaser, 2 Ben. (U. S.) 180, 10 Fed. Cas. No. 5,474, holding that, where a bankrupt was arrested in an action in a state court, upon allegations of fraud in contracting the debt to recover which the action was brought, and gave bail and applied to the federal court, upon affidavits denying the allegations of fraud, for an order discharging him from arrest, the federal court was competent to give him the relief sought, provided his arrest was founded upon a debt from which his discharge in bankruptcy would release him. *Compare* Kinsman *v.* Reinex, 2 Miles (Pa.) 200; Com. *v.* Daniel, 4 Pa. L. J. Rep. 29, 6 Pa. L. J. 330.

3. WHEN MAY BE MADE. A motion to vacate an order of arrest must be made within the time prescribed by statute or rule of court.[84] In the absence of a statute or rule of court fixing the time, the application should be made promptly,[85] and at a preliminary stage of the proceedings.[86]

4. NOTICE OF MOTION — a. Necessity. A motion to vacate or modify an order of arrest may be made before the judge who granted the order, without notice to the adverse party. Notice is necessary, however, when the application is made to another judge, or to the court.[87]

b. Specification of Grounds. When notice is necessary, it must specify distinctly the grounds upon which defendant seeks relief;[88] and defendant will be confined to such grounds on the hearing of the motion.[89]

84. Baker Mfg. Co. *v.* Knotts, 30 Kan. 356, 2 Pac. 510; Armstrong Mfg. Co. *v.* Ferris, 125 N. Y. 722, 26 N. E. 453, 35 N. Y. St. 283; New Haven Web Co. *v.* Ferris, 125 N. Y. 364, 26 N. E. 453, 35 N. Y. St. 283 [*affirming* 15 Daly (N. Y.) 217, 4 N. Y. Suppl. 610, 23 N. Y. St. 61, 16 N. Y. Civ. Proc. 265, 22 Abb. N. Cas. (N. Y.) 455]; Dale *v.* Radcliffe, 25 Barb. (N. Y.) 333, 15 How. Pr. (N. Y.) 71; Wilmerding *v.* Moon, 1 Duer (N. Y.) 645, 8 How. Pr. (N. Y.) 213; Lewis *v.* Truesdell, 3 Sandf. (N. Y.) 706, Code Rep. N. S. (N. Y.) 106; Elwood *v.* Gardner, 10 Abb. Pr. N. S. (N. Y.) 238; Barker *v.* Wheeler, 14 Abb. Pr. (N. Y.) 170, 23 How. Pr. (N. Y.) 193; Overill *v.* Durkee, 2 Abb. Pr. (N. Y.) 383; Farmer *v.* Robbins, 47 How. Pr. (N. Y.) 415; Pelo *v.* Clukey, 36 How. Pr. (N. Y.) 179; Crowell *v.* Brown, 17 How. Pr. (N. Y.) 68; O'Neil *v.* Durkee, 12 How. Pr. (N. Y.) 94; Moore *v.* Calvert, 9 How. Pr. (N. Y.) 474; Barker *v.* Dillon, Code Rep. N. S. (N. Y.) 206, 9 N. Y. Leg. Obs. 310; Parker *v.* McPhail, 112 N. C. 502, 16 S. E. 848; Corbin *v.* Stewart, 2 Wkly. Notes Cas. (Pa.) 630.

After verdict.— Under a statutory provision that an application to vacate an order of arrest may be made "at any time before judgment," such application may be made after verdict and before entry of judgment. Fuentes *v.* Mayorga, 7 Daly (N. Y.) 103.

Before service of process.— The motion may be made before the service of the process. Martin *v.* Gross, 56 N. Y. Super. Ct. 512, 4 N. Y. Suppl. 337, 22 N. Y. St. 439, 16 N. Y. Civ. Proc. 235. *Contra*, Gedney *v.* Haas, 50 How. Pr. (N. Y.) 310; Kern *v.* Rackow, 44 How. Pr. (N. Y.) 443.

Extension of time.—When a motion is made after the expiration of the time prescribed by statute, it must clearly appear that the time for making it was properly extended. Wheeler *v.* Brady, 2 Hun (N. Y.) 347, 4 Thomps. & C. (N. Y.) 547.

85. Schachne *v.* Kayser, 66 How. Pr. (N. Y.) 395; Blackiston *v.* Potts, 2 Miles (Pa.) 388; Ingersoll *v.* Campbell, 10 Wkly. Notes Cas. (Pa.) 553; Walker *v.* Lumb, 9 Dowl. P. C. 131, 4 Jur. 1014, 1 Woll. 3; Sugars *v.* Concannon, 7 Dowl. P. C. 391, 5 M. & W. 30.

86. *Indiana.*—Wibright *v.* Wise, 4 Blackf. (Ind.) 137.

New Hampshire.— Stevenson *v.* Smith, 28 N. H. 12.

New York.— Johnson *v.* Florence, 32 How. Pr. (N. Y.) 230.

Ohio.—Adams *v.* Brace, 1 Ohio Dec. (Reprint) 139.

Canada.— Hogan *v.* Gordon, 2 L. C. Jur. 161.

After giving bail.— It is too late for defendant to move to vacate an order of arrest after he has given bail. State *v.* Downs, 8 Ind. 42; McKenzie *v.* Hackstaff, 2 E. D. Smith (N. Y.) 75; Bridgewater Paint Mfg. Co. *v.* Messmore, 15 How. Pr. (N. Y.) 12; Pixley *v.* Winchell, 7 Cow. (N. Y.) 366, 17 Am. Dec. 525. *Compare* Ross *v.* Balfour, 5 U. C. Q. B. O. S. 683; Bowers *v.* Flower, 3 Ont. Pr. 62, holding that defendant is not precluded from moving to rescind the order for his arrest by the fact that he has put in special bail.

87. Cayuga County Bank *v.* Warfield, 13 How. Pr. (N. Y.) 439. See also Rogers *v.* McElhone, 12 Abb. Pr. (N. Y.) 292, 20 How. Pr. (N. Y.) 441, holding that an application to vacate an order of arrest on motion must be made in the same manner that other motions are made — that is, the motion must be made to the court (or to a judge thereof) in which the action is pending, and sufficient notice thereof must be given.

Discharge on common bail.— A defendant who has been held to special bail must give notice to plaintiff of an application to be discharged on common bail. Gilmore *v.* Edmunds, 9 Allen (Mass.) 379; Morris *v.* Geiger, 10 N. J. L. 331.

It is not a waiver of objection to an insufficient notice that plaintiff's attorney appeared at the time and place named in the notice, for the purpose of examining the notice and return. Francis *v.* Howard, 115 Mass. 236.

A notice to a creditor reciting that a person "arrested on execution in your favor desires to take the oath for the relief of poor debtors," and appointing a time and place for his examination, is sufficient, although the debtor was arrested on mesne process only. Calnan *v.* Toomey, 129 Mass. 451.

88. Lalor *v.* Fisher, 2 Rob. (N. Y.) 669.

Alleging facts.— Defendant must state in his application facts showing why he should be discharged, and not conclusions of law to that effect. People *v.* Bancker, 5 N. Y. 106.

89. Barker *v.* Cook, 40 Barb. (N. Y.) 254, 16 Abb. Pr. (N. Y.) 83, 25 How. Pr. (N. Y.)

5. Procedure — a. Nature and Scope of Inquiry — (I) *Upon Motion to Vacate Order of Arrest.* Upon a motion to vacate an order of arrest, the issue is as to the existence of grounds of arrest, and not as to plaintiff's belief in their existence.[90] And, except where the motion is based upon defects in the proceedings to procure the order, the question is not whether the order should have been made, but whether it should be discontinued.[91] A motion to vacate an order of arrest does not embrace one to reduce the amount of bail.[92]

(II) *Upon Motion to Be Discharged From Custody.* On a motion to discharge on common bail, the merits of the controversy will not be considered further than to ascertain if a reasonable cause of action is shown.[93]

b. Evidence — (I) *What Admissible* — (A) *Under Earlier Practice.* Under the earlier practice, defendant's motion to be discharged from arrest, or to quash, vacate, or set aside the order of arrest, was heard only upon the papers upon which the order was granted.[94]

(B) *Statutory Rule.* In some jurisdictions, however, this rule has been so far

190; Dieckerhoff *v.* Ahlborn, 2 Abb. N. Cas. (N. Y.) 372; Willis *v.* Snook, 5 Jur. 579, 8 M. & W. 147. See also Adams *v.* Mills, 3 How. Pr. (N. Y.) 219, which holds that, where the notice of motion to vacate an order to hold defendant to bail is merely that it will be made upon the insufficiency of the affidavits upon which the order was allowed, defendant will not be allowed to read counter-affidavits, nor will plaintiff be allowed to read additional ones.

90. Gardner *v.* O'Connell, 5 La. Ann. 353. See also Peel *v.* Elliott, 7 Abb. Pr. (N. Y.) 433, 16 How. Pr. (N. Y.) 485, holding that, on a motion to vacate an order of arrest, founded on the nature of the cause of action, if there is any ambiguity as to the nature of the right of action relied upon, the proper inquiry is, not what cause of action plaintiff intended to set forth, but, rather, what cause of action he must rely on for a recovery.

It is the duty of the court to examine the affidavits of each party and to dispose of the case according to the just preponderance of the proof, as disclosed by such affidavits. Levy *v.* Bernhard, 2 N. Y. App. Div. 336, 37 N. Y. Suppl. 849, 73 N. Y. St. 62, 3 N. Y. Annot. Cas. 40.

91. Allen *v.* McCrasson, 32 Barb. (N. Y.) 662; Hernandez *v.* Carnobeli, 4 Duer (N. Y.) 642, 10 How. Pr. (N. Y.) 433; Falconer *v.* Elias, 3 Sandf. (N. Y.) 731; Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315; Barron *v.* Sanford, 6 Abb. Pr. (N. Y.) 320 note, 14 How. Pr. (N. Y.) 443; Chapin *v.* Seeley, 13 How. Pr. (N. Y.) 490.

92. Heyman *v.* Mittelstaedt, 2 N. Y. St. 645; Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339. *Contra*, Republic of Mexico *v.* De Arrangois, 11 How. Pr. (N. Y.) 1.

93. Waters *v.* Collot, 2 Yeates (Pa.) 26, 2 Dall. (Pa.) 247, 1 L. ed. 367; Parassel *v.* Gautier, 2 Dall. (U. S.) 330, 1 L. ed. 402, 18 Fed. Cas. No. 10,709. See also David *v.* Sittig, 10 Mart. (La.) 607, holding that evidence of defendant's minority at the time of incurring the liability which is the basis of the action cannot be received on a motion to discharge him from custody, as a case cannot, on an interlocutory motion, be tried and decided on its merits. *Compare* Pratt *v.* Strickland, 1 Browne (Pa.) 213, wherein defendant was discharged on common bail upon the ground that he was an infant.

If the affidavit to hold to bail is, in itself, sufficient the court will not, upon a motion to appear without bail, inquire into the merits of the cause. Laverty *v.* Snelling, 3 Cranch C. C. (U. S.) 290, 14 Fed. Cas. No. 8,124.

Discharge in insolvency.—When defendant's motion is based upon a discharge in insolvency the court has power to examine into the validity of the discharge. American Flask, etc., Co. *v.* Son, 7 Rob. (N. Y.) 233, 3 Abb. Pr. N. S. (N. Y.) 333.

94. *Indiana.*— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

New Jersey.— Stiles *v.* Vandewater, 48 N. J. L. 67, 4 Atl. 658; Tyler *v.* Allen, 31 N. J. L. 441; Painter *v.* Houston, 28 N. J. L. 121.

New York.—Welsh *v.* Hill, 2 Johns. (N. Y.) 100.

North Carolina.— Devries *v.* Summit, 86 N. C. 126.

Pennsylvania.— Gall *v.* Molessa, 3 Pa. Dist. 537; Brown *v.* Esquirrel, 12 Wkly. Notes Cas. (Pa.) 421.

England.— Horsley *v.* Walstab, 2 Marsh. 548, 7 Taunt. 235, 2 E. C. L. 341. *Compare* Armstrong *v.* Stratton, 1 Moore C. P. 110, 7 Taunt. 405, 2 E. C. L. 421, holding that it is within the discretion of the court to receive plaintiff's supplemental affidavits to hold to bail, but such discretion ought to be very sparingly exercised.

Canada.— Frear *v.* Ferguson, 2 Chamb. (U. C.) 144; Hodgson *v.* Oliva, 3 Rev. de Lég. 349; Lawrence *v.* Hinckley, 3 Rev. de Lég. 348.

Exceptions to rule.— Where the affidavit for an arrest, alleging the non-residence of defendant, was sworn out nearly four months prior to the date of the arrest, the court, on a motion to discharge on common bail, admitted evidence to prove that on the day of the arrest defendant was a resident. Adams *v.* Brace, 1 Ohio Dec. (Reprint) 139. See also Penman *v.* Wayne, 1 Dall. (Pa.) 241, 1 L. ed. 118.

modified[95] that defendant may support his motion with affidavits,[96] which plaintiff may oppose with affidavits tending to prove any ground of arrest recited in the order,[97] but no other.[98]

(II) *PRIMA FACIE FORCE OF AFFIDAVIT TO HOLD TO BAIL.* When defendant moves on the merits to vacate the order of arrest, or to be discharged from arrest, the affidavit to hold to bail, or other evidence upon which the order was granted, is *prima facie* sufficient to sustain the order.[99] Hence, defendant's evi-

95. How motion should be heard.— The court will not consider separately an application to set aside an order of arrest on the ground of the insufficiency of the papers upon which it was granted, and, as a part of the same motion, an application to set aside the same order on new affidavits. There should be but a single consideration and decision, which should be on the facts in the original papers, the affidavits in support of the motion, and the answering affidavits. Hinck *v.* Dessar, 3 N. Y. St. 349.

What papers must be presented with motion.— On a motion to vacate an order of arrest, the order itself, or a copy thereof, and the papers upon which it was founded, must be presented to the court, an affidavit stating generally their contents being insufficient. Kern *v.* Rackow, 44 How. Pr. (N. Y.) 443.

96. Howe Mach. Co. *v.* Lincoln, 24 Kan. 123; Evans *v.* Holmes, 4 How. Pr. (N. Y.) 515; Johnson *v.* Florence, 32 How. Pr. (N. Y.) 230; Barber *v.* Hubbard, 3 Code Rep. (N. Y.) 169 [*affirming* 3 Code Rep. (N. Y.) 156]; Pegler *v.* Hislop, 5 Dowl. & L. 223, 1 Exch. 437, 11 Jur. 996, 17 L. J. Exch. 53; Graham *v.* Sandrinelli, 4 Dowl. & L. 317, 16 L. J. Exch. 67, 16 M. & W. 191; Gibbons *v.* Spalding, 2 Dowl. N. S. 746, 7 Jur. 377, 12 L. J. Exch. 185, 11 M. & W. 173; Perry *v.* Milne, 8 L. C. Jur. 222; Demill *v.* Easterbrook, 10 U. C. L. J. 246. See also Hale *v.* Grogan, 99 Ky. 170, 18 Ky. L. Rep. 46, 35 S. W. 282, holding that the better method of controverting the allegations of an affidavit for arrest is by counter-affidavit, and not by pleadings. *Compare* Solomon *v.* Waas, 2 Hilt. (N. Y.) 179, holding that, where the right to arrest arises from the nature of the action, affidavits to disprove the cause of action are inadmissible.

97. N. Y. Code Civ. Proc. § 568; Harriss *v.* Sneeden, 101 N. C. 273, 7 S. E. 801; McKay *v.* Garcia, 6 Ben. (U. S.) 556, 16 Fed. Cas. No. 8,844; Pegler *v.* Hislop, 5 Dowl. & L. 223, 1 Exch. 437, 11 Jur. 996, 17 L. J. Exch. 53; Graham *v.* Sandrinelli, 4 Dowl. & L. 317, 16 L. J. Exch. 67, 16 M. & W. 191; Gibbons *v.* Spalding, 2 Dowl. N. S. 746, 7 Jur. 377, 12 L. J. Exch. 185, 11 M. & W. 173. See also Ziporkes *v.* Chmelniker, 15 N. Y. St. 215, holding that where defendant serves affidavits upon a motion to set aside an order of arrest plaintiff may read additional affidavits in support of the order, even though the papers upon which the order was granted in the first instance were insufficient.

After submission of motion.—Although the motion to vacate an order of arrest has been submitted, the court may, before decision on the motion, receive new proofs supporting the order. Ensign *v.* Nelson, 49 Hun (N. Y.) 215, 1 N. Y. Suppl. 685, 17 N. Y. St. 66, 14 N. Y. Civ. Proc. 438, 21 Abb. N. Cas. (N. Y.) 321 [*affirmed* in 112 N. Y. 674, 20 N. E. 416, 20 N. Y. St. 982].

Complaint as evidence.— Where defendant files affidavits in support of his motion to vacate an order of arrest, plaintiff's complaint may be introduced in evidence to sustain the order. Ensign *v.* Nelson, 49 Hun (N. Y.) 215, 1 N. Y. Suppl. 685, 17 N. Y. St. 66, 14 N. Y. Civ. Proc. 438, 21 Abb. N. Cas. (N. Y.) 321 [*affirmed* in 112 N. Y. 674, 20 N. E. 416, 20 N. Y. St. 982]. But where defendant's motion is based on the original papers alone, and the complaint fails to state a good cause of action, authorizing an arrest, an amended complaint, filed after notice of the motion to vacate was made, will not be considered on the hearing of the motion. Flatow *v.* Von Bremsen, 11 N. Y. Suppl. 677, 33 N. Y. St. 24, 19 N. Y. Civ. Proc. 121 [*distinguishing* McBride *v.* Langan, 10 N. Y. Suppl. 554, 18 N. Y. Civ. Proc. 201; Hanson *v.* Langan, 9 N. Y. Suppl. 625, 30 N. Y. St. 828].

98. Cady *v.* Edmonds, 12 How. Pr. (N. Y.) 197; Davis *v.* Cardue, 38 S. C. 471, 17 S. E. 247.

Proof authorizing arrest on other ground.— On a motion to be discharged, under the provisions of the statute abolishing imprisonment for debt, from an arrest by capias ad respondendum, the facts authorizing an arrest by warrant under the same act will not be heard in opposition to the motion. Stoddard *v.* Coffin, 10 Wend. (N. Y.) 602.

99. *Louisiana.*— Gardner *v.* O'Connell, 5 La. Ann. 353.

New Jersey.— Tyler *v.* Allen, 31 N. J. L. 441.

New York.— Spencer *v.* Hilton, 10 Wend. (N. Y.) 608.

Pennsylvania.— Berger *v.* Smull, 39 Pa. St. 302.

Canada.—Doutre *v.* McGuinnis, 5 L. C. Jur. 158.

See also McFarlan *v.* McJinsey, 6 Blackf. (Ind.) 85, holding that a capias ad respondendum issued by a justice of the peace is presumed to have been correctly issued until the contrary is shown. And see People *v.* Tweed, 5 Hun (N. Y.) 382, holding that, where a party applies for the discharge of an order of arrest or the reduction of his bail, and does not deny the facts upon which the order was granted, a presumption is raised that such facts are true. *Compare* Hernandez *v.* Carnobeli, 4 Duer (N. Y.) 642, 10 How.

dence should squarely and unequivocally meet that upon which the order was granted.[1]

(III) *Burden of Proof.* The burden of proof is on plaintiff when the order was granted on a ground extrinsic to the cause of action,[2] and is on defendant when the order was granted on a ground identical with or dependent upon the cause of action.[3]

c. Decision of Motion — (I) *What Law Governs.* The validity of an order of arrest is to be determined by the law existing at the time of the arrest, and not at the time of the order.[4]

Pr. (N. Y.) 433; Anderson *v.* Hunt, 55 How. Pr. (N. Y.) 336, holding that when a motion is made to discharge upon the original papers, if upon the case presented the question is doubtful, then plaintiff has not made out his case and defendant must be discharged.

1. *Louisiana.*—Abat *v.* Robetaille, 4 La. 226.

New York.— Elwell *v.* Russell, 29 N. Y. App. Div. 436, 51 N. Y. Suppl. 964; Hayes *v.* Beard, 13 N. Y. Suppl. 692, 37 N. Y. St. 535; Tupper *v.* Morin, 12 N. Y. Suppl. 310, 25 Abb. N. Cas. (N. Y.) 398; Union Bank *v.* Mott, 9 Abb. Pr. (N. Y.) 106, 17 How. Pr. (N. Y.) 353; Claflin *v.* Frank, 8 Abb. Pr. (N. Y.) 412.

North Carolina.—Powers *v.* Davenport, 101 N. C. 286, 7 S. E. 747.

England.— Robinson *v.* Gardner, 7 Dowl. P. C. 716; Ross *v.* Montefiore, 1 H. & N. 722.

Canada.— Jones *v.* Gress, 25 U. C. Q. B. 594.

2. Duncan *v.* Guest, 2 N. Y. Civ. Proc. 275; Pegler *v.* Hislop, 5 Dowl. & L. 223, 1 Exch. 437, 11 Jur. 996, 17 L. J. Exch. 53; Beam *v.* Beatty, 19 Ont. Pr. 207. See also Henry *v.* Flanagan, 1 Kulp (Pa.) 352, holding that where defendant claims privilege from arrest as a freeholder and swears that his property is unencumbered, the burden is on plaintiff to prove that judgments against one of defendant's name are liens on the property. *Contra,* Molson *v.* Carter, 25 L. C. Jur. 65; Egart *v.* Laidlaw, 7 L. C. Jur. 227, holding that it is incumbent upon defendant to establish that the allegations of the affidavit are false or insufficient. *Compare* Craig *v.* Brown, Pet. C. C. (U. S.) 352, 6 Fed. Cas. No. 3,328; Knox *v.* Greenleaf, Wall. C. C. (U. S.) 108, 14 Fed. Cas. No. 7,909, holding that, if the questions before the court are doubtful as to the law or the facts, the court will not discharge on common bail, but will put defendant to his bail.

Where there are conflicting affidavits on a motion to vacate an order of arrest, granted on the ground that the debtor was about to remove from the state with intent to defraud his creditors, the facts that defendant did not dispute the claim in suit, and that, though of abundant ability to pay it, he was about to remove from the state without doing so, were held proof of a fraudulent intent on his part which rendered his affidavit less worthy of credit than that of plaintiff. Brodsky *v.* Ihms, 16 Abb. Pr. (N. Y.) 251, 25 How. Pr. (N. Y.) 471.

3. Southworth *v.* Resing, 3 Cal. 377; Clark *v.* Pinckney, 50 Barb. (N. Y.) 226; Clews *v.* Raphael, 4 Thomps. & C. (N. Y.) 664; Whitmore *v.* Van Steenbergh, 2 Thomps. & C. (N. Y.) 668; Republic of Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634; Chittenden *v.* Hubbell, 6 Abb. Pr. (N. Y.) 319 note; Woodward Steam Pump Mfg. Co. *v.* Stokes, 33 How. Pr. (N. Y.) 396; Phillips *v.* Benedict, 20 How. Pr. (N. Y.) 265; Warner *v.* Bates, 75 Wis. 278, 43 N. W. 957. *Contra,* Allen *v.* McCrasson, 32 Barb. (N. Y.) 662; Mulry *v.* Collett, 3 Rob. (N. Y.) 716.

Defendant's evidence must be sufficient to authorize nonsuit or verdict.— Where the arrest is grounded on the nature of the cause of action, the order will not be set aside upon the merits unless defendant clearly makes out such a case as would require the judge at the trial either to nonsuit plaintiff or to direct a verdict for defendant. McClure *v.* Levy, 68 Hun (N. Y.) 525, 22 N. Y. Suppl. 1006, 52 N. Y. St. 568; Hoy *v.* Duncan, 33 N. Y. Super. Ct. 555; Lorillard F. Ins. Co. *v.* Meshural, 7 Rob. (N. Y.) 308; Tallman *v.* Whitney, 5 Daly (N. Y.) 505; Royal Ins. Co. *v.* Noble, 5 Abb. Pr. N. S. (N. Y.) 54; Levins *v.* Noble, 15 Abb. Pr. (N. Y.) 475; Stuyvesant *v.* Bowran, 3 Abb. Pr. N. S. (N. Y.) 270, 34 How. Pr. (N. Y.) 51; Griswold *v.* Sweet, 49 How. Pr. (N. Y.) 171; Blakelee *v.* Buchanan, 44 How. Pr. (N. Y.) 97.

Defendant's denial insufficient.— Where a defendant is arrested on an affidavit stating a cause of action which, of itself, gives the right to hold defendant to bail, the order will not be vacated upon affidavits which merely deny the existence of such cause of action. Cousland *v.* Davis, 4 Bosw. (N. Y.) 619; Bedell *v.* Sturta, 1 Bosw. (N. Y.) 634, 6 Abb. Pr. (N. Y.) 319 note; Chittenden *v.* Hubbell, 6 Abb. Pr. (N. Y.) 319 note.

Conflicting affidavits.— Where the cause of action is identical with the ground of arrest the court will not vacate the order of arrest on conflicting affidavits (Jaroslauski *v.* Saunderson, 1 Daly (N. Y.) 232; Miller *v.* Parks, 66 How. Pr. (N. Y.) 159), particularly where the affidavit on behalf of plaintiff was made by a disinterested witness and is opposed only by defendant's affidavit (Butler *v.* Mellvaine, 31 How. Pr. (N. Y.) 379), even though the affidavits of defendant tend to disprove the existence of the cause of action (Peck *v.* Lombard, 22 Hun (N. Y.) 63).

4. Hecht *v.* Levy, 20 Hun (N. Y.) 53.

(11) *Effect of Delay.* A decision upon a motion to vacate an order of arrest is not void because it was withheld beyond the time fixed by statute,[5] or until after the rendition of final judgment.[6]

6. Imposition of Terms Upon Granting Relief. When defendant is entitled as a matter of right to have an order of arrest vacated, the court has no power to impose a condition in granting the relief.[7] But when the order is voidable merely, because of technical defects or irregularities, the court may impose a proper and reasonable condition.[8]

7. Second Motion. When a motion to vacate an order of arrest has been made and denied it cannot be renewed upon any statement of facts without leave of the court.[9]

K. Second Arrest — 1. In Same Action — a. After Escape. An officer may, at any time before the return-day, retake, without new process, one who had escaped after being arrested under mesne civil process,[10] even though the escape was voluntary.[11]

5. Stafford *v.* Ambs, 8 Abb. N. Cas. (N. Y.) 237.

6. Allison *v.* Maddrey, 114 N. C. 421, 19 S. E. 646; Kohn *v.* Burtnett, 59 How. Pr. (N. Y.) 410.

7. Matter of Bradner, 87 N. Y. 171; Tompkins *v.* Smith, 48 N. Y. Super. Ct. 113, 1 N. Y. Civ. Proc. 398, 62 How. Pr. (N. Y.) 499; Lee *v.* Averill, 2 Sandf. (N. Y.) 621, 1 Code Rep. (N. Y.) 73; Bondy *v.* Collier, 13 Misc. (N. Y.) 15, 33 N. Y. Suppl. 996, 67 N. Y. St. 847, 2 N. Y. Annot. Cas. 28 [*reversing* 11 Misc. (N. Y.) 443, 32 N. Y. Suppl. 221, 65 N. Y. St. 419]. *Compare* Northern R. Co. *v.* Carpentier, 4 Abb. Pr. (N. Y.) 47, holding that where the court is satisfied that there was no malice and that there was probable cause for procuring the order of arrest, it may, upon a motion to vacate the order upon the merits, grant the relief on condition that defendant shall stipulate not to bring an action for the arrest. See also Edgerton *v.* Ford, 11 Abb. Pr. (N. Y.) 415, holding that the discretion exercised by the court at general term in imposing a stipulation not to sue for false imprisonment or malicious prosecution as a condition of reversing an order refusing to set aside an order of arrest can neither be reviewed by the court below, nor at a subsequent general term.

8. People *v.* Wayne Cir. Judge, 36 Mich. 500; Leigh *v.* Alpaugh, 24 N. J. L. 629; Matter of Bradner, 87 N. Y. 171; Kimball *v.* Flagg, 15 Daly (N. Y.) 496, 8 N. Y. Suppl. 469, 29 N. Y. St. 490; Chandler *v.* Brecknell, 4 Cow. (N. Y.) 49; Wilks *v.* Lorck, 2 Taunt. 399.

9. Lovell *v.* Martin, 21 How. Pr. (N. Y.) 238. See also Wingo *v.* Watson, 98 N. C. 482, 4 S. E. 463, holding that, when a motion to vacate an order of arrest has been denied, a second motion will not be considered, as the matter is *res adjudicata*.

Effect of verdict when cause of action and ground of arrest are identical.— If the facts relied upon as warranting an arrest are put in issue by the pleadings in the cause and brought to trial, a verdict or finding upon those facts either way ought to be deemed conclusive of the question upon any subsequent motion to vacate the order of arrest. Chaine *v.* Coffin, 17 Abb. Pr. (N. Y.) 441; Warren *v.* Wendell, 13 Abb. Pr. (N. Y.) 187.

Time within which motion must be renewed after leave.— Where a motion to vacate an arrest was denied, with leave to renew the motion on showing that the claim was secured by an attachment, it was held that the renewal could not be made after the rendition of judgment. Mills *v.* Rodewald, 13 Hun (N. Y.) 439.

10. Com. *v.* Sheriff, 1 Grant (Pa.) 187.

What is retaking.— Where A was arrested at the suit of B, and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of C, and the sheriff subsequently arrested A at C's suit, such arrest was considered as an original taking, and not as a retaking after an escape. Atkinson *v.* Jameson, 5 T. R. 25.

Pursuit of escaped prisoner out of state.— The sheriff of another state cannot pursue and retake in this state a prisoner who has escaped from his custody after arrest on civil process. Bromley *v.* Hutchins, 8 Vt. 194, 30 Am. Dec. 465.

11. *New Hampshire.*— Langdon *v.* Hathaway, 1 N. H. 367. *Compare* Bruce *v.* Snow, 20 N. H. 484, which says that it seems that a sheriff who has voluntarily permitted a debtor to escape cannot retake him.

New York.— Clark *v.* Cleveland, 6 Hill (N. Y.) 344; Stone *v.* Woods, 5 Johns. (N. Y.) 182.

Vermont.— Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115.

England.— Atkinson *v.* Matteson, 2 T. R. 172.

Canada.— Ross *v.* Webster, 5 U. C. Q. B. 570.

Pursuit out of county.— Where a prisoner on mesne process has made a voluntary escape, and the sheriff has acquired the right to retake him on a fresh suit, he may be retaken beyond the limits of the county. Langdon *v.* Hathaway, 1 N. H. 367.

When released by plaintiff's consent.— Where a defendant is released from custody at

b. Because of Insufficiency of Bail. When a sheriff, after arresting a defendant on mesne process, accepts bail and releases the prisoner, he cannot afterward rearrest him upon the ground that the bail is insufficient.[12]

c. After Discharge. A defendant who has been discharged from arrest may not, ordinarily, be rearrested in the same action,[13] unless the order under which the first arrest was made was void.[14]

his own request, by consent of plaintiff, in order that he may have an opportunity of attending to his private business, he may be retaken on an alias capias on the same affidavit to hold to bail. Penfold *v.* Maxwell, 1 Chit. 275 note, 18 E. C. L. 151.

Effect of agreement not to recapture.—The right of an officer to retake a prisoner under mesne process after a voluntary escape is not impaired by his agreement to refrain from recapture. Langdon *v.* Hathaway, 1 N. H. 367.

12. State *v.* Brittain, 25 N. C. 17; Ricks *v.* Richardson, Dudley (S. C.) 57.

Failure of bail to justify.— Where the bail fails to justify, the sheriff may rearrest a prisoner whom he has discharged on bail, as, upon the failure of the bail to justify, the sheriff becomes liable as bail himself, and is, therefore, entitled to the same rights and powers (Seaver *v.* Genner, 10 Abb. Pr. (N. Y.) 256; Metcalf *v.* Stryker, 10 Abb. Pr. (N. Y.) 12; Sartos *v.* Merceques, 9 How. Pr. (N. Y.) 188); but cannot do so until the actual failure of the bail to justify (Arteaga *v.* Conner, 88 N. Y. 403, 2 N. Y. Civ. Proc. 152); and where plaintiff's attorney consents to a postponement, even though for an indefinite time, of the justification of defendant's sureties, the sheriff has no right to rearrest defendant until the sureties have made an actual default, and no mere lapse of time will give him this right (Arteaga *v.* Conner, 46 N. Y. Super. Ct. 91).

Provisional bail.— Where a bail-bond is taken, conditioned for the obligor's appearance at the return-day of the writ, but under the express agreement that it shall only be required as security for his forthcoming on the next day after the arrest, unless other or additional bail is given, the officer making the arrest may, if such bail is not given, retake defendant without new process. Bronson *v.* Noyes, 7 Wend. (N. Y.) 188.

Where sheriff puts in bail for defendant.— Where a sheriff's officer, after arresting a defendant, released him on his promise to put in good bail, and, upon afterward finding that the bail were not forthcoming, put in bail himself without defendant's consent, and rearrested defendant the day previous to that upon which his time for putting in bail expired, it was held that defendant was entitled to his discharge. Taylor *v.* Evans, 1 Bing. 367, 8 Moore C. P. 398, 8 E. C. L. 551.

13. McGilvery *v.* Morehead, 2 Cal. 607; Enoch *v.* Ernst, 21 How. Pr. (N. Y.) 96; Benson *v.* Adams, (Easter T., 3 Vict.) 1 Robinson & J. Ont. Dig. 208. But see Meucci *v.* Raudnitz, 20 Hun (N. Y.) 343 (holding that it is within the discretion of the court to grant a second order of arrest, after another order in the same action has been vacated on the ground that the affidavit failed to establish fraudulent intent on the part of defendant); Chambers *v.* Durand, 33 N. Y. Super. Ct. 494 (holding that, if plaintiff fails to sustain his first grounds of arrest and yet, by his proofs on the motion, establishes another cause of arrest, the order should be vacated without prejudice to plaintiff's right to make a new motion for an order of arrest on proper notice to defendant).

When discharge procured by fraud.— A defendant may be rearrested in the same action where he procured his discharge from the first arrest by fraud — as where he gave a draft for part of the demand and agreed to settle the remainder in a few days, and the draft was dishonored (Puckford *v.* Maxwell, 6 T. R. 52), or gave a note, which he dishonored (McDonald *v.* Amm, (Easter T., 2 Vict.) 1 Robinson & J. Ont. Dig. 208); but a party who procured his discharge by giving security which turns out to be worthless cannot be rearrested unless he was guilty of fraud (Wilson *v.* Hamer, 8 Bing. 54, 21 E. C. L. 441).

When capias failed to issue after first arrest.— Where a debtor arrested under a warrant was discharged because no capias to support the arrest was issued within the required time, and was subsequently arrested a second time under a capias, the material of the affidavit upon which he was arrested being the same in both cases, it was held that the second arrest was valid, the warrant being auxiliary to the capias. Williams *v.* Gibbons, 4 B. & S. 617, 10 Jur. N. S. 236, 33 L. J. Q. B. 33, 9 L. T. Rep. N. S. 328, 13 Wkly. Rep. 70, 116 E. C. L. 617.

Rearrest before appearance-day.— Where a justice takes bail for appearance at a fixed time, a second arrest by the same complainant, for the same charge, before the time appointed, is illegal. King *v.* Orr, 5 U. C. Q. B. O. S. 724.

After discharge because of temporary privilege.— Where an order of arrest is set aside because defendant was arrested on a general election-day, he may again be arrested in the same suit on the same process, since the exemption from arrest expired with the election-day, and the parties were put upon the same footing toward each other as if the arrest had not been made. Petrie *v.* Fitzgerald, 1 Daly (N. Y.) 401.

14. Amsinck *v.* Harris, 3 Ohio Dec. (Reprint) 472. See also Matter of Bowen, 20 Wis. 300, 91 Am. Dec. 404, holding that, where defendant, after his first arrest, stated to the sheriff that the order of arrest was defective and void on its face, and plaintiff, having some doubt of its validity, directed defendant

2. In Another Action For Same Cause — a. During Pendency of First Action. A person will never be held to bail in two different actions for the same cause at the same time.[15]

b. After Discontinuance of First Action. While, as a general rule, a person should not be arrested a second time for the same cause of action,[16] one who has been arrested on mesne process may, after the order has been vacated and the suit discontinued or non-prossed, be rearrested in a new action for the same cause, if it appears that there is no design to vex, harass, or oppress him.[17]

L. Liability For Wrongful Arrest — 1. In General. A plaintiff who has procured the arrest of defendant in a civil action[18] is liable to an action of damages

to be discharged, and procured a new order of arrest, based upon the same affidavit, defendant was not entitled to be discharged from his second arrest on the ground of his previous arrest and discharge.

15. Hernandez *v.* Carnobeli, 4 Duer (N. Y.) 642, 10 How. Pr. (N. Y.) 433; Clark *v.* Weldon, 4 Yeates (Pa.) 206; Bingham *v.* Wilkins, Crabbe (U. S.) 50, 3 Fed. Cas. No. 1,416.

16. Wright *v.* Ritterman, 4 Rob. (N. Y.) 704 (even in a different form of action); Wells *v.* Gurney, 8 B. & C. 769, 15 E. C. L. 378; Archer *v.* Champneys, 1 B. & B. 289, 5 E. C. L. 640.

New York — Stillwell Act. — A defendant who has been arrested under mesne process cannot be arrested in the same action upon a warrant issued under the Stillwell Act. Townsend *v.* Nebenzahl, 20 Hun (N. Y.) 81, 8 Abb. N. Cas. (N. Y.) 427 [*affirming* 57 How. Pr. (N. Y.) 328; appeal *dismissed* in 81 N. Y. 644].

When first arrest was in another state. — Defendant may be arrested in an action, notwithstanding a previous arrest in an action by other parties in a foreign state for the same cause. Whittemore *v.* Adams, 2 Cow. (N. Y.) 626; Peck *v.* Hozier, 14 Johns. (N. Y.) 346.

17. *Massachusetts.* — Jewett *v.* Locke, 6 Gray (Mass.) 233.

Michigan. — Breckon *v.* Ottawa Cir. Judge, 109 Mich. 615, 67 N. W. 906.

New York. — Ewart *v.* Schwartz, 48 N. Y. Super. Ct. 390; People *v.* Tweed, 5 Hun (N. Y.) 382 [appeal *dismissed* in 63 N. Y. 202].

Pennsylvania. — Butterworth *v.* White, 2 Miles (Pa.) 141; Robinett *v.* Pollard, 2 Miles (Pa.) 99.

United States. — Parassel *v.* Gautier, 2 Dall. (U. S.) 330, 1 L. ed. 402, 18 Fed. Cas. No. 10,709.

England. — Wells *v.* Gurney, 8 B. & C. 769, 15 E. C. L. 378; Archer *v.* Champneys, 1 B. & B. 289, 5 E. C. L. 640; Kearney *v.* King, 1 Chit. 273, 18 E. C. L. 150; Turton *v.* Hayes, 1 Str. 439.

Canada. — Sheldon *v.* Hamilton, 3 U. C. Q. B. O. S. 65; National Park Bank *v.* Ellis, 18 N. Brunsw. 547. *Compare* McCague *v.* Meighan, 2 U. C. Q. B. O. S. 550, wherein a second arrest, made after plaintiff had been non-prossed in the first suit, was set aside, because of his failure to pay the costs.

Presumption as to vexation. — A second arrest in a second action will always be deemed vexatious until the contrary is shown. Peltier *v.* Washington Banking Co., 14 N. J. L. 391; Young *v.* Weeks, 7 Daly (N. Y.) 115; Williams *v.* Thacker, 1 B. & B. 514, 5 E. C. L. 773; Archer *v.* Champneys, 1 B. & B. 289, 5 E. C. L. 640.

Second arrest before discontinuance. — Where an affidavit to hold to bail was defective, and plaintiff thereupon made a full affidavit and took out a new writ, and the next day moved to discontinue upon payment of costs, it was held that defendant should be discharged on common bail in the second action, as plaintiff should have discontinued before he took out a new writ. Belifante *v.* Levy, 2 Str. 1209. To same effect see Barry *v.* Eccles, 3 U. C. Q. B. 112; Ellis *v.* James, 1 Ont. Pr. 153. But where, after defendant had put in bail, plaintiff discovered that the sureties were worthless, and discontinued, but, before discontinuance, arrested defendant in a second action, it was held that the second arrest was good, as defendant would probably have run away if plaintiff had discontinued earlier. Olmius *v.* Delany, 2 Str. 1216.

Where first process was void. — A defendant, after arrest on mesne process, may be rearrested in a new action for the same cause if the first process was absolutely void. Schadle *v.* Chase, 16 How. Pr. (N. Y.) 413.

Where first action prematurely brought. — Where plaintiff held defendant to bail before the cause of action accrued, and afterward discontinued, and then rearrested him in a new action for the same cause after it accrued, the court discharged defendant on common bail on the ground that plaintiff was guilty of gross negligence in making the first arrest before the cause of action accrued, and that, for that reason, the second arrest was vexatious. Wheelwright *v.* Joseph, 5 M. & S. 93.

Third arrest. — A third arrest in a third action, all for the same cause, is not, necessarily, vexatious where defendant was once released on his agreement to waive the arrest, and both times on his earnest solicitations, and promises to pay, which promises he failed to keep. Citizens' Nat. Bank *v.* Vorhis, 39 Hun (N. Y.) 24. *Compare* Wells *v.* Gurney, 8 B. & C. 769, 15 E. C. L. 378, wherein the court say that it is doubtful whether a third arrest for the same cause is ever allowable, even in the absence of vexatious conduct on the part of plaintiff.

18. **Liability of officers.** — Though a writ of arrest may have been illegally obtained, the clerk who issued it and the sheriff who exe-

therefor,[19] when the arrest was malicious and without probable cause,[20] constituted other abuse of the process of the court,[21] or was made without the affidavit required by statute.[22]

2. Upon Undertaking — a. When Right of Action Accrues. Defendant's right to maintain an action on the undertaking by plaintiff for defendant's arrest[23] accrues when it is judicially determined that plaintiff was not entitled to have him arrested,[24]

cuted it, in obedience to the mandates of a competent tribunal, cannot be sued as co-trespassers with plaintiff in the suit, the latter alone being responsible for the consequences of the proceedings. Driggs *v.* Morgan, 10 Rob. (La.) 119.

19. **When defendant may sue.**— A debtor arrested at the instance of his creditor, in order to compel payment of the debt with property exempt by the constitution, may sue for damages for abuse of process before the termination of the action in which he was arrested. Lockhart *v.* Bear, 117 N. C. 298, 23 S. E. 484.

Presumption as to waiver of wrong.—In the absence of an affirmative statement or action to the contrary, the presumption is that a person wrongfully arrested and illegally held in custody neither consented to the wrong nor waived the illegality. *In re* Baum, 61 Kan. 117, 58 Pac. 958.

20. **An attorney will be liable** for maliciously procuring an arrest when he knew there was no cause of action. Burnap *v.* Marsh, 13 Ill. 535.

Malice alone is insufficient to support an action for the abuse of legal process in making a civil arrest. There must also be a want of probable cause. Tucker *v.* Davis, 77 N. C. 330.

Estoppel to deny probable cause.— In an action for maliciously suing out a capias ad respondendum plaintiff is estopped to deny the existence of a probable cause of action by the fact that a judgment was rendered against him in the suit wherein he was arrested. Herman *v.* Brookerhoff, 8 Watts (Pa.) 240.

21. **Defendant decoyed within its jurisdiction.**—One who was induced by fraud to come within the jurisdiction of the court, in order that he might be arrested and imprisoned on a capias ad respondendum, may maintain an action therefor. Wanzer *v.* Bright, 52 Ill. 35.

To compel payment from exempt property. — A creditor who arrests his debtor in order to compel the payment of the debt from property which the constitution exempts from execution, is liable to the debtor for abuse of process. Lockhart *v.* Bear, 117 N. C. 298, 23 S. E. 484.

When process used in good faith.— A person who delivers a capias ad respondendum to an officer, with instructions to arrest defendant forthwith, is not liable for an arrest made while defendant was privileged from arrest, unless he knew or had cause to believe him to be privileged at that time. Sewell *v.* Lane, 1 Ind. 293. See also Ward *v.* Cozzens, 3 Mich. 252.

22. Cody *v.* Adams, 7 Gray (Mass.) 59; Curry *v.* Pringle, 11 Johns. (N. Y.) 444.

Sufficiency of affidavit.— An affidavit to obtain an order of arrest in which the statement that defendant, in removing his property, intends to defraud his creditors is made upon the deponent's belief, derived from statements made by a certain specified person, is legally sufficient to warrant the order in the first instance, although insufficient to support it on a motion to vacate. Such an order is erroneous merely, and, being within the jurisdiction of the judge, is a protection to the party obtaining it as well as to the officer who made the arrest under it before it was set aside. Hall *v.* Munger, 5 Lans. (N. Y.) 100.

23. **Leave of court.**— In order to sue on an undertaking for an order of arrest under N. Y. Code Civ. Proc. § 559, leave of court need not be obtained under section 814, since the latter section, by its terms, applies only to bonds or undertakings given to the people or to a public officer. Krause *v.* Rutherford, 45 N. Y. App. Div. 132, 60 N. Y. Suppl. 1047.

Without first proceeding against plaintiff. — A party arrested in a civil action may sue in the first instance on the undertaking without proceeding against the party who procured the arrest. Keck *v.* Gross, 6 Misc. (N. Y.) 438, 26 N. Y. Suppl. 1111, 58 N. Y. St. 301.

Right is assignable.— The right to recover damages upon an undertaking given to procure an order of arrest is assignable. Bamberger *v.* Kahn, 43 Hun (N. Y.) 411.

When plaintiff is not proper party.— A plaintiff who did not sign the undertaking for arrest is not a proper party defendant in an action for damages on the undertaking. Gobbi *v.* Associazone Fraterna, 32 Misc. (N. Y.) 756, 65 N. Y. Suppl. 672.

24. **Pending an appeal** one arrested and discharged by a justice cannot maintain an action on the undertaking given to procure his arrest. Stechhan *v.* Roraback, 67 Cal. 29, 7 Pac. 7. But, where an action was instituted on an undertaking for an arrest on civil process, which arrest had been vacated and an appeal taken from the vacating order, and notice therein given plaintiff (defendant in the original action) before answer filed, the notice of appeal was ineffectual as a bar to plaintiff's action on the undertaking, defendant not having perfected the appeal by executing the undertaking therein required under N. Y. Code Civ. Proc. § 1326. Ferris *v.* Tannebaum, 15 N. Y. Suppl. 295, 39 N. Y. St. 71, 27 Abb. N. Cas. (N. Y.) 136.

A consent order of the parties, vacating an order of arrest, is not a judicial determination that plaintiff in the original action was not entitled to the order of arrest, and, hence, will not support an action on the undertaking. Hallen *v.* Jones, 2 Misc. (N. Y.) 249, 21

and this has been held to be true even though the original cause is still pending.[25]

b. Release of Sureties From Liability. The sureties are released from liability on the undertaking when, without their consent, plaintiff and defendant enter into a stipulation which changes their relative positions or alters the terms of the contract;[26] but they cannot escape responsibility because their principal has put himself beyond the jurisdiction of the court,[27] nor can they take advantage of their own wrong by escaping liability because of defects in the undertaking for which they are responsible.[28]

M. Bonds For Relief of Imprisoned Debtors — 1. In General. It seems that a bond for the relief of a poor debtor is not vitiated either by the fact that it contains trifling defects[29] or contains conditions not required by the statute which authorizes the relief.[30]

2. Release of Sureties From Liability. It has been held that the sureties on a prison-bounds bond[31] or a poor debtor's bond[32] are released from further liability

N. Y. Suppl. 943, 50 N. Y. St. 329 [*reversing* 1 Misc. (N. Y.) 192, 20 N. Y. Suppl. 659, 48 N. Y. St. 937].

Judgment as to one of two defendants.— Where, in an action against two defendants, plaintiff gave an undertaking for their arrest, by which the sureties bound themselves that plaintiff would pay costs and damages if defendants recovered judgment, one defendant who has recovered judgment cannot maintain an action on the bond while the action is pending as to the other. Miller *v.* Herlich, 5 N. Y. St. 909.

Setting aside default.— When a plaintiff who has given an undertaking for arrest is defaulted in the principal action while absent, and a judgment is also procured against him on such undertaking, he is entitled, upon good cause shown, not only to have the default set aside, but also the judgment which was rendered upon the undertaking. Wettig *v.* Moltz, 45 N. Y. Super. Ct. 389.

25. Krause *v.* Rutherford, 45 N. Y. App. Div. 132, 60 N. Y. Suppl. 1047; Allaire *v.* Kalfon, 20 N. Y. App. Div. 546, 47 N. Y. Suppl. 969.

Even though cause of action and cause of arrest are identical, this is true, for, although a final judgment for plaintiff may thus indicate that the arrest was proper, the liability on the bond is fixed by the discharge from arrest. Squire *v.* Senia, 2 Misc. (N. Y.) 577, 21 N. Y. Suppl. 1027, 51 N. Y. St. 220; Squire *v.* McDonald, 2 Misc. (N. Y.) 422, 21 N. Y. Suppl. 1025, 50 N. Y. St. 762, 23 N. Y. Civ. Proc. 150.

Where ground authorizing arrest abandoned.— In an action in the superior court in which plaintiff joined causes for fraud, money received in a fiduciary capacity, and on account, and defendant was arrested, and, before trial, the cause for fraud was eliminated by consent and the arrest vacated, whereupon defendant brought an action in the city court against the sureties on the undertaking, it was held that the action was not prematurely brought, and that, to enable it to be sustained, the ground or propriety of the order vacating the arrest need not be determined, and that the amended complaint and papers were admissible to prove that fraud had been eliminated from the original action. Rothwell *v.* Paine, 9 N. Y. Civ. Proc. 128.

An order vacating an order of arrest which has become final by expiration of the time allowed for appeal is a final decision that plaintiff was not entitled to the order vacated, authorizing action on plaintiff's undertaking, even though the subsequent judgment may be for plaintiff and establish the right to an order of arrest. Silverstein *v.* Rugiero, 28 Misc. (N. Y.) 139, 58 N. Y. Suppl. 1059 [*affirming* 26 Misc. (N. Y.) 872, 57 N. Y. Suppl. 1147].

Under the former practice in New York the entry of judgment in favor of defendant was a condition precedent to liability on plaintiff's undertaking for the order of arrest (Parshall *v.* Hammond, 5 Alb. L. J. 381), and the obligors in the undertaking were not liable thereon when the action in which it was given was simply discontinued (Moses *v.* Waterbury Button Co., 37 N. Y. Super. Ct. 393).

26. Schuyler *v.* Englert, 10 Daly (N. Y.) 463, 62 How. Pr. (N. Y.) 479; Miller *v.* Herlich, 5 N. Y. St. 909. *Compare* Rothwell *v.* Paine, 9 N. Y. Civ. Proc. 128.

27. Rogay *v.* Juilliard, 25 La. Ann. 305.

28. Thus, the failure of plaintiff in an action in which an order of arrest was granted to have the undertaking approved by the judge will not relieve the sureties from responsibility thereon (Keck *v.* Gross, 6 Misc. (N. Y.) 438, 26 N. Y. Suppl. 1111, 58 N. Y. St. 301), and the fact that an arrest bond is several, and not joint and several, does not relieve the sureties from liability when they are sued severally (Rothwell *v.* Paine, 9 N. Y. Civ. Proc. 128).

29. Gilmore *v.* Edmunds, 7 Allen (Mass.) 360.

30. Kavanagh *v.* Saunders, 8 Me. 422; Anderson *v.* Foster, 2 Bailey (S. C.) 500.

31. **Not assignable.**— A bond taken under the Prison Bounds Act is not assignable (Peck *v.* Glover, 1 Nott & M. (S. C.) 582), at any rate, not until a breach of the bond occurs (Tunison *v.* Cramer, 5 N. J. L. 586).

32. **Validity.**— A bond to take the poor-debtors' oath, voluntarily given by a creditor under arrest on mesne process, to his creditor,

thereunder when the sheriff voluntarily permits their principal to escape,[33] or when their principal, within the life of the bond, surrenders himself into custody[34] fulfils the conditions of the bond.[35] The same is true where the principal is dis-

is valid at common law if it is given without duress or abuse of legal process. Pindar *v.* Upton, 44 N. H. 358.

33. Huntington *v.* Williams, 3 Conn. 427.

34. Morrow *v.* Weaver, 8 Ala. 288, prison-bounds bond.

Surrender must be actual.— A poor debtor, enlarged on giving the statutory bond, who seeks to save forfeiture by surrendering himself into jail, can do so only by actually surrendering himself into the custody of the jailer and being received by him into actual custody. Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409.

35. **What conditions must be performed.**— The obligor is not required to perform any statutory provisions in relation to poor debtors except those recited in his bond (Bell *v.* Furbush, 56 Me. 178); but, if one of the conditions be "and further do and perform all that is required in and by the acts in such case made and provided," this imposes upon the poor debtor the duty of abiding by the order of the justices before whom he shall make disclosure (French *v.* McAllister, 20 Me. 465).

What is fulfilment.— A condition that the debtor will, within fifteen days after the last day of the term of the court at which judgment shall be rendered in the suit, notify the judgment creditor, for the purpose of disclosure, etc., is saved by a notice within fifteen days after the last day of the term at which judgment is rendered, although there had been an adjournment of the court and a special judgment had been entered prior to such adjournment (Parsons *v.* Hathaway, 40 Me. 132); but a forfeiture is not prevented by a notice to the creditor within fifteen days after judgment, but before the last day of the term of the court at which it is rendered (Hunkins *v.* Palmer, 48 Me. 251).

Where a recognizance in poor-debtor proceedings recited that defendant desired to take the oath for relief of poor debtors, and the oath that he did not intend to leave the state, and defendant, after due notice to plaintiff, applied to take oath only that he did not intend to leave the state, and, upon examination, plaintiff being present, the oath was refused, and defendant departed, after having waited in court until after the certificate of refusal had been attached to the writ and the court had stated that its duty in the matter was ended, it was held that there was no breach of the recognizance. Bessom *v.* McLaughlin, 166 Mass. 296, 44 N. E. 248.

What is not fulfilment.— A recognizance conditioned that the debtor "deliver himself up for examination, giving notice in the manner required" by Mass. Gen. Stat. c. 124, cannot be performed by a surrender to a single justice, since Mass. Stat. (1860), c. 215, substitutes two justices of the quorum for the single justice required by the former chapter. Dike *v.* Story, 7 Allen (Mass.) 349. Neither is a discharge by the commissioners of special bail, procured by fraud, a fulfilment of the conditions of the bond. Poole *v.* Vernon, 2 Hill (S. C.) 667.

Wrongful refusal of certificate of discharge. — A debtor who is entitled to his discharge is not liable on his recognizance because he departed without the magistrate's consent, after a wrongful refusal by such magistrate to give him a certificate of discharge. Coleman *v.* Hawkes, 120 Mass. 594.

Enjoinment of proceedings.— A recognizance conditioned that the debtor shall appear at an adjourned hearing and submit to examination, and abide the final order of the magistrate thereon, is discharged by the service on the magistrate of an injunction, procured by the creditor, prohibiting all further proceedings in the case. Palmer *v.* Everett, 7 Allen (Mass.) 358.

Evidence of performance.— Where a poor-debtor's oath has been administered within the appointed hour, evidence that the creditor had told the magistrate that he might as well discharge the debtor, as he (the creditor) should not appear, is competent to be submitted to the jury as tending to prove a waiver of the full hour. Lord *v.* Skinner, 9 Allen (Mass.) 376.

Where a debtor is carried before two justices of the peace and of the quorum, and by them ordered to be imprisoned because he is not entitled to a discharge from arrest, the mittimus, under the hands and seals of the justices, is competent evidence to prove the facts therein stated in an action on the debtor's bond (Cordis *v.* Sager, 14 Me. 475); but the notes of evidence of the commissioner of special bail, taken on the examination of a debtor, are inadmissible as evidence of the validity of the debtor's schedule (Hyatt *v.* Hill, 2 McMull. (S. C.) 55).

Conclusiveness of justice's certificate.— A certificate given by the justices to a poor debtor, in the form prescribed by the statute, is not conclusive, but *prima facie* evidence merely, that a citation was issued by the justices to, or was duly served upon, the creditor. Brown *v.* Foster, 6 R. I. 564.

Conclusiveness of officer's return.— In an action upon a poor-debtor's recognizance, oral evidence is inadmissible to show that the debtor's last and usual place of abode is different from that recited in the return of the officer who served the notice upon the debtor to appear for examination. Stewart *v.* Griswold, 134 Mass. 391. But evidence may be introduced to contradict the sheriff's return that the service was made in his county, where the only object of such evidence is to show that the service was made at a point too far distant from the place of examination to afford the requisite statutory notice. Francis *v.* Howard, 115 Mass. 236. And an officer's return, stating that he served the citation on a

charged in bankruptcy or insolvency proceedings from the obligation for which the arrest was made.[36]

3. FORFEITURE — a. What Works Forfeiture. On the other hand, the bond is forfeited by the failure of the principal obligor to faithfully perform any of the conditions thereof.[37]

b. Actions Brought Upon Forfeiture — (I) *MAY BE BROUGHT WHEN.* An action will not lie against the sureties until plaintiff has recovered judgment for his debt or damages against the principal in the bond.[38]

(II) *PLEADING.* The declaration in an action on a bail bond must aver facts showing that the taking of the bond was authorized by the debtor's situation;[39] and, in pleading a discharge under a poor-debtor's act, it is necessary to aver facts showing that the officer who granted the discharge had jurisdiction so to do.[40]

(III) *DEFENSES.* In an action on a debtor's bond the sureties may show that the writ upon which their principal was arrested was void;[41] but may not question the exercise of a discretionary power by the officer who granted the process.[42]

(IV) *MEASURE OF DAMAGES.* When a forfeiture occurs, the sureties' liability is for the amount of damages actually sustained by the creditor, and not for the penalty of the bond.[43]

certain day, without specifying the hour, is not sufficient evidence that the citation was duly served, when the notice was sufficient if served before, but not if served after, a certain hour of such day. Park *v.* Johnston, 7 Cush. (Mass.) 265. The agreement of the parties that the debtor's notice of his examination failed to state the time of day at which the examination would be held, provided such fact was admissible against the officer's return, was held not to be a waiver of the conclusiveness of the return. Lowery *v.* Caldwell, 139 Mass. 88, 28 N. E. 451.

36. Young *v.* Whitton, 9 Ohio 100 (even though the insolvency proceedings are subsequently dismissed by a court of review); Caldclough *v.* Carey, 5 Watts & S. (Pa.) 155; Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Simms *v.* Slacum, 3 Cranch (U. S.) 300, 2 L. ed. 446 (even though such discharge was obtained by fraud).

Discharge in another county.—An insolvent debtor, whose application to be discharged is pending in one county of Pennsylvania, need not make a second application in another county in which he has been arrested and given bond, since a discharge under the first will fulfil the conditions of the bond. Caldclough *v.* Carey, 5 Watts & S. (Pa.) 155.

37. Marston *v.* Savage, 38 Me. 128 (even though the existence of the ground of arrest is disproved); Adams *v.* Pierce, 177 Mass. 206, 58 N. E. 591; Detwiler *v.* Casselberry, 5 Watts & S. (Pa.) 179 (even though he is immediately surrendered into custody by his bondsmen); Headman *v.* O'Neil, 2 Bailey (S. C.) 190 (even though he is remanded to prison upon the creditor's application).

Escape of prison-bounds debtor from close custody.— When a debtor who has given a prison-bounds bond is confined in jail and escapes, the sureties on the bond are not liable for the escape. The liberty of the debtor, which is the consideration for the bond, fails as soon as he is committed to close confinement. Horton *v.* Hicks, 27 Ga. 311.

38. Harley *v.* Neilson, 2 Strobh. (S. C.) 166.

39. Gregory *v.* Thrall, 28 Vt. 305.

40. Brown *v.* Foster, 6 R. I. 564.

41. Learnard *v.* Bailey, 111 Mass. 160.

42. Supe *v.* Francis, 49 Mich. 266, 13 N. W. 584.

43. Richards *v.* Morse, 36 Me. 240; Sargent *v.* Pomroy, 33 Me. 388; French *v.* McAllister, 20 Me. 465; Goodwin *v.* Huntington, 17 Me. 74; Kellogg *v.* Manro, 9 Johns. (N. Y.) 300. *Contra,* Whiting *v.* Putnam, 17 Mass. 175, the court saying that a bond for the liberty of the prison-yard, given by one imprisoned on mesne process, is not subject to the equitable power of the court as is a bond given by one committed upon execution.

When liability is for nominal damages only. — In an action upon a poor-debtor's bond where there was no evidence in relation to the amount of damages except that the oath had been irregularly taken by the debtor before two magistrates, who had certified that he was clearly entitled to have the oath administered after a disclosure of his affairs, it was held that execution should issue for nominal damages only. Waldron *v.* Berry, 22 Me. 486.

Under Mass. Pub. Stat. c. 162, § 64, providing that, where a debtor files a recognizance and defaults, judgment shall be entered for the amount of the penalty, but execution shall be for so much thereof as may be justly due, the sureties on a recognizance, where the debtor defaults after he has by insolvency proceedings prevented plaintiff from obtaining judgment, are liable to execution only for nominal damages. Hopwood *v.* Smith, 170 Mass. 428, 49 N. E. 628.

Evidence in reduction of damages.— Evidence of the principal's insolvency is admissible to reduce the damages to a nominal amount. Downes *v.* Reily, 53 Me. 62.

Effect of bankruptcy on liability.— The liability of a surety on a bond to procure the release of a debtor from arrest before judg-

ARRESTANDIS BONIS NE DISSIPENTUR. A writ which lay for a person whose cattle or goods were taken by another, who, during a contest, was likely to make away with them and who had not the ability to render satisfaction.[1]

ARRESTANDO IPSUM QUI PECUNIAM RECEPIT. A writ which lay for apprehending a person who had taken the king's prest-money to serve in wars and then hid himself.[2]

ARRESTEE. In Scotch law, the person in whose possession a debt or property has been attached by arrestment.[3]

ARRESTER. In Scotch law, the person or creditor in whose behalf process of arrestment is issued.[4]

ARRESTMENT. In Scotch law, process in the nature of an attachment, whereby the person in whose hands any personal estate of the debtor is lodged is prohibited from delivering or paying the same till the creditor so arresting is paid or the debtor gives security to answer the demand.[5]

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM. A writ which lay for a denizen against the goods of aliens found within the kingdom, in recompense of goods taken from him in a foreign country, after denial of restitution.[6]

ARREST OF JUDGMENT. See CRIMINAL LAW; JUDGMENTS.

ARRET. A judgment, sentence, or decree of a court of competent jurisdiction.[7]

ARRIVE. To come to or reach one place from another.[8] (See, generally, MARINE INSURANCE.)

ARROGATIO. In the civil law, the adoption of a person *sui juris*.[9] (See, generally, ADOPTION OF CHILDREN.)

ment is rendered for the creditor is not an "uncertain or contingent demand," and such a surety becomes liable when the bond is forfeited though he is declared a bankrupt after signing the bond, but before it is forfeited, and is discharged as a bankrupt after such forfeiture. Woodard *v.* Herbert, 24 Me. 358.

Who may assess damages.— In an action on a poor-debtor's bond the damages are to be assessed by the court and not by the jury. Burbank *v.* Berry, 22 Me. 483.

1. Wharton L. Lex.
2. Jacob L. Dict.
3. Wharton L. Lex.
4. Burrill L. Dict.
5. Jacob L. Dict.
6. Jacob L. Dict.
7. Bouvier L. Dict.
8. Thomson *v.* U. S., 1 Brock. (U. S.) 407, 411, 23 Fed. Cas. No. 13,985.
9. Reinders *v.* Koppelmann, 68 Mo. 482, 497, 30 Am. Rep. 802.

ARSON

By Edmund Burke

CROSS-REFERENCES

For Matters Relating to:
Burglary With Intent to Commit Arson, see BURGLARY.
Civil Liability For Fires Set:
By Railroad, see RAILROADS.

For Matters Relating to — (*continued*)
Civil Liability For Fires Set — (*continued*)
Maliciously, see FIRES.
Negligently, see NEGLIGENCE.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Arson, at common law,[1] is usually defined as "the wilful and malicious burning the house or outhouse of another."[2]

II. NATURE AND ELEMENTS OF OFFENSE.

A. In General — 1. MALICE — INTENT — a. Generally. The burning must be wilful and malicious, and not accidental; otherwise, it is not felony, but only a trespass;[3] and, ordinarily, there must be an intent to destroy the property fired,[4]

1. **Under statutes,** the crime has, in some jurisdictions, been distinguished by degrees (see Lacy *v.* State, 15 Wis. 13), and, in most jurisdictions, extended to embrace the burning of buildings other than those immediately appertaining to the dwelling-house (see *infra*, II, A, 3), as well as the burning of one's own dwelling with intent to injure or defraud another (see *infra*, II, A, 5; II, B), and even the setting fire to or burning of certain kinds of personal property, more particularly the immediate products of the soil (see *infra*, II, A, 3, h).

Where a statute does not denounce the offense eo nomine, as in Louisiana, it has been held that, under the generic term "arson" are included the offenses described in La. Rev. Stat. §§ 841–843, as the burning in the nighttime of any inhabited house or water-craft, burning of the same in the daytime, and the burning of any other houses or water-craft not provided for in the preceding sections, each of which is but one class of arson, with a specific punishment attached. State *v.* Fulford, 33 La. Ann. 679.

Where a statute does not define the offense, but fixes the punishment therefor, the common law must be looked to for its proper definition. Aikman *v.* Com., 13 Ky. L. Rep. 894, 18 S. W. 937; Cochrane *v.* State, 6 Md. 400; State *v.* Hannett, 54 Vt. 83.

2. *Alabama.*—Graham *v.* State, 40 Ala. 659.
Arkansas.— Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.
California.— People *v.* Myers, 20 Cal. 76.
Connecticut.— State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336.
Georgia.— Hester *v.* State, 17 Ga. 130.
Missouri.— State *v.* McCoy, 162 Mo. 383, 62 S. W. 991.
New York.— People *v.* Fanshawe, 137 N. Y. 68, 73, 32 N. E. 1102, 50 N. Y. St. 1.
Vermont.— State *v.* Dennin, 32 Vt. 158.
England.— 4 Bl. Comm. 220.

Other definitions are: "The malicious burning of another's house." Graham *v.* State, 40 Ala. 659, 664.

"The malicious and voluntary burning the house of another by night or day." 1 East P. C. 1015; 1 Hale P. C. 566 [*quoted* in Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166; State *v.* Porter, 90 N. C. 719, 720]; 1 Hawkins P. C. c. 39.

If homicide result, ordinarily the act is murder. State *v.* Cooper, 13 N. J. L. 361, 25 Am. Dec. 490. See, generally, HOMICIDE.

3. *Alabama.*— Heard *v.* State, 81 Ala. 55, 1 So. 640; Winslow *v.* State, 76 Ala. 42.
California.— People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265.
Colorado.— Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111.
Delaware.— State *v.* Hand, 1 Marv. (Del.) 545, 41 Atl. 192.
Georgia.— Jenkins *v.* State, 53 Ga. 33, 21 Am. Rep. 255.
Illinois.— Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; McDonald *v.* People, 47 Ill. 533.
Iowa.— State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275; State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159.
Kentucky.—Aikman *v.* Com., 13 Ky. L. Rep. 894, 18 S. W. 937.
Maryland.— Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166.
Mississippi.— Jesse *v.* State, 28 Miss. 100.
Missouri.— State *v.* Jones, 106 Mo. 302, 17 S. W. 366. But see State *v.* McCoy, 162 Mo. 383, 62 S. W. 991.
New Hampshire.— State *v.* Gove, 34 N. H. 510.
North Carolina.—State *v.* Mitchell, 27 N. C. 350, holding that the word "or" before "maliciously" in N. C. Rev. Stat. c. 34, § 7, must be read "and."
England.— 4 Bl. Comm. 220, 222; 2 East P. C. 1015.

4. People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265; People *v.* Long, 2 Edm. Sel. Cas. (N. Y.) 129; State *v.* Phifer, 90 N. C. 721; Reg. *v.* Harris, 15 Cox C. C. 75; Reg. *v.* Nattrass, 15 Cox C. C. 73. See also Reg. *v.* Batstone, 10 Cox C. C. 20 (holding that throwing a light into a postoffice letter-box in a house, with the intention of merely burning the letters, is not felony); Reg. *v.* Child, L. R. 1 C. C. 307, 12 Cox C. C. 64 note, 40 L. J. M. C. 127, 24 L. T. Rep. N. S. 556, 19 Wkly. Rep. 726 (holding that setting fire to goods,

though, if a person set fire to or burn a house while engaged in the commission of a felony, it is arson, even though there was no intent to set fire to or burn the building.[5] It is immaterial, however, whether the motive be gain, revenge, or any other kind of malicious mischief.[6]

b. To Escape From Jail. It has been frequently held that if a prisoner burn a part of a jail merely for the purpose of effecting his escape, and not with the intent to destroy the building, he is not guilty of arson;[7] but it would seem that a more logical and consistent view is that taken by the authorities deciding to the contrary.[8] The authorities are agreed, however, that if he intends to burn down the building to effect his main design, which is to escape, he is guilty.

2. The Burning — a. In General. An intent, or even attempt, to commit the crime by actually setting the fire, unless it absolutely burns the house, does not fall within the description *incendit et combussit*.[9] Yet, if there is actual ignition[10] of any part of the house, though the fire immediately go out of itself,

with intent to injure the owner thereof, does not amount to a felony under the statute, although the house in which the goods were stored caught fire).

Intent to produce death.— Under a statute defining arson in the first degree as the wilful burning of a dwelling-house containing a human being, the specific intent to produce death is not essential, and it is even immaterial whether defendant knew that the building burned was usually, or had at any time, been occupied by persons lodging therein. People *v.* Orcutt, 1 Park. Crim. (N. Y.) 252. See also *infra*, II, A, 3, a, (II), (B).

5. People *v.* Fanshawe, 137 N. Y. 68, 32 N. E. 1102, 50 N. Y. St. 1 [*affirming* 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 47 N. Y. St. 331, 8 N. Y. Crim. 326]; Reg. *v.* Lyons, Bell C. C. 38, 8 Cox C. C. 84, 5 Jur. N. S. 23, 28 L. J. M. C. 33, 7 Wkly. Rep. 58. But see Reg. *v.* Faulkner, 13 Cox C. C. 550, 11 Ir. R. C. L. 8, wherein it was held that accidentally setting fire to a ship while the prisoner was there in an attempt to steal was not arson.

6. People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265; State *v.* McCoy, 162 Mo. 383, 62 S. W. 991; People *v.* Jones, 2 Edm. Sel. Cas. (N. Y.) 86; Rex *v.* Salmon, R. & R. 26.

7. Washington *v.* State, 87 Ga. 12, 13 S. E. 131; Jenkins *v.* State, 53 Ga. 33, 21 Am. Rep. 255; People *v.* Cotteral, 18 Johns. (N. Y.) 115; State *v.* Mitchell, 27 N. C. 350; Delany *v.* State, 41 Tex. 601.

8. Lockett *v.* State, 63 Ala. 5; Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269; Martin *v.* State, 29 Ala. 30; State *v.* Byrne, 45 Conn. 273; State *v.* Nevelle, 2 Ohio Dec. (Reprint) 358, 2 West. L. Month. 494; Willis *v.* State, 32 Tex. Crim. 534, 25 S. W. 123; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773. See 4 Cent. Dig. tit. "Arson," § 5.

9. *Alabama.*— Graham *v.* State, 40 Ala. 659.

Arkansas.— Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

California.— People *v.* Haggerty, 46 Cal. 354; People *v.* Myers, 20 Cal. 76.

Maryland.— Cochrane *v.* State, 6 Md. 400.

North Carolina.— State *v.* Hall, 93 N. C. 571; State *v.* Sandy, 25 N. C. 570.

England.— Reg. *v.* Russell, C. & M. 541, 41 E. C. L. 295; Reg. *v.* Parker, 9 C. & P. 45, 38 E. C. L. 39; Rex *v.* Taylor, 2 East P. C. 1020, 1 Leach 49; 4 Bl. Comm. 222.

See 4 Cent. Dig. tit. "Arson," § 23.

Result of explosion.— By the force of a dynamite explosion, splinters of the ceiling of a house were scattered on the floor. Some of these splinters were on fire. Some of the paper between the tin roofing and the rafters also burned. It was held that, on a trial under an indictment charging defendant with the burning of the house, but not drawn under Tex. Pen. Code (1895), art. 761, making the explosion of a house by explosives arson, it was error to refuse an instruction that the explosion did not come within the definition of arson, unless it resulted in setting the house on fire, in contradistinction to the burning of the parts of the house blown off and detached therefrom. Landers *v.* State, 39 Tex. Crim. 671, 47 S. W. 1008.

"Setting fire to" synonymous with "burn." — Although 9 Geo. I, c. 22, provided that "if any person or persons, shall 'set fire to' any house," etc., it was construed to have made no departure from the common-law requirement that there must be an actual burning to constitute the crime. Rex *v.* Taylor, 5 East P. C. 1820, 1 Leach 49; Rex *v.* Spalding, 2 East P. C. 1025, 1 Leach 218; Rex *v.* Breeme, 2 East P. C. 1026, 1 Leach 220. So, too, "setting fire to" and "burning" were held to be synonymous in State *v.* Taylor, 45 Me. 322; State *v.* Jones, 106 Mo. 302, 17 S. W. 366; but the contrary was asserted in Howel *v.* Com., 5 Gratt. (Va.) 664; and in Graham *v.* State, 40 Ala. 659, 664, it was said: "It has been held that the words 'set fire to' are substantially synonymous with the word 'burn' when used with reference to a house. Ordinarily, and in common acceptation, the phrase 'set fire to,' would be understood to convey a different meaning from the word 'burn,' when applied to a house, or anything else." See also Benbow *v.* State, (Ala. 1901) 29 So. 553; State *v.* Babcock, 51 Vt. 570.

10. The flames need not be visible.—Graham *v.* State, 40 Ala. 659; Rex *v.* Stallion, 1 Moody 398.

Scorching or smoking.— The offense is not complete where the building is simply scorched

the offense is committed,[11] and it is immaterial how small a part is consumed,[12] provided there be a perceptible wasting of the fiber of the structure,[13] or, as it is commonly expressed, that the material be charred,[14] even where the offense in its highest degree is visited with capital punishment.[15]

b. Means Employed — (I) *In General.* If the burning be wilful, it is not material how the fire was communicated.[16] It need not have been applied by defendant with his own hand,[17] nor need he even have been present if he procured, aided, and abetted the commission of the crime.[18]

(II) *Fire Communicated to Another Building.* If a person sets fire to one building with intent that the fire should be communicated to and burn another, this is, in law, deemed the burning of the latter.[19]

3. The Structure or Property Burned — a. Houses or Dwelling-Houses — (I) *In General.* The common law only threw its protection over such houses as were used for the habitation of man,[20] this protection, however, was held to extend, not only to the very dwelling-house, but to all outhouses which were a

or smoked, without the fire being actually communicated thereto. Woolsey *v.* State, 30 Tex. App. 346, 17 S. W. 546.

11. Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464; People *v.* Cotteral, 18 Johns. (N. Y.) 115 (an indictment for burning a building with intent to defraud an insurance company); State *v.* Babcock, 51 Vt. 570; 3 Coke Inst. 66; 1 Hale P. C. 568, 569.

12. *Alabama.*— Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269; Graham *v.* State, 40 Ala. 659; Martin *v.* State, 29 Ala. 30.

Connecticut.—State *v.* Byrne, 45 Conn. 273.

Massachusetts.— Com. *v.* Van Schaack, 16 Mass. 105.

North Carolina.—State *v.* Mitchell, 27 N. C. 350.

Texas.— Delany *v.* State, 41 Tex. 601; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

But see State *v.* De Bruhl, 10 Rich. (S. C.) 23, to the effect that, under 22 & 23 Car. II, c. 7, providing that "if any person shall," etc., "burn, or cause to be burnt or destroyed, any ricks," etc., "barns, or other houses or buildings," etc., no injury to any building comes within the meaning of the statute which does not unfit it for the purpose for which it was erected.

See 4 Cent. Dig. tit. "Arson," § 23.

It is sufficient that a wooden partition annexed to a building was charred by fire, and in one place burned through (People *v.* Simpson, 50 Cal. 304); that some of the window-frames, casings, and doors of the building were so injured that they had to be repaired and in some instances replaced (State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722); that the floor of a house was charred to the depth of half an inch (State *v.* Sandy, 25 N. C. 570); that, where wood was placed on the steps of a house and fired, the fire communicated to the door and would soon have caught the roof had it not been extinguished (Blanchette *v.* State, (Tex. Crim. 1893) 24 S. W. 507); or that the straw entering into the composition of the roof was burned (Rex *v.* Stallion, 1 Moody 398).

13. People *v.* Haggerty, 46 Cal. 354; Com. *v.* Tucker, 110 Mass. 403.

14. Benbow *v.* State, (Ala. 1901) 29 So. 553; Reg. *v.* Parker, 9 C. & P. 45, 38 E. C. L. 39.

"Charred" means the reduction of the wood to coal. State *v.* Hall, 93 N. C. 571; State *v.* Sandy, 25 N. C. 570.

15. People *v.* Butler, 16 Johns. (N. Y.) 203; *In re* Butler, 4 City Hall Rec. (N. Y.) 77.

16. Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

Placing matches where liable to be ignited. — If defendant places matches in a gin-house, amid unginned cotton, with the intention and expectation that they will be ignited by the necessary or probable handling of the cotton, and they are ignited, in consequence of which the gin-house is burned, he is guilty of burning it. Overstreet *v.* State, 46 Ala. 30.

17. People *v.* Jones, 123 Cal. 65, 55 Pac. 698; People *v.* Trim, 39 Cal. 75; State *v.* Squaires, 2 Nev. 226; Allen *v.* State, 10 Ohio St. 287.

18. Allen *v.* State, 10 Ohio St. 287; Searles *v.* State, 6 Ohio Cir. Ct. 331; Reg. *v.* Clayton, 1 C. & K. 128, 47 E. C. L. 128.

19. *Alabama.*— Grimes *v.* State, 63 Ala. 166.

California.— People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919.

Kentucky.— Combs *v.* Com., 93 Ky. 313, 14 Ky. L. Rep. 283, 20 S. W. 221.

New York.— Hennessey *v.* People, 21 How. Pr. (N. Y.) 239.

North Carolina.— State *v.* Laughlin, 53 N. C. 354.

South Carolina.— Gage *v.* Shelton, 3 Rich. (S. C.) 242.

England.— Rex *v.* Cooper, 5 C. & P. 535, 24 E. C. L. 694.

But, where, by the felonious burning of an uninhabited building, a dwelling-house is endangered, the communicating of the fire from such building to the dwelling-house does not raise the crime to the grade of arson in the first degree, unless, when the dwelling-house took fire, there was a human being therein. State *v.* Grimes, 50 Minn. 123, 52 N. W. 275. See also *infra*, II, A, 3, a, (II), (B).

20. State *v.* Porter, 90 N. C. 719.

part thereof, even though they were not contiguous to such dwelling-house or under the same roof with it.[21]

(II) *Meaning of "House"*—(A) *In General.* A house has been defined as any building or structure inclosed with walls and covered, whatever may be the materials used for building,[22] and every house for the dwelling and habitation of man is taken to be a dwelling-house.[23]

(B) *Necessity of Human Occupation.* By the preponderance of authority, to constitute the structure a dwelling-house it must at the time have been occupied by a human being, even though it were designed and intended for a dwelling;[24]

21. *Connecticut.*—State *v.* Stewart, 6 Conn. 47.

Ohio.— Allen *v.* State, 10 Ohio St. 287.

South Carolina.— State *v.* Carter, 49 S. C. 265, 27 S. E. 106, holding that setting fire to the dwelling-house itself, as well as to the parcels thereof, is arson, within a statute declaring that one who sets fire to a building within the curtilage of any house or room wherein persons habitually sleep, whereby such dwelling-house or sleeping apartment shall be endangered, may be sentenced to death.

Virginia.— Page *v.* Com., 26 Gratt. (Va.) 943.

England.— 2 East P. C. 1020; 1 Hale P. C. 566 [*quoted* in State *v.* Porter, 90 N. C. 719].

To make an outhouse, not adjoining a dwelling-house, nor under the same roof, parcel thereof, within the meaning of Va. Code (1873), c. 188, § 1, providing for the punishment by death of any person who shall set fire to certain buildings, two things must appear: (1) that such outhouse is within the curtilage of the dwelling-house, and occupied therewith; and (2) that some person usually lodges therein at night. Page *v.* Com., 26 Gratt. (Va.) 943.

A barn is not parcel of the house when it stands eighteen rods from the mansion-house, entirely disconnected therefrom, and separated by a highway. State *v.* Stewart, 6 Conn. 47.

Adjoining a dwelling-house.— Where the statute relates to buildings "adjoining" a dwelling-house this means "adjacent to" or "contiguous." State *v.* Downs, 59 N. H. 320; Peverelly *v.* People, 3 Park. Crim. (N. Y.) 59. See, generally, ADJOINING.

"Belonging to" dwelling-house.— A barn, part of the necessary buildings of a farm, though not adjoining or connected with the dwelling-house thereon, so situated that its destruction by fire would endanger said dwelling-house, is a barn "belonging" thereto, within Brightly Purd. Dig. Pa. p. 353, § 137, and the setting fire thereto is felonious arson. Hill *v.* Com., 98 Pa. St. 192.

22. Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

23. McLane *v.* State, 4 Ga. 335. See also People *v.* Fisher, 51 Cal. 319, holding that it is not necessary that the building should have been intended for, or should have been used as, a habitation, but that it is sufficient if it is capable of affording shelter for human beings.

A barrel-house appurtenant to a cooperage shop fifty yards distant from the dwelling-house of its owner, and outside of the fence surrounding it, is a house within Tenn. Code, § 4668. Pike *v.* State, 8 Lea (Tenn.) 577.

A building erected for the temporary use of workmen, to dry their clothes and take their meals therein, although a person sleeps there with the knowledge but without permission of the owner, is not a dwelling-house. Reg. *v.* England, 1 C. & K. 533, 47 E. C. L. 533.

A freight-car body, detached from the wheels and placed on permanent posts, where used as a freight warehouse, is a house within Ga. Pen. Code, § 136. Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262.

A gin-house is not included in the term "houses." State *v.* Thorne, 81 N. C. 413.

A small one-room structure, not occupied for years, which was unfit for habitation and had for many years been used only for storage purposes, is not a house within Ala. Crim. Code, §§ 3780, 3781. Henderson *v.* State, 105 Ala. 82, 16 So. 931.

A tenement-house is a dwelling-house within the meaning of 2 N. Y. Rev. Stat. 657, § 9. Levy *v.* People, 80 N. Y. 327 [*affirming* 19 Hun (N. Y.) 383].

Remnants of building.— The remains of a wooden dwelling, after a previous fire, which rendered the building untenantable, is not a building within the statute. Reg. *v.* Labadie, 32 U. C. Q. B. 429. See also Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435, holding that a person cannot be convicted of arson, under Tex. Pen. Code, arts. 651, 652, for burning the materials of a crib after having torn it down.

Separate stories with different occupants.— Where the upper and lower stories of a building are respectively occupied by different tenants as a dwelling and as a store, and there is no mode of interior communication, the dwelling is not parcel of the store so that, if burned by setting fire to the store, the offense can be punished as if it were a burning of the dwelling. People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

24. Hicks *v.* State, (Fla. 1901) 29 So. 631; Stallings *v.* State, 47 Ga. 572; State *v.* Warren, 33 Me. 30. *Contra*, under Ind. Rev. Stat. (1881), § 1927. Garrett *v.* State, 109 Ind. 527, 10 N. E. 570.

A building which has never been occupied cannot be considered as a dwelling-house, although designed for said purpose. Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51; Com. *v.*

but a temporary absence will not, ordinarily, affect the character of the house.[25] It is not necessary, however, that the whole of the building be so occupied or that the entire building be devoted exclusively to human habitation,[26] nor need the accused have knowledge that the building burned was usually, or at any time, occupied by persons lodging therein.[27]

(III) *Meaning of "Curtilage."* The curtilage of a dwelling-house is a space, necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employment;[28] the yard, garden, or field which is near to, and used in connection with, the dwelling.[29] While, it has been said that it need not be separated from other lands by a fence,[30] the better rule seems to be to the contrary, though the inclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings within the inclosure.[31]

b. Barns, Outhouses, Cotton-Houses, and Corn-Cribs. While according to the construction of the word "house," it was arson at common law to burn a barn[32]

Barney, 10 Cush. (Mass.) 478; People *v.* Handley, 93 Mich. 46, 52 N. W. 1032.

Effect of opportunity to leave.— If, at the time the dwelling-house takes fire, there was a human being therein, the provision of the statute to that effect is satisfied, although before that time the person had ample opportunity to leave the house. Whether the person is asleep or awake, or whether escape is practicable or not before the building takes fire, is not material. Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464 [*affirming* 3 Hun (N. Y.) 310, 5 Thomps. & C. (N. Y.) 539]. But it has been held that where the statute makes present habitation essential to the offense in its highest degree, it is a mitigating circumstance that the inmates are compelled by the offender to quit the house before it is set on fire. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

Presence in outhouse not parcel of dwelling. — The fact that the inmates of a dwelling-house were in an outbuilding not communicating with the dwelling-house when the dwelling-house was set on fire does not render the offense capital, where the outbuilding was not parcel of the dwelling-house. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

Presence of stranger.— Where a dwelling-house was entered and set on fire in the night-time by a mob, a stranger who went in at the same time for the purpose of protecting the persons and property of the inmates was not a person lawfully within the dwelling-house, within the meaning of the statute, and his being within the dwelling-house when the fire was applied does not render the arson capital. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

25. State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336; Meeks *v.* State, 102 Ga. 572, 27 S. E. 679; Johnson *v.* State, 48 Ga. 116; Com. *v.* Barney, 10 Cush. (Mass.) 478; Reg. *v.* Kimbrey, 6 Cox C. C. 464.

Where the vacancy has been prolonged for many months, it is otherwise. Com. *v.* Barney, 10 Cush. (Mass.) 478; State *v.* Clark, 52 N. C. 167; Hooker *v.* Com., 13 Gratt. (Va.) 763. See also Rex *v.* Lyon, 2 East P. C. 497, 1 Leach 185; Rex *v.* Fuller, 1 Leach 186 note.

26. State *v.* Jones, 106 Mo. 302, 17 S. W. 366; People *v.* Orcutt, 1 Park. Crim. (N. Y.) 252.

Part fired need not be occupied.— It is sufficient to constitute such crime if there was a human being in another part of the house at the time, though there was no one in that part of the house where the fire was started. State *v.* Young, 153 Mo. 445, 55 S. W. 82 [*citing* Levy *v.* People, 80 N. Y. 327].

27. People *v.* Orcutt, 1 Park. Crim. (N. Y.) 252.

28. State *v.* Shaw, 31 Me. 523, 527.

29. Cook *v.* State, 83 Ala. 62, 64, 3 So. 849, 3 Am. St. Rep. 688.

"Curtilage" and "courtyard" are used as synonyms. Roscoe Crim. Ev. 277 [*cited* in Com. *v.* Barney, 10 Cush. (Mass.) 480].

30. State *v.* Shaw, 31 Me. 523.

31. Com. *v.* Barney, 10 Cush. (Mass.) 480.

It includes the garden, should there be one (State *v.* Shaw, 31 Me. 523); and a barn opening into the yard, immediately adjoining the dwelling, and forming a part of the inclosure (Washington *v.* State, 82 Ala. 31, 2 So. 356), standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication by a pair of bars (People *v.* Taylor, 2 Mich. 250), or situated in an inclosure which was surrounded by a general fence, though the yard in which the barn stood was separated from the yard immediately about the house by a stone wall, is within the curtilage (Reg. *v.* Gilbert, 1 C. & K. 84, 47 E. C. L. 84), but one situated fifteen rods from the dwelling-house, with a public highway passing between them, and a yard between the barn and the highway, is not (Curkendall *v.* People, 36 Mich. 309).

32. **A barn** is "a covered building for securing grain, hay, flax, and other productions of the earth" (State *v.* Laughlin, 53 N. C. 354, 355 [*quoting* Webster Dict.]), but it is not necessary that it should be designed or used in whole or in part for the storage of hay, corn, or produce of any kind (State *v.* Smith, 28 Iowa 565). A building of hewn logs, twenty-six feet by fifteen feet in size, with a partition, on one side of which horses were kept, and on the other fodder, hay, oats, etc., with sheds adjoining, where were kept farming utensils, is a barn (State

or outhouse[33] which was parcel of a dwelling-house,[34] it was also arson at common law to burn a barn, not parcel of the dwelling-house, if at the time it contained hay or corn.[35] By statute, it has been made arson to burn an empty barn[36] or cotton-house,[37] a stable,[38] or an outhouse not parcel of the dwelling-house,[39] and, in some states, the crime has been extended to include, either expressly or impliedly, the burning of corn-cribs,[40] though this has been held not to be included in the prohibition of setting fire to "or burning any barn, stable . . . storehouse or warehouse."[41]

c. Churches and Schools. To burn a school-house is not arson at common law,[42] but it has been held that a school-house is included within the meaning of the word "dwelling-house,"[43] "house,"[44] and "any other outhouse not parcel of a dwelling-house."[45] So, too, a church has been held to be a "house" within the meaning of a statute defining the crime.[46]

d. Jails. A jail in which there are prisoners or other residents at the time

v. Cherry, 63 N. C. 493); but a house eighteen feet long and fifteen feet wide, built of logs notched up, the cracks covered inside with rough boards, roofed with rough boards, with a good plank floor, and a door about four feet high, containing, at the time of the burning, a quantity of corn, peas, and oats, though the only building on the farm used for storing the crop (State *v.* Jim, 53 N. C. 459), or a house seventeen feet long and twelve feet wide, placed on blocks in a stable-yard, and having two rooms in it, one quite small, used for storing nubbins and refuse corn, to be first fed to stock, and the other used for storing peas, oats, and other products of the farm (State *v.* Laughlin, 53 N. C. 455) is not.

33. An outhouse is one that belongs to a dwelling-house, and is, in some respects, parcel of such dwelling-house and situated within the curtilage. State *v.* Roper, 88 N. C. 656, 658. *Compare* Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262. The term has been held to include a thatched pigsty in a yard, into which a door of the dwelling-house opens (Reg. *v.* Jones, 1 C. & K. 181, 2 Moody 208, 47 E. C. L. 181); an open shed in a farmyard, composed of upright supporting pieces of wood, with boards laid across them and covered with straw as a roof (Rex *v.* Stallion, 1 Moody 398), and a building, used as a school-room, separated from the house by a passage, but within the curtilage (Rex *v.* Winter, R. & R. 295); but not a cart hovel, consisting of a stubbled roof supported by uprights, in a field at a distance from other dwellings (Rex *v.* Parrot, 6 C. & P. 402, 25 E. C. L. 495); an open and isolated building (Rex *v.* Haughton, 5 C. & P. 555, 24 E. C. L. 705; Rex *v.* Ellison, 1 Moody 336); a building whereof one part is used as a stable and the other for storage (Reg. *v.* Munson, 2 Cox C. C. 186); a building not inhabited, although constructed and intended for a dwelling-house (Elsmore *v.* St. Briavells, 8 B. & C. 461, 6 L. J. K. B. O. S. 372, 2 M. & R. 514, 15 E. C. L. 229), or a building erected for a brick-oven, although subsequently used for keeping a cow (Reg. *v.* Colley, 2 M. & Rob. 475).

The words "house or outhouse" are not **synonymous,** as contained in the statute in relation to arson, and the offense is complete when either is burned. Whiteside *v.* State, 4 Coldw. (Tenn.) 175.

34. See *supra*, II, A, 3, a, (I).

35. State *v.* Smith, 28 Iowa 565; Sampson *v.* Com., 5 Watts & S. (Pa.) 385; State *v.* Sutcliffe, 4 Strobh. (S. C.) 372; 4 Bl. Comm. 221; 1 Hale P. C. 567.

36. House *v.* House, 5 Harr. & J. (Md.) 125.

37. Washington *v.* State, 68 Ala. 85, where it is said that to make the burning of a cotton-pen arson, under the statute, it must contain cotton.

38. A building is not a stable though used as such originally, where it is later used as a lumber-shed only (Reg. *v.* Colley, 2 M. & Rob. 475), or where it was originally erected for a brick-oven, but subsequently used for keeping a cow (Rex *v.* Haughton, 5 C. & P. 555, 24 E. C. L. 705).

39. 2 East P. C. 1021.

40. Thus, the malicious burning of a crib of corn is arson, within the Louisiana act of March 18, 1858, section 3, making criminal the burning of any outhouse, or any other building or house not embraced and provided for in sections 1 and 2 of the act, which apply to inhabited houses or water-craft. State *v.* Millican, 15 La. Ann. 557.

What is a corn-crib.— A cabin which has been inhabited up to within a month or two before the attempt to burn it is not a corn-crib containing corn, although the owner had at that time deposited corn therein. Thomas *v.* State, 116 Ala. 461, 22 So. 666.

41. State *v.* Jeter, 47 S. C. 2, 24 S. E. 889.

42. Wallace *v.* Young, 5 T. B. Mon. (Ky.) 155.

43. State *v.* O'Brien, 2 Root (Conn.) 516 [*disapproved* in State *v.* Bailey, 10 Conn. 144, an information for burglary].

44. Wallace *v.* Young, 5 T. B. Mon. (Ky.) 155.

45. Jones *v.* Hungerford, 4 Gill & J. (Md.) 402, 405.

46. Watt *v.* State, 61 Ga. 66; McDonald *v.* Com., 86 Ky. 10, 9 Ky. L. Rep. 230, 4 S. W. 687.

has been held to be an inhabited "dwelling-house" or "building" within the meaning of statutes defining arson.[47]

e. Warehouses, Storehouses, Shops, and Offices. The statutes have also been extended to include the setting fire to and burning of buildings used for commercial purposes,[48] such as warehouses,[49] storehouses,[50] shops, or offices.[51]

f. Unfinished Structures. In general, an uncompleted structure, not ready for occupation or use, is not a building or dwelling-house,[52] though, if the building is so far advanced as to be ready for habitation or use, the burning of it may be arson.[53]

g. Ships and Vessels. The statutory inhibition has been made to include, also, the firing of vessels and ships.[54]

h. Stacks of Grain, Hay, Etc. It is said that it was felony at common law to wilfully and maliciously burn a stack of grain,[55] and generally, by statute, the burning of stacks of grain, hay, straw, and the like has been prohibited.[56]

47. *Alabama.*— Sands *v.* State, 80 Ala. 201; Walker *v.* State, 61 Ala. 30.

Connecticut.— State *v.* Byrne, 45 Conn. 273.

Idaho.— State *v.* Collins, 2 Ida. 1182, 31 Pac. 1048.

New York.— People *v.* Cotteral, 18 Johns. (N. Y.) 115.

Texas.— Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

Virginia.— Com. *v.* Posey, 4 Call (Va.) 109, 2 Am. Dec. 560. See also Stevens *v.* Com., 4 Leigh (Va.) 683, holding that, under a statute prohibiting the burning of any house or houses whatsoever, other than those enumerated in preceding sections, one may be indicted for burning the county jail.

England.— Rex *v.* Donnevan, 2 East P. C. 1020, 1 Leach 69, 2 W. Bl. 682. *Contra*, Reg. *v.* Connor, 2 Cox C. C. 65.

See 4 Cent. Dig. tit. "Arson," § 11.

48. Building used for carrying on trade.— A building used by a carpenter as a place of deposit for his tools is not "a building used in carrying on the trade of a carpenter" (Reg. *v.* Smith, 14 U. C. Q. B. 546); but a building used for the storing of timber and a deposit of tools is (Reg. *v.* Amos, 5 Cox C. C. 222, T. & M. 423, 2 Den. C. C. 65, 15 Jur. 90, 20 L. J. M. C. 103).

49. A warehouse is any building used as a warehouse when burned, although constructed and used for another purpose. Allen *v.* State, 10 Ohio St. 287. It includes a building used only by the owner in storing the tools and materials used by him in his personal business. Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047.

50. Hall *v.* State, 3 Lea (Tenn.) 552.

A building is a storehouse, within the meaning of N. C. Rev. Stat. c. 34, § 1, in which goods are kept for sale by a retail merchant. State *v.* Sandy, 25 N. C. 570.

51. A shop, in the sense of the statute, implies a house or building in which small quantities of goods, wares, or drugs, and the like are sold, or in which mechanics labor and sometimes keep their manufactures for sale. State *v.* Morgan, 98 N. C. 641, 3 S. E. 927.

Occupied for professional business.— The words "building or room," in the Indiana statute defining the crime of arson, are limited by the words: "occupied as a shop, or office for professional business;" and, hence, to render a person guilty of arson, under the statute, for burning such building or room, it must have been at the time occupied as an office for professional business. State *v.* O'Connell, 26 Ind. 266.

52. State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336; State *v.* Wolfenberger, 20 Ind. 242; Reg. *v.* Edgell, 11 Cox C. C. 132.

53. Com. *v.* Elliston, 14 Ky. L. Rep. 216, 20 S. W. 214; Com. *v.* Squire, 1 Metc. (Mass.) 258; Reg. *v.* Manning, L. R. 1 C. C. 338, 12 Cox C. C. 106, 41 L. J. M. C. 11, 25 L. T. Rep. N. S. 573, 20 Wkly. Rep. 102.

"Erected."— Where it was proved that the building was not up at the time; that the part which had been raised was not entirely inclosed, the floors were not laid, the stairs were not up, and no part of the building was ready for occupation, it was not, within the statute, a building "erected." McGary *v.* People, 45 N. Y. 153 [*reversing* 2 Lans. (N. Y.) 227].

54. A small pleasure-boat, eighteen feet long, is a ship or vessel. Rex *v.* Bowyer, 4 C. & P. 559, 19 E. C. L. 648. But, while setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law, unless some permanent part of the building be burned it does not come under Mass. Stat. (1804), c. 131, making criminal the malicious burning of any building, or any ship or vessel. Com. *v.* Francis, Thach. Crim. Cas. (Mass.) 240.

55. State *v.* Sutcliffe, 4 Strobh. (S. C.) 372, 400; 4 Bl. Comm. 221. *Contra*, Creed *v.* People, 81 Ill. 565.

56. A stack of beans may properly be described as a stack of pulse. Rex *v.* Woodward, 1 Moody 323.

A stack of grain may consist of flax with seed or grain in it (Reg. *v.* Spencer, 7 Cox C. C. 189, Dears. & B. 131, 2 Jur. N. S. 1212, 26 L. J. M. C. 16, 5 Wkly. Rep. 70), or of a stack of barley (Rex *v.* Swatkins, 4 C. & P. 548, 19 E. C. L. 643); but wheat threshed from the straw is not a stack of wheat (Erskine *v.* Com., 8 Gratt. (Va.) 624).

A stack of straw cannot consist of sedge and rushes (Reg. *v.* Baldock, 2 Cox C. C. 55),

4. Value of Property. Under some statutes, the value of the property burned is an element of the offense, while under others it is not.[57]

5. Ownership of Property — a. In General. As arson, at common law, was an offense against the security of the dwelling-house rather than the property in it,[58] there could, ordinarily, be no conviction of the owner for burning his own house,[59] even though the act was done with intent to defraud an insurer;[60] and, where it is not arson for a man to burn his own house, an agent or servant who sets fire to the house at the owner's request is not guilty of arson.[61] For this purpose the tenant or other person in possession was regarded as the owner, and

or, in part, of coleseed straw and part of wheat stubble (Rex *v.* Tottenham, 7 C. & P. 237, 32 E. C. L. 590), nor is a quantity of straw packed in a dory, in course of transportation to market, deemed a stack of straw (Reg. *v.* Satchwell, L. R. 2 C. C. 21, 12 Cox C. C. 449, 42 L. J. M. C. 63, 28 L. T. Rep. N. S. 569, 21 Wkly. Rep. 642).

Haystacks are *ejusdem generis* as "goods, wares, or merchandise," and are therefore properly embraced under the word "chattels." They are also included in the term "grass . . . standing in the field." State *v.* Harvey, 141 Mo. 343, 345, 42 S. W. 938.

To constitute a stack it is not necessary that it should be erected out of doors. Reg. *v.* Munson, 2 Cox C. C. 186.

57. Henderson *v.* State, 105 Ala. 82, 16 So. 931 (holding that the burning of a cotton-house containing cotton is arson in the second degree, under Ala. Crim. Code, § 3781, although the house, with its contents, is of less value than five hundred dollars, the provision therein as to the value having reference only to the buildings named in the section just preceding the provision as to the burning of cotton-houses); Brown *v.* State, 52 Ala. 345 (holding that, in arson in the third degree, the value of the property burned is not an element of the offense).

58. *California.*— People *v.* De Winton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 374.

Colorado.— Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111.

Connecticut.—State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602.

Indiana.— Ritchey *v.* State, 7 Blackf. (Ind.) 168; Emig *v.* Daum, 1 Ind. App. 146, 27 N. E. 322.

Kentucky.— Com. *v.* Elliston, 14 Ky. L. Rep. 216, 20 S. W. 214.

Maine.— State *v.* Haynes, 66 Me. 307, 22 Am. Rep. 569.

Michigan.— People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773; Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302.

Missouri.— State *v.* Wacker, 16 Mo. App. 417.

South Carolina.— State *v.* Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 32 L. R. A. 647.

Texas.— Tuller *v.* State, 8 Tex. App. 501.

Vermont.— State *v.* Hannett, 54 Vt. 83.

Washington.— State *v.* Biles, 6 Wash. 186, 33 Pac. 347; McClaine *v.* Territory, 1 Wash. 345, 25 Pac. 453.

Even the statutory offense, in the absence of qualifying words, is said to be against the habitation. Hicks *v.* State, (Fla. 1901) 29 So. 631.

59. *Alabama.*— Heard *v.* State, 81 Ala. 55, 1 So. 640; Davis *v.* State, 52 Ala. 357.

California.— People *v.* De Winton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 374.

Connecticut.—State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Lyon, 12 Conn. 487.

Maine.— State *v.* Haynes, 66 Me. 307, 22 Am. Rep. 569.

Massachusetts.— Bloss *v.* Tobey, 2 Pick. (Mass.) 320.

Tennessee.— Roberts *v.* State, 7 Coldw. (Tenn.) 359.

England.— Rex *v.* Isaac, 2 East P. C. 1031; Rex *v.* Probert, 2 East P. C. 1030; Rex *v.* Breeme, 2 East P. C. 1026, 1 Leach 220; Rex *v.* Spalding, 2 East P. C. 1025, 1 Leach 218.

See 4 Cent. Dig. tit. "Arson," § 19.

60. *Alabama.*— Heard *v.* State, 81 Ala. 55, 1 So. 640.

California.—People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265; People *v.* Schwartz, 32 Cal. 160.

Maine.— State *v.* Haynes, 66 Me. 307, 22 Am. Rep. 569.

New Hampshire.— State *v.* Hurd, 51 N. H. 176.

New York.— Shepherd *v.* People, 19 N. Y. 537. And see People *v.* Henderson, 1 Park. Crim. (N. Y.) 560.

South Carolina.— State *v.* Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 32 L. R. A. 647.

But see Roberts *v.* State, 7 Coldw. (Tenn.) 359, to the effect that, at common law, the burning of one's own house to defraud or injure an insurer was a misdemeanor, but not a felony; otherwise under the statute.

61. *Alabama.*— Heard *v.* State, 81 Ala. 55, 1 So. 640.

Maine.— State *v.* Haynes, 66 Me. 307, 22 Am. Rep. 569, holding that, where a statute refers in terms only to the owner, it may be construed to include the owner's servant also.

Massachusetts.—Com. *v.* Makely, 131 Mass. 421.

South Carolina.— State *v.* Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 32 L. R. A. 647.

Tennessee.— Roberts *v.* State, 7 Coldw. (Tenn.) 359.

See 4 Cent. Dig. tit. "Arson," § 21.

not he who held the fee,[62] and it seems immaterial whether such possession is lawful or otherwise.[63] It was, however, a high misdemeanor to set fire to one's own house or other building under circumstances endangering the property of others,[64] or when the house was inhabited by accused and other tenants in a populous city.[65] At the present time many statutes defining the offense make no distinction in reference to the ownership of the building destroyed, so that now the tenant is put upon the same plane as third persons.[66]

b. Husband or Wife of Accused. At common law, neither a husband or wife, because of their legal identity, could be guilty of the offense of burning the other's dwelling;[67] but, under statutes giving married women the right to own and control separate real estate the same as if sole, arson may be committed by a

62. *Alabama.*— Sullivan *v.* State, 5 Stew. & P. (Ala.) 175.

California.— People *v.* Simpson, 50 Cal. 304.

Connecticut.—State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602.

Indiana.— Garrett *v.* State, 109 Ind. 527, 10 N. E. 570; McNeal *v.* Woods, 3 Blackf. (Ind.) 485.

Michigan.—Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302.

Missouri.— State *v.* Young, 53 Mo. 445, 55 S. W. 82.

New Jersey.— State *v.* Fish, 27 N. J. L. 323.

New York.— People *v.* Smith, 3 How. Pr. (N. Y.) 226; People *v.* Gates, 15 Wend. (N. Y.) 159.

Vermont.— State *v.* Hannett, 54 Vt. 83.

England.—Archbold Crim. Pl. 336, 488; 4 Bl. Comm. 220; Rex *v.* Holmes, Cro. Car. 376, 2 East P. C. 1023, W. Jones 351; Rex *v.* Breeme, 2 East P. C. 1026, 1 Leach 220; Rex *v.* Spalding, 2 East P. C. 1025, 1 Leach 218; Rex *v.* Ball, 1 East P. C. 505, R. & M. 30; Rex *v.* Wallis, 1 Moody 344.

Hence, if a landlord or reversioner sets fire to his own house, of which another is in possession, under lease, it is arson (McNeal *v.* Woods, 3 Blackf. (Ind.) 485; Tuller *v.* State, 8 Tex. App. 501; Rex *v.* Harris, 2 East P. C. 1023, Foster 113; 4 Bl. Comm. 222), and this rule has not been changed by statute (Erskine *v.* Com., 8 Gratt. (Va.) 624).

One entitled only to dower out of a house which is leased to another, may commit arson by burning it. Rex *v.* Harris, 2 East P. C. 1023, Foster 113.

A mere **residence** in a house, without any interest therein, will not prevent it from being the house of another. As where the prisoner was a poor man, maintained by a parish, and had, some time before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning. Rex *v.* Rickman, 2 East P. C. 1034; Rex *v.* Gowan, 2 East P. C. 1027, 1 Leach 246.

Tenant under lease a part-owner.— Under Tex. Pen. Code, art. 660, denouncing the burning of a house by a part-owner, a tenant in possession of a house under a lease is a part-owner. Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

63. Avant *v.* State, 71 Miss. 78, 13 So. 881; Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027; People *v.* Van Blarcum, 2 Johns. (N. Y.) 105; Rex *v.* Wallis, 1 Moody 344.

64. Heard *v.* State, 81 Ala. 55, 1 So. 640; Davis *v.* State, 52 Ala. 357; People *v.* De Winton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 374 (holding, however, that under the California statutes, the owner of a building who was in possession thereof could not be convicted of arson for the burning of the same, though the building was so situated as to endanger the lives of the inhabitants of other buildings); State *v.* Laughlin, 53 N. C. 354; Rex *v.* Isaac, 2 East P. C. 1031; Rex *v.* Probert, 2 East P. C. 1030; 4 Bl. Comm. 221.

65. *In re* Ball's Case, 2 City Hall Rec. (N. Y.) 85.

66. *Louisiana.*— State *v.* Elder, 21 La. Ann. 157; State *v.* Rohfrischt, 12 La. Ann. 382.

Mississippi.— Avant *v.* State, 71 Miss. 78, 13 So. 881.

Missouri.— State *v.* Hayes, 78 Mo. 307; State *v.* Moore, 61 Mo. 276.

New Hampshire.— State *v.* Hurd, 51 N. H. 176.

New York.— Shepherd *v.* People, 19 N. Y. 537 [*overruling* People *v.* Henderson, 1 Park. Crim. (N. Y.) 560].

Ohio.—Allen *v.* State, 10 Ohio St. 287.

Texas.— Gutgesell *v.* State, (Tex. Crim. 1898) 43 S. W. 1016.

Vermont.— Prout *v.* Vaughn, 52 Vt. 451.

England.— Reg. *v.* Pardoe, 17 Cox C. C. 715; Reg. *v.* Ball, 1 Moody 30.

See 4 Cent. Dig. tit. "Arson," § 19 *et seq.*

Omission of "of another" in an act defining the crime has been taken to indicate a purpose to bring the tenant or person in possession within its penalty. Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111. See also Hicks *v.* State, (Fla. 1901) 29 So. 631. *Contra*, State *v.* Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 32 L. R. A. 647; Rex *v.* Breeme, 2 East P. C. 1026, 1 Leach 220.

Burning by part-owner.— It has been held that the part-owner of a ship may be convicted of setting fire to it with intent to injure the other part-owners, although he has insured the whole ship, and promised that the other part-owners should have the benefit of the insurance. Rex *v.* Philip, 1 Moody 263.

67. Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302; Rex *v.* March, 1 Moody, 182.

husband in burning the house of his wife, although dwelling in it with her at the time.[68]

B. Burning With Intent to Defraud Insurer. Although, at common law, burning one's own property with intent to defraud an insurer was, at most, only a misdemeanor,[69] the act is now generally condemned as a felony.[70] It is not material whether the accused was the owner of the property or not,[71] or in whose name the goods were insured,[72] and it has also been held immaterial whether the policy is valid or not, or whether there is an enforceable liability.[73] If the company issuing the insurance had a *de facto* existence it is sufficient,[74] and compliance of a foreign corporation with the laws of the state is not essential.[75]

C. Attempt. Where the offense is regulated by statute, which uses only the word "destroy," there can be no conviction thereunder for a bare attempt;[76] but, generally, where the intent is accompanied by an overt act purporting to be in execution of such intent, there may be a conviction of at least a misdemeanor.[77] The intent is essential,[78] but it is not necessary that there should have been a burning,[79] a mere solicitation, accompanied by overt acts, being sufficient.[80]

III. INDICTMENT, INFORMATION, OR COMPLAINT.

A. For Arson, Generally[81] — 1. In General — a. Facts Constituting Offense.

68. Garrett *v.* State, 109 Ind. 527, 10 N. E. 570; Emig *v.* Daum, 1 Ind. App. 146, 27 N. E. 322.

69. See *supra*, II, A, 5, a.

70. Com. *v.* Goldstein, 114 Mass. 272 (holding that, under Mass. Gen. Stat. c. 161, § 7, prohibiting the wilful burning of insured property with intent to injure one or several insurers, though different insurers may have issued policies upon the same articles of property, the burning of the property by a single act, with intent to injure the insurers, is but a single crime); Meister *v.* People, 31 Mich. 99 (holding that the Michigan statute includes two distinct offenses: (1) the actual burning with intent to defraud; and (2) the wilful causing or procuring insured property to be burned, with intent to injure the insurer, and that one not present at the burning cannot be convicted upon an indictment under the first provision); People *v.* Jones, 24 Mich. 215; Reg. *v.* Lyons, Bell C. C. 38, 8 Cox C. C. 84, 5 Jur. N. S. 33, 28 L. J. M. C. 33, 7 Wkly. Rep. 58 (holding that, under 14 & 15 Vict. c. 19, and 7 Wm. IV & 1 Vict. c. 89, it was a felony to burn one's own goods with intent to defraud the insurer thereof, although the fire did not affect the house wherein they were stored).

71. Jhons *v.* People, 25 Mich. 499; Searles *v.* State, 6 Ohio Cir. Ct. 331.

72. Com. *v.* Goldstein, 114 Mass. 272.

73. State *v.* Byrne, 45 Conn. 273; McDonald *v.* People, 47 Ill. 533; State *v.* Tucker, 84 Mo. 23. *Contra*, Meister *v.* People, 31 Mich. 99; State *v.* Tuttgerding, 8 Ohio Dec. (Reprint) 74, 5 Cinc. L. Bul. 464, the latter case holding that it is a good defense that the house was vacant when burned, in consequence of which the policy was invalidated.

74. People *v.* Hughes, 29 Cal. 257; State *v.* Byrne, 45 Conn. 273; State *v.* Tucker, 84 Mo. 23.

75. People *v.* Hughes, 29 Cal. 257; Com. *v.* Goldstein, 114 Mass. 272.

76. Kinningham *v.* State, 120 Ind. 322, 22 N. E. 313.

77. *Arkansas.*— Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

Iowa.— State *v.* Johnson, 19 Iowa 230.

New York.— McDermott *v.* People, 5 Park. Crim. (N. Y.) 102; *In re* Orr, 5 City Hall Rec. (N. Y.) 181.

Vermont.— State *v.* Dennin, 32 Vt. 158.

England.— Reg. *v.* Taylor, 4 F. & F. 511.

Canada.— Reg. *v.* Goodman, 22 U. C. C. P. 338.

See 4 Cent. Dig. tit. "Arson," § 28.

Statute repealed.— The repealing clause of the Louisiana act of 1855 relative to crimes and offenses repealed the second section of the act of Feb. 21, 1828, which made it a crime, punishable with imprisonment at hard labor, "to prepare combustible materials, and put them in any place, with an intention to set fire to a mansion-house or other building." State *v.* Clay, 12 La. Ann. 431.

78. People *v.* Long, 2 Edm. Sel. Cas. (N. Y.) 129.

79. State *v.* Dennin, 32 Vt. 158.

80. State *v.* Hayes, 78 Mo. 307; People *v.* Bush, 4 Hill (N. Y.) 133; Mackesey *v.* People, 6 Park. Crim. (N. Y.) 114; McDermott *v.* People, 5 Park. Crim. (N. Y.) 102; State *v.* Bowers, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199, 28 Am. St. Rep. 847. *Contra*, McDade *v.* People, 29 Mich. 50 [Cooley, J., dissenting].

81. For forms of indictments, informations, or complaints, in whole or in part, for arson, generally, see the following cases:

Alabama.— Leonard *v.* State, 96 Ala. 108, 11 So. 307 (corn-crib containing corn); Childress *v.* State, 86 Ala. 77, 5 So. 775 (jail); Sands *v.* State, 80 Ala. 201 (jail); Lockett *v.* State, 63 Ala. 5 (jail); Brown *v.* State, 52 Ala. 345 (barn and corn-crib).

California.— People *v.* Wooley, 44 Cal. 494, dwelling-house.

While all the facts or circumstances which constitute the crime, as defined by common law or by the statute, should be stated with particularity and clearness,[82] the indictment need not strictly pursue the language of the statute, provided words of equivalent import are employed.[83] An indictment in the form prescribed by the code is sufficient.[84]

b. Degree of Offense — (i) *In General.* The degree of the crime need not be alleged, that being for the jury to determine from all the facts and circumstances developed in the evidence.[85]

(ii) *Negativing Commission of Crime in Higher Degree.* Although the statute expressly defines arson, in its lesser degrees, as the burning of buildings not included in the definition of the crime in the higher degrees, it is not necessary, in an indictment for a lesser degree, that the aggravating circumstances which would lift it to the higher degree should be negatived.[86]

Delaware.— State *v.* Barrett, (Del. 1899) 47 Atl. 381, dwelling-house.

Florida.— Duncan *v.* State, 29 Fla. 439, 10 So. 815, bridge.

Indiana.— Jordan *v.* State, 142 Ind. 422, 41 N. E. 817 (mill); Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135 (county court-house); Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019 (shop); Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631 (county court-house); Garrett *v.* State, 109 Ind. 527, 10 N. E. 570 (dwelling-house); Dugle *v.* State, 100 Ind. 259 (stable).

Kansas.— State *v.* Colgate, 31 Kan. 511, 3 Pac. 346, 47 Am. Rep. 507, books of account, etc.

Kentucky.— Deshazer *v.* Com., 12 Ky. L. Rep. 453, 14 S. W. 542, barn containing corn and oats.

Maine.— State *v.* Hurley, 71 Me. 354, dwelling-house.

Michigan.— People *v.* Duford, 66 Mich. 90, 33 N. W. 28, dwelling-house.

Missouri.— State *v.* Jones, 106 Mo. 302, 17 S. W. 366 (barn); State *v.* Johnson, 93 Mo. 73, 5 S. W. 699 (penitentiary).

Nebraska.— Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027, stacks of grain.

Nevada.— State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000, cordwood.

New Hampshire.— State *v.* Emerson, 53 N. H. 619, barn.

New Jersey.— State *v.* Price, 11 N. J. L. 203, barn.

New York.— Woodford *v.* People, 3 Hun (N. Y.) 310, 5 Thomps. & C. (N. Y.) 539 (several dwelling-houses); Didieu *v.* People, 4 Park. Crim. (N. Y.) 593 (dwelling-house).

North Carolina.—State *v.* Daniel, 121 N. C. 574, 28 S. E. 255 (stable); State *v.* Green, 92 N. C. 779 (gin-house); State *v.* Simpson, 9 N. C. 460 (tar).

Ohio.— Allen *v.* State, 10 Ohio St. 287, warehouse.

Oregon.— State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896, barn.

South Carolina.— State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241, gin-house.

Vermont.— State *v.* Roe, 12 Vt. 93, church.

Virginia.— Wolf *v.* Com., 30 Gratt. (Va.) 833 (barn); White *v.* Com., 29 Gratt. (Va.) 824 (barn or tobacco-house); Com. *v.* Posey, 4 Call (Va.) 109, 2 Am. Dec. 560 (jail).

82. May *v.* State, 85 Ala. 14, 15, 5 So. 14 (holding that an indictment for arson in the third degree is not sufficient which merely, in the language of the statute, alleges that the burning was "under such circumstances as did not constitute arson in the first or second degree;" but that the facts and circumstances must be stated); People *v.* Hood, 6 Cal. 236; People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773; Hennessey *v.* People, 21 How. Pr. (N. Y.) 239.

Charging acts in alternative.— An indictment charging that accused did "burn or caused to be burned" a certain dwelling-house, is bad, because the charge is laid in the alternative. People *v.* Hood, 6 Cal. 236.

Charging conspiracy to burn, and burning. — There is no duplicity in an indictment charging a conspiracy to burn a building, and the execution of the act. Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239. And see Mitchell *v.* State, 5 Coldw. (Tenn.) 53.

An indictment insufficient to charge a higher degree may be good for a lower degree. Cheatham *v.* State, 59 Ala. 40.

83. Childress *v.* State, 86 Ala. 77, 5 So. 775.

Using disjunctive statutory words in conjunctive.— An allegation in the conjunctive that defendant "burned, and caused to be burned," will be sustained, although the statute is in the disjunctive, "burn or cause to be burned." State *v.* Price, 11 N. J. L. 203.

House not a dwelling-house.— An allegation in an indictment that the house burned was "an outhouse and a corn-crib" is equivalent to an allegation that such house "was not a dwelling-house." Hester *v.* State, 17 Ga. 130.

84. Leonard *v.* State, 96 Ala. 108, 11 So. 307; Cheatham *v.* State, 59 Ala. 40.

85. People *v.* Russell, 81 Cal. 616, 23 Pac. 418.

86. *Georgia.*— Hester *v.* State, 17 Ga. 130.

Louisiana.— State *v.* Gregory, 33 La. Ann. 737.

Massachusetts.— Com. *v.* Squire, 1 Metc. (Mass.) 258.

New York.—People *v.* Pierce, 11 Hun (N. Y.) 633; People *v.* Haynes, 55 Barb. (N. Y.) 450, 38 How. Pr. (N. Y.) 369; People *v.* Durkin, 5 Park. Crim. (N. Y.) 243.

c. Particular Averments — (I) *Time.* In jurisdictions where, if the burning is in the night-time, the offense is of a higher degree, to authorize a conviction for the higher degree, the fact that the act was committed in the night-time should be alleged in the indictment,[87] for, if it is not, it will be taken to have been done in the daytime.[88] If, however, the statute is silent in this respect the time of day need not be averred.[89]

(II) *With Force and Arms.* It is not necessary to allege that the offense was committed *vi et armis.*[90]

(III) *Malice — Intent* — (A) *Generally.* Where the statute makes the offense a felony it should be charged to have been "feloniously" done.[91] Malice being of the essence of the crime at common law and under statute, it has been held that the act must be charged to have been "maliciously" done,[92] even though the word is not used in the statute,[93] or though the words "feloniously, wilfully, and unlawfully" are employed.[94] When the statute employs particular words to express the intent, these, or words of equivalent import, should be used in charging the offense.[95]

Vermont.— State *v.* Ambler, 56 Vt. 672.

Wisconsin.— State *v.* Kroscher, 24 Wis. 64; Lacy *v.* State, 15 Wis. 13.

See 4 Cent. Dig. tit. "Arson," § 35.

An indictment in the general words of the statute, and following the analogous forms given for the higher degrees, without alleging any fact or circumstance which constitutes arson in the first or second degree, is, necessarily, an indictment for arson in the third degree, and is sufficient in form and substance. James *v.* State, 104 Ala. 20, 16 So. 94; Brown *v.* State, 52 Ala. 345. See also State *v.* Young, 9 N. D. 165, 82 N. W. 420, holding that an information accusing defendant of arson, and charging facts constituting arson in the third degree, is sufficiently specific as to the crime charged, and does not accuse of one crime and state facts constituting a different crime.

87. Dick *v.* State, 53 Miss. 384; State *v.* England, 78 N. C. 552; *In re* Curran, 7 Gratt. (Va.) 619.

88. *In re* Curran, 7 Gratt. (Va.) 619.

89. State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722; State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193; Dick *v.* State, 53 Miss. 384. See also Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047 (holding that, where it is unnecessarily averred that the offense was committed in the night-time, the commonwealth may enter a *nolle prosequi* as to this part of the indictment); Com. *v.* Lamb, 1 Gray (Mass.) 493, 495 (holding that, where the particular arson charged is equally punishable whether committed in the night or daytime, the fact that the indictment, in charging the offense to have been committed in the night-time, states that it was between the hour of sunsetting on one day and that of sunrising on the next is immaterial, though the statute defines "night-time," in criminal prosecutions, to be "the time between one hour after the sunsetting on one day and one hour before sunrising on the next day"). But see *In re* Curran, 7 Gratt. (Va.) 619, to the effect that, although the common-law form is probably sufficient, it is better practice, if the burning occurred in the daytime, to so charge.

Statute directory as to punishment.— Where a statute provided that "arson in the daytime shall be punished by a shorter period of imprisonment and labor than arson committed in the night," it was held to be only directory, and not to necessitate a charge in the indictment that the offense was committed in the day or in the night. Brightwell *v.* State, 41 Ga. 482.

90. State *v.* Temple, 12 Me. 214.

91. Mott *v.* State, 29 Ark. 147; State *v.* Roper, 88 N. C. 656. *Contra,* Tuller *v.* State, 8 Tex. App. 501.

92. Maxwell *v.* State, 68 Miss. 339, 8 So. 546; Jesse *v.* State, 28 Miss. 100.

Malice aforethought.— An indictment for arson is sufficient if it avers that the house was "willfully and maliciously set on fire," without averring that it was done with malice aforethought. State *v.* Price, 37 La. Ann. 215.

A warrant alleging that defendant, "with force and arms," did set fire to and burn a certain mill, "contrary to the form of the statute," etc., and referring to the act as a "felony," is sufficient, though it does not charge a "willful and malicious" burning, in the terms of How. Anno. Stat. Mich. § 9125, under which the warrant was drawn. People *v.* Pichette, 111 Mich. 461, 69 N. W. 739.

93. 2 East P. C. 1021. *Contra,* State *v.* McCoy, 162 Mo. 383, 62 S. W. 991; Tuller *v.* State, 8 Tex. App. 501.

94. Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166, holding, however, that, under a statute prohibiting the reversal of a judgment for any matter of form which might have been the subject of demurrer to the indictment, a conviction will not be reversed for failure to allege that the burning was done maliciously. But see Aikman *v.* Com., 13 Ky. L. Rep. 894, 18 S. W. 937, holding that the word "feloniously" embraces the word "maliciously."

95. State *v.* Pierce, 123 N. C. 745, 31 S. E. 847 (holding that "unlawfully, wilfully, and feloniously" will not take the place of the statutory words "wantonly and wilfully"); State *v.* Morgan, 98 N. C. 641, 3 S. E. 927

(B) *To Burn or Destroy.* Where an intent to burn or destroy the property is not an element of the offense,[96] or where defendant is charged with setting fire directly to a building which was thereby burned,[97] it is not necessary to allege an intent to burn it. *Aliter*, where he is charged with setting fire to one building whereby another building is burned,[98] or where such intent is, by statute, made a specific element of the offense.[99]

(C) *To Injure or Defraud.* At common law,[1] or where the statute does not require it,[2] an intent to injure a particular person need not be charged further than such intent is implied by a charge that the burning was done wilfully and maliciously.[3]

(IV) *Setting Fire to, and Burning.* It is not sufficient to allege that the building was "set fire to," where the statute uses the word "burn,"[4] but it is not necessary to allege a consumption of the property by fire,[5] nor is it necessary, although it is usual, to allege that defendant "set fire" to the building where the burning is stated.[6]

(holding that the words "unlawfully, maliciously, or feloniously" will not supply the statutory words "wantonly and wilfully"); State *v.* Massey, 97 N. C. 465, 2 S. E. 445 (holding that "unlawfully and maliciously" are not equivalent to "wantonly and wilfully"); Rex *v.* Reader, 4 C. & P. 245, 1 Moody 239, 19 E. C. L. 498 (holding that "feloniously, voluntarily, and maliciously" are not equivalent to "feloniously, unlawfully, and maliciously").

Wilfully.— The words "unlawfully, maliciously, and feloniously" imply that the act was "wilfully" done. People *v.* Haynes, 55 Barb. (N. Y.) 450, 38 How. Pr. (N. Y.) 369; State *v.* Thorne, 81 N. C. 413; Chapman *v.* Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

Use of words in conjunctive or disjunctive. — The words "wilfully" and "maliciously" may be used either conjunctively or disjunctively, although the statute uses them disjunctively (State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134; State *v.* Philbin, 38 La. Ann. 964; State *v.* Price, 37 La. Ann. 215); and it is sufficient if the indictment uses either of the words alone (State *v.* Philbin, 38 La. Ann. 964).

The unnecessary use of descriptive words such as "feloniously" (State *v.* Keen, 95 N. C. 646; Staeger *v.* Com., 103 Pa. St. 469), "unlawfully" (State *v.* Philbin, 38 La. Ann. 964), or "unlawfully, wilfully, and feloniously" (State *v.* Battle, 126 N. C. 1036, 35 S. E. 624) is simply surplusage.

96. People *v.* Fanshawe, 137 N. Y. 68, 32 N. E. 1102, 50 N. Y. St. 1 [*affirming* 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 47 N. Y. St. 331, 8 N. Y. Crim. 326].

97. State *v.* Watson, 63 Me. 128; State *v.* Hill, 55 Me. 365; State *v.* McCoy, 162 Mo. 383, 62 S. W. 991.

The intent is sufficiently charged in such case by the use of the words "feloniously, wilfully, and maliciously." State *v.* Bean, 77 Me. 486.

98. State *v.* Watson, 63 Me. 128; State *v.* Hill, 55 Me. 365.

99. People *v.* Mooney, 127 Cal. 339, 59 Pac. 761.

1. State *v.* McCarter, 98 N. C. 637, 4 S. E. 553.

2. Such an averment was required under 7 & 8 Geo. IV, c. 30, § 9 (Rex *v.* Smith, 4 C. & P. 569, 19 E. C. L. 653), and under N. C. Code, § 985, subs. 6, prior to N. C. Acts (1885), c. 66 (State *v.* Phifer, 90 N. C. 721; State *v.* Porter, 90 N. C. 719; State *v.* England, 78 N. C. 552).

3. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921; State *v.* Rogers, 94 N. C. 860; Reg. *v.* Greenwood, 23 U. C. Q. B. 250. See also Rex *v.* Newell, 1 Moody 458, where a conviction was sustained, although it was alleged that the intent was to injure A and the jury found an intent to injure B. But *compare* Reg. *v.* Bryans, 12 U. C. C. P. 161, holding that it is necessary, where the setting fire is to a man's own house, to prove an intent to injure and defraud, although the words, "with intent thereby to injure or defraud any person," introduced into the Imperial Act, are omitted in the Canadian act.

Intent to secure reward.— Although the intent is to obtain a reward by giving the first warning of the fire, a conviction may be had on an indictment charging an intent to injure the owner of the property burned. Reg. *v.* Regan, 4 Cox C. C. 335.

4. *Arkansas.*— Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

California.— People *v.* Myers, 20 Cal. 76.

Maryland.— Cochrane *v.* State, 6 Md. 400.

North Carolina.— State *v.* Hall, 93 N. C. 571.

Virginia.— Howel *v.* Com., 5 Gratt. (Va.) 664.

Contra, State *v.* Taylor, 45 Me. 322; Rex *v.* Salmon, R. & R. 26.

See 4 Cent. Dig. tit. "Arson," § 50.

An allegation of "burning" in an indictment for "setting fire to" may be rejected as surplusage. State *v.* Hull, 83 Iowa 112, 48 N. E. 917.

5. Hester *v.* State, 17 Ga. 130; Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135.

6. People *v.* Myers, 20 Cal. 76 [*overruling* People *v.* Hood, 6 Cal. 236]; State *v.* Jones, 106 Mo. 302, 17 S. W. 366; State *v.* Gaffrey, 3 Pinn. (Wis.) 369, 4 Chandl. (Wis.) 163.

Use of "was" for "did."— An information which charges that accused "was" wilfully,

(v) *The Structure or Property Burned* — (a) *In General.* It is necessary to aver what was burned,[7] but it is sufficient to describe a building in the language used in the statute on which the indictment is founded,[8] and though the statute prohibits the burning of particularly designated buildings, it is sufficient to allege that the building was used as such a building.[9] The indictment may, without duplicity, charge in one count the burning of a number of buildings, caused by the act of accused in setting fire to one.[10]

maliciously, and feloniously set fire to, with intent then and there to burn, etc., instead of "did," is good, in arrest of judgment, the error being merely clerical. People *v.* Duford, 66 Mich. 90, 33 N. W. 28.

Where an unnecessary charge of "setting fire" is included, the omission of the word "fire" will not vitiate, since the whole clause may be rejected as surplusage. Polsten *v.* State, 14 Mo. 463.

7. Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51.

Describing building in alternative.— Charging a burning to have been of a "certain house or outhouse" is bad, as being in the alternative. Horton *v.* State, 60 Ala. 72; Whiteside *v.* State, 4 Coldw. (Tenn.) 175. But see State *v.* Moore, 61 Mo. 276, holding that an indictment is not fatally defective for describing the property burned as a "house or building" where the words are evidently used in a synonymous sense, and to designate the same object.

Mill-house.— An indictment describing the property burned as a certain "mill-house," is sufficient. Ford *v.* State, 112 Ind. 373, 14 N. E. 241.

The averment must be proved as laid.— Thus, an indictment charging the burning of a dwelling-house is not supported by proof of the burning of a building not a dwelling-house (Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51; People *v.* Handley, 93 Mich. 46, 52 N. W. 1032; State *v.* Young, 9 N. D. 165, 82 N. W. 420), an averment of burning a "building" is not supported by proof of burning a "dwelling-house" (State *v.* Atkinson, 88 Wis. 1, 58 N. W. 1034. Though the contrary is intimated in Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677), an indictment for setting fire to a "cock of hay" cannot be sustained under a statute making it an offense to set fire to a "stack of hay" (Reg. *v.* McKeever, 15 Ir. R. C. L. 86), nor, upon an indictment for burning a barn with grain or corn in it, can a prisoner be convicted upon proof that he burned a crib with corn in it (State *v.* Laughlin, 53 N. C. 354); but, an indictment for burning, in the night-time, a building erected for public use, is sustained by proof of burning in the night-time a building removed by a city, and afterward fitted up as a school-house and engine-house (Com. *v.* Horrigan, 2 Allen (Mass.) 159). And an information for arson, which describes the property burned as "a two-story wooden storehouse building," is sustained by proof that the building had two stories, with no communication between them, and that the lower one, which was set on fire, was used as a storehouse, while the upper was used as a lodging-house (State *v.* Biles, 6 Wash. 186, 33 Pac. 347).

8. People *v.* Russell, 81 Cal. 616, 617, 23 Pac. 418 (holding that when an information charged, in the language of the statute, that defendant burned a "building" it was sufficient without describing the building, according to the statutory definition, as one "capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted"); State *v.* Temple, 12 Me. 214; State *v.* Jaynes, 78 N. C. 504; State *v.* Bedell, 65 Vt. 541, 542, 27 Atl. 208, the last case holding that an indictment for setting fire to a school-house, under Vt. Rev. Stat. § 4128, making it an offense to set fire to a town-house, school-house, or "other building erected for public use," is good, though it fails to charge that the school-house was erected for public use.

Building.— An allegation of burning a "flouring, grist, and corn mill-house," is a sufficient description of a "building" (Jordan *v.* State, 142 Ind. 422, 41 N. E. 817), but a "sawmill" is not necessarily a "building" (State *v.* Livermore, 44 N. H. 386).

"Corn-crib" and "corn-pen" may be used synonymously. Cook *v.* State, 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688.

Jail.— In charging the burning of a jail it is sufficient to describe it as "the common gaol and county prison in the said county of New Kent." Com. *v.* Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

Purpose for which building occupied.— The word "saloon" is not sufficiently expressive of the purpose for which the building was used (State *v.* O'Connell, 26 Ind. 266), but if a building is called a "stable," the designation is sufficient to describe its uses (Dugle *v.* State, 100 Ind. 259; State *v.* Smith, 28 Iowa 565).

Describing realty as personalty.— It is not a material variance that a building which was realty was alleged to be personalty. Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019; Ford *v.* State, 112 Ind. 373, 14 N. E. 241.

9. McLane *v.* State, 4 Ga. 335; State *v.* Morgan, 98 N. C. 641, 3 S. E. 927.

10. Com. *v.* Lamb, 1 Gray (Mass.) 493; Woodford *v.* People, 3 Hun (N. Y.) 310, 5 Thomps. & C. (N. Y.) 539 [*affirmed* in 62 N. Y. 117, 20 Am. Rep. 464]; Early *v.* Com., 86 Va. 921, 11 S. E. 795. See also Com. *v.* Goldstein, 114 Mass. 272, holding that an allegation that defendant burned several articles of merchandise, separately specified, charges a single act of burning and not as many separate acts as there are different articles named.

(B) *How Described* — (1) IN GENERAL — (a) HOUSE OR DWELLING-HOUSE — aa. *Generally.* By the common law it was not necessary to aver that the house burned was a dwelling, but only that a house was burned;[11] but where, by statute, the crime can be committed only on a dwelling-house it must be so alleged.[12]

bb. *Separate Apartments.* Where there is no interior communication between different parts of the same building which are separately occupied, the parts are to be regarded as separate buildings, and should be so described.[13]

(b) CHURCH. In an indictment for burning a meeting-house it is not necessary to allege that the place was then continued to be used as a place for public worship. Its use for any other purpose would be matter of defense.[14]

(c) *Unfinished Structure.* An indictment is good which alleges that defendant set fire to and burned "a building erected for a dwelling-house, and not completed or inhabited."[15]

(2) CONTENTS. If the act is made punishable only when the building contains other property, the fact that it contains such property should be alleged;[16] and where the statute distinguishes between the burning of a building and the contents thereof, it must definitely appear whether the burning was of the building itself or of the contents.[17]

(3) LOCATION. It must affirmatively appear that the building burned was within the jurisdiction of the court;[18] but it is not necessary to allege that the

11. *Kentucky.*— Com. *v.* Elliston, 14 Ky. L. Rep. 216, 20 S. W. 214.

Massachusetts.— Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677.

North Carolina.— State *v.* Thorne, 81 N. C. 413.

South Carolina.— State *v.* Sutcliffe, 4 Strobh. (S. C.) 372, 399.

Virginia.— Com. *v.* Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

England.— 2 East P. C. 1033; 1 Hale P. C. 567.

The words "used as a prison," in an indictment for burning a house occupied by a person lodged therein, founded on a statute making it arson to burn a prison or any other house occupied by a person lodged therein, may be rejected as surplusage. Childress *v.* State, 86 Ala. 77, 5 So. 775.

12. Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677; State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068; State *v.* Sutcliffe, 4 Strobh. (S. C.) 372.

Occupied as a dwelling.— Under an indictment charging defendant with burning "the dwelling-house of" a certain person, he cannot be convicted of the offense of burning a "dwelling-house occupied by him as such." Aikman *v.* Com., 13 Ky. L. Rep. 894, 18 S. W. 937.

13. State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602; State *v.* Sandy, 25 N. C. 570.

14. State *v.* Temple, 12 Me. 214.

15. Com. *v.* Squire, 1 Metc. (Mass.) 258.

16. State *v.* Porter, 90 N. C. 719; Chapman *v.* Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565; Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435. But see Evans *v.* Com., 11 Ky. L. Rep. 573, 12 S. W. 768, 769, holding that, even though the statute defines the offense as the burning of a building where grain is usually kept, an indictment for burning "a barn" is sufficient without an averment that any sort of grain was kept in it.

17. Avant *v.* State, 71 Miss. 78, 13 So. 881, holding that an indictment which charges that defendant set fire to and burned a certain cotton-house, in which was then and there a designated quantity of cotton, the said cotton-house and cotton being the property of one named, with the intent to injure the person named, is an accusation of the arson of the house, not the cotton. But see People *v.* Didieñ, 17 How. Pr. (N. Y.) 224, holding that an indictment for arson in burning a building will sustain a conviction for burning the goods in the building, although the proof fails to show that the building itself was burned.

18. State *v.* Wacker, 16 Mo. App. 417, 418 (holding that an indictment for burning "a certain dwelling-house situated in the city of St. Louis aforesaid" is too indefinite in description); State *v.* Gaffrey, 3 Pinn. (Wis.) 369, 4 Chandl. (Wis.) 163.

The locality is sufficiently stated when the indictment avers that defendant, "at P, in the county of H, did . . set fire to and burn a certain barn" (Com. *v.* Lamb, 1 Gray (Mass.) 493); that defendant "at the township aforesaid," etc., "one barn, of the property of one Nicholas Ryerson, not parcel of the dwelling-house of the said Nicholas Ryerson, there situate, wilfully and maliciously did burn" (State *v.* Price, 11 N. J. L. 203, 205); that defendants, "in the county of Spokane, State of Washington, did then and there unlawfully, willfully and maliciously set fire to and burn a certain storehouse building" (State *v.* Meyers, 9 Wash. 8, 10, 36 Pac. 1051); or where the house burned is described as "a certain house then and there occupied, owned, and controlled by him the said Baker," the words "then and there" referring to the time and county previously stated (Baker *v.* State, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427).

building burned was within the curtilage of a dwelling,[19] unless that fact is made essential to the crime, or affects the degree.[20] Neither is it necessary, in an indictment for burning an outhouse, to state whether such outhouse was situated within or without a city, town, or village, where such fact affects only the punishment.[21]

(VI) *PRESENCE OF HUMAN BEING.* It is not necessary to allege that the building was occupied unless the statute expressly or impliedly makes the presence of a human being an ingredient of the offense,[22] but a statutory requirement in this respect must be strictly complied with.[23]

(VII) *VALUE OF PROPERTY.* It is only necessary to allege the value of the property burned, or attempted to be destroyed, when the value enters into the degree of the crime or affects the punishment;[24] but, under statutes distinguish-

Location of dwelling in indictment for burning barn.— An indictment for burning a barn situated at a certain place, which was within the jurisdiction of the court, and alleged to be "within the curtilage of the dwelling-house of said Peck," need not also aver that the dwelling-house was at that place. Com. *v.* Barney, 10 Cush. (Mass.) 480.

Variance.— The venue of the offense is not sufficiently proved by evidence showing merely that the outhouse alleged to have been burned was at a point thirty-five or forty feet from a dwelling-house, which was located in the county laid in the indictment (Green *v.* State, (Ga. 1899) 34 S. E. 563), and where the indictment describes the house as in the sixth ward, and the proof shows it to be in the fifth ward, there is a fatal variance (People *v.* Stater, 5 Hill (N. Y.) 401).

19. State *v.* Taylor, 45 Me. 322; State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241; State *v.* Gwinn, 24 S. C. 146.

20. State *v.* Jeter, 47 S. C. 2, 24 S. E. 889.

Not parcel of dwelling-house.— An indictment, under a statute providing against the burning of barns and other outhouses not parcel of any dwelling-house, is bad unless it alleges that the dwelling burned was not parcel of any dwelling-house. Gibson *v.* State, 54 Md. 447; Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166. *Contra,* Staeger *v.* Com., 103 Pa. St. 469. And see Com. *v.* Hamilton, 15 Gray (Mass.) 480; People *v.* Pierce, 11 Hun (N. Y.) 633.

21. Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262; Smith *v.* State, 64 Ga. 605.

22. Garrett *v.* State, 109 Ind. 527, 10 N. E. 570; State *v.* Meyers, 9 Wash. 8, 36 Pac. 1051; McClaine *v.* Territory, 1 Wash. 345, 25 Pac. 453.

The words "in which there was at the time no human being," may be rejected as surplusage where the statute makes the burning of an inhabited dwelling-house arson, whether there is at the time any human being in it or not. Paine *v.* State, 89 Ala. 26, 8 So. 133.

Names of occupants of house endangered.— An indictment charging that defendant burned his own house, thereby endangering the safety of houses belonging to other persons, is sufficient without giving the names of such other persons. Baker *v.* State, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

Where the punishment may be increased if bodily injury ensues, an indictment is not bad for duplicity because it charges that the house, when burned, contained a little child, which was seriously injured by the fire. Beaumont *v.* State, 1 Tex. App. 533, 28 Am. Rep. 424.

23. Childress *v.* State, 86 Ala. 77, 5 So. 775; State *v.* Grimes, 50 Minn. 123, 52 N. W. 275. Thus, under Miss. Rev. Code (1871), § 2490, which provided that any one who shall wilfully burn, in the night-time, any house in which some person is usually "staying, lodging, or residing at night," on conviction shall suffer, etc., it was held that an indictment charging the commission of the offense in the night-time in a certain dwelling-house, in which a human being was at the time, etc., omitting to charge the staying, lodging, and residing to be at night, as well as the burning, was insufficient. Lewis *v.* State, 49 Miss. 354.

It is not necessary to name the person occupying the house. State *v.* Hayes, 78 Mo. 307; State *v.* Aguila, 14 Mo. 130.

Sufficient averments.—An averment "which was at the time occupied by Alfred Phillips, who was lodged therein," is equivalent to an allegation in the statutory form — that is to say, "in which there was at the time a human being," and is sufficient (Childress *v.* State, 86 Ala. 77, 83, 5 So. 775), as is an averment in an indictment for burning a penitentiary that, at the time when the fire was set, certain officers, servants, and employees of the state did usually lodge there (State *v.* Johnson, 93 Mo. 73, 5 S. W. 699).

In an indictment for burning several houses, an allegation that there were "within the said dwelling-houses some human being" imports that there was a human being in each. Woodford *v.* People, 62 N. Y. 117, 118, 20 Am. Rep. 464 [*affirming* 3 Hun (N. Y.) 310, 5 Thomps. & C. (N. Y.) 539].

24. *Illinois.*— Clark *v.* People, 2 Ill. 117, wherein it is said that "this would probably be unnecessary at common law."

Indiana.—Ritchey *v.* State, 7 Blackf. (Ind.) 168.

Maine.— State *v.* Temple, 12 Me. 214.

Massachusetts.—Com. *v.* Hamilton, 15 Gray (Mass.) 480.

Virginia.— Wolf *v.* Com., 30 Gratt. (Va.) 833.

See 4 Cent. Dig. tit. "Arson," § 43.

ing the lesser degrees by money value, it is rather the value of the property sought to be burned than the amount actually consumed that is controlling.[25]

(VIII) *Ownership of Property*—(A) *Necessity of Averring*—(1) In General. Both at common law and under statute, the ownership of the building or property burned must, ordinarily, be averred and proved as laid,[26] and a defect in this respect may be taken advantage of by motion in arrest.[27]

(2) In Case of Public Building. In the absence of statute[28] no allegation of ownership is necessary in the case of public buildings.[29]

(B) *How Stated.* In view of the common-law conception of the crime,[30] it has been held that the premises should, ordinarily, be alleged to be the property of the occupant in possession in his own right, and not of the real owner,[31]

25. Granison *v.* State, 117 Ala. 22, 23 So. 146.

26. *Alabama.*—Smoke *v.* State, 87 Ala. 143, 6 So. 376; Davis *v.* State, 52 Ala. 357; Boles *v.* State, 46 Ala. 204; Graham *v.* State, 40 Ala. 659; Martin *v.* State, 29 Ala. 30; Martha *v.* State, 26 Ala. 72.

Arkansas.— Mott *v.* State, 29 Ark. 147.

California.— People *v.* De Winton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 374; People *v.* Myers, 20 Cal. 76. But see People *v.* Shainwold, 51 Cal. 468, holding that there is no variance between an indictment for the burning of a building described as the property of certain persons, formerly occupied by other persons, and proof that, although the building was formerly occupied by the persons named, it was not the property of those designated as the owners.

Connecticut.—State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Lyon, 12 Conn. 487.

Indiana.— Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019; Garrett *v.* State, 109 Ind. 527, 10 N. E. 570.

Massachusetts.— Com. *v.* Wade, 17 Pick. (Mass.) 395. But in Com. *v.* Brailey, 134 Mass. 527, it was held that, in an indictment under Mass. Gen. Stat. c. 161, § 2, an averment of ownership did not affect the identity of the offense, and that a variance in respect thereto was not fatal.

Mississippi.— Avant *v.* State, 71 Miss. 78, 13 So. 881; Morris *v.* State, (Miss. 1890) 8 So. 295.

Missouri.— State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068.

Nebraska.—Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027.

New York.— McGary *v.* People, 45 N. Y. 153 [*reversing* 2 Lans. (N. Y.) 227], holding that a charge that the building burned belonged to the Phœnix Mills Company, and evidence that the corporate name of the company is The Phœnix Mills of Seneca Falls presents a fatal variance.

Wisconsin.— Carter *v.* State, 20 Wis. 647.

England.— Rex *v.* Rickman, 2 East P. C. 1034.

See 4 Cent. Dig. tit. "Arson," § 45.

Ownership of building first fired.—Whether, in an indictment under Mass. Stat. (1804), c. 131, charging that defendant set fire to a building, and that, by the burning of such building, a dwelling-house was burned in the night-time, it is necessary to state who was the owner or occupant of such building, or that it was the building of another, *quære.* Com. *v.* Wade, 17 Pick. (Mass.) 395.

Unknown owner.— An averment that the ownership of the building is unknown need not be proved. Childress *v.* State, 86 Ala. 77, 5 So. 775.

There is no variance where an indictment describes the house alleged to have been burned as occupied by defendant and one H as tenants, if the evidence shows that the owner of the house rented it to defendant, and that H jointly occupied it under an agreement with defendant. Woolsey *v.* State, 30 Tex. App. 346, 17 S. W. 546.

27. Martin *v.* State, 28 Ala. 71; State *v.* Keena, 63 Conn. 329, 28 Atl. 522.

In the absence of objection made in the court below, the question of variance between the names "Leon Ratcliff," as alleged in the indictment, and "Leonidas Ratcliff," as it appeared in the evidence, will not be considered in the appellate court. Hinds *v.* State, 55 Ala. 145.

28. If required to be alleged, the possession should be laid to be in the keeper of the jail. State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068; Reg. *v.* Connor, 2 Cox C. C. 65.

29. *Alabama.*—Sands *v.* State, 80 Ala. 201; Lockett *v.* State, 63 Ala. 5.

Arkansas.— Mott *v.* State, 29 Ark. 147.

Missouri.— State *v.* Johnson, 93 Mo. 73, 5 S. W. 699; State *v.* Wacker, 16 Mo. App. 417.

New York.— People *v.* Van Blarcum, 2 Johns. (N. Y.) 105.

Vermont.— State *v.* Roe, 12 Vt. 93.

Virginia.— Stevens *v.* Com., 4 Leigh (Va.) 683.

See 4 Cent. Dig. tit. "Arson," § 47.

Meeting-house.—In an indictment for burning a meeting-house it is not necessary to allege in whom is the property of the house. State *v.* Temple, 12 Me. 214.

An unnecessary averment that the jail burned was the house of the sheriff may be rejected as surplusage. Stevens *v.* Com., 4 Leigh (Va.) 683.

30. See *supra,* II, A, 5, a.

31. *Alabama.*— Davis *v.* State, 52 Ala. 357.

California.— People *v.* De Winton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 374; People *v.* Wooley, 44 Cal. 494.

Delaware.—State *v.* Bradley, 1 Houst. Crim. Cas. (Del.) 164.

Indiana.—Ritchey *v.* State, 7 Blackf. (Ind.)

though, in many states, this rule has been modified.[32] Ownership may be alleged in the alternative,[33] or it may, in different counts, be alleged to be in different persons.[34] It has been held to be sufficient if the property is described as "belonging to,"[35]

168; Emig *v.* Daum, 1 Ind. App. 146, 27 N. E. 322.

Kentucky.— Young *v.* Com., 12 Bush (Ky.) 243.

Michigan.— People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

Missouri.— State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068; State *v.* Wacker, 16 Mo. App. 417.

Nebraska.— Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027.

New Jersey.— State *v.* Fish, 27 N. J. L. 323.

New York.— Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464 [*affirming* 3 Hun (N. Y.) 310, 5 Thomps. & C. (N. Y.) 539]; People *v.* Gates, 15 Wend. (N. Y.) 159.

Vermont.— State *v.* Hannett, 54 Vt. 83; State *v.* Roe, 12 Vt. 93.

England.— Reg. *v.* Kimbrey, 6 Cox C. C. 464.

See 4 Cent. Dig. tit. "Arson," § 46.

Arson by tenant or occupant.— An indictment against a tenant for arson in burning the leased building must allege such tenancy (Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435); but it has been held sufficient in such case to allege that the landlord was the owner of the house (People *v.* Simpson, 50 Cal. 304).

Ownership may be laid in a servant residing in the building on leased premises (Davis *v.* State, 52 Ala. 357), in one having title by descent and in the dowress jointly (People *v.* Eaton, 59 Mich. 559, 26 N. W. 702), in one who held the property in trust, although defendant had a contingent interest in it, and was occupying it (Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111), in a wife in possession during her husband's absence (May *v.* State, 85 Ala. 14, 5 So. 14), in a widow having an unassigned dower interest, and the right to the dwelling as a mansion-house (State *v.* Moore, 61 Mo. 276; State *v.* Gailor, 71 N. C. 88, 17 Am. Rep. 3), in one in possession under an oral gift (Wyley *v.* State, 34 Tex. Crim. 514, 31 S. W. 393), in a bankrupt, although the house has been included in the assignment (Rex *v.* Ball, 1 Moody 30), in a partnership (People *v.* Greening, 102 Cal. 384, 36 Pac. 665; Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019, and in a tenant of property occupied jointly with the landlord (Shepherd *v.* People, 19 N. Y. 537); but not in one working a farm on shares, whose mere right is to deposit the crops in the buildings (People *v.* Smith, 3 How. Pr. (N. Y.) 226), or in the proprietor of a stable and one of his tenants jointly where the greater part of the stable was in the rightful occupancy of another (Com. *v.* Wade, 17 Pick. (Mass.) 395).

Property of person of same name as defendant.—An indictment, describing the property destroyed as the property of a person of the same name as defendant, will not be quashed, on the ground that the property belongs to defendant, where it does not affirmatively appear that the owner of the property is the same person as defendant. Com. *v.* Jacoby, 11 York Leg. Rec. (Pa.) 162.

Lawfulness of occupation.— In an indictment for burning the dwelling-house of another, where such house is lawfully occupied, the fact that such occupation was lawful should be distinctly alleged. Lacy *v.* State, 15 Wis. 13.

Insufficient averment of ownership of personalty.— An indictment charging that defendant "set fire to a great amount of rags, . . . in the cellar under the . . . building situated on the north half . . . of lot 4, . . . owned by Margaret Grady," avers that G was the owner of the building, and not of the rags. State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193.

32. Owner or occupant.— In some states the premises may be charged to be the house of either the owner or occupant. People *v.* Fisher, 51 Cal. 319; Harvey *v.* State, 67 Ga. 639; Avant *v.* State, 71 Miss. 78, 13 So. 881; State *v.* Carter, 49 S. C. 265, 27 S. E. 106. See also Com. *v.* Elder, 172 Mass. 187, 51 N. E. 975; State *v.* Kroscher, 24 Wis. 64.

Owned by one and occupied by another.— If it be alleged that the dwelling-house is owned by one and occupied by another, this is sufficient. State *v.* Barrett, (Del. 1899) 47 Atl. 381; State *v.* McCarter, 98 N. C. 637, 4 S. E. 553. But, in People *v.* Myers, 20 Cal. 76, 78, it was said that an indictment charging defendant with burning a dwelling-house which "was then and there the property of one Lemon, and was then and there the dwelling-house of one Chinaman," was bad for uncertainty as to whether the building burned was the dwelling-house of L or C, and could not be made good by any rejection for surplusage.

Possession by cotenant.— In an indictment under the statute for arson of a crib, ownership is properly laid in one tenant who had actual possession and exclusive occupancy of the premises on which it was situate, under the contract with the cotenant, though the fee was in the two jointly, as tenants in common. Adams *v.* State, 62 Ala. 177.

Where the name of the owner is immaterial it need not be proved even though alleged. People *v.* Handley, 100 Cal. 370, 34 Pac. 853.

33. Brown *v.* State, 79 Ala. 51; Sampson *v.* Com., 5 Watts & S. (Pa.) 385.

34. Cunningham *v.* State, 117 Ala. 59, 23 So. 693, holding that, in such case, a charge restricting the jury to one of the counts, where there is no evidence that separate offenses were committed, is properly refused.

35. Com. *v.* Hamilton, 15 Gray (Mass.) 480.

"the property of," "owned by," "in possession of,"[36] or simply "of"[37] a person named.

(IX) *CONCLUSION.* An indictment for arson, in burning a stable, must conclude "against the form of the statute," etc., otherwise it will be bad, on error.[38]

2. JOINDER OF COUNTS. Where the offenses charged in the several counts of an indictment are not repugnant, but grow out of the same transaction, and are mere variations of the statement of the same act, such counts may be joined, although some of them charge the offense as a felony and others as a misdemeanor,[39] or though some charge an actual burning and another a solicitation and inciting to commit the crime.[40]

B. Burning With Intent to Defraud Insurer[41] — **1. IN GENERAL.** An indictment for burning property with intent to defraud the insurer must allege facts which show that accused is brought within the terms of the statute with such certainty as to identify the offense, and distinguish it from other transactions.[42]

2. OWNERSHIP OF PROPERTY. When the statute ignores it, an allegation of ownership is not necessary;[43] but, when it is alleged that defendant is the owner, it has been held that the averment must be proved as laid.[44]

3. INTENT. It should be alleged that defendant acted with intent to injure the insurer.[45]

4. DESCRIPTION OF INSURER. It has been held that the indictment should aver that the insurer is a corporation, if such be the fact,[46] or that it is a partnership, if such be the fact, composed of certain individuals, giving their names.[47] It

36. State *v.* Daniel, 121 N. C. 574, 28 S. E. 255.

37. Jordon *v.* State, 142 Ind. 422, 41 N. E. 817; Wolf *v.* State, 53 Ind. 30; State *v.* Daniel, 121 N. C. 574, 28 S. E. 255; State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241; Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762, the last case holding that redundancy, in alleging the ownership of a house in a certain person, and its occupation by the accused for and as the agent of another, does not vitiate it.

38. Chapman *v.* Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

39. *Alabama.*— Washington *v.* State, 68 Ala. 85.

Massachusetts.— Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356.

New York.— People *v.* Fanshawe, 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 47 N. Y. St. 331, 8 N. Y. Crim. 326 [*affirmed* in 137 N. Y. 68, 32 N. E. 1102, 50 N. Y. St. 1].

Pennsylvania.— Staeger *v.* Com., 103 Pa. St. 469.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

See 4 Cent. Dig. tit. "Arson," § 33.

Different houses and different owners.— An indictment containing four counts, each of which charges the offense in the first degree, but alleges a different house and a different ownership, is not subject to demurrer for misjoinder of counts. Miller *v.* State, 45 Ala. 24.

40. Mitchell *v.* State, 5 Coldw. (Tenn.) 53. And see Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239.

41. For forms of indictments or informations for burning property with intent to defraud the insurer thereof see State *v.* Byrne, 45 Conn. 273; State *v.* Jessup, 42 Kan. 422, 22 Pac. 627; Com. *v.* Bradford, 126 Mass. 42; Com. *v.* Goldstein, 114 Mass. 272; Searles *v.* State, 6 Ohio Cir. Ct. 331.

42. Carncross *v.* People, 1 N. Y. Crim. 518.

43. U. S. *v.* McBride, 7 Mackey (D. C.) 371.

44. People *v.* Butler, 62 N. Y. App. Div. 508, 71 N. Y. Suppl. 129, holding that one charged with burning his barn, with intent to prejudice the insurer, cannot be convicted on evidence merely showing that he burned his wife's barn. But, under an indictment for burning a building, the property of defendant, with intent to defraud the insurer thereof, it may be shown, without variance, that the building, although owned by defendant, was erected upon leased ground. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228.

45. People *v.* Schwartz, 32 Cal. 160; Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333.

46. People *v.* Schwartz, 32 Cal. 160; Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333. But see U. S. *v.* McBride, 7 Mackey (D. C.) 371 (holding that, in the absence of anything to show the contrary, a description of the company as "the president and directors of the Firemen's Insurance Company" is sufficient); Johnson *v.* State, 65 Ind. 204 (holding an averment of corporate existence to be unnecessary if the company is designated by a name apparently indicating it to be a corporation); Mackesey *v.* People, 6 Park. Crim. (N. Y.) 114 (holding that "North American Fire Insurance Company" was a sufficient description to authorize the introduction of evidence to prove incorporation).

Failure to prove incorporation is not a fatal variance. Evans *v.* State, 24 Ohio St. 458.

47. People *v.* Schwartz, 32 Cal. 160; Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333.

seems, however, that it need not be averred whether the company is domestic or foreign,[48] or that the insurer was authorized to do business in the state;[49] and it is no ground for arrest of judgment, on an indictment for arson committed with intent to defraud an insurance company, that there was a variance between the name of the company as given in the indictment and as proved on the trial.[50]

5. EXISTENCE OF INSURANCE ON PROPERTY. It must be alleged that the property burned was, at the time, insured against fire;[51] but the indictment need not aver that accused held a valid policy, or any policy,[52] nor need the policy be set forth according to its tenor.[53]

C. Attempt.[54] It is sufficient to charge the attempt in the language of the statute defining the offense,[55] and the particular manner in which the attempt was made need not be pointed out.[56] In one count may be included what defendant did himself and what he solicited another to do, in making the same attempt,[57] or a charge of breaking and entering a building, as well as an attempt, in the building, after the breach and entry, to set fire to it.[58]

IV. EVIDENCE.

A. Burden of Proof and Presumptions. Where a building is burned, the presumption is that the fire was caused by accident rather than by the act of the accused, accompanied by a deliberate intent;[59] but it is also presumed that one intends the natural consequence of his act,[60] and an intent to injure the owner or

48. Johnson *v.* State, 65 Ind. 204.

49. State *v.* Tucker, 84 Mo. 23.

50. People *v.* Hughes, 29 Cal. 257.

51. *Alabama.*—Martin *v.* State, 29 Ala. 30.

Illinois.— Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333.

New York.— People *v.* Henderson, 1 Park. Crim. (N. Y.) 560.

Ohio.— State *v.* Yablon, 11 Ohio Dec. (Reprint) 569, 27 Cinc. L. Bul. 324; State *v.* Calland, 5 Cinc. L. Bul. 472.

England.— Reg. *v.* Bryans, 12 U. C. C. P. 161.

But see U. S. *v.* McBride, 7 Mackey (D. C.) 371, holding that, where an attempt to injure an insurance corporation is averred, it is not necessary to aver any insurance on, or interest in, the property by the company.

See 4 Cent. Dig. tit. "Arson," § 36.

Omission cured by verdict.— An omission of the allegation that the property was at the time insured is a defect which cannot be raised after verdict of guilty. State *v.* Jessup, 42 Kan. 422, 22 Pac. 627.

Sufficient averments.— An allegation that the goods burned were "then and there insured" in a corporation "theretofore duly established" sufficiently alleges an insurance by a corporation legally existing, and bound by the policy, at the time of the fire (Com. *v.* Goldstein, 114 Mass. 272), and an allegation that defendant burned his own house, the said house "being at the time insured," is sufficient, without alleging the facts in relation to the insurance (Baker *v.* State, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427).

52. McDonald *v.* People, 47 Ill. 533.

The fact that the policy was made payable to a mortgagee of the building is not inconsistent with an allegation in the indictment that the company insured the building to the accused. State *v.* Byrne, 45 Conn. 273.

53. Com. *v.* Goldstein, 114 Mass. 272.

54. For forms of indictments and informations for attempt at arson see Howard *v.* State, 109 Ga. 137, 34 S. E. 330 (jail); Com. *v.* Flagg, 135 Mass. 545 (soliciting another to burn a barn); Com. *v.* Flynn, 3 Cush. (Mass.) 529 (dwelling-house); People *v.* Thompson, 37 Mich. 118 (soliciting another to burn a meeting-house); McDermott *v.* People, 5 Park. Crim. (N. Y.) 102 (barn); Peverelly *v.* People, 3 Park. Crim. (N. Y.) 59 (warehouse adjoining an inhabited dwelling-house).

55. People *v.* Giacamella, 71 Cal. 48, 12 Pac. 302.

Description of building.— It is sufficient to describe a house as "a certain guard and jail-house" in a municipality named, which was the property of that municipality. Howard *v.* State, 109 Ga. 137, 34 S. E. 330.

Feloniously.— The attempt should be described as "feloniously" made where it is, in fact, a felony. Com. *v.* Weiderhold, 112 Pa. St. 584, 4 Atl. 345.

56. People *v.* Bush, 4 Hill (N. Y.) 133; Mackesey *v.* People, 6 Park. Crim. (N. Y.) 114.

The combustible material used for the purpose need not be described. Com. *v.* Flynn, 3 Cush. (Mass.) 529.

57. State *v.* Hayes, 78 Mo. 307.

Persons employed in attempt.— Evidence that defendant hired the person named and another to join in burning a certain building will support an information charging him with hiring such person named to burn it. People *v.* Thompson, 37 Mich. 118.

58. Com. *v.* Harney, 10 Metc. (Mass.) 422.

59. Phillips *v.* State, 29 Ga. 105. See also People *v.* Doneburg, 64 N. Y. Suppl. 438.

60. State *v.* Phifer, 90 N. C. 721.

insurer may be inferred from the deliberate act of firing.[61] On plea of not guilty, the state must show that the accused was at a place where he could have committed the act,[62] and it has also been held that it must prove that he had no permission or authority from the owner to burn the house.[63] Where a human being was placed in the building burned a few hours before the fire, the presumption is that he was still there at the time of the fire.[64]

B. Admissibility — 1. In General — a. Facts in Issue and Relevant Thereto. The extent of the conflagration may be shown [65] and, on the trial of an indictment for burning an uninhabited building, where a dwelling was endangered, it may be shown that the fire was actually communicated to the dwelling, to establish that the latter was endangered.[66] Opinion evidence as to the incendiary origin of the crime is inadmissible,[67] and testimony, although suggesting an incendiary origin, should not be received where nothing appears to connect defendant with the arson.[68]

b. Collateral and Corroborative Evidence — (I) *In General.* While evidence of circumstances tending to incriminate the accused is admissible,[69] testimony

61. *California.*— People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305.

Connecticut.— State *v.* Byrne, 45 Conn. 273.

Massachusetts.— Com. *v.* Harvey, 10 Metc. (Mass.) 422.

North Carolina.— State *v.* Jaynes, 78 N. C. 504.

England.— Rex *v.* Farrington, R. & R. 207.

62. People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

63. Eller *v.* People, 153 Ill. 344, 38 N. E. 660.

64. Childress *v.* State, 86 Ala. 77, 5 So. 775.

65. Woodford *v.* People, 5 Thomps. & C. (N. Y.) 539 [*affirmed* in 62 N. Y. 117, 20 Am. Rep. 464].

Simultaneous firing of several buildings.— Where a dwelling and two outhouses were so close together that the burning of one must have resulted in the destruction of the others, it was competent, in a prosecution for burning the dwelling, to show that the three buildings were fired simultaneously. People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919.

66. State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

67. State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630; Monroe *v.* Lattin, 25 Kan. 351; Tefft *v.* Wilcox, 6 Kan. 46.

68. Gawn *v.* State, 13 Ohio Cir. Ct. 116, 7 Ohio Cir. Dec. 119.

69. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Admissions to the effect that accused was present at the place of the fire at an earlier hour than admitted by him (Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356); that, on the night of the fire, he used a team which the evidence associated with the perpetrator of the crime (State *v.* Ward, 61 Vt. 153, 17 Atl. 483); or that he was near the farm on which the burned property was located (People *v.* Eaton, 59 Mich. 559, 26 N. W. 702), are admissible; but a statement, made several months after his barn was burned, that defendant had a good insurance on his house, and it might go to blazes with the barn, is not an admission that he burned the barn (Hamilton *v.* People, 29 Mich. 173).

Mutilation of books which would show the interest of defendant in the insured property which he is charged with burning is pertinent to the issue, if done by, or at the instance of, defendant. People *v.* O'Neil, 49 Hun (N. Y.) 422, 4 N. Y. Suppl. 119, 6 N. Y. Crim. 274 [*affirmed* in 112 N. Y. 355, 19 N. E. 796, 20 N. Y. St. 754].

Making claim and swearing to proof of loss is competent on the trial of an indictment for burning, or aiding and abetting another to burn, property with intent to defraud the insurer (Stitz *v.* State, 104 Ind. 359, 4 N. E. 145; Searles *v.* State, 6 Ohio Cir. Ct. 331); as is evidence of previous demands on other insurers for losses occurring at other fires (Reg. *v.* Gray, 4 F. & F. 1102). It may also be shown that defendant claimed that the insurance money should be paid to him, and not to another who was entitled to it; and that he stated that he "was willing to sacrifice a little of it if they would make a settlement with him then and there." People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020, 12 N. Y. Crim. 524.

Possession of property and incendiary materials.— Evidence of the possession of goods similar to those in the building immediately before the fire (State *v.* Vatter, 71 Iowa 557, 32 N. W. 506), or of the possession, immediately after the fire, of materials similar to those used in kindling the fire (Morris *v.* State, 124 Ala. 44, 27 So. 336; State *v.* Gillis, 15 N. C. 606; Halleck *v.* State, 65 Wis. 147, 26 N. W. 572) is admissible; but it is error to exclude evidence of defendant explaining the removal of the goods (People *v.* Fournier, (Cal. 1897) 47 Pac. 1014). So, where there was evidence that defendant was seen to approach the building with a jug in her hand, and pour oil therefrom, to which she set fire, evidence that the jug was formerly in possession of her husband is admissible as evidence of the prisoner's identity. Thomas *v.* State, 107 Ala. 13, 18 So. 229.

Statements on preliminary examination.—

of a merely argumentative character,[70] or of the conduct of the accused or of other facts having no tendency to implicate him,[71] should not be received; but evidence of the conduct of the accused prior to, at, and immediately subsequent to, the fire is, in general, admissible.[72] So, too, evidence tending to show that, from existing conditions or prior occurrences, the fire might well have been of accidental origin is admissible.[73] Evidence cannot be received to exculpate[74] or incriminate[75] another, or where it has no tendency to implicate defendant any more than several others.[76] The rule excluding secondary evidence applies to the admission of oral statements of value, where they are contained in a written application to the insurer;[77] but such evidence is admissible to show the contents of policies where accused refuses to introduce them on his trial for burning property with intent to defraud the insurer.[78]

(II) *Acts and Declarations of Accomplices.* Facts tending to corroborate the testimony of an accomplice, although not otherwise directly bearing on the main fact tried, are admissible.[79] So, the joint act of several may be shown on the trial of one,[80] and, on the trial of several, it is not necessary to show a conspiracy before introducing evidence implicating only some of defendants,[81] though, until a connection between the parties is established, the act of one, indicating a motive for the offense, cannot be received against the other.[82] After the existence of a conspiracy is established, the acts and statements of the accomplice, done, made, or said in furtherance of the execution of the crime, or subsequently in relation thereto, are admissible.[83]

That the accused, on his preliminary examination, gave an account of his whereabouts on the night of the fire that was inconsistent with his former statements may be shown. People *v.* Eaton, 59 Mich. 559, 26 N. W. 702.

That defendant's clerk forbade the removal of goods from the store burned is incompetent, in the absence of any evidence that defendant authorized him to do so, other than the statement of a person that he was told by defendant to desist from carrying out goods. Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027, 26 S. W. 75.

70. Thus, it was error to admit evidence of the amount of goods saved from a house that was burned at the same time as defendant's store, to corroborate evidence that defendant obstructed the removal of goods from his store. Bluman *v.* State, 33 Tex. Crim. 43, 26 S. W. 75, 21 S. W. 1027.

71. Thus it was error to admit evidence tending to show that defendant had used personal violence upon a female servant in his household, one of the persons whom it was claimed he had procured to set the fire. People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846 [*reversing* 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020].

72. People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020, 12 N. Y. Crim. 524; People *v.* Burton, 77 Hun (N. Y.) 498, 28 N. Y. Suppl. 1081, 60 N. Y. St. 544; Woodford *v.* People, 5 Thomps. & C. (N. Y.) 539; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Shifflet *v.* Com., 14 Gratt. (Va.) 652; Reg. *v.* Taylor, 5 Cox C. C. 138.

73. People *v.* Fournier, (Cal. 1897) 47 Pac. 1014; State *v.* Delaney, 92 Iowa 467, 61 N. W. 189; Hamilton *v.* People, 29 Mich. 173.

74. State *v.* England, 78 N. C. 552.

75. U. S. *v.* White, 5 Cranch C. C. (U. S.) 73, 28 Fed. Cas. No. 16,676.

76. Thus, evidence of the habits of a watchdog, or of his acts on the night of the fire, is not admissible in connection with, or corroboration of, evidence that defendant had previously said, while declaring his intention to burn the building, that he must do so soon after leaving the place, and before the dog forgot him. Com. *v.* Marshall, 15 Gray (Mass.) 202.

77. Thus verbal statements of defendant as to the value of goods insured, made to the agent of the insurance company, are not admissible in evidence upon the trial of defendant for attempting to set fire to the insured goods, where the written application for insurance contains a statement as to the value of the goods, and is offered in evidence, or is present in court. People *v.* Jones, 24 Mich. 215.

78. Knights *v.* State, 58 Nebr. 225, 78 N. W. 508, 76 Am. St. Rep. 78.

79. Johnson *v.* State, 65 Ind. 204; State *v.* Kingsbury, 58 Me. 238; Hall *v.* State, 3 Lea (Tenn.) 552.

80. Thus an affidavit made jointly by defendant and the secretary of a corporation, to which defendant had sold the business carried on in the building which he was charged with burning, for the purpose of obtaining insurance thereon, is as competent evidence against defendant as if made by himself alone. People *v.* O'Neil, 49 Hun (N. Y.) 422, 4 N. Y. Suppl. 119, 6 N. Y. Crim. 274 [*affirmed* in 112 N. Y. 355, 19 N. E. 796, 20 N. Y. St. 754].

81. State *v.* Travis, 39 La. Ann. 356, 1 So. 817.

82. People *v.* Scott, 10 Utah 217, 37 Pac. 335.

83. People *v.* Trim, 39 Cal. 75.

(III) *Experiments.* The court may, in its discretion, receive experimental evidence,[84] but it is error to receive evidence of an experiment made under conditions entirely different from those existing at the time of the fire.[85]

2. **Motive.** Evidence of the prisoner's pecuniary condition,[86] the fact that accused owned a policy of insurance upon the building burned,[87] and especially that he procured overinsurance,[88] is admissible upon the question of motive on a trial for burning property with an intent to defraud the insurer thereof. So, the fact that the building burned contained papers prejudicial to the interests of accused,[89] or the pecuniary relations existing between the owner of the building burned and relatives of the insured who had property stored therein,[90] may be shown. And on the trial on an indictment for setting fire to a jail, the indictment containing the charges for which accused was in jail is admissible on the question of intent.[91] Accused, having given evidence that others had equally as strong motive to commit the offense, is not entitled to give the names of such persons.[92]

A false statement made by one of defendants after the fire, to the import that the barn was not insured, is no part of the *res gestæ*, and should not be received against another defendant (Hamilton *v.* People, 29 Mich. 173), and a statement of the principal, after the fire, that he had hired the accused to burn the property, not made in connection with any efforts of the principal to obtain insurance, are inadmissible as against the accused (Searles *v.* State, 6 Ohio Cir. Ct. 331).

84. People *v.* Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

85. People *v.* Gotshall, 123 Mich. 474, 82 N. W. 274.

86. Com. *v.* Hudson, 97 Mass. 565; People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020, 12 N. Y. Crim. 524; Reg. *v.* Grant, 4 F. & F. 322. *Contra*, under an indictment for burning a gin-house. State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241.

The admission of drafts, drawn by defendant, for the purpose of showing his financial condition at the time of the fire, was not error where most, if not all, of the indebtedness evidenced by the drafts was shown by defendant's testimony to have existed at that time. State *v.* Hull, 83 Iowa 112, 48 N. W. 917.

The pendency of a suit concerning the title should not have been introduced to show a motive to defraud, when the time for taking proofs had expired some time before the fire, and the answer denied the equity of the bill. *A fortiori*, evidence of a suit brought subsequent to the fire was improper. Hamilton *v.* People, 29 Mich. 173.

87. State *v.* Watson, 63 Me. 128; People *v.* Didien, 17 How. Pr. (N. Y.) 224; Freund *v.* People, 5 Park. Crim. (N. Y.) 198; Didieu *v.* People, 4 Park. Crim. (N. Y.) 593.

Amount of stock owned by defendant.— In a prosecution for burning insured property, the amount of stock owned by defendant in the company to which he had sold the property is competent as tending to show the interest of defendant in the insurance. People *v.* O'Neil, 49 Hun (N. Y.) 422, 4 N. Y. Suppl. 119, 6 N. Y. Crim. 274 [*affirmed* in 112 N. Y. 355, 19 N. E. 796, 20 N. Y. St. 754].

The amount of defendant's loss, and the value of stock remaining, as ascertained in the course of an adjustment of the loss, in the presence and with the assistance of defendant, is admissible on the question of motive. People *v.* Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

Insurance on another building.—On a prosecution for burning one's building with intent to get the insurance thereon, evidence that the building of a third person, in which the fire started, was also insured, was admissible. People *v.* Fournier, (Cal. 1897) 47 Pac. 1014.

88. *Indiana.*— Stitz *v.* State, 104 Ind. 359, 4 N. E. 145.

Iowa.— State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193.

Massachusetts.— Com. *v.* Hudson, 97 Mass. 565. See also Com. *v.* Bradford, 126 Mass. 42.

Nevada.— State *v.* Cohn, 9 Nev. 179, holding that parol evidence may be received to show the place and amount of overinsurance.

New York.— Shepherd *v.* People, 19 N. Y. 537. But the jury cannot consider the question of overinsurance of defendant's property, where the only evidence thereof is that, in the proofs of loss, the property was valued at less than the insured amount, and there is no evidence that such proofs referred to all the property insured. People *v.* Kelly, 11 N. Y. App. Div. 495, 42 N. Y. Suppl. 756.

Rebuttal.— Where, on a trial for arson, in order to show a malicious motive, evidence was introduced that defendant had in the building a stock of goods worth only five hundred dollars, which was insured for two thousand dollars, evidence offered in rebuttal that the goods were mortgaged for one thousand seven hundred dollars was held immaterial, since the money received from insurance might be advantageous to pay off the mortgage notes. Com. *v.* McCarthy, 119 Mass. 354.

89. Winslow *v.* State, 76 Ala. 42.

90. Fulton *v.* State, 58 Ga. 224.

91. Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269.

92. Hudson *v.* State, 61 Ala. 333.

3. Other Crimes — a. In General. Evidence of other crimes is not admissible,[93] unless committed in furtherance of the plan to burn[94] where the arson was committed in aid of a purpose to accomplish the other crime.[95] Where, however, the evidence is restricted to that purpose, it may be shown that defendant possessed the skill, tools, and opportunity to construct an implement used at the commission of another crime.[96]

b. Other Fires. While evidence that other fires occurred in the vicinity at or about the same time as the burning of the building alleged in the indictment,[97] or that the same or other property of accused or prosecutor was on fire on previous or subsequent occasions,[98] is not generally admissible in the absence of anything to show defendant's connection with the charge for which he is on trial, yet, if it tends to directly connect defendant with the burning alleged in the indictment,[99] to establish intent,[1] or to show the incendiary origin of the crime,[2] it may be received. So, evidence of the burning of other property belonging to the same owner at almost the same time is admissible to show that the two fires were parts of a scheme concocted and carried out by accused.[3]

c. Previous Attempts. A previous attempt to burn a building may be shown to establish intent, if accompanied by evidence of circumstances tending to implicate defendant on the former occasion,[4] and evidence of a previous conspiracy to burn the same building is admissible.[5]

4. Property Burned — a. Character. Testimony tending to fix the description of the building is proper,[6] and the character of the surrounding buildings may be shown to establish the fact that the building burned was a dwelling-house.[7]

b. Contents. It is improper to admit evidence of the contents on the trial of an indictment for burning a building, where the character of the building is not controverted.[8]

93. State *v.* Graham, 121 N. C. 623, 28 S. E. 409; Reg. *v.* Greenwood, 23 U. C. Q. B. 250.

94. State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896; Hall *v.* State, 3 Lea (Tenn.) 552.

95. Jones *v.* State, 63 Ga. 395; Kramer *v.* Com., 87 Pa. St. 299.

96. Com. *v.* Choate, 105 Mass. 451.

97. Com. *v.* Gauvin, 143 Mass. 134, 8 N. E. 895; State *v.* Dukes, 40 S. C. 481, 19 S. E. 134. But see People *v.* Jones, 123 Cal. 65, 55 Pac. 698, holding that evidence that other buildings were also burned was admissible in proof of the *corpus delicti*, and also to corroborate accused's confession that other buildings were burned.

98. Brock *v.* State, 26 Ala. 104; State *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328; People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846 [*reversing* 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020]; People *v.* Cassidy, 14 N. Y. Suppl. 349, 39 N. Y. St. 27.

99. Com. *v.* McCarthy, 119 Mass. 354. See also Chapman *v.* State, 112 Ga. 56, 37 S. E. 102.

1. Knights *v.* State, 58 Nebr. 225, 78 N. W. 508, 76 Am. St. Rep. 78.

2. State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000; State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

3. Wright *v.* People, 1 N. Y. Crim. 462.

4. *California.*— People *v.* Fournier, (Cal. 1897) 47 Pac. 1014; People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091; People *v.* Shainwold, 51 Cal. 468.

Louisiana.— State *v.* Rohfrischt, 12 La. Ann. 382.

Massachusetts.— Com. *v.* Bradford, 126 Mass. 42; Com. *v.* McCarthy, 119 Mass. 354.

Vermont.— State *v.* Hallock, 70 Vt. 159, 40 Atl. 51; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

England.— Reg. *v.* Dossett, 2 C. & K. 306, 2 Cox C. C. 243, 61 E. C. L. 306; Reg. *v.* Bailey, 2 Cox C. C. 311; Reg. *v.* Harris, 4 F. & F. 342.

See 4 Cent. Dig. tit. "Arson," § 62.

Request of witness to burn house.— The fact that defendant, a few months before the burning charged, requested the witness to burn the house, is admissible. Martin *v.* State, 28 Ala. 71.

5. Meister *v.* People, 31 Mich. 99.

6. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228, holding that evidence that the building had been occupied as a summer hotel during the preceding summer was admissible as a description of the building.

The owner may testify that the house was formerly occupied as a dwelling, and was adapted to be so occupied. Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677.

7. People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1003, 44 N. Y. St. 869 [*affirming* 14 N. Y. Suppl. 349, 39 N. Y. St. 327], holding that it was competent, for the purpose of describing the scene of the crime, to show the location and occupancy of four buildings in the same block as that burned; and that a map of the building set on fire, and of the adjacent and surrounding premises, was also admissible for that purpose.

8. Simpson *v.* State, 111 Ala. 6, 7, 20 So. 572; Brown *v.* State, 52 Ala. 345, the latter

c. Occupancy. The possession, occupancy, and control of the premises may be shown by parol.[9]

d. Ownership. Testimony of ownership is irrelevant where the lawfulness of the possession is not questioned;[10] but, where proof is necessary and the deed cannot be produced, a registered copy is competent to prove ownership of the property,[11] which may even be proved by parol.[12]

5. Threats and Prior Relations. It has been held that threats made by the accused[13] against the person or property of the prosecutor[14] may be shown, not only for the purpose of proving malice, but to connect accused with the commission of the offense.[15] Similarly it may be shown that unfriendly relations existed between accused and the owner of the building,[16] or the insurer

case holding that, in an indictment for arson in the third degree, where the building is designated as a "corn-crib," proof that "corn and fodder were kept in it" is relevant and proper to show that the building was such a one as was described in the indictment; but that proof of what was in it at the time it was burned is irrelevant, and should be excluded. But see Hamilton *v.* People, 29 Mich. 173, holding that the contents may be shown even though not alleged.

9. State *v.* Elder, 21 La. Ann. 157.

10. People *v.* Scott, 32 Cal. 200; State *v.* Moore, 61 Mo. 276.

Evidence that the husband furnished part of the money to build the house originally is inadmissible, since such would not change the ownership. Garrett *v.* State, 109 Ind. 527, 10 N. E. 570.

11. Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494.

12. *Nebraska.*— Knights *v.* State, 58 Nebr. 225, 78 N. W. 508, 76 Am. St. Rep. 78.

North Carolina.— State *v.* Jaynes, 78 N. C. 504.

Texas.— Hester *v.* State, (Tex. Crim. 1899) 51 S. W. 932; Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762.

Vermont.— State *v.* Smalley, 50 Vt. 736.

Washington.— State *v.* Meyers, 9 Wash. 8, 36 Pac. 1051.

See 4 Cent. Dig. tit. "Arson," § 61.

The declaration of accused may be received to show his ownership of an insured building. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228.

13. **Threats made by a stranger** are not competent for the state (Ford *v.* State, 112 Ind. 373, 14 N. E. 241; State *v.* Crawford, 99 Mo. 74, 12 S. W. 354), though it is otherwise where the evidence is offered by the defense (Hensley *v.* State, 9 Humphr. (Tenn.) 242).

14. **Threats against adjacent property.**— It has been held that evidence of threats made by accused against the owner of a building in immediate proximity to the burned structure, and which caught on fire, is relevant (Bond *v.* Com., 83 Va. 581, 3 S. E. 149); but, in a prosecution of accused for burning his own building to defraud his insurer, evidence that he had made threats against the owners of buildings in the vicinity, which buildings were burned about the same time as his own, is inadmissible to establish a presumption that he is guilty of the offense charged (State *v.* Smalley, 50 Vt. 736).

15. *Alabama.*— Morris *v.* State, 124 Ala. 44, 27 So. 336; Winslow *v.* State, 76 Ala. 42; Hinds *v.* State, 55 Ala. 145.

California.— People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091.

Iowa.— State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275.

Massachusetts.— Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563; Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54.

Michigan.— People *v.* Eaton, 59 Mich. 559, 26 N. W. 702.

Missouri.— State *v.* Crawford, 99 Mo. 74, 12 S. W. 354.

Nevada.— State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

North Carolina.— State *v.* Lytle, 117 N. C. 799, 23 S. E. 476; State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038; State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

See 4 Cent. Dig. tit. "Arson," § 62.

Lapse of time between the making of certain threats, and the time of the burning of the property for which the prisoner is accused of arson, goes only to the weight of the testimony, and not to its competency. Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54; Com. *v.* Goodwin, 14 Gray (Mass.) 55. But see Carncross *v.* People, 1 N. Y. Crim. 518, where threats made several years before were held inadmissible.

The fact that ownership of the property was afterward changed does not render inadmissible evidence of prior threats of accused to burn the same building. State *v.* Fenlason, 78 Me. 495, 7 Atl. 385.

Rebuttal.— On trial of an indictment for burning a court-house and records, including a decree of sale of real estate of the accused, it was error to refuse to admit, in rebuttal of testimony of a declaration of the prisoner that "he had three ways of heading the Kingwood lawyers," a certificate of protection in bankruptcy granted to accused. Gregg *v.* State, 3 W. Va. 705.

16. Prater *v.* State, 107 Ala. 26, 18 So. 238; Long *v.* State, 86 Ala. 36, 5 So. 443; McAdory *v.* State, 62 Ala. 154; Shepherd *v.* People, 19 N. Y. 537; Davis *v.* State, 15 Tex. App. 594; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; State *v.* Hannett, 54 Vt. 83. See also Oliver *v.* State, 33 Tex. Crim. 541, 28 S. W.

thereof,[17] or between accused and one who had property stored therein at the time of and prior to the burning;[18] but it is improper to inquire into the cause of the quarrel.[19] The existence of friendly relations, without reference to the time at which such feelings were entertained, cannot be shown to establish want of motive.[20]

C. Weight and Sufficiency. Arson may be proved by circumstantial evidence,[21] but the evidence must be sufficient beyond a reasonable doubt to convict defendant.[22]

V. TRIAL.

A. Questions of Law and Fact. It has been held that, after proper instructions from the court as to the legal meaning of the terms, it is a question for the jury to determine whether there was a burning,[23] whether the building burned was within the curtilage,[24] whether an incomplete structure was so far advanced as to be a building[25] or was a dwelling-house,[26] and whether defendant had the nec-

202, holding that, where it appeared that defendant had beaten his stepdaughter, and driven her from his house, and that the house burned was that in which the stepdaughter had taken refuge, defendant's treatment of his stepdaughter was admissible in order to show a motive for the burning.

Lapse of a long time between the acts manifesting hostile relations and the commission of the offense does not affect the admissibility of such evidence. Hudson *v.* State, 61 Ala. 333.

Ill-will of defendant toward the agent of the owner of the property is inadmissible to prove a motive, in the absence of evidence of threats against the latter, or of any facts tending to show that defendant's ill-will had extended to the owner. State *v.* Battle, 126 N. C. 1036, 35 S. E. 624.

Refusal to rent building to defendant.— Evidence that prosecutor refused to rent to accused his farm, on which the barn was situated which accused was charged with burning, because he had already leased it, is inadmissible to show a motive of accused for burning the barn. Simpson *v.* State, 111 Ala. 6, 20 So. 572.

17. People *v.* Gotshall, 123 Mich. 474, 82 N. W. 274.

18. State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

19. State *v.* Hannett, 54 Vt. 83.

20. Com. *v.* Cornelly, 7 Pa. Super. Ct. 77, 42 Wkly. Notes Cas. (Pa.) 34.

It is improper to inquire into the friendliness of defendant's family with prosecutor's wife. Bell *v.* State, 74 Ala. 420.

21. Whitfield *v.* State, 25 Fla. 289, 5 So. 805; Meeks *v.* State, 103 Ga. 420, 30 S. E. 252; Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

22. Green *v.* State, 111 Ga. 139, 36 S. E. 609; Boatwright *v.* State, 103 Ga. 430, 30 S. E. 256; Clark *v.* State, 37 Ga. 191; State *v.* Johnson, 19 Iowa 230.

Existence of insurance corporation.— The act of incorporation, with proof of user, is sufficient to establish the existence of the corporation (Carncross *v.* People, 1 N. Y. Crim. 518), and testimony that a party was acting as the agent of an insurance company, effected an insurance, and delivered the policy to the insured, is sufficient to authorize the jury to find the *de facto* existence of the corporation, and the execution and delivery of the policy of insurance by its *de facto* agent (People *v.* Hughes, 29 Cal. 257).

Intent.— The fact that defendant, four months before the fire, advised certain persons to remove property from the building and others to insure adjoining property, does not necessarily indicate an intention to burn the building. People *v.* Doneburg, 51 N. Y. App. Div. 613, 64 N. Y. Suppl. 438.

Motive.— Proof that the buildings were insured (Martin *v.* State, 28 Ala. 71), or overinsured (Stitz *v.* State, 104 Ind. 359, 4 N. E. 145; People *v.* Kelly, 11 N. Y. App. Div. 495, 42 N. Y. Suppl. 756) does not establish a motive for the owner to burn them, unless it is shown that he knew of the insurance or overinsurance. Neither is the fact that prosecutor had not fully settled with defendant for work done by the latter a sufficient motive. Ross *v.* State, 109 Ga. 516, 35 S. E. 102.

Ownership.— Proof of possession, unquestioned, is sufficient evidence of property in the alleged owner of the premises burned to sustain a verdict of guilty. State *v.* Taylor, 45 Me. 322. Production of the title-deed to the premises is not necessary, in addition to proof of the owner's occupation at the time of the fire. State *v.* Burrows, 1 Houst. Crim. Cas. (Del.) 74.

23. Com. *v.* Betton, 5 Cush. (Mass.) 427.

24. Cook *v.* State, 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688; Com. *v.* Barney, 10 Cush. (Mass.) 480.

25. Com. *v.* Squire, 1 Metc. (Mass.) 258; Reg. *v.* Manning, L. R. 1 C. C. 338, 12 Cox C. C. 106, 41 L. J. M. C. 11, 25 L. T. Rep. N. S. 573, 20 Wkly. Rep. 102.

26. State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336.

An appellate court will not review the question whether the building was a dwelling-house, and whether it was the property of the person alleged to be the owner, after these matters have been submitted to the jury. Joan *v.* Com., 136 Mass. 162. But,

essary intent.[27] It is also a question for the jury to determine whether a motive for the crime was disclosed.[28]

B. Instructions. The instructions should define the crime and explain its constituent elements;[29] but the term "curtilage" need not be defined without request,[30] and, having given the code definition, the court may refuse to charge that arson is a crime against the dwelling-house.[31] While a conviction should not be authorized upon a finding of facts of a less criminal nature than those comprised in the definition,[32] it is proper to confine the instructions to the highest degree where the evidence is indisputable as to the existence of the facts constituting that degree,[33] or to refuse a charge to acquit if the evidence does not sustain a conviction for the higher degree where the offense is alleged in several degrees.[34] On the other hand, it is error to authorize a general verdict of "Guilty" where the indictment sets out the offense in different degrees, and it is doubtful to which degree the evidence is applicable.[35] All matters of defense should, upon request, be incorporated in an instruction;[36] but it is not error not to touch upon a possible defense, in the absence of any evidence thereof.[37]

VI. PUNISHMENT.

Arson, at common law, was a felony punishable with death.[38] The punish-

where an indictment contained two counts — one for burning a barn, parcel of the dwelling-house, and one for burning a barn not parcel of any dwelling-house — and accused was convicted of the former offense, and the appellate court found that the building was of the latter character, a new trial was ordered. State *v.* Stewart, 6 Conn. 47.

27. State *v.* Phifer, 90 N. C. 721.

28. People *v.* Burton, 77 Hun (N. Y.) 498, 28 N. Y. Suppl. 1081, 60 N. Y. St. 544; State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

29. **Wilful.**— The instructions in a prosecution for arson should define the meaning of the word "wilful" as therein used. Erwin *v.* State, (Tex. Crim. 1901) 61 S. W. 390.

Malice.— Since, in arson, the law presumes malice from the wilfulness of the act, without specific proof thereof, it was proper to refuse a requested instruction defining malice, that the evidence failed to show malice, that malice was a necessary ingredient, and that it was not necessarily implied from the fact that defendant wilfully set fire to the building. Morris *v.* State, 124 Ala. 44, 27 So. 336.

The instructions should be construed as a whole, however, so that the omission of the word "maliciously" in one part of the charge, where it is properly used in another, is not prejudicial (Young *v.* Com., 12 Bush (Ky.) 243); and an instruction wherein the court used the term "set fire to" instead of "burn," is unobjectionable where the subsequent instructions told the jury that it was necessary that a burning should have occurred (State *v.* Babcock, 51 Vt. 570).

30. State *v.* Shaw, 31 Me. 523.

31. People *v.* Lee Hung, (Cal. 1883) 1 Pac. 155.

32. Thus, if the statute fixes the value as an element of the crime, an instruction that, if the property is "of some value," the jury shall find defendant guilty, is erroneous. Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027.

33. Cunningham *v.* State, 117 Ala. 59, 23 So. 693; State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486.

34. Thus, where an indictment charges arson both in the first and second degrees, and value is a material element only of the higher offense, a charge authorizing an acquittal, on reasonable doubt as to the value of the property, is properly refused. Hudson *v.* State, 61 Ala. 333.

35. Carter *v.* State, 20 Wis. 647.

36. Thus, where there is evidence tending to show that defendant was indisposed, it is error to give an instruction, ignoring the alleged indisposition, to the effect that if defendant was within a certain distance of the building burned, and knew of the fire, and did not go with the others and aid in saving the property, the jury might consider that fact as a circumstance indicating guilt (McAdory *v.* State, 59 Ala. 92); and where, on the trial of a defendant for setting fire to a guard-house, the issue was whether he attempted to burn a hole in the door solely for the purpose of effecting his escape, or set fire to the house maliciously and with intent to burn it, and the court, in its charge, after stating in detail a number of alleged acts of defendant, instructed the jury they should look to the circumstances and to the conduct of defendant in determining what his intention was, the court should also instruct the jury they might look to defendant's statement, and decide whether or not the statement successfully rebutted any inferences of guilty intention, provided there were such, which might be drawn from the testimony (Washington *v.* State, 87 Ga. 12, 13 S. E. 131).

37. People *v.* Jones, 123 Cal. 65, 55 Pac. 698.

38. 1 East P. C. 1015; 1 Hale P. C. 566.

Benefit of clergy was allowed by 25 Edw. III, c. 4, but was taken away by 23 & 25

ment is now governed by statute and may be either death,[39] imprisonment at hard labor,[40] or fine.[41] Punishment within the limits prescribed by statute cannot be said to be excessive.[42]

ART. The employment of means to a desired end; the adaptation of powers in the natural world to the uses of life.[1] (Art: As Subject of Patent, see PATENTS. Terms or Words of, see CONTRACTS; STATUTES.)

ART AND PART. A term used in Scotland and the north of England, where one charged with a crime, in committing the same, was both a contriver of, and acted his part in it.[2]

ARTESIAN WELL. See BOUNTIES; WATERS; WELL.

ARTICLE. One thing of many;[3] one item of several;[4] distinct portion or part.[5]

Hen. VIII, and, notwithstanding the latter statute was repealed for a time by 1 Edw. VI, it was revived by 6 Edw. VI. State *v.* Bosse, 8 Rich. (S. C.) 276; Com. *v.* Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; 1 Hale P. C. 573. But a prisoner indicted under 22 & 23 Car. II, c. 7, for burning a house in the night-time, is entitled to his clergy. State *v.* Bosse, 8 Rich. (S. C.) 276; State *v.* Sutcliffe, 4 Strobh. (S. C.) 372.

39. Where the jury recommend that the death penalty be commuted to life-imprisonment, it is the duty of the court to commute the death penalty. Stallings *v.* State, 47 Ga. 572, holding that the death penalty for arson may be commuted, irrespective of whether the conviction was founded on circumstantial evidence or not.

40. State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486, holding that the prisoner may be so confined in the penitentiary, although the statute does not specify the place of confinement.

Minimum duration of confinement.— Under a statute fixing the punishment as imprisonment "for life or for any term of years," the minimum period of imprisonment is two years. People *v.* Burridge, 99 Mich. 343, 58 N. W. 319.

Place of confinement where defendant a woman.— Under Mass. Rev. Stat. c. 143, § 18, it was held that a woman convicted of arson under Mass. Stat. (1852), c. 259, should be imprisoned for life in the county jail or house of correction.

41. Under Ala. Crim. Code, § 4491, the only punishment which can be imposed on a conviction for arson in the third degree is a fine of not exceeding two thousand dollars. Leonard *v.* State, 96 Ala. 108, 11 So. 307.

42. Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; Harbin *v.* State, 133 Ind. 698, 33 N. E. 635.

Statutes construed.— Under the Illinois act of 1859, which declared that any owner setting fire to a building, with intent to defraud an insurance company, "shall be deemed guilty of arson, and punished accordingly," it was held that the punishment should be that enumerated in the criminal code for wrongfully burning property, and not that for wrongfully setting fire to property with intent to destroy the same. McDonald *v.* People, 47 Ill. 533.

The North Carolina act of 1846, chapter 70, providing that any one unlawfully burning an uninhabited building shall be guilty of a misdemeanor, altered 1 N. C. Rev. Stat. 347, so far as the latter declared the burning of a mill-house to be a felony, and reduced the punishment therefor from death to fine and imprisonment. State *v.* Upchurch, 31 N. C. 454.

The Tennessee act of 1865, chapter 5, section 4, which increased the penalty for burning a dwelling-house or bridge, did not repeal, and had no effect on, the provisions of the code applicable to the burning of buildings other than dwellings. Hall *v.* State, 3 Lea (Tenn.) 552.

1. Piper *v.* Brown, Holmes (U. S.) 20, 21, 19 Fed. Cas. No. 11,180.

"A polite or liberal art is that in which the mind or imagination is chiefly concerned, as poetry, music and painting." New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141.

"A useful or mechanical art is that in which the hands and body are more concerned than the brain." New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141.

As used in our patent acts and constitution "the word 'art' means a useful art, or a manufacture which is beneficial" (Smith *v.* Downing, 1 Fish. Pat. Cas. 64, 22 Fed. Cas. No. 13,036), as examples of which are mentioned in Jacobs *v.* Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200, "the art of printing, that of telegraphy, or that of photography."

Especially when used without any qualifying adjective or phrase, the term is used "to signify art in its higher manifestations, or art *par excellence*, as it is represented in works of art by those who are distinctively denominated artists." Almy *v.* Jones, 17 R. I. 265, 266, 21 Atl. 616, 12 L. R. A. 414.

2. Jacob L. Dict.

3. State *v.* Williams, 32 Minn. 537, 539, 21 N. W. 746; Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195; Junge *v.* Hedden, 37 Fed. 197, 198 [*affirmed* in 146 U. S. 233, 13 S. Ct. 88, 36 L. ed. 953].

4. Junge *v.* Hedden, 37 Fed. 197, 198 [*affirmed* in 146 U. S. 233, 13 S. Ct. 88, 36 L. ed. 953].

5. Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195; Junge *v.* Hedden, 37 Fed. 197, 198

The word is also sometimes construed as meaning "a joint or part of member." [6]

ARTICLED CLERK. A pupil of an attorney or solicitor, who undertakes, by articles of clerkship containing covenants mutually binding, to instruct him in the principles and practice of the profession.[7]

ARTICLES APPROBATORY. In Scotch law, that part of the proceedings which corresponds to the answer to the charge in a bill in chancery.[8]

ARTICLES IMPROBATORY. In Scotch law, that part of the proceedings which corresponds to the charge in a bill in chancery.[9]

ARTICLES OF AGREEMENT. A written memorandum of the terms of an agreement.[10] (See, generally, CONTRACTS.)

ARTICLES OF ASSOCIATION. Articles subscribed by the members of a joint-stock company or corporation organized under a general law, and which create the corporate union between them.[11] (See, generally, ASSOCIATIONS; CORPORATIONS; JOINT-STOCK COMPANIES.)

ARTICLES OF CONFEDERATION. The compact between the original thirteen states of the Union.[12]

ARTICLES OF FAITH. See ARTICLES OF RELIGION.

ARTICLES OF IMPEACHMENT. The formal statement of the charges against a public officer, put forward as the basis of proceedings to remove him.[13]

ARTICLES OF PARTNERSHIP. A written agreement by which the parties enter into a partnership upon the conditions therein mentioned.[14] (See, generally, PARTNERSHIP.)

ARTICLES OF RELIGION or **OF FAITH.** The system of faith of the Church of England, more commonly known as the Thirty-Nine Articles.[15]

ARTICLES OF ROUP. In Scotch law, the conditions under which property is exposed to sale by auction.[16]

ARTICLES OF SET. In Scotch law, an agreement for a lease.[17]

ARTICLES OF THE NAVY. A system of rules prescribed for the government of the navy.[18] (See, generally, ARMY AND NAVY.)

ARTICLES OF THE PEACE. A complaint made or exhibited to a court by a person who makes oath that he is in fear of death or bodily harm from some one who has threatened or attempted to do him injury.[19]

ARTICLES OF WAR. A system of rules prescribed for the government of the army.[20] (See, generally, ARMY AND NAVY.)

ARTICULATE SPEECH. An uttered sound produced by the human voice.[21]

[*affirmed* in 146 U. S. 233, 13 S. Ct. 88, 36 L. ed. 953].

6. Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195.

"It is derived from the Greek, the original or radical word meaning 'to join' or 'to fit to' as a part." Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195.

"It is a word of separation to individualize and distinguish some particular thing from the general thing or whole of which it forms a part, as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise." Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195.

In common usage it is applied "to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity." Junge *v.* Hedden, 146 U. S. 233, 13 S. Ct. 88, 36 L. ed. 953 [*affirming* 37 Fed. 197]. But its use in this sense is said to be comparatively modern. Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193, 195 [*citing* Allison Am. Dict.; Worcester Dict.].

7. Wharton L. Lex.

8. Bouvier L. Dict.

9. Bouvier L. Dict.

10. Burrill L. Dict.

11. Black L. Dict.

12. This went into operation March 1, 1781, and remained in force until March 4, 1789, when the present constitution of the United States was adopted. Burrill L. Dict.

13. Abbott L. Dict.

14. Bouvier L. Dict.

15. Burrill L. Dict.

These were drawn up by the convocation in 1562 and confirmed by James I. Wharton L. Lex.

16. Wharton L. Lex.

17. Bouvier L. Dict.

18. Black L. Dict.

In the United States these are comprised in U. S. Rev. Stat. (1872), § 1624.

19. Sweet L. Dict.

20. Burrill L. Dict.

In the United States these are comprised in U. S. Rev. Stat. (1872), § 1342.

21. Telephone Cases, 126 U. S. 1, 532, 8 S. Ct. 778, 31 L. ed. 863.

ARTIFICE. The art of making;[22] a trick or fraud.[23]

ARTIFICER. One by whom anything is made.[24]

ARTIFICIAL. Made by art; created by law; the opposite of "natural."[25]

ARTIFICIALLY. Scientifically; technically; using terms of art.[26]

ARTIFICIAL PERSONS. Such as are created and devised by human laws, for the purposes of society and government, which are called corporations or bodies politic.[27]

ARTIFICIAL PRESUMPTION. The presumption which the law raises as to the existence of a second fact when the existence of one fact is not direct evidence of the existence of the other.[28]

ARTISANS. See LICENSES; LIENS; MECHANICS' LIENS.

AS. Like; similar to; of the same kind; in the same manner; in the manner in which;[29] likeness; like as; in like manner;[30] when;[31] and sometimes, when required by the context, "it," "that," or "which."[32]

AS AFORESAID. Words of relation to a preceding clause.[33]

ASCENDANTS. In its broad sense "persons related or connected in the ascending line, by consanguinity or affinity;" in a more restricted sense "only those related by consanguinity."[34]

ASCENT. The transmission of an estate from the ancestor to the heir in the ascending line.[35]

ASCERTAIN. To make sure or certain; to fix; to establish; to determine; to settle;[36] to find out;[37] to find out or learn for a certainty, by trial, examination, or experiment.[38]

ASPHYXIA. A want of pulse or cessation of the motion of the heart and arteries; apparent death, or suspended animation, particularly from suffocation or drowning, or the inhalation of irrespirable gases; the collapsed state in cholera, with want of pulse.[39]

ASPORTATION. A taking out of the possession of the owner, without his privity and consent, without the *animus revertendi*.[40] (See, generally, LARCENY; TRESPASS.)

ASS. See ANIMALS; EXEMPTIONS.

ASSAILANT. One who assails or assaults; the aggressor.[41]

22. Century Dict.

23. State *v.* Hemm, 82 Iowa 609, 617, 48 N. W. 971 [*quoting* Webster Dict.].

24. Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363, 365 [*citing* Johnson Dict.].

25. Burrill L. Dict.

26. Black L. Dict.

27. 1 Bl. Comm. 123 [*quoted* by Cowen, J., in Thomas *v.* Dakin, 22 Wend. (N. Y.) 9, 90].

Distinguished from natural persons.—"The plain and broad distinction between a natural and an artificial person is, that whilst the former may do any act which he is not prohibited by law from doing, the latter can do none which the charter giving it existence does not expressly, or by fair inference, to enable it to perform its functions authorize it to do." Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558, 568.

28. Gulick *v.* Loder, 13 N. J. L. 68, 72, 23 Am. Dec. 711.

29. Hooper *v.* Wells, 27 Cal. 11, 30, 85 Am. Dec. 211 [*quoting* Webster Dict.].

30. Den *v.* Cubberly, 12 N. J. L. 308, 314.

31. Seibert's Appeal, 13 Pa. St. 501, 504. See also Fisher *v.* Johnson, 38 N. J. Eq. 46, 47.

32. Beasley *v.* People, 89 Ill. 571, 577.

33. Burrill L. Dict.

These words "in the latter clause necessarily draw down and incorporate the words in the former clause." Ellenborough, C. J., in Meredith *v.* Meredith, 10 East 503, 510.

34. Martin, J., in Bernard *v.* Vignaud, 10 Mart. (La.) 481, 561.

35. Burrill L. Dict.

36. Brown *v.* Lyddy, 11 Hun (N. Y.) 451, 456 [*quoting* Worcester Dict.].

Used in this sense in legal literature in such expressions as "the use in pleading of an averment, is to ascertain that to the court, which is generally or doubtfully expressed" (Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 220, 4 Am. Dec. 339), though its use in this sense is said to be archaic (Century Dict.).

37. Perry County *v.* Selma, etc., R. Co., 58 Ala. 546, 565.

38. State *v.* Boyd, 31 Nebr. 682, 734, 48 N. W. 739, 51 N. W. 602.

39. State *v.* Baldwin, 36 Kan. 1, 20, 12 Pac. 318 [*quoting* Webster Dict.].

40. Wilson *v.* State, 21 Md. 1, 9.

The word "asportavit"—literally, "he carried away"—is sometimes used in the same sense. See Croom *v.* State, 71 Ala. 14; Redridge *v.* Palmer, 2 H. Bl. 2, 4.

41. Scales *v.* State, 96 Ala. 69, 75, 11 So. 121.

ASSAULT AND BATTERY

By James Beck Clark

CROSS-REFERENCES

For Matters Relating to:
- Action by:
  - Master For Assault on Servant, see MASTER AND SERVANT.
  - Parent For Assault on Child, see PARENT AND CHILD.
- Affray, see AFFRAY.
- Assault:
  - As Incident to:
    - Ejection of Passenger, see CARRIERS.
    - Making Unlawful Arrest, see FALSE IMPRISONMENT.
  - By:
    - Husband on Wife, see HUSBAND AND WIFE.
    - Master:
      - On Apprentice, see APPRENTICES.
      - On Seaman, see SEAMEN.
    - Officers of Agricultural Society, see AGRICULTURE.
    - Parent on Child, see PARENT AND CHILD.
  - Capacity to Commit, see HUSBAND AND WIFE; INFANTS; INSANE PERSONS.
  - On Officer, see OBSTRUCTING JUSTICE.
  - Right of Aliens to Sue For, see ALIENS.
  - With Intent to Commit Specific Crime, see ABORTION; HOMICIDE; LARCENY; MAYHEM; RAPE; ROBBERY.
- Assignability of Action, see ASSIGNMENTS.
- Conviction of Assault or Battery Under Indictment For Higher Crime, see INDICTMENTS AND INFORMATIONS.
- Kidnapping, see KIDNAPPING.
- Liability of Master For Assault by Servant, see MASTER AND SERVANT.
- Pointing Weapons, see WEAPONS.
- Prize-Fighting, see PRIZE-FIGHTING.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. CRIMINAL LIABILITY.

A. Definitions — 1. ASSAULT. An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect.[1]

1. Tarver *v.* State, 43 Ala. 354, 356; Hays *v.* People, 1 Hill (N. Y.) 351, 352; Bodeman *v.* State, (Tex. Crim. 1897) 40 S. W. 981; Jarnigan *v.* State, 6 Tex. App. 465; Garnet *v.* State, 1 Tex. App. 605, 607, 28 Am. Rep. 425.

Other definitions are: "An unlawful attempt coupled with present ability to commit a violent injury on the person of another."

Arkansas.— Pratt *v.* State, 49 Ark. 179, 181, 4 S. W. 785.

California.— People *v.* Stanton, 106 Cal. 139, 141, 39 Pac. 525; People *v.* Pape, 66 Cal. 366, 367, 5 Pac. 621; People *v.* McMakin, 8 Cal. 547.

Delaware.— State *v.* Jones, (Del. 1900) 47 Atl. 1006; State *v.* Burton, (Del. 1900) 47 Atl. 619; State *v.* Lockwood, 1 Pennew. (Del.) 76, 39 Atl. 589.

Illinois.— Stevens *v.* People, 158 Ill. 111, 117, 41 N. E. 856; Hunt *v.* People, 53 Ill. App. 111.

Indiana.— State *v.* Trulock, 46 Ind. 289, 290.

Iowa.— State *v.* Cody, 94 Iowa 169, 172, 62 N. W. 702.

Tennessee.— Bloomer *v.* State, 3 Sneed (Tenn.) 66, 68.

Texas.— Evans *v.* State, 25 Tex. Suppl. 303; Higginbotham *v.* State, 23 Tex. 574.

"An intentional attempt to strike within striking distance, which fails of its intended effect, either by preventive interference, or by misadventure." Lane *v.* State, 85 Ala. 11, 14, 4 So. 730.

"An attempt to strike in striking distance, or shoot in shooting distance." Gray *v.* State, 63 Ala. 66, 73.

"An attempt, or offer, to do another personal violence, without actually accomplishing it." Johnson *v.* State, 35 Ala. 363, 365.

"An effort or an attempt to commit an offense against the person of another with force." Beasley *v.* State, 18 Ala. 535, 539.

"An offer or an attempt to strike another." Com. *v.* Lee, 3 Metc. (Ky.) 229; State *v.* Hampton, 63 N. C. 13, 14; State *v.* Myerfield, 61 N. C. 108, 109.

2. BATTERY. A battery, or, as it is sometimes called, an assault and battery, is an unlawful touching of the person of another by the aggressor himself, or by any other substance put in motion by him.[2]

"An attempt to commit a violent injury upon the person of another." Goodrum *v.* State, 60 Ga. 509, 510.

"An attempt with force and violence, to do a corporeal hurt to another." People *v.* Lee, 1 Wheel. Crim. (N. Y.) 364, 365; Reg. *v.* Shaw, 23 U. C. Q. B. 616, 619.

"An intent to do bodily harm, but fails — falls short of doing the harm, touching the body, doing the battery." State *v.* Lightsey, 43 S. C. 114, 115, 20 S. E. 975.

"Any offer or attempt to do violence to the person of another, in a rude, angry or resentful manner." State *v.* Davis, 1 Hill (S. C.) 46.

"An offer or an attempt to do a corporal injury to another." U. S. *v.* Hand, 2 Wash. (U. S.) 435, 26 Fed. Cas. No. 15,297.

"Any wilful and unlawful attempt or offer with force to do a corporeal injury to another." Abbott L. Dict. [*quoted* in State *v.* Godfrey, 17 Oreg. 300, 304, 20 Pac. 625, 11 Am. St. Rep. 830].

"Any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being." 2 Bishop N. Crim. L. § 23 [*quoted* in Pratt *v.* State, 49 Ark. 179, 181, 4 S. W. 785; State *v.* Gorham, 55 N. H. 152, 168].

"An attempt or offer to beat another without touching him." 3 Bl. Comm. 120 [*quoted* in State *v.* Blackwell, 9 Ala. 79, 82; Norton *v.* State, 14 Tex. 387].

"An attempt or offer, with force and violence, to do some bodily hurt to another, whether from wantonness or malice, by means calculated to produce the end if carried into execution." Davis Crim. L. [*quoted* in Berkeley *v.* Com., 88 Va. 1017, 14 S. E. 916].

"An inchoate violence to the person of another with the present means of carrying the intent into effect." 2 Greenleaf Ev. § 82 [*quoted* in State *v.* Smith, 80 Mo. 516, 518; Richels *v.* State, 1 Sneed (Tenn.) 606]; People *v.* Lilley, 43 Mich. 521, 525, 5 N. W. 982.

"An intentional attempt by force to do an injury to the person of another." 3 Greenleaf Ev. § 59 [*quoted* in Sweeden *v.* State, 19 Ark. 205, 213]; State *v.* Davis, 23 N. C. 125, 127, 35 Am. Dec. 735.

"An attempt unlawfully to apply any actual force, however small, to the person of another, directly or indirectly; the act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person." Rapalje & L. L. Dict. [*quoted* in Wells *v.* State, 47 Nebr. 74, 75, 66 N. W. 29; State *v.* Godfrey, 17 Oreg. 300, 304, 20 Pac. 625, 11 Am. St. Rep. 830].

"Any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness." Roscoe Ev. 257 [*quoted* in Smith *v.* State, 39 Miss. 521, 525]; State *v.* Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863.

"An intentional attempt by violence to do an injury to another." Wharton Am. Crim. L. § 1341 [*quoted* in Garnet *v.* State, 1 Tex. App. 605, 607, 28 Am. Rep. 425].

Distinguished from "assault and battery." —"Assault" and "assault and battery" are separate and distinct offenses (Hunt *v.* People, 53 Ill. App. 111), the latter term being used as the equivalent of "battery" (see *infra*, I, A, 2).

Every attempt to commit a felony against the person involves an assault. McBride *v.* State, 7 Ark. 374.

In places under the exclusive jurisdiction of the federal government there is no punishment provided by the laws of the United States for a simple assault by one private person upon another. U. S. *v.* Barnaby, 51 Fed. 20.

2. Kirland *v.* State, 43 Ind. 146, 153, 13 Am. Rep. 386.

Other definitions are: "The unlawful beating of another."

Georgia.— Goodrum *v.* State, 60 Ga. 509, 510.

Illinois.— Hunt *v.* People, 53 Ill. App. 111 [*citing* 3 Bl. Comm. 120].

Iowa.— State *v.* Cody, 94 Iowa 169, 173, 62 N. W. 702.

Kentucky.— Com. *v.* Lee, 3 Metc. (Ky.) 229.

Texas.— Norton *v.* State, 14 Tex. 387.

"An unlawful touching, in either a rude, an insolent or an angry manner." State *v.* Philley, 67 Ind. 304; Cranor *v.* State, 39 Ind. 64.

"Any touching of the person of an individual, in a rude or angry manner, without justification." State *v.* Harden, 2 Speer (S. C.) 152 note.

"Any unlawful violence upon the person of another, with intent to injure him." Evans *v.* State, 25 Tex. Suppl. 303; Jarnigan *v.* State, 6 Tex. App. 465; Garnet *v.* State, 1 Tex. App. 605, 607, 28 Am. Rep. 425.

"An unlawful beating, or other physical violence or constraint, inflicted upon a human being without his consent." 1 Bishop N. Crim. L. § 548 [*quoted* in State *v.* Cody, 94 Iowa 169, 173, 62 N. W. 702].

Includes assault.— Every battery includes an assault.

Arkansas.— Sweeden *v.* State, 19 Ark. 205 [*citing* 3 Greenleaf Ev. § 60].

Delaware.— State *v.* Burton, (Del. 1900) 47 Atl. 619.

Iowa.— State *v.* Cody, 94 Iowa 169, 62 N. W. 702; State *v.* Twogood, 7 Iowa 252.

Kentucky.— Furnish *v.* Com., 14 Bush (Ky.) 180.

B. Elements of Offense — 1. Assault — a. In General — (i) *Attempt or Offer.* Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not constitute an assault;[3] but there must be an attempt or offer, though interrupted[4] — the commencement of an act, which, if not prevented, would produce a battery.[5]

(ii) *Force and Violence* — (a) *Must Be Physical.* The force or violence attempted or offered must be physical,[6] and no words, of themselves, can constitute an assault.[7]

(b) *Kind of Physical Force* — (1) In General. The kind of physical force employed is immaterial. It has been held that it may consist of striking,[8]

Texas.— Johnson *v.* State, 17 Tex. 515; Norton *v.* State, 14 Tex. 387.

Canada.— Reg. *v.* Shaw, 23 U. C. Q. B. 616.

3. *Arkansas.*— Yoes *v.* State, 9 Ark. 42.

Georgia.— Brown *v.* State, 95 Ga. 481, 20 S. E. 495.

Indiana.— Klein *v.* State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Mississippi.— Smith *v.* State, 39 Miss. 521.

Missouri.— State *v.* Painter, 67 Mo. 84.

North Carolina.— State *v.* Davis, 23 N. C. 125, 35 Am. Dec. 735.

Texas.— Fondren *v.* State, 16 Tex. App. 48; Cato *v.* State, 4 Tex. App. 87.

But see Hays *v.* People, 1 Hill (N. Y.) 351, 353, to the effect that "there need not be even a direct attempt at violence; but any indirect preparation towards it, . . . such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient."

Calling out a party for the purpose of having a difficulty with him, does not, of itself, render defendant guilty of an assault unless he carried his intention into effect. Yoes *v.* State, 9 Ark. 42.

Picking up a stone, but making no attempt to cast it at the prosecuting witness, who was about twenty steps distant, amounts merely to preparation and does not constitute an assault. Brown *v.* State, 95 Ga. 481, 20 S. E. 495.

4. *Alabama.*— Carter *v.* State, 87 Ala. 113, 6 So. 356; State *v.* Blackwell, 9 Ala. 79.

California.— People *v.* Dodel, 77 Cal. 293, 19 Pac. 484.

Indiana.— Cutler *v.* State, 59 Ind. 300; Martin *v.* State, 13 Ind. App. 389, 41 N. E. 831.

North Carolina.— State *v.* Reavis, 113 N. C. 677, 18 S. E. 388; State *v.* Price, 111 N. C. 703, 16 S. E. 414; State *v.* Milsaps, 82 N. C. 549; State *v.* Church, 63 N. C. 15; State *v.* Mooney, 61 N. C. 434; State *v.* Myerfield, 61 N. C. 108.

Oregon.— State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

Texas.— Johnson *v.* State, 43 Tex. 576; Kiersey *v.* State, (Tex. Crim. 1893) 22 S. W. 37; Flournoy *v.* State, 25 Tex. App. 244, 7 S. W. 865; Young *v.* State, 7 Tex. App. 75.

Virginia.— Berkeley *v.* Com., 88 Va. 1017, 14 S. E. 916.

See also *infra*, I, B, 1, b, (xiii), (a); II, B, 1, a.

Raising a stick in a striking posture over another's head, and causing him to step aside to avoid an apprehended blow, is an assault. State *v.* McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607.

Turning about with the hand clenched and bent at one's side, but not drawn back, and saying, "I have a great mind to strike you," whereupon prosecutor walks away in another direction, amounts to an offer of violence. State *v.* Hampton, 63 N. C. 13.

Use of firearms.— Presenting a firearm in condition for immediate use (Johnson *v.* State, 19 Tex. App. 545; U. S. *v.* Kiernan, 3 Cranch C. C. (U. S.) 435, 26 Fed. Cas. No. 15,529), or taking one into one's hands, accompanied by some act to carry one's intention into effect (State *v.* Epperson, 27 Mo. 255; State *v.* Church, 63 N. C. 15; Higginbotham *v.* State, 23 Tex. 574; Bodeman *v.* State, (Tex. Crim. 1897) 40 S. W. 981), amount to an assault; but the drawing of a pistol, without presenting or cocking it, does not (Lawson *v.* State, 30 Ala. 14). See also *infra*, I, B, 1, a, (ii), (b), (1).

Using insulting language, and picking up a stone about twelve feet from complainant, but not offering to throw it, do not constitute an assault, but only a menace of violence. State *v.* Milsaps, 82 N. C. 549.

5. Norris *v.* State, 87 Ala. 85, 6 So. 371; Lawson *v.* State, 30 Ala. 14; Lee *v.* State, 34 Tex. Crim. 519, 31 S. W. 667.

6. **Merely refusing to leave land** upon which one is trespassing is not an assault. Pockett *v.* Pool, 11 Manitoba 275.

7. *Georgia.*— Williams *v.* State, 99 Ga. 203, 25 S. E. 681.

Indiana.— Cutler *v.* State, 59 Ind. 300.

Mississippi.— State *v.* Rodgers, (Miss. 1901) 29 So. 73; Smith *v.* State, 39 Miss. 521.

Missouri.— State *v.* White, 52 Mo. App. 285, verbal solicitation of a woman for sexual intercourse.

North Carolina.— State *v.* Davis, 23 N. C. 125, 35 Am. Dec. 735.

Tennessee.— Smith *v.* State, 8 Lea (Tenn.) 402.

Texas.— Jarnigan *v.* State, 6 Tex. App. 465.

England.— 1 Hawkins P. C. c. 62, § 1.

Canada.— Reg. *v.* Langford, 15 Ont. 52.

8. *Alabama.*— Lane *v.* State, 85 Ala. 11, 4 So. 730; Gray *v.* State, 63 Ala. 66.

Kentucky.— Com. *v.* Lee, 3 Metc. (Ky.) 229.

shooting,[9] or drawing or presenting[10] firearms, taking indecent liberties with a female,[11] putting a poisonous or noxious substance in another's drink whereby he was injured,[12] or stopping and preventing a person, by means of threats, from passing along the public highway.[13]

(2) ABANDONMENT OR NEGLECT. Exposure to the inclemency of the weather is sufficient to support an indictment for assault,[14] provided injury actually result

North Carolina.— State *v.* Hampton, 63 N. C. 13; State *v.* Myerfield, 61 N. C. 108.

Pennsylvania.— Com. *v.* Brungess, 23 Pa. Co. Ct. 13.

England.— 3 Bl. Comm. 120; 1 Hawkins P. C. c. 62, § 1.

Canada.— Reg. *v.* Harmer, 17 U. C. Q. B. 555.

See 4 Cent. Dig. tit. "Assault and Battery," § 68.

Driving a wagon to attempt to run into another wagon on the highway is an assault. People *v.* Lee, 1 Wheel. Crim. (N. Y.) 364.

Overturning a bale of cotton in such an angry manner as to strike prosecuting witness and throw him from the cotton is a simple assault. Bonner *v.* State, 97 Ala. 47, 12 So. 408.

Throwing vitriol upon another with intent to injure him involves an assault. People *v.* Stanton, 106 Cal. 139, 39 Pac. 525.

Whipping has always been considered an assault. Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368.

9. Engelhardt *v.* State, 88 Ala. 100, 7 So. 154; Gray *v.* State, 63 Ala. 66; Crumbley *v.* State, 61 Ga. 582 (holding that to shoot at another at the distance of twenty steps is an assault, even if the gun be loaded only with powder); Reg. *v.* Cronan, 24 U. C. C. P. 106 (holding that to discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit is an assault).

10. *California.*—People *v.* McMakin, 8 Cal. 547.

Kansas.— State *v.* Taylor, 20 Kan. 643.

Missouri.— State *v.* Epperson, 27 Mo. 255.

New York.— People *v.* Morehouse, 6 N. Y. Suppl. 763, 25 N. Y. St. 294.

North Carolina.— State *v.* Jones, 118 N. C. 1237, 24 S. E. 493; State *v.* Rawles, 65 N. C. 334; State *v.* Church, 63 N. C. 15.

South Carolina.—State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

Texas.— Higginbotham *v.* State, 23 Tex. 574; Bodeman *v.* State, (Tex. Crim. 1897) 40 S. W. 981; Johnson *v.* State, 19 Tex. App. 545.

United States.— U. S. *v.* Kiernan, 3 Cranch C. C. (U. S.) 435, 26 Fed. Cas. No. 15,529.

England.— 1 Hawkins P. C. c. 62, § 1.

See 4 Cent. Dig. tit. "Assault and Battery," § 74.

11. *California.*— People *v.* Manchego, 80 Cal. 306, 22 Pac. 223.

Massachusetts.— Com. *v.* Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336.

Minnesota.— State *v.* West, 39 Minn. 321, 40 N. W. 249.

Missouri.— State *v.* White, 52 Mo. App. 285.

England.— Reg. *v.* Guthrie, L. R. 1 C. C. 241, 11 Cox C. C. 522, 39 L. J. M. C. 95, 22 L. T. Rep. N. S. 485, 18 Wkly. Rep. 792; Rex *v.* Nichol, R. & R. 96.

Having sexual intercourse, the woman consenting in the belief that defendant is her husband (Reg. *v.* Williams, 8 C. & P. 286, 34 E. C. L. 737), or that defendant is treating her medically with a view to her cure (Reg. *v.* Case, 4 Cox C. C. 220, 1 Den. C. C. 580, 14 Jur. 489, 19 L. J. M. C. 174, 4 N. Sess. Cas 347, T. & M. 318, 1 Eng. L. & Eq. 544), is an assault.

Making a female patient strip naked, under the pretense that defendant, a medical man, cannot otherwise judge of her illness, is, if he himself takes off her clothes, an assault. Rex *v.* Rosinski, 1 Moody 198. See also Agnew *v.* Jobson, 13 Cox C. C. 625, holding that an examination by medical men, in pursuance of a magistrate's order, of the person of a female, charged with concealing the birth of her child, constitutes an assault.

12. Johnson *v.* State, (Ga. 1893) 17 S. E. 974; Carr *v.* State, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863; Com. *v.* Stratton, 114 Mass. 303, 19 Am. Rep. 350; Reg. *v.* Button, 8 C. & P. 660, 34 E. C. L. 948, in the two cases the drug administered being cantharides. But in three later English cases (Reg. *v.* Hanson, 4 Cox C. C. 138, 2 C. & K. 912, 61 E. C. L. 912; Reg. *v.* Walkden, 1 Cox C. C. 282; Reg. *v.* Dilworth, 2 M. & Rob. 531) it was held that administering cantharides to a woman, with intent to injure her health, was neither a misdemeanor at common law nor an assault, nor was it within 7 Wm. IV & 1 Vict. c. 85. See also Reg. *v.* Hennah, 13 Cox C. C. 547, where defendant was indicted for administering to a woman, a poison, to wit, a certain destructive and noxious thing, to wit, cantharides, with intent to injure, annoy, and aggrieve, and it was held that, to constitute this offense, the thing administered must be noxious in itself, and not merely when taken in excess, and that although it may have been administered with intent to injure or annoy.

13. Bloomer *v.* State, 3 Sneed (Tenn.) 66; U. S. *v.* Ortega, 4 Wash. (U. S.) 531, 27 Fed. Cas. No. 15,971. But see State *v.* Edge, 1 Strobh. (S. C.) 91 (holding that to stop another's carriage forcibly, without intention to do bodily harm, is not an indictable assault), and Reg. *v.* McElligott, 3 Ont. 535 (holding that merely standing in front of another's horses does not amount to an assault).

14. Com. *v.* Stoddard, 9 Allen (Mass.) 280 (where defendant left an infant child in the street, in the night-time, without the care of any person, and without sufficient clothing or shelter); Rex *v.* Ridley, 2 Camph. 650; Reg.

from the abandonment;[15] but it has been held that mere acts of non-feasance will not.[16]

(III) *INTENT.* The intent to injure[17] or frighten[18] is an essential element of the offense,[19] and, hence, the menace must be unconditional,[20] except when the assault is with a deadly weapon[21] or the condition is one which defendant had no right to impose.[22] The intent need not, however, be a specific purpose to do a particular injury,[23] mere recklessness being sufficient.[24]

v. March, 1 C. & K. 496, 47 E. C. L. 496 (where defendants put a new-born child in a bag, and hung it on some park palings at the side of a footpath, and there left it).

15. Reg. *v.* Phillpot, 6 Cox C. C. 140, Dears. C. C. 179, 17 Jur. 399, 22 L. J. M. C. 113, 1 Wkly. Rep. 314, 20 Eng. L. & Eq. 591; Reg. *v.* Hogan, 5 Cox C. C. 255, 2 Den. C. C. 277, 15 Jur. 805, 20 L. J. M. C. 219, T. & M. 601, 5 Eng. L. & Eq. 553; Reg. *v.* Renshaw, 2 Cox C. C. 285, 11 Jur. 615, 20 Eng. L. & Eq. 593 note.

16. Rex *v.* Smith, 2 C. & P. 449, 12 E. C. L. 668.

17. Intent to excite the sexual passion of a woman, in order to obtain connection with her, is an intent to injure, aggrieve, or annoy, within 23 Vict. c. 8, § 12. Reg. *v.* Wilkins, 9 Cox C. C. 20, 7 Jur. N. S. 1128, L. & C. 89, 31 L. J. M. C. 72, 5 L. T. Rep. N. S. 330, 10 Wkly. Rep. 62.

An intent to insult is not sufficient. Goodwin's Case, 6 City Hall Rec. (N. Y.) 9.

18. State *v.* Triplett, 52 Kan. 678, 35 Pac. 815; State *v.* Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; Smith *v.* State, (Tex. Crim. 1900) 57 S. W. 949.

19. *Alabama.*— Johnson *v.* State, 35 Ala. 363.

Arkansas.— Pratt *v.* State, 49 Ark. 179, 4 S. W. 785.

California.— People *v.* Dodel, 77 Cal. 293, 19 Pac. 484; People *v.* Keefer, 18 Cal. 636; People *v.* McMakin, 8 Cal. 547.

Indiana.— State *v.* Swails, 8 Ind. 524, 65 Am Dec. 772.

Maine.— State *v.* Carver, 89 Me. 74, 35 Atl. 1030.

Mississippi.— Smith *v.* State, 39 Miss. 521 [*explained* in Lanier *v.* State, 57 Miss. 102].

Missouri.— State *v.* Sears, 86 Mo. 169.

New York.— Goodwin's Case, 6 City Hall Rec. (N. Y.) 9.

North Carolina.— State *v.* Davis, 23 N. C. 125, 35 Am. Dec. 735.

South Carolina.— State *v.* Sims, 3 Strobh. (S. C.) 137.

Tennessee.—Cowley *v.* State, 10 Lea (Tenn.) 282; Richels *v.* State, 1 Sneed (Tenn.) 606.

Texas.— Johnson *v.* State, 43 Tex. 576; Grayson *v.* State, 37 Tex. 228; Hill *v.* State, 34 Tex. 623; Shields *v.* State, 39 Tex. Crim. 13, 44 S. W. 844; White *v.* State, 29 Tex. App. 530, 16 S. W. 340; Floyd *v.* State, 29 Tex. App. 341, 15 S. W. 819; Flournoy *v.* State, 25 Tex. App. 244, 7 S. W. 865; Dickenson *v.* State, 24 Tex. App. 121, 5 S. W. 648; Crawford *v.* State, 21 Tex. App. 454, 1 S. W. 446; Fondren *v.* State, 16 Tex. App. 48; Rutherford *v.* State, 13 Tex. App. 92; Perez *v.* State, 10 Tex. App. 327; Jarnigan *v.* State, 6 Tex. App. 465; Cato *v.* State, 4 Tex. App. 87.

Virginia.— Berkeley *v.* Com., 88 Va. 1017, 14 S. E. 916.

United States.— U. S. *v.* Hand, 2 Wash. (U. S.) 435, 26 Fed. Cas. No. 15,297.

England.— Rex *v.* Gill, 1 Str. 190.

See 4 Cent. Dig. tit. "Assault and Battery," § 69.

20. Johnson *v.* State, 35 Ala. 363; State *v.* Blackwell, 9 Ala. 79; State *v.* Crow, 23 N. C. 375 ("Were you not an old man, I would knock you down"); Com. *v.* Eyre, 1 Serg. & R. (Pa.) 347 ("If it were not for your gray hairs, I would tear your heart out"); Hill *v.* State, 34 Tex. 623; Rainbolt *v.* State, 34 Tex. 286; Warren *v.* State, 33 Tex. 517; Bell *v.* State, 29 Tex. 492; Chamberlain *v.* State, 2 Tex. App. 451.

21. State *v.* Church, 63 N. C. 15; State *v.* Myerfield, 61 N. C. 108.

22. Keefe *v.* State, 19 Ark. 190 ("If you do not pay me my money, I will have your life"); State *v.* Church, 63 N. C. 15 ("I will strike you if you do not pull off your hat"); State *v.* Morgan, 25 N. C. 186, 38 Am. Dec. 714; Crow *v.* State, 41 Tex. 468; U. S. *v.* Richardson, 5 Cranch C. C. (U. S.) 348, 27 Fed. Cas. No. 16,155 ("If you open your mouth"); U. S. *v.* Myers, 1 Cranch C. C. (U. S.) 310, 27 Fed. Cas. No. 15,845 ("If you say so again, I will knock you down").

23. Mistake as to identity of person assaulted.— It is none the less an assault that defendant was mistaken in the identity of the person assaulted. Carter *v.* State, 87 Ala. 113, 6 So. 356; Cowley *v.* State, 10 Lea (Tenn.) 282; State *v.* Meadows, 18 W. Va. 658.

24. Not knowing whether firearm is loaded. — One who fires a loaded and capped pistol at another recklessly, and hits him, not knowing or seeking to know whether it is loaded, may be convicted. Com. *v.* McLaughlin, 5 Allen (Mass.) 507; State *v.* Wolfe, 5 N. J. L. 84.

Riding a horse so near as to endanger one's person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault. State *v.* Sims, 3 Strobh. (S. C.) 137.

Shooting into a crowd is an assault on each.

Iowa.— State *v.* Myers, 19 Iowa 517.

Michigan.— People *v.* Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575.

Mississippi.—Malone *v.* State, 77 Miss. 812, 26 So. 968.

North Carolina.— State *v.* Nash, 86 N. C.

(IV) *PRESENT ABILITY.* To constitute an assault there must be a present ability to carry the unlawful intention into effect,[25] or, at least, such apparent ability to inflict the injury as to cause the person against whom it is directed reasonably to fear the injury unless he retreat to secure his safety;[26] but to have present ability it is not essential that defendant should at any time be within striking distance,[27] or even that defendant should be actually present.[28]

(V) *RESULTING INJURY.* To constitute an assault there need be no actual contact of the person,[29] provided such physical force be put in motion as to create

650, 41 Am. Rep. 472; State *v.* Merritt, 61 N. C. 134.

Tennessee.—Cowley *v.* State, 10 Lea (Tenn.) 282.

See 4 Cent. Dig. tit. "Assault and Battery," § 74.

25. *Alabama.*— Tarver *v.* State, 43 Ala. 354; Shaw *v.* State, 18 Ala. 547.

Arkansas.— Pratt *v.* State, 49 Ark. 179, 4 S. W. 785.

California.— People *v.* Dodel, 77 Cal. 293, 19 Pac. 484.

Indiana.—Hays *v.* State, 77 Ind. 450; State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772; Martin *v.* State, 13 Ind. App. 389, 41 N. E. 831; Klein *v.* State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Oregon.— State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

Texas.—McKay *v.* State, 44 Tex. 43; Smith *v.* State, 32 Tex. 593; Robinson *v.* State, 31 Tex. 170; Jarnigan *v.* State, 6 Tex. App. 465; Spears *v.* State, 2 Tex. App. 244. But *compare* Kief *v.* State, 10 Tex. App. 286, construing effect of Tex. Rev. Pen. Code, art. 489.

Virginia.— Berkeley *v.* Com., 88 Va. 1017, 14 S. E. 916 [*citing* Davis Crim. L. 353, 354].

See also *infra*, I, B, 1, b, (XIII), (A); I, B, 1, b, (XIV).

Firearm must be presented in carrying distance.— To constitute an assault with a firearm, it is necessary that the weapon should be presented within its carrying distance. Tarver *v.* State, 43 Ala. 354.

Pointing unloaded firearm.— Hence, in some jurisdictions, it has been held that pointing an unloaded firearm does not constitute an assault.

Alabama.— Chapman *v.* State, 78 Ala. 463, 56 Am. Rep. 42.

Indiana.— Klein *v.* State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354.

Oregon.— State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

Texas.— McKay *v.* State, 44 Tex. 43; Crow *v.* State, 41 Tex. 468; Robinson *v.* State, 31 Tex. 170; Burton *v.* State, 3 Tex. App. 408, 30 Am. Rep. 146.

England.— Reg. *v.* James, 1 C. & K. 530, 47 E. C. L. 529.

But *compare* cases cited *infra*, note 26.

See 4 Cent. Dig. tit. "Assault and Battery," § 70.

26. Thomas *v.* State, 99 Ga. 38, 26 S. E. 748.

Pointing unloaded firearm at another, in a threatening manner, is, in some jurisdictions, held to constitute an assault when the party at whom it is pointed does not know that it is not loaded, or has no reason to believe that it is not, and is, by the act of the menacing party, put in fear of bodily harm.

Iowa.— State *v.* Shepard, 10 Iowa 126.

Kansas.— State *v.* Archer, 8 Kan. App. 737, 54 Pac. 927.

Massachusetts.— Com. *v.* White, 110 Mass. 407.

New York.— People *v.* Morehouse, 6 N. Y. Suppl. 763, 25 N. Y. St. 294.

Tennessee.— State *v.* Smith, 2 Humphr. (Tenn.) 457.

Texas.— Kief *v.* State, 10 Tex. App. 286, construing Tex. Rev. Pen. Code, art. 489, and distinguishing earlier Texas cases cited *supra*, note 25.

See also *dicta* to same effect in State *v.* Cherry, 33 N. C. 475; Reg. *v.* St. George, 9 C. & P. 483, 38 E. C. L. 285; but *compare* cases cited *supra*, note 25.

27. Thus, an intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance.

California.— People *v.* Yslas, 27 Cal. 630.

Georgia.— Thomas *v.* State, 99 Ga. 38, 26 S. E. 748.

Iowa.— State *v.* Malcolm, 8 Iowa 413.

North Carolina.— State *v.* Martin, 85 N. C. 508, 39 Am. Rep. 711; State *v.* Vannoy, 65 N. C. 532; State *v.* Rawles, 65 N. C. 334 (where the distance was seventy-five yards); State *v.* Davis, 23 N. C. 125, 35 Am. Dec. 735.

Texas.— Brister *v.* State, 40 Tex. Crim. 505, 51 S. W. 393; Gann *v.* State, (Tex. Crim. 1897) 40 S. W. 725.

Virginia.— Berkeley *v.* Com., 88 Va. 1017, 14 S. E. 916 [*citing* 1 Russell Crimes, 563].

28. People *v.* Pape, 66 Cal. 366, 5 Pac. 621, holding that an attempt to commit a violent injury on the person of another, by means of exploding a tin box of powder, constitutes an assault with a deadly weapon, though the person guilty thereof was not present when the explosion occurred.

29. *Alabama.*— Beasley *v.* State, 18 Ala. 535.

Delaware.— State *v.* Jones, (Del. 1900) 47 Atl. 1006.

Iowa.— State *v.* Myers, 19 Iowa 517.

Massachusetts.— Com. *v.* Hagenlock, 140 Mass. 125, 3 N. E. 36.

Missouri.— State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344.

New Hampshire.— State *v.* Gorham, 55

a well-founded apprehension of physical injury,[30] nor need there be any fear created,[31] provided injury is actually inflicted.[32]

b. Aggravated Assault — (i) *In General.* An aggravated assault at the common law is one that has, in addition to the mere intention to commit it, another object which is also criminal — as an assault with intent to kill, maim, or wound, or the like[33] — but these are now commonly made distinct offenses by statute,[34] and any circumstance of aggravation, in the manner or character of an assault, by which it exceeds the incidents of a common assault as distinguished from an assault with intent to commit some distinct offense other than battery, may be justly said to render it of an aggravated nature.[35] In order to support a conviction for an aggravated assault there must be an act upon which aggravation supervenes, and with which it is in some way connected.[36]

(ii) *By Adult on Female or Child.* An assault is, by statute, aggravated when committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child. Within such a statute an adult is one who has attained the full age of twenty-one years,[37] and the word "child" must be taken in its ordinary sense, and not as synonymous with "minor."[38] To constitute the offense under the first clause there must be an assault,[39] which may consist of violent and indecent liberties or familiarities,[40] on a female,[41] and the person committing the assault must be an adult male,[42] except when a female, in

N. H. 152 [*citing* 2 Bishop Crim. L. §§ 49–54].

South Carolina.— State *v.* Davis, 1 Hill (S. C.) 46.

Texas.— Atterberry *v.* State, 33 Tex. Crim. 88, 25 S. W. 125.

United States.— U. S. *v.* Salisbury, 2 N. Y. Leg. Obs. 53, 27 Fed. Cas. No. 16,214.

Canada.—Reg. *v.* Richardson, 46 U. C. Q. B. 375.

See also *infra*, I, B, 1, b, (XIII), (A); I, B, 1, b, (XIV).

30. *Alabama.*— Balkum *v.* State, 40 Ala. 671.

Missouri.— State *v.* Dooley, 121 Mo. 591, 26 S. W. 558.

New Hampshire.— State *v.* Gorham, 55 N. H. 152 [*citing* 2 Bishop Crim. L. §§ 49–54].

North Carolina.— State *v.* Horne, 92 N. C. 805, 53 Am. Rep. 442; State *v.* Martin, 85 N. C. 508, 39 Am. Rep. 711; State *v.* Marsteller, 84 N. C. 726; State *v.* Shipman, 81 N. C. 513; State *v.* Rawles, 65 N. C. 334.

Rhode Island.—State *v.* Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863.

Texas.— Ray *v.* State, (Tex. Crim. 1893) 21 S. W. 540.

31. People *v.* Wilson, 119 Cal. 384, 51 Pac. 639; State *v.* Gorham, 55 N. H. 152 [*citing* 2 Bishop Crim. L. §§ 49–54].

32. State *v.* Gorham, 55 N. H. 152 [*citing* 2 Bishop Crim. L. §§ 49–54].

33. Norton *v.* State, 14 Tex. 387 [*citing* 1 East P. C. 406; Roscoe Crim. Ev. 210; 1 Russell Crimes, 604].

34. See Abortion; Homicide; Larceny; Mayhem; Obstructing Justice; Rape; Robbery.

35. Norton *v.* State, 14 Tex. 387.

"Aggravated assault" and "aggravated assault and battery" are synonymous as the terms are used in the statute. Gaston *v.* State, 11 Tex. App. 143.

36. State *v.* Cokely, 4 Iowa 477, 479 (where it is said: "The assault is still the original offense"); Munday *v.* Maiden, 33 L. T. Rep. N. S. 377, 24 Wkly. Rep. 57 (wherein it was held that defendant was wrongfully convicted of an aggravated assault when he had placed a girl eight years old on his knee and kissed her, and, about a quarter of an hour afterward, without asking her to do anything or again touching her, exposed his person and abused himself in her presence).

37. Ellers *v.* State, (Tex. Crim. 1900) 55 S. W. 813; Galbraith *v.* State, (Tex. App. 1890) 13 S. W. 607; Henkel *v.* State, 27 Tex. App. 510, 11 S. W. 671; Hall *v.* State, 16 Tex. App. 6, 49 Am. Rep. 824; George *v.* State, 11 Tex. App. 95; Schenault *v.* State, 10 Tex. App. 410. See also Adult, 1 Cyc. 938.

38. Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293; Allen *v.* State, 7 Tex. App. 298; McGregor *v.* State, 4 Tex. App. 599.

39. Blackburn *v.* State, 39 Tex. 153.

40. Rogers *v.* State, 40 Tex. Crim. 355, 50 S. W. 338; Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622; Young *v.* State, 31 Tex. Crim. 24, 19 S. W. 431; Bradford *v.* State, 25 Tex. App. 723, 9 S. W. 46; Veal *v.* State, 8 Tex. App. 474; Ridout *v.* State, 6 Tex. App. 249.

Consent of female child.— Defendant may be convicted of an aggravated assault on a female child eight years old by indecently or violently fondling her person, with intent to injure her, without showing that the act was done without her consent. Hill *v.* State, (Tex. Crim. 1897) 39 S. W. 666.

41. Blackburn *v.* State, 39 Tex. 153.

42. Gorman *v.* State, 42 Tex. 221; Blackburn *v.* State, 39 Tex. 153; Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622; Henkel *v.* State, 27 Tex. App. 510, 11 S. W. 671; Kemp *v.* State, 25 Tex. App. 589, 8 S. W. 804; Robinson *v.* State, 25 Tex. App. 111, 7 S. W. 531; Hall *v.* State, 16 Tex. App. 6, 49 Am. Rep. 824; Andrews *v.* State, 13 Tex. App. 343;

connection with an adult male, joins in assault on another female, when, as all present and participating in an assault are principals, the first female may be convicted of aggravated assault.[43]

(III) *By Means Inflicting Disgrace.* By statute an assault is aggravated if made with a whip or cowhide or by means such as to inflict disgrace on the person assaulted.[44] If made with a whip or cowhide no disgrace in fact need be shown,[45] but if made by other means it must be shown that a sense of shame or constraint was produced.[46]

(IV) *Cutting or Stabbing.* When the offense of cutting or stabbing is made an aggravated assault there must exist an intent to cut or stab,[47] and the assault must be committed with a weapon with which a person may be wounded by cutting or stabbing.[48] Malice against the individual cut is not essential, general malice being sufficient.[49] To constitute stabbing, the knife need not enter further than to penetrate the skin and draw blood.[50]

(V) *Indecent Assault.* To constitute the offense of assaulting a female child, and taking indecent liberties with her person, the liberties taken need not have been with her private parts, but may be such liberties as the common sense of society would regard as indecent and improper.[51] Where the child is below the age of consent the acts need not be against her consent[52] or positive resistance.[53]

(VI) *On Decrepit Person.* An assault by a person of robust health or strength on a decrepit person is, by statute, an aggravated assault, and one is decrepit who is disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render him comparatively helpless in a personal conflict with a person of ordinary health and strength.[54]

(VII) *Shooting.* In some jurisdictions shooting is an aggravated assault, and neither malice[55] nor deliberation on the part of defendant[56] is necessary to constitute the offense. Under some statutes there must be both a shooting and wounding,[57] while, under others, no actual injury is necessary.[58] The weapon,

Griffin *v.* State, 12 Tex. App. 423. See 4 Cent. Dig. tit. "Assault and Battery," § 77.

43. Kemp *v.* State, 25 Tex. App. 589, 8 S. W. 804; Dunman *v.* State, 1 Tex. App. 593. But where a woman was engaged in an assault on another woman, and a man, without solicitation, encouragement, or preconcert with the first woman, joined in the assault, she was guilty of a simple assault only. Kemp *v.* State, 25 Tex. App. 589, 8 S. W. 804.

44. Feeling the private parts of a chaste female, against her will, is such means. Slawson *v.* State, 39 Tex. Crim. 176, 45 S. W. 575, 73 Am. St. Rep. 914.

45. Coolidge *v.* State, (Tex. Crim. 1894) 24 S. W. 904.

46. Hawes *v.* State, (Tex. Crim. 1898) 44 S. W. 1094.

47. Wallace *v.* State, 95 Ga. 470, 20 S. E. 250.

An intent to kill is not made an ingredient in the offense of stabbing described in Ky. Rev. Stat. p. 264, art. 17, § 1. Tyra *v.* Com., 2 Metc. (Ky.) 1.

48. Erwin *v.* Com., 96 Ky. 422, 16 Ky. L. Rep. 602, 29 S. W. 340 (holding that a wound made by striking with a wooden club was not sufficient); Com. *v.* Branham, 8 Bush (Ky.) 387; Riggs *v.* Com., 17 Ky. L. Rep. 1015, 33 S. W. 413 (holding that a wound made by striking with a pistol was not sufficient). But see Rex *v.* Atkinson, R. & R. 77, holding that striking over the face and head with the sharp or claw part of a hammer was a sufficient cutting, within 43 Geo. III, c. 58.

49. Taylor *v.* State, 6 Lea (Tenn.) 234; Wright *v.* State, 9 Yerg. (Tenn.) 341; Rex *v.* Hunt, 1 Moody 93.

50. Ward *v.* State, 56 Ga. 408.

Result if death had ensued.— Defendant may be rightfully convicted, under a count for maliciously stabbing with intent to wound, when the act was done under such circumstances that, had death ensued, the crime would not have been murder either in the first or second degree, but would have been manslaughter only. Nichols *v.* State, 8 Ohio St. 435.

51. People *v.* Hicks, 98 Mich. 86, 56 N. W. 1102.

52. Cliver *v.* State, 45 N. J. L. 46.

53. People *v.* Justices Ct. Special Sessions, 18 Hun (N. Y.) 330; Reg. *v.* McGavaran, 6 Cox C. C. 64, 3 C. & K. 320.

54. Hall *v.* State, 16 Tex. App. 6, 49 Am. Rep. 824.

A person is decrepit who is fifty years of age, with one arm disabled. Bowden *v.* State, 2 Tex. App. 56.

55. Hadley *v.* State, 58 Ga. 309; State *v.* Aleck, 41 La. Ann. 83, 5 So. 639; State *v.* Sandoz, 37 La. Ann. 376.

56. Hadley *v.* State, 58 Ga. 309.

57. Com. *v.* Morgan, 11 Bush (Ky.) 601.

58. State *v.* Brady, 39 La. Ann. 687, 2 So. 556; State *v.* Agee, 68 Mo. 264.

however, must be loaded,[59] though it is immaterial with what,[60] provided it be fired within the distance it would carry when loaded as it was.[61]

(VIII) *To Extort Confession.* Where an assault by two or more persons, on an accusation or for the purpose of extorting a confession, is made an aggravated offense, to support such a charge the accusation must be the moving cause.[62]

(IX) *When Bodily Harm Is Inflicted.* Where an assault becomes aggravated if bodily harm is actually inflicted, there must, to constitute the offense, be an assault,[63] though the injury need not result directly therefrom,[64] and there need not be a specific intent to inflict the injury.[65] To constitute grievous bodily harm it is not necessary that the injury should be either permanent or dangerous, it being sufficient if it is such as to seriously interfere with comfort or health.[66]

(X) *When Committed in Court of Justice.* An assault is aggravated when committed in a court of justice.[67]

(XI) *When Committed in House of Private Family.* By statute, an assault becomes aggravated when the person committing the offense goes into the house of a private family and is there guilty of an assault and battery; but, to constitute this offense, a battery must be committed [68] and the person whose residence is invaded must have a family.[69]

(XII) *While Having Deadly Weapon in Possession.* Under a statute making it an aggravated offense to assault another with a cowhide, whip, or stick, having at the time in one's possession a pistol or other deadly weapon, with intent

59. Jones *v.* State, 64 Ga. 450; Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760. See also Reg. *v.* Gamble, 10 Cox C. C. 545, wherein defendant, charged with a felonious attempt to shoot, was proved to have presented a pistol at a man, and to have pulled the trigger, but the pistol did not go off, and that, if it ever had been primed, it would have been impossible for the priming to fall out, and the pistol must have gone off, and it was held that there was no case to go to the jury.

60. Johnson *v.* State, 26 Ga. 611.

61. Clark *v.* State, 84 Ga. 577, 10 S. E. 1094; Henry *v.* State, 18 Ohio 32; Reg. *v.* Abraham, 1 Cox C. C. 208.

62. Underwood *v.* State, 25 Ala. 70.

63. Reg. *v.* Clarence, 22 Q. B. D. 23, 16 Cox C. C. 511, 53 J. P. 149, 58 L. J. M. C. 10, 59 L. T. Rep. N. S. 780, 37 Wkly. Rep. 166, wherein it was held that defendant could not be convicted of an assault "occasioning actual bodily harm" where, knowing that he was suffering from gonorrhœa, he communicated the disease to his wife.

64. Reg. *v.* Halliday, 54 J. P. 312, 61 L. T. Rep. N. S. 701, 38 Wkly. Rep. 256, wherein defendant was convicted, the prosecutrix having broken her leg in getting out of a window in order to escape from the violence of defendant, who had used threats to her amounting to threats against her life.

65. Tulley *v.* Corrie, 10 Cox C. C. 584, 640, 17 L. T. Rep. N. S. 140, holding that, under 24 & 25 Vict. c. 100, §§ 23, 24, if a noxious thing is unlawfully administered with intent only to injure or annoy, and does, in fact, inflict grievous bodily harm, a felony is committed. See also Stewart *v.* State, (Tex. Crim. 1899) 50 S. W. 459.

66. Reg. *v.* Ashman, 1 F. & F. 88.

Abandoning an infant child, intending that it should die, on a cold, wet day, where it was found after some hours, nearly dead from congestion of the lungs and heart, the effects of the exposure; but where in a few hours there remained no bodily injury either to the lungs or heart, or otherwise, was not a bodily injury dangerous to life within 7 Wm. IV & 1 Vict. c. 85, § 12. Reg. *v.* Gray, 7 Cox C. C. 326, Dears. & B. 903, 3 Jur. N. S. 989, 26 L. J. M. C. 203, 5 Wkly. Rep. 736.

Causing panic.— Where defendant, at the close of a theatrical performance, ran down the stairs, wilfully put out the gas, and placed an iron bar across the doorway, which caused a panic among the persons when leaving the gallery, and several of them were seriously injured through the pressure of the crowd, he was properly convicted. Reg. *v.* Martin, 8 Q. B. D. 54, 14 Cox C. C. 633, 46 J. P. 228, 51 L. J. M. C. 36, 45 L. T. Rep. N. S. 444, 30 Wkly. Rep. 106.

Communication of venereal disease.— An indictment for inflicting actual bodily harm is sustainable by evidence that a man, knowing that he has an infectious disease, has intimacy with a girl without informing her of the fact, by means of which the disease was communicated to her. Reg. *v.* Sinclair, 13 Cox C. C. 28.

Cutting a female child's private parts, so as to enlarge them for the time, was a grievous bodily harm within 43 Geo. III, c. 58, although the hymen was not injured, the incision was not deep, and the wound eventually was not dangerous. Rex *v.* Cox, Leach 71, R. & R. 269.

67. State *v.* Hunter, 44 Tex. 94 [*citing* Paschal Dig. art. 2150]; Pinson *v.* State, 23 Tex. 579; 4 Bl. Comm. 125; 1 Hawkins P. C. c. 21, § 3.

68. Pederson *v.* State, 21 Tex. App. 485, 1 S. W. 521.

69. State *v.* Cass, 41 Tex. 552.

to intimidate, it is not essential that defendant should expose the pistol, or that the person assaulted should know that his assailant had one.[70]

(XIII) *With Dangerous or Deadly Weapon*—(A) *In General.* In some jurisdictions[71] an assault is aggravated if made with a dangerous or deadly weapon. The character of the instrument or weapon with which the assault is committed constitutes the gist of this offense as distinguishing it from simple assault;[72] but, as in simple assault, there must be an attempt or offer to use the weapon,[73] coupled with present ability.[74] This offense involves neither a specific intent[75] nor malice,[76] nor is it necessary that a battery should follow.[77]

(B) *What Is a Dangerous or Deadly Weapon.* A dangerous or deadly weapon is one likely to produce death or great bodily harm by the use made of it;[78] but a weapon capable of producing death is not necessarily a weapon likely to produce death.[79]

70. Lawson *v.* State, 62 Miss. 556.

71. No such offense is known to the law as "assault with a dangerous weapon." *In re* Titcomb, 9 Hawaii 131. See also U. S. *v.* Williams, 6 Sawy. (U. S.) 244, 2 Fed. 61, to the effect that no punishment is provided for an assault with a dangerous weapon, committed on land within the exclusive jurisdiction of the United States, even though it involves an attempt to commit murder.

72. People *v.* Vanard, 6 Cal. 562; Parrott *v.* Com., 20 Ky. L. Rep. 761, 47 S. W. 452; State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830; Tollett *v.* State, (Tex. Crim. 1900) 55 S. W. 335; Pearce *v.* State, 37 Tex. Crim. 643, 40 S. W. 806; Wilson *v.* State, 34 Tex. Crim. 64, 29 S. W. 41; Stephenson *v.* State, 33 Tex. Crim. 162, 25 S. W. 784; Jenkins *v.* State, 30 Tex. App. 379, 17 S. W. 938; Melton *v.* State, 30 Tex. App. 273, 17 S. W. 257; Pierce *v.* State, 21 Tex. App. 540, 1 S. W. 463; Kouns *v.* State, 3 Tex. App. 13. See 4 Cent. Dig. tit. "Assault and Battery," § 80.

Sharp, dangerous weapon.— No conviction can be had, under a statute providing for punishing "any assault upon the person of another with any knife, dirk, dagger, or other sharp, dangerous weapon," unless the weapon with which the assault is made is sharp as well as dangerous. Com. *v.* Hawkins, 11 Bush (Ky.) 603; Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143 [*reversing* Sheld. (N. Y.) 504]; People *v.* Hickey, 11 Hun (N. Y.) 631; People *v.* Cavanagh, 62 How. Pr. (N. Y.) 187 (where the weapon was a horseshoe).

Time and place of arming immaterial.— Where it appears that defendant had the weapon prior to the assault, it is immaterial whether he brought it to the place of assault, or procured it there. State *v.* Dineen, 10 Minn. 407.

73. People *v.* Dodel, 77 Cal. 293, 19 Pac. 484; Tarpley *v.* People, 42 Ill. 340. See also *supra*, I, B, 1, a, (I).

74. State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830; State *v.* Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863. See also *supra*, I, B, 1, a, (IV).

75. People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503; People *v.* Connor, 53 Hun (N. Y.) 352, 6 N. Y. Suppl. 220, 25 N. Y. St. 138, 7 N. Y. Crim. 468; State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

76. U. S. *v.* Lunt, 1 Sprague (U. S.) 311, 26 Fed. Cas. No. 15,643.

77. People *v.* Hannigan, 58 N. Y. Suppl. 703 [*affirmed* in (N. Y. 1899) 57 N. E. 1120]; State *v.* Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863. See also *supra*, I, B, 1, a, (V).

78. *California.*— People *v.* Leyba, 74 Cal. 407, 16 Pac. 200; People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; People *v.* Fuqua, 58 Cal. 245.

Florida.— Pittman *v.* State, 25 Fla. 648, 6 So. 437.

Illinois.— McNary *v.* People, 32 Ill. App. 58.

Kentucky.— Long *v.* Com., 18 Ky. L. Rep. 176, 35 S. W. 919.

North Carolina.— State *v.* Sinclair, 120 N. C. 603, 27 S. E. 77.

Oregon.— State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

Texas.— McReynolds *v.* State, 4 Tex. App. 327; York *v.* State, 3 Tex. App. 15.

Washington.— State *v.* Rosener, 8 Wash. 42, 35 Pac. 357.

See 4 Cent. Dig. tit. "Assault and Battery," § 81.

79. Pittman *v.* State, 25 Fla. 648, 6 So. 437.

An ax may be a dangerous weapon (State *v.* Hertzog, 41 La. Ann. 775, 6 So. 622), but is not, necessarily, a deadly weapon (Melton *v.* State, 30 Tex. App. 273, 17 S. W. 257; Gladney *v.* State, (Tex. App. 1889) 12 S. W. 868. But *compare* State *v.* Shields, 110 N. C. 497, 14 S. E. 779, holding that an ax is, *ex vi termini*, a deadly weapon).

A chair is not, necessarily, a deadly weapon. Kouns *v.* State, 3 Tex. App. 13.

A chisel is a deadly weapon, within Ky. Rev. Stat. c. 28, art. 6, § 2. Com. *v.* Branham, 8 Bush (Ky.) 387.

A club is a deadly weapon. State *v.* Phillips, 104 N. C. 786, 10 S. E. 463.

A hoe is a deadly weapon. Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

A knife may, or may not be, a dangerous or deadly weapon, according to circumstances. State *v.* Jacob, 10 La. Ann. 141; Weaver *v.*

(XIV) *WITH INTENT TO INFLICT BODILY HARM.* Under some statutes an assault with intent to inflict bodily harm is an aggravated assault, the intent constituting the very gravamen of the offense;[80] but this need not be a specific intent to assault the prosecuting witness[81] or to inflict the particular kind of injury which resulted.[82] Under some statutes, the assault must be with a deadly weapon,[83] and, under others, where no considerable provocation appeared or the circumstances show an abandoned and malignant heart;[84] but the existence of either of these elements is sufficient.[85] As in simple assaults, the force must be unlawful[86] and the ability to inflict the injury must exist,[87] though no actual battery need ensue.[88] It has been held that by the term "great bodily injury" is meant an injury of a graver character than an ordinary battery;[89] and that a "serious

State, 24 Tex. 387; Warren *v.* State, 22 Tex. App. 383, 3 S. W. 240; Coker *v.* State, 22 Tex. App. 20, 2 S. W. 615. See also Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

A pistol is not, necessarily, a deadly weapon (Branch *v.* State, 35 Tex. Crim. 304, 33 S. W. 356; Ballard *v.* State, (Tex. App. 1890) 13 S. W. 674; Key *v.* State, 12 Tex. App. 506), and whether it is or is not must depend on its size, or the manner of its use (Skidmore *v.* State, 43 Tex. 93; Stephenson *v.* State, 33 Tex. Crim. 162, 25 S. W. 784; Jenkins *v.* State, 30 Tex. App. 379, 17 S. W. 938; Pierce *v.* State, 21 Tex. App. 540, 1 S. W. 463). It may be such even when used as a bludgeon. State *v.* Franklin, 36 Tex. 155.

A stick is not, necessarily, a deadly weapon. State *v.* Sinclair, 120 N. C. 603, 27 S. E. 77 (a piece of pine weather-boarding, fourteen to eighteen inches long, three-quarters of an inch thick, and six inches wide at one end, tapering to a point at the other end, was not a deadly weapon in the hands of a sickly, fifteen-year-old boy); Pinson *v.* State, 23 Tex. 579; Stevens *v.* State, 27 Tex. App. 461, 11 S. W. 459 (a good-sized walking-stick made of *bois d'arc* and loaded); Wilson *v.* State, 15 Tex. App. 150 (a black-jack fence-pole).

A stone may be a dangerous weapon, depending on the size and other circumstances. State *v.* Dineen, 10 Minn. 407.

Boiling water was a "dangerous thing" within 7 Wm. IV & 1 Vict. c. 85, § 5. Reg. *v.* Crawford, 2 C. & K. 129, 1 Den. C. C. 100, 61 E. C. L. 129.

Brass knuckles are not necessarily a deadly weapon. Ballard *v.* State, (Tex. App. 1890) 13 S. W. 674; Wilks *v.* State, 3 Tex. App. 34.

80. *California.*— People *v.* Keefer, 18 Cal. 636.

Iowa.— State *v.* Malcolm, 8 Iowa 413.

Michigan.— People *v.* Ochotski, 115 Mich. 601, 73 N. W. 889.

Minnesota.—State *v.* Garvey, 11 Minn. 154.

Montana.—State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63; State *v.* Eschbach, 13 Mont. 399, 34 Pac. 179.

Nevada.— State *v.* Napper, 6 Nev. 113.

New Mexico.— Chacon *v.* Territory, 7 N. M. 241, 34 Pac. 448.

New York.— People *v.* Terrell, 11 N. Y. Suppl. 364, 33 N. Y. St. 368.

Washington.—State *v.* Surry, (Wash. 1900) 63 Pac. 557.

Wisconsin.— Vosburgh *v.* State, 82 Wis. 168, 51 N. W. 1092.

See 4 Cent. Dig. tit. "Assault and Battery," § 79.

81. People *v.* Kalunki, 123 Mich. 110, 81 N. W. 923; People *v.* Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575; Reg. *v.* Stopford, 11 Cox C. C. 643; Reg. *v.* Fretwell, 9 Cox C. C. 471, 10 Jur. N. S. 595, L. & C. 443, 33 L. J. M. C. 128, 10 L. T. Rep. N. S. 428, 12 Wkly. Rep. 751; Reg. *v.* Lynch, 1 Cox C. C. 361.

82. People *v.* Miller, 91 Mich. 639, 52 N. W. 65. See also Reg. *v.* Bowen, 1 C. & M. 149, 41 E. C. L. 86; Rex *v.* Shadbolt, 5 C. & P. 504, 24 E. C. L. 678; Rex *v.* Gillow, 1 Lewin 57, 1 Moody 85.

83. People *v.* Murat, 45 Cal. 281; State *v.* Johnson, 3 N. D. 150, 54 N. W. 547.

84. Baker *v.* People, 49 Ill. 308; State *v.* Eschbach, 13 Mont. 399, 34 Pac. 179; State *v.* McDonald, 14 Utah 173, 46 Pac. 872.

85. State *v.* Eschbach, 13 Mont. 399, 34 Pac. 179; State *v.* McDonald, 14 Utah 173, 46 Pac. 872.

86. State *v.* Shea, 104 Iowa 724, 74 N. W. 687.

87. State *v.* Napper, 6 Nev. 113; People *v.* Terrell, 11 N. Y. Suppl. 364, 33 N. Y. St. 368. See also *supra*, I, B, 1, a, (IV).

88. Young *v.* People, 6 Ill. App. 434. See also *supra*, I, B, 1, a, (V).

89. Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491.

Such injuries are striking a person several severe blows on the head with a pistol (Allen *v.* People, 82 Ill. 610) or hammer (Wells *v.* State, 47 Nebr. 74, 66 N. W. 29); slapping a child's face with one's hand, causing a swelling which remained for several days (Whitner *v.* State, 46 Nebr. 144, 64 N. W. 704), or breaking one's leg by knocking down with the fist and kicking (Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491).

Result if death had ensued.— To constitute the offense of assault with intent to do great bodily harm, less than murder, under How. Anno. Stat. Mich. § 9122*a*, the assault need not be such that, had death ensued, the offense would have been more than manslaughter. People *v.* Ochotski, 115 Mich. 601, 73 N. W. 889. See also Reg. *v.* Nicholls, 9 C. & P. 267, 38 E. C. L. 165; Reg. *v.* Griffiths, 8 C. & P. 248, 2 Moody 40, 34 E. C. L. 716.

bodily danger" is an injury which is attended with danger or gives rise to apprehension.[90]

(xv) *With Means Calculated to Inflict Bodily Injury.* A premeditated assault with means calculated to inflict great bodily injury is, in some jurisdictions, an aggravated assault. To constitute the offense a premeditated design is necessary;[91] but the use of a dangerous or deadly weapon is not.[92]

(xvi) *Wounding.* Wounding is, in some jurisdictions, an aggravated assault. To constitute this offense the wounding must be direct,[93] and, where the statute so provides, must have been given with some instrument,[94] though, where the statute relates to wounds with a dangerous weapon, it is not essential that the instrument used should be a technically dangerous weapon, fashioned and used for purposes of offense.[95] To constitute a wound there must be an injury by which the skin is broken,[96] either internally or externally.[97] Malicious intent is not an element of this offense.[98]

90. George *v.* State, 21 Tex. App. 315, 17 S. W. 351 [*followed* in Halsell *v.* State, 29 Tex. App. 22, 18 S. W. 418].

There is serious bodily injury where the injuries inflicted stiffened one of prosecutor's fingers (Branch *v.* State, 35 Tex. Crim. 304, 33 S. W. 356), or where, with a knife, the wounds inflicted were a cut at the wrist, a quarter of an inch deep and three-quarters long, and one on the head, to the skull, an inch and a half long (Thompson *v.* State, (Tex. Crim. 1895) 30 S. W. 667).

91. Territory *v.* Hancock, (Ariz. 1894) 35 Pac. 1060; Pinson *v.* State, 23 Tex. 579.

92. A brickbat weighing five pounds is such a means as the statute contemplates. People *v.* Fahey, 64 Cal. 342, 30 Pac. 1030.

The fists may be such means (Keley *v.* State, 12 Tex. App. 245) but are not necessarily so (Buchanan *v.* State, (Tex. App. 1890) 13 S. W. 1000).

Throwing another out of a third-story window is sufficient. People *v.* Emmons, 61 Cal. 487.

93. Reg. *v.* Spooner, 6 Cox C. C. 392 (holding that an injury occasioned by prosecutor falling on some iron trams, in consequence of a blow from the prisoner, was not within 7 Wm. IV & 1 Vict. c. 85, § 4); Rex *v.* Beckett, 1 M. & Rob. 526 (holding that a wound caused by prosecutor forcing himself, in self-defense, against a weapon with which the prisoner was attacking him, was not a wound inflicted by the prisoner within 9 Geo. IV, c. 31, § 11). But where defendant struck prosecutor on the side of his hat with an air-gun, with great force, by which prosecutor was wounded, but the wound was made by the violence with which the hat was struck, the weapon used by the prisoner never coming in contact with the head of the prosecutor, this was a wounding within the latter statute. Rex *v.* Sheard, 7 C. & P. 846, 32 E. C. L. 903.

94. Rex *v.* Harris, 7 C. & P. 446, 32 E. C. L. 700 (holding that biting off the end of a person's nose was not a wounding within 9 Geo. IV, c. 31, § 12); Rex *v.* Wood, 4 C. & P. 381, 19 E. C. L. 564 (holding that breaking a person's collar-bone, and bruising him, was not a wounding within the same statute); Reg. *v.* Jennings, 2 Lewin 130 (holding that biting off a joint from a person's finger was not a wounding within the same statute); Rex *v.* Stevens, 1 Moody 409.

Throwing oil of vitriol over prosecutor's face, with intent to disfigure, and so wounding his face, was not a wounding within 9 Geo. IV, c. 31, § 12. Reg. *v.* Henshall, 2 Lewin 135; Rex *v.* Murrow, 1 Moody 456.

A kick with a shoe was within this statute. Rex *v.* Briggs, 1 Lewin 61, 1 Moody 318.

95. State *v.* Hertzog, 41 La. Ann. 775, 6 So. 622; State *v.* Scott, 39 La. Ann. 943, 3 So. 83 (where a pocket-knife was used).

96. Moriarty *v.* Brooks, 6 C. & P. 684, 25 E. C. L. 638; Rex *v.* Beckett, 1 M. & Rob. 526.

There should be a separation of the whole skin, and a separation of the cuticle or upper skin only is not sufficient. Com. *v.* Gallagher, 6 Metc. (Mass.) 565; Reg. *v.* McLoughlin, 8 C. & P. 635, 34 E. C. L. 934.

There was held to be a wounding where the skin was broken by a blow from a bludgeon (Rex *v.* Payne, 4 C. & P. 558, 19 E. C. L. 648), a hammer (Reg. *v.* Smith, 8 C. & P. 173, 34 E. C. L. 673; Rex *v.* Withers, 4 C. & P. 446, 1 Moody 294, 19 E. C. L. 595), or a stone (State *v.* Leonard, 22 Mo. 449), or from a kicking (Reg. *v.* Duffill, 1 Cox C. C. 49).

97. Reg. *v.* Smith, 8 C. & P. 173, 34 E. C. L. 673.

A rupture of the lining membrane of the urethra, followed by a small flow, such rupture being caused by a kick on the private parts of the prosecutor, is a wounding within 7 Wm. IV & 1 Vict. c. 85, § 4. Reg. *v.* Waltham, 3 Cox C. C. 442. But a violent kick on the private parts of a woman, which caused a flow of blood, mingled with urine, for some time afterward, was held not a wounding within this statute, no proof being given as to the precise point whence the blood originally came. Reg. *v.* Jones, 3 Cox C. C. 441.

98. State *v.* Broadbent, 19 Mont. 467, 48 Pac. 775; Reg. *v.* Latimer, 17 Q. B. D. 359, 16 Cox C. C. 70, 51 J. P. 184, 55 L. J. M. C. 135, 54 L. T. Rep. N. S. 768; Reg. *v.* Cox, 1 F. & F. 664.

2. Battery — a. Touching — (i) *In General.* It is an essential element of the offense of battery or assault and battery that the person[99] of the prosecutor be touched[1] either by the aggressor himself[2] or by the substance put in motion by him.[3] Actual injury is not necessary,[4] the least violation of the person being sufficient.[5]

(ii) *Manner of.* According to the common-law authorities, it was sufficient if the touching was done wilfully or in anger,[6] and, under some statutes defining the offense, the touching must not only be unlawful, but it must be done in either a rude, insolent, or angry manner.[7]

b. Intent — Malice. An intent to injure is an element of the offense,[8] but

99. Striking another's cane while in his hand is an assault and battery. Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

Striking a horse which prosecutor was driving has been held to amount to a battery. People *v.* Moore, 50 Hun (N. Y.) 356, 3 N. Y. Suppl. 159, 18 N. Y. St. 1031; Com. *v.* Fleet, 8 Phila. (Pa.) 614. *Contra*, Kirland *v.* State, 43 Ind. 146, 13 Am. Rep. 386.

Taking hold of one's coat in an angry, rude, or insolent manner, or with a view to hostility, and detaining the wearer, amounts to a battery. U. S. *v.* Ortega, 4 Wash. (U. S.) 531, 27 Fed. Cas. No. 15,971.

1. Kirland *v.* State, 43 Ind. 146, 13 Am. Rep. 386; Floyd *v.* State, 29 Tex. App. 341, 15 S. W. 819; Donaldson *v.* State, 10 Tex. App. 307.

2. Kirland *v.* State, 43 Ind. 146, 13 Am. Rep. 386.

3. Kirland *v.* State, 43 Ind. 146, 13 Am. Rep. 386.

Dropping croton oil into a piece of candy at a purchaser's request is battery, where the purchaser caused another person to eat the candy to his injury, and the druggist had reason to believe that the dose was intended for such person as a trick, and not for medicinal purposes. State *v.* Monroe, 121 N. C. 677, 28 S. E. 547, 61 Am. St. Rep. 686, 43 L. R. A. 861.

Placing cantharides in a drink, and causing it to be taken without disclosing its presence, is a battery. Com. *v.* Stratton, 114 Mass. 303, 19 Am. Rep. 350.

To put cow-itch upon a towel and in a tub of water, for the purpose of being used, where it injures a person, is a misdemeanor, and an indictment may be sustained. People *v.* Blake, 1 Wheel. Crim. (N. Y.) 490.

4. Scott *v.* State, 118 Ala. 115, 24 So. 414.

5. *Alabama.*— Smith *v.* State, 123 Ala. 64, 26 So. 641; Scott *v.* State, 118 Ala. 115, 24 So. 414; Murdock *v.* State, 65 Ala. 520.

Arkansas.— Sweeden *v.* State, 19 Ark. 205 [*citing* 3 Greenleaf Ev. § 60].

Georgia.— Goodrum *v.* State, 60 Ga. 509.

Illinois.— Hunt *v.* People, 53 Ill. App. 111.

New York.— People *v.* Powers, 1 Wheel. Crim. (N. Y.) 405.

Texas.—Evans *v.* State, 25 Tex. Suppl. 303; Johnson *v.* State, 17 Tex. 515; Norton *v.* State, 14 Tex. 387; Jarnigan *v.* State, 6 Tex. App. 465; Garnet *v.* State, 1 Tex. App. 605, 28 Am. Rep. 425.

England.— 3 Bl. Comm. 120; 1 Hawkins P. C. c. 62, § 2.

See 4 Cent. Dig. tit. "Assault and Battery," § 68.

Manipulation of a woman without her consent, in order to obtain sexual knowledge of her person, may amount to a battery. Atkins *v.* State, 11 Tex. App. 8.

Placing the open hand on the breast of a person, and pushing him back several steps, so that he fell, is an assault and battery. State *v.* Baker, 65 N. C. 332.

Pouring turpentine and pepper on another's person is a battery. Murdock *v.* State, 65 Ala. 520.

Seizing and taking out of school a child who had been placed there by the direction of his father, who had legal custody of the child, is a battery. Com. *v.* Nickerson, 5 Allen (Mass.) 518.

Taking and detaining a person, without his consent, will support an indictment for assault and battery. Long *v.* Rogers, 17 Ala. 540.

"Unlawful beating."— No distinction can be drawn between the meaning of the words "unlawful beating," as used in the statute, and the word "battery" at common law. Hunt *v.* People, 53 Ill. App. 111.

6. 3 Bl. Comm. 120; 1 Hawkins P. C. c. 62, § 2. But see Alston *v.* State, 109 Ala. 51, 52, 20 So. 81, holding that an instruction that "the least touching of another person, wilfully or in anger, is a battery," is vitiated by the disjunctive "or," since touching one wilfully is not sufficient to constitute a battery.

7. Hays *v.* State, 77 Ind. 450; Slusser *v.* State, 71 Ind. 280; Howard *v.* State, 67 Ind. 401; McCulley *v.* State, 62 Ind. 428; State *v.* Wright, 52 Ind. 307; Com. *v.* Brungess, 23 Pa. Co. Ct. 13.

Touching in lust.— "To touch a virtuous wife in the way of illicit love is a far greater outrage than to touch her in anger, and equally a breach of the peace. It is violence proceeding from lust, instead of violence proceeding from rage. It issues from the passion which, unrestrained, culminates in rape, instead of from the passion which culminates in homicide." Goodrum *v.* State, 60 Ga. 509, 511, holding that it is an assault and battery for a man, without any innocent excuse, to put his arm around the neck of another's wife against her will.

8. Com. *v.* Brungess, 23 Pa. Co. Ct. 13; Weaver *v.* State, (Tex. Crim. 1894) 24 S. W.

the intended injury may be bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind.[9] When injury is inflicted the intent to injure[10] and malice[11] are presumed.

3. Attempt. As an assault is itself an attempt to commit a crime, there can be no such offense as an attempt to commit a simple assault;[12] though it seems that there may be an attempt to commit an aggravated assault;[13] and an indictment will lie for attempting to induce another to commit assault and battery on a third person,[14] or for attempting to provoke one having the present ability to do so upon one's self.[15]

C. Persons Liable. Mere presence at the time an assault was made will not render one guilty of an assault;[16] but one present, ready to aid if necessary,[17] or actually aiding and encouraging the principal offender,[18] or in pursuance of an unlawful conspiracy,[19] is equally as guilty as the actual perpetrator. So, too, one who incites or procures another to commit an assault, though not present at its commission or otherwise participating therein, may be indicted and punished as a principal.[20]

D. Jurisdiction — 1. In General. At common law a common assault was an indictable offense;[21] but jurisdiction over this offense has been variously affected by statutes.[22]

648; Castingaro *v.* State, (Tex. Crim. 1894) 24 S. W. 648; Renella *v.* State, (Tex. Crim. 1894) 24 S. W. 647; Berry *v.* State, 30 Tex. App. 423, 17 S. W. 1080; McConnel *v.* State, 25 Tex. App. 329, 8 S. W. 275; Ware *v.* State, 24 Tex. App. 521, 7 S. W. 240; Donaldson *v.* State, 10 Tex. App. 307.

This intent is not supplied by an intent to violate an ordinance against fast driving. Com. *v.* Adams, 114 Mass. 323, 19 Am. Rep. 362.

9. Floyd *v.* State, 29 Tex. App. 341, 15 S. W. 819; Atkins *v.* State, 11 Tex. App. 8; Donaldson *v.* State, 10 Tex. App. 307.

10. Evans *v.* State, 25 Tex. Suppl. 303; Floyd *v.* State, 29 Tex. App. 341, 15 S. W. 819; Atkins *v.* State, 11 Tex. App. 8.

Accidental injury of wrong person.—Under Tex. Pen. Code, art. 486, providing that an assault and battery may be committed though the person actually injured was not the person intended to be injured, where defendant began a quarrel, and, in order to prevent the person he was quarreling with from picking up an ax-helve, struck at him, and accidentally hit a bystander, he is guilty of an assault and battery upon the latter. Powell *v.* State, 32 Tex. Crim. 230, 22 S. W. 677.

11. Hill *v.* State, 63 Ga. 578, 36 Am. Rep. 120; Smith *v.* Com., 100 Pa. St. 324 [*affirming* Com. *v.* Lister, 15 Phila. (Pa.) 405, 39 Leg. Int. (Pa.) 32]; Com. *v.* Scanlan, 2 Pa. Co. Ct. 605.

12. Wilson *v.* State, 53 Ga. 205. But see Leblanc *v.* Reg., 2 Quebec 255, holding that a verdict of attempt to assault is not irregular.

13. State *v.* Herron, 12 Mont. 230, 29 Pac. 819, 33 Am. St. Rep. 576.

14. U. S. *v.* Lyles, 4 Cranch C. C. (U. S.) 469, 26 Fed. Cas. No. 15,646.

15. Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; Stuckmyer *v.* State, 29 Ind. 20.

16. Schribe *v.* State, (Tex. Crim. 1896) 35 S. W. 375.

17. State *v.* Gooch, 105 Mo. 392, 16 S. W. 892.

18. *Delaware.*— State *v.* Burton, (Del. 1900) 47 Atl. 619.

Iowa.— State *v.* McClintock, 8 Iowa 203.

Massachusetts.— Com. *v.* Hurley, 99 Mass. 433.

Minnesota.— State *v.* Herdina, 25 Minn. 161.

Mississippi.— Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392.

Missouri.— State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990.

Nebraska.— Wagner *v.* State, 43 Nebr. 1, 61 N. W. 85.

North Carolina.— State *v.* Jones, 118 N. C. 1237, 24 S. E. 493; State *v.* Merritt, 61 N. C. 134.

South Carolina.— State *v.* Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669.

Texas.— Kemp *v.* State, 25 Tex. App. 589, 8 S. W. 804; Dunman *v.* State, 1 Tex. App. 593.

United States.— U. S. *v.* Lyles, 4 Cranch C. C. (U. S.) 469, 26 Fed. Cas. No. 15,646; U. S. *v.* Ricketts, 1 Cranch C. C. (U. S.) 164, 27 Fed. Cas. No. 16,158.

See 4 Cent. Dig. tit. "Assault and Battery," § 87.

After a principal offender is armed with a dangerous weapon, one who comes to his assistance, knowing him to be so armed, and participates in the intent to do great bodily harm, and aids in the assault, is as guilty as though he had aided in the previous arming. State *v.* Herdina, 25 Minn. 161.

19. Fuller *v.* State, 117 Ala. 200, 23 So. 73; Thompson *v.* State, 25 Ala. 41; Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392; Reg. *v.* Bowen, 1 C. & M. 149, 41 E. C. L. 86.

20. Baker *v.* State, 12 Ohio St. 214.

21. 4 Bl. Comm. 216 [*cited* in State *v.* Hailstock, 2 Blackf. (Ind.) 257].

22. In Arkansas, under the constitution of 1836, an assault and battery could only be punished by presentment or indictment (Durr *v.* State, 6 Ark. 461; Rector *v.* State, 6 Ark. 187), but, by the act of Dec. 16, 1846, which

2. Necessity of Prosecutor. A court of summary jurisdiction has no power to convict of a common assault unless the party aggrieved, or some one on his behalf, complains of the assault, with a view to the adjudication of the court

was held not to apply to indictments pending at its passage (Gooch *v.* State, 8 Ark. 448), exclusive jurisdiction was conferred on justices of the peace (State *v.* Cox, 8 Ark. 436).

In California the superior court has jurisdiction of an aggravated assault amounting to a felony, and this is not affected by the fact that the offense charged includes a lesser offense. People *v.* Fahey, 64 Cal. 342, 30 Pac. 1030.

In Hawaii the supreme court has concurrent jurisdiction with the police and district courts over an assault with a weapon obviously and imminently dangerous to life. Reg. *v.* Quai, 8 Hawaii 282.

In Illinois circuit courts have original jurisdiction in all cases of misdemeanors, which include assaults (Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213); but, under an earlier statute, exclusive jurisdiction over assaults and assaults and batteries was conferred on justices of the peace (Carpenter *v.* People, 5 Ill. 197).

In Indiana, under an early statute, a common assault was not indictable, but was in the exclusive jurisdiction of justices of the peace. State *v.* Hailstock, 2 Blackf. (Ind.) 257. By the act of 1849 such jurisdiction was given to justices in certain counties. Smith *v.* State, 2 Ind. 251 (holding that the circuit court did not acquire jurisdiction by charging in the indictment an intent to commit a felony); Nelson *v.* State, 2 Ind. 249. The circuit court now has jurisdiction. Hinkle *v.* State, 127 Ind. 490, 26 N. E. 777, holding that such jurisdiction is not ousted by the act of March 9, 1889, which provides that, upon conviction of assault and battery, in the courts named in the section, the punishment shall be as therein stated.

In Iowa the offense of assault and battery is triable summarily before a justice of the peace or other officer authorized by law, on information under oath, without indictment or the intervention of a grand jury, and not otherwise (State *v.* Lee, 37 Iowa 402; State *v.* Carpenter, 23 Iowa 506; State *v.* Burdick, 9 Iowa 402); but aggravated assaults are within the exclusive jurisdiction of the district court (State *v.* Carpenter, 23 Iowa 506).

In Kansas an assault is a criminal offense (Kan. Gen. Stat. p. 325, § 43) of which the district court has original jurisdiction, concurrent with justices of the peace. State *v.* Finley, 6 Kan. 366. But in Guy *v.* State, 1 Kan. 448, it was held that assault and battery is not indictable.

In Maine the supreme judicial court has original jurisdiction, by indictment, of the offense of assault and battery, concurrent with the jurisdiction of municipal and police courts and trial justices, when the offense is not of a high and aggravated character. State *v.* Jones, 73 Me. 280.

In Missouri an act declaring assaults and batteries not indictable, but punishable before justices of the peace in a summary manner, was held constitutional. State *v.* Ledford, 3 Mo. 102.

In New Hampshire the court of common pleas has no original jurisdiction in cases of assault and battery; but complaints for such offenses must be first made before a justice of the peace (State *v.* Hilton, 32 N. H. 285; State *v.* Berritt, 17 N. H. 268; State *v.* Taylor, 16 N. H. 477); but, to give the court jurisdiction of an indictment for an offense the description of which necessarily includes an assault, it is not necessary that there be a preliminary examination before a magistrate; and a conviction upon such an indictment for assault and battery, simply, does not oust the court of jurisdiction (State *v.* Webster, 39 N. H. 96).

In North Carolina the superior court has jurisdiction of aggravated assaults, and failure to prove the particular charge does not oust the jurisdiction acquired by virtue of the form of the indictment. State *v.* Phillips, 104 N. C. 786, 10 S. E. 463; State *v.* Ray, 89 N. C. 587. And, under the provisions of the act of 1879, c. 92, the superior, inferior, and criminal courts have concurrent jurisdiction with justices of the peace of assaults and assaults and batteries, where a justice has not taken jurisdiction within six months after the commission of the offense. State *v.* Moore, 82 N. C. 659.

In Texas, if the offense be of an aggravated nature, a justice cannot take cognizance of the case for the purpose of trial and punishment, but is required to recognize the offender, with sufficient sureties, to appear at the district court. Norton *v.* State, 14 Tex. 387.

In England justices have power to hear and determine charges of assault and battery, except where a question as to the title to land arises (Reg. *v.* Pearson, L. R. 5 Q. B. 237, 11 Cox C. C. 493, 39 L. J. M. C. 76, 22 L. T. Rep. N. S. 126), and the fact that the evidence, if believed, discloses a felony does not affect their jurisdiction (Anonymous, 1 B. & Ad. 382, 20 E. C. L. 527; Wilkinson *v.* Dutton, 3 B. & S. 821, 9 Jur. N. S. 1104, 32 L. J. M. C. 152, 8 L. T. Rep. N. S. 276, 113 E. C. L. 821).

In Canada, on information for attempt to do grievous bodily harm, justices of the peace have no right to alter the charge to one of simple assault. Miller *v.* Lea, 25 Ont. App. 428, 2 Can. Crim. Cas. 282.

Presumption on appeal.— Under Mass. Stat. (1887), c. 293, § 1, providing that "municipal, district, and police courts shall have jurisdiction, concurrently with the superior court, of cases of assault and battery with a weapon dangerous to life, where there is no intent shown to commit any other offense,"

upon it,[23] or it affirmatively appears that the aggrieved person has declined or refused to prefer a complaint;[24] but an indictment may be preferred by a person other than the person aggrieved, or some one on his behalf.[25]

E. Indictment, Information, or Complaint — 1. For Assault, or Assault and Battery[26] — a. In General. It is not necessary to charge in so many words that defendant was guilty of an assault or assault and battery,[27] though the acts constituting the offense must be alleged.[28] Such facts must be stated

a complaint for an assault with a weapon dangerous to life, which does not charge an intent to commit any other offense, is apparently within the final jurisdiction of a police court; and where the record of such court shows that it took final jurisdiction it will be presumed on appeal, in the absence of a showing to the contrary, that there was no evidence that defendant had an intent to commit any other offense. Com. *v.* O'Donnell, 150 Mass. 502, 23 N. E. 217.

23. Nicholson *v.* Booth, 16 Cox C. C. 373, 52 J. P. 662, 57 L. J. M. C. 43, 58 L. T. Rep. N. S. 187; Reg. *v.* Deny, 15 Jur. 227, 20 L. J. M. C. 189, 2 L. M. & P. 230; Reg. *v.* Wicklow, 30 L. R. Ir. 633.

A police officer who appears as complainant on a charge of assault at petty sessions is not a party acting on behalf of the person aggrieved within 24 & 25 Vict. c. 100, § 42. Reg. *v.* Wicklow, 30 L. R. Ir. 633.

24. Reg. *v.* Wicklow, 30 L. R. Ir. 633.

25. Com. *v.* Patterson, 2 Metc. (Ky.) 374; Reg. *v.* Gaunt, 18 Cox C. C. 210, 60 J. P. 90, 73 L. T. Rep. N. S. 585.

26. For forms of indictments, informations, and complaints for assault and assault and battery see the following cases:

Alabama.— Smith *v.* State, 123 Ala. 64, 26 So. 641; Fuller *v.* State, 117 Ala. 200, 23 So. 73; Little *v.* State, 89 Ala. 99, 8 So. 82; Murdock *v.* State, 65 Ala. 520; Wood *v.* State, 50 Ala. 144; Balkum *v.* State, 40 Ala. 671; Johnson *v.* State, 35 Ala. 363; Thompson *v.* State, 25 Ala. 41; State *v.* Middleton, 5 Port. (Ala.) 484.

Arizona.— West *v.* Territory, (Ariz. 1894) 36 Pac. 207.

Arkansas.— State *v.* Tidwell, 43 Ark. 71; Bryant *v.* State, 41 Ark. 359; Wigley *v.* State, 41 Ark. 225; State *v.* Seely, 30 Ark. 162.

California.— People *v.* Savercool, 81 Cal. 650, 22 Pac. 856; People *v.* Forney, 81 Cal. 118, 22 Pac. 481; People *v.* Emmons, 61 Cal. 487; People *v.* War, 20 Cal. 117.

Indiana.— Parker *v.* State, 118 Ind. 328, 20 N. E. 833; State *v.* Kinder, 109 Ind. 226, 9 N. E. 917; State *v.* Philley, 67 Ind. 304; State *v.* Prather, 54 Ind. 63; Ryan *v.* State, 52 Ind. 167; State *v.* Trulock, 46 Ind. 289; Brooster *v.* State, 15 Ind. 190; State *v.* Wimple, 8 Blackf. (Ind.) 214; Hasse *v.* State, 8 Ind. App. 488, 36 N. E. 54.

Iowa.— State *v.* McKinley, 82 Iowa 445, 48 N. W. 804; State *v.* McClintock, 1 Greene (Iowa) 392.

Maine.— State *v.* Littlefield, 70 Me. 452, 35 Am. Rep. 335; State *v.* Goddard, 69 Me. 181.

Maryland.— Harne *v.* State, 39 Md. 552.

Massachusetts.— Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121; Com. *v.* Stoddard, 9 Allen (Mass.) 280.

Michigan.— People *v.* Ochotski, 115 Mich. 601, 73 N. W. 889; People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531.

Missouri.— State *v.* Havens, 95 Mo. 167, 8 S. W. 219; State *v.* Ray, 37 Mo. 365; State *v.* Craighead, 32 Mo. 561; State *v.* Bohannon, 21 Mo. 490; Carrico *v.* State, 11 Mo. 579.

Montana.— State *v.* Broadbent, 19 Mont. 467, 48 Pac. 775.

Nebraska.— Wells *v.* State, 47 Nebr. 74, 66 N. W. 29; Hodgkins *v.* State, 36 Nebr. 160, 54 N. W. 86.

New York.— People *v.* Casey, 72 N. Y. 393; People *v.* McKinnon, 1 Wheel. Crim. (N. Y.) 170.

North Carolina.— State *v.* Black, 109 N. C. 856, 13 S. E. 877, 14 L. R. A. 205.

Ohio.— State *v.* Inskeep, 49 Ohio St. 228, 34 N. E. 720; White *v.* State, 13 Ohio St. 569.

Tennessee.— State *v.* Ladd, 2 Swan (Tenn.) 225.

Texas.— State *v.* Hunter, 44 Tex. 94; State *v.* Craighead, 32 Mo. 561; State *v.* Bohannon, Tex. 95; State *v.* Murrah, 25 Tex. 758; Smith *v.* State, (Tex. Crim. 1900) 57 S. W. 949; Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293; Roberson *v.* State, 15 Tex. App. 317; Coney *v.* State, 2 Tex. App. 62.

Virginia.— Jones *v.* Com., 87 Va. 63, 12 S. E. 226; Com. *v.* Woodson, 9 Leigh (Va.) 669.

Washington.—State *v.* Clayborne, 14 Wash. 622, 45 Pac. 303.

England.— Reg. *v.* Elrington, 1 B. & S. 688, 9 Cox C. C. 86, 8 Jur. N. S. 97, 31 L. J. M. C. 14, 5 L. T. Rep. N. S. 284, 10 Wkly. Rep. 13, 101 E. C. L. 688; Vaughton *v.* Bradshaw, 9 C. B. N. S. 103, 7 Jur. N. S. 468, 30 L. J. C. P. 93, 3 L. T. Rep. N. S. 373, 9 Wkly. Rep. 1201, 99 E. C. L. 103; Reg. *v.* Crawford, 2 C. & K. 129, 1 Den. C. C. 100, 61 E. C. L. 129; Reg. *v.* March, 1 C. & K. 496, 47 E. C. L. 496; Reg. *v.* Button, 8 C. & P. 660, 34 E. C. L. 948.

Canada.—Reg. *v.* Richardson, 46 U. C. Q. B. 375; Reg. *v.* Bonter, 30 U. C. C. P. 19; Reg. *v.* Drain, 8 Manitoba 535.

27. State *v.* Bitman, 13 Iowa 485, holding that an information which charged defendant with cruelly and inhumanly whipping and beating his own child sufficiently charged the offense of assault and battery.

28. Beasley *v.* State, 18 Ala. 535. But see Rataree *v.* State, 62 Ga. 245 (holding that it is not ground for arresting judgment that an

positively,[29] but need not be stated in minute detail,[30] it being sufficient to state the facts which constitute the offense in terms sufficiently clear and specific so that defendant cannot be mistaken in its nature, and would be enabled to plead an acquittal or conviction on it in bar of another prosecution for the same offense.[31]

b. Joinder of Offenses—(i) *In General.* The indictment may, in separate counts, charge a simple and an aggravated assault,[32] or distinct grounds of aggravation,[33] and is not bad for duplicity because it charges facts constituting more than one offense where the lesser is necessarily included in the greater,[34] or where,

accusation in a city court charged the accused with an assault, without specifying any acts constituting such assault); State *v.* Douglass, 1 Greene (Iowa) 550 (holding that it is sufficient, before a justice of the peace, if the affidavit charges an assault in general terms).

29. Allen *v.* State, 13 Tex. App. 28; Hunt *v.* State, 9 Tex. App. 404. But an information which charges directly that accused committed the offense is not defective because it states parenthetically, "as shown by the complaint of" A, as such words in parenthesis are not essential or descriptive of the offense, and may be treated as surplusage. Hilliard *v.* State, 17 Tex. App. 210.

30. *Kansas.*— State *v.* Beverlin, 30 Kan. 611, 2 Pac. 630; State *v.* Finley, 6 Kan. 366.

Minnesota.— See State *v.* Bell, 26 Minn. 388, 4 N. W. 621.

Missouri.— State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565.

Tennessee.— Bloomer *v.* State, Sneed (Tenn.) 66.

Texas.— Roberson *v.* State, 15 Tex. App. 317.

31. People *v.* Holland, 59 Cal. 364; State *v.* Boynton, 75 Iowa 753, 38 N. W. 505; State *v.* Seamons, 1 Greene (Iowa) 418; State *v.* Cox, 43 Mo. App. 328.

Common-law form.— Where the offense prohibited by statute is the same as at common law, the indictment may well adopt the common-law form to charge an aggravated assault. Evans *v.* State, 25 Tex. Suppl. 303.

Following the language of the statute is, ordinarily, sufficient.

California.— People *v.* Savercool, 81 Cal. 650, 22 Pac. 856; People *v.* Forney, 81 Cal. 118, 22 Pac. 481; *Ex p.* Mitchell, 70 Cal. 1, 11 Pac. 488 [*following* People *v.* Turner, 65 Cal. 540, 4 Pac. 553].

Indiana.—State *v.* Kinder, 109 Ind. 226, 9 N. E. 917; State *v.* Trulock, 46 Ind. 289.

Minnesota.— State *v.* Shenton, 22 Minn. 311; State *v.* Garvey, 11 Minn. 154.

Nebraska.— Smith *v.* State, 58 Nebr. 531, 78 N. W. 1059; Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; Hodgkins *v.* State, 36 Nebr. 160, 54 N. W. 86.

Virginia.— Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

Washington.— Clarke *v.* Territory, 1 Wash. Terr. 68.

United States.— Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

Statutory form held bad.— The form of indictment for aggravated assault prescribed by the "common-sense" indictment bill [Gen. Laws XVIIth Legislature, p. 61, § 11, form No. 4] is unconstitutional. Allen *v.* State, 13 Tex. App. 28.

Charging in alternative.— When the indictment charges that defendant, by force, poured, or attempted to pour, "a mixture of spirits of turpentine and pepper" on the person of the prosecutrix, this is, in legal effect, the averment of an assault and battery, and the alternative averments are authorized by the statute. Murdock *v.* State, 65 Ala. 520.

"Cut, penetrate, and wound" equivalent to "stab."— The words "cut, penetrate, and wound," in an indictment, sufficiently describe the offense of malicious stabbing, under Tenn. Code, § 4608. Starks *v.* State, 7 Baxt. (Tenn.) 64.

Omission of the word "did," before the words "assault, beat, and maltreat," was supplied by intendment. State *v.* Edwards, 19 Mo. 674.

Use of "and" for "an."— An indictment charging that defendant "did commit and assault," otherwise good, is sufficient. Such use of the word "and" for "an" will not be noticed on general exceptions, either on motion to quash or in arrest of judgment. Martin *v.* State, 40 Tex. 19.

Use of "inflict" for "cause."— Under a statute providing that whosoever shall "cause" any grievous bodily harm to any person, etc., shall be guilty of felony, an indictment alleging that "A unlawfully and maliciously did 'inflict' grievous bodily harm," not using the statutory word "cause," is sufficient. Reg. *v.* Bray, 15 Cox C. C. 197.

Circumstances constituting manslaughter if death ensued.— In an indictment for an assault with a dangerous weapon, under circumstances which, if death had ensued, would have constituted manslaughter, the circumstances should be set out; but it is not necessary to state that the offense was committed "in a case and under circumstances," etc. Jennings *v.* State, 9 Mo. 862. See also State *v.* Bailey, 21 Mo. 484.

32. Bonner *v.* State, 97 Ala. 47, 12 So. 408; Rex *v.* Finacane, 5 C. & P. 551, 24 E. C. L. 703; Reg. *v.* Sirois, 27 N. Brunsw. 610.

33. Timon *v.* State, 34 Tex. Crim. 363, 30 S. W. 808.

34. Siebert *v.* State, 95 Ind. 471; State *v.* Twogood, 7 Iowa 252; State *v.* Smith, 57 Kan. 673, 47 Pac. 541; Reg. *v.* Guthrie, L. R. 1 C. C. 241, 11 Cox C. C. 522, 39 L. J. M. C. 95, 22 L. T. Rep. N. S. 485, 18 Wkly. Rep. 792. *Contra*, where the lesser offense is not

though the language is applicable to either of the statutory offenses, it clearly indicates the commission of but one act by defendant.[35]

(II) *Mutual Assaults.* Two persons who commit an assault and battery, each on the other, at the same time, if severally charged, may be joined in the same indictment; but it is not proper to do so, because the court has discretion to quash the indictment.[36]

(III) *Separate Assaults*—(A) *By Two Persons.* Separate assaults by two or more persons may be united in one indictment by separate counts.[37]

(B) *On Two Persons.* An indictment may properly charge an assault to have been committed on two persons at the same time,[38] or separate assaults on different persons may be united in one indictment by separate counts.[39]

(C) *By Two Persons on Two Persons.* An indictment in one count against two or more persons for assault and battery upon two or more is not bad, as embracing distinct offenses,[40] and either of defendants may be convicted for his own separate assault on the persons named in the indictment.[41]

c. Joinder of Defendants. Several defendants may be jointly indicted,[42] though they need not be;[43] but the verdict and judgment must be several.[44]

d. Particular Averments—(I) *Description of Defendant.* In describing defendant the omission of a middle letter,[45] or the use of a name *idem sonans* with his own,[46] is not fatal; and, where he is equally well known by either of two names, an indictment charging him by either of such names is sufficient.[47] The indictment is not invalidated by an omission to repeat defendant's name in the clause, "the said ——— then and there having," etc.[48]

(II) *Time.* Time, not being of the essence of the offense,[49] need not be specifically alleged;[50] but it must be shown that the offense was committed within the period of limitation[51] and prior to the finding of the indictment.[52]

(III) *Place*—(A) *In General.* The place where the offense was committed must be alleged;[53] but, where a county is named in the caption, an allegation that

so included. State *v.* Marcks, 3 N. D. 532, 58 N. W. 25.

35. State *v.* McTier, 45 La. Ann. 440, 12 So. 516; State *v.* Taylor, 35 La. Ann. 835; State *v.* Van Zant, 71 Mo. 541. See also Crow *v.* State, 41 Tex. 468.

36. State *v.* Lonon, 19 Ark. 577.

37. Com. *v.* Malone, 114 Mass. 295.

38. *Massachusetts.*— Com. *v.* O'Brien, 107 Mass. 208.

Michigan.— People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531.

Rhode Island.— Kenney *v.* State, 5 R. I. 385.

Texas.— State *v.* Bradley, 34 Tex. 95.

England.— Rex *v.* Benfield, 2 Burr. 980 [*overruling* Rex *v.* Clendon, Ld. Raym. 1572, 2 Str. 870].

Supported by evidence of assault on one.— Such an indictment is supported by proof of assault on one only. Com. *v.* O'Brien, 107 Mass. 208. *Contra,* State *v.* McClintock, 8 Iowa 203.

39. Com. *v.* Malone, 114 Mass. 295; State *v.* Boyer, 70 Mo. App. 156.

40. State *v.* McClintock, 8 Iowa 203; Fowler *v.* State, 3 Heisk. (Tenn.) 154. *Contra,* Anonymous, Lofft 271.

41. State *v.* McClintock, 8 Iowa 203.

42. Hansford *v.* State, 54 Ga. 55; Lewis *v.* State, 33 Ga. 131. And, under an indictment against several for an assault and battery, some may be convicted of an assault, and some of an assault and battery. White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. (N. Y.) 606].

43. Webb *v.* State, 36 Tex. Crim. 41, 35 S. W. 380; U. S. *v.* Hunter, 1 Cranch C. C. (U. S.) 446, 26 Fed. Cas. No. 15,425.

44. Bosleys *v.* Com., 7 J. J. Marsh. (Ky.) 598.

45. Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121.

46. McLaughlin *v.* State, 52 Ind. 476.

47. State *v.* Bundy, 64 Me. 507.

48. State *v.* Brown, 3 Heisk. (Tenn.) 1.

49. Thompson *v.* State, 25 Ala. 41; Myers *v.* State, 121 Ind. 15, 22 N. E. 781.

50. State *v.* Cokely, 4 Iowa 477; Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121. *Contra,* Territory *v.* Armijo, 7 N. M. 571, 37 Pac. 1117.

51. State *v.* Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; State *v.* Magrath, 19 Mo. 678; State *v.* Eubanks, 41 Tex. 291.

52. Kincaid *v.* State, 8 Tex. App. 465.

53. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34.

Alleging that the offense was committed in the county sufficiently lays the venue. State *v.* Foye, 53 Mo. 336. See also Com. *v.* Creed, 8 Gray (Mass.) 387; Com. *v.* Tolliver, 8 Gray (Mass.) 386, 69 Am. Dec. 252, in which cases it was held that an indictment for an assault in one town is supported by proof of an assault in another town in the same county, and within the jurisdiction of the court.

No venue to the wounding is necessary, in

the offense charged was committed at, etc., in said county sufficiently states the county wherein it was committed.[54] So, too, a sufficient allegation of venue in a first count under which defendant was found not guilty will supply a defect in this respect in a second count.[55]

(B) *In Public — Terror of Citizens.* In an indictment for assault and battery it is not necessary to allege that the offense was committed in public, or to the terror of citizens.[56]

(IV) *Description of Party Assaulted.* Where the name of the party injured is known, it should be stated in the indictment or information,[57] and proved substantially as alleged;[58] but, if unknown, it may be alleged that the name of the person injured is unknown to the grand jury.[59] It is sufficient, how-

an indictment for feloniously wounding, if there be a venue to the assault and stroke which caused it. State *v.* Bailey, 21 Mo. 484; State *v.* Freeman, 21 Mo. 481.

Stating the venue as defendant's place in the township of Townsend, not adding "in the county of Norfolk," or equivalent words, was sufficient, for Consol. Stat. Upp. Can. c. 3, § 1, subs. 37, shows that township to be within the county. Reg. *v.* Shaw, 23 U. C. Q. B. 616.

54. Hampton *v.* U. S., Morr. (Iowa) 489; State *v.* Bell, 26 Minn. 388, 4 N. W. 621. *Contra,* Kennedy *v.* Com., 3 Bibb (Ky.) 490.

55. Evans *v.* State, 24 Ohio St. 208.

56. Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614.

57. State *v.* Seely, 30 Ark. 162; State *v.* Bitman, 13 Iowa 485; Henry *v.* State, 7 Tex. App. 388.

A clerical mistake whereby it is stated that defendant did assault and wound one "Dunlop," by means of which wounding the life of the said "Craighead" was then and there endangered, etc., is cured by section 27 of article 4 of the act of practice in criminal cases, the mistake being merely clerical, and in no way tending to prejudice the substantial rights of defendant. State *v.* Craighead, 32 Mo. 561. See also Reg. *v.* Crespin, 11 Q. B. 913, 12 Jur. 433, 17 L. J. M. C. 128, 63 E. C. L. 913.

Omission of a final letter in the christian (Hall *v.* State, 32 Tex. Crim. 594, 25 S. W. 292) or surname (Hart *v.* State, 38 Tex. 382) does not vitiate the indictment.

Defect available on motion in arrest.— The failure of an indictment to set out the name of the person assaulted, or to aver that it is to the grand jurors unknown, being a substantial defect, may be taken advantage of by a motion in arrest of judgment. Ranch *v.* State, 5 Tex. App. 363.

It is sufficient if the information charge an assault and battery "upon the person of this informant," where it is signed and verified by him, even though his name does not appear in the body thereof (State *v.* McKinley, 82 Iowa 445, 48 N. W. 804), or state that defendants did, "upon one W. H. S. Brown, make an assault, with intent then and there willfully, maliciously, unlawfully, and feloniously to inflict a great bodily injury," without more specifically stating the person intended to be injured by the assault (State *v.* Shinner, 76 Iowa 147, 40 N. W. 144), or to charge defendant with committing an assault, without mentioning the name of the person on whom the assault was committed, and then charging that then and there the said D was beaten, wounded, etc. (Harne *v.* State, 39 Md. 552).

Presumption.— Where the record shows that an information charged an assault upon Daniel Aneson, and that the evidence proved an assault on Daniel Aueson, but it also appears that the court told the jury that defendant was accused of assaulting Daniel Aueson, it will be presumed that the court read the information aright, and that in copying for printing the clerk had mistaken the letter "u" for the letter "n." People *v.* Douglass, 87 Cal. 281, 25 Pac. 417.

58. State *v.* Seely, 30 Ark. 162; Swails *v.* State, 7 Blackf. (Ind.) 324; Gorman *v.* State, 42 Tex. 221; Brown *v.* State, 16 Tex. App. 197; Osborne *v.* State, 14 Tex. App. 225; Burgamy *v.* State, 4 Tex. App. 572; Goode *v.* State, 2 Tex. App. 520; State *v.* Meadows, 18 W. Va. 658.

Failure to prove the christian name of the party assaulted is fatal. McLaughlin *v.* State, 52 Ind. 279, 476. *Compare* Com. *v.* O'Baldwin, 103 Mass. 210.

It is sufficient to prove that an assault was committed on a person bearing that name, although two persons bore the same name — namely, E E the elder, and E E the younger — and the assault had been committed on the latter only. Rex *v.* Peace, 3 B. & Ald. 579, 5 E. C. L. 334.

Testimony of a grand juror is not admissible to show what the grand jury meant where there is a variance between the name as alleged and proved. State *v.* Wammack, 70 Mo. 410.

59. *Arkansas.*—State *v.* Seely, 30 Ark. 162.

Massachusetts.— Com. *v.* Stoddard, 9 Allen (Mass.) 280.

Mississippi.— Grogan *v.* State, 63 Miss. 147.

New York.— White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. (N. Y.) 606].

Texas.—State *v.* Elmore, 44 Tex. 102; State *v.* Snow, 41 Tex. 596; Rutherford *v.* State, 13 Tex. App. 92; Ranch *v.* State, 5 Tex. App. 363.

United States.— U. S. *v.* Davis, 4 Cranch C. C. (U. S.) 333, 25 Fed. Cas. No. 14,924.

ever, if the party is designated by his christian and surname,[60] by a name acquired by reputation,[61] or if the name alleged be *idem sonans* with the true name, though differently spelled.[62] It need not be specifically averred that such party was a human being[63] or a living person,[64] that he was late of the county,[65] or that he was in the peace of the state.[66]

(v) *With Force and Arms.* In an indictment for assault and battery the words "force and arms" are not necessary in the description of the offense.[67]

(vi) *Unlawfully, Wilfully, Maliciously, Etc.* Since the word "assault" carries with it the idea of illegality,[68] an indictment for assault or assault and battery need not allege that it was committed unlawfully,[69] wilfully,[70] maliciously,[71] or the like, except where these terms are required by statute.[72] When the offense

England.— Rex *v.* Pearce, 3 B. & Ald. 579, 5 E. C. L. 334.

See 4 Cent. Dig. tit. "Assault and Battery," § 111.

"Whose name is unknown," without stating "to the" pleader or "grand jury" is sufficient. Brooster *v.* State, 15 Ind. 190.

Wife of person named.— Charging an assault to have been made upon "the body of the wife of Thaddeus Bunker," without alleging that her name was unknown to the jurors, is fatally defective. Ranch *v.* State, 5 Tex. App. 363, 364. But it is sufficient to allege that the offense was committed "in and upon the body of Mary R., wife of the complainant." Com. *v.* Gray, 2 Cush. (Mass.) 535.

60. Henry *v.* State, 7 Tex. App. 388.

Giving the initials of the christian name of a person assaulted is enough. State *v.* Seely, 30 Ark. 162.

The initial of a middle name may be rejected as surplusage. Choen *v.* State, 52 Ind. 347, 21 Am. Rep. 179; Stockton *v.* State, 25 Tex. 772. See also Evans *v.* Com., 5 Pa. Co. Ct. 362, holding that the omission of such letter, if it be an error, is cured by verdict.

Use of abbreviation and full name.— A complaint that defendant, "in and upon the body of Jos. T. Battles" did make an assault, and "him, the said Joseph T. Battles, did" beat, etc., "and other wrongs to the said Joseph T. Battles then and there did," shows that "Jos." and "Joseph" are designations of the same person, and there is no variance. Com. *v.* Smith, 153 Mass. 97, 26 N. E. 436.

Use of initials and full name.— An indictment is not defective, in describing the person against whom the offense was committed, which sets forth that "defendants . . . feloniously did make an assault upon the person of one J. W. Jones, . . . and him, the said John W. Jones, in fear and danger . . . did put," and afterward refers to him as the "said John W. Jones," showing the connection, and identifying the individual as being one and the same person. State *v.* Wall, 39 Mo. 532, 533.

61. Bell *v.* State, 25 Tex. 574; Henry *v.* State, 7 Tex. App. 388; Owen *v.* State, 7 Tex. App. 329.

62. **Where the names are idem sonans** a variance between the indictment and proof is not fatal. Ward *v.* State, 28 Ala. 53 (Chambless and Chandles); Gahan *v.* People, 58 Ill. 160 (Danner and Dannaher); Rape *v.* State, 34 Tex. Crim. 615, 31 S. W. 652 (Garzia and Garcia); Henry *v.* State, 7 Tex. App. 388 (Whitman and Whiteman); Goode *v.* State, 2 Tex. App. 520 (Mary Etta and Marietta).

63. People *v.* Forney, 81 Cal. 118, 22 Pac. 481.

64. Com. *v.* Ford, 5 Gray (Mass.) 475.

65. State *v.* Wimple, 8 Blackf. (Ind.) 214.

66. State *v.* Elliott, 7 Blackf. (Ind.) 280.

67. State *v.* Elliott, 7 Blackf. (Ind.) 280.

68. U. S. *v.* Lunt, 1 Sprague (U. S.) 311, 26 Fed. Cas. No. 15,643.

69. State *v.* Bray, 1 Mo. 180; State *v.* Hartman, 41 Tex. 562; State *v.* Hays, 41 Tex. 526; State *v.* Lutterloh, 22 Tex. 210.

70. State *v.* Boyer, 70 Mo. App. 156.

71. State *v.* Boyer, 70 Mo. App. 156; U. S. *v.* Lunt, 1 Sprague (U. S.) 311, 26 Fed. Cas. No. 15,643.

72. **"Maliciously."**— Under some statutes the act must be charged to have been "maliciously" done (Allen *v.* State, 4 Baxt. (Tenn.) 21), and an omission in this respect is not cured by the use of the word "feloniously" (Reg. *v.* Jope, 8 N. Brunsw. 161).

"Rude, insolent, or angry manner."— Under the Indiana statute an indictment for assault and battery must charge, either in direct terms or equivalent words, that the touching was done "in a rude, insolent, or angry manner" (Knight *v.* State, 84 Ind. 73; Slusser *v.* State, 71 Ind. 280; Howard *v.* State, 67 Ind. 401; McCulley *v.* State, 62 Ind. 428; State *v.* Wright, 52 Ind. 307; Sloan *v.* State, 42 Ind. 570; Cranor *v.* State, 39 Ind. 64; Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34); but if one or more of them be used, or the equivalent of one or more of them, it is sufficient (Sloan *v.* State, 42 Ind. 570).

"Unlawfully."— Under some statutes it must be averred that the act was "unlawfully" done, either directly (State *v.* Smith, 74 Ind. 557; Howard *v.* State, 67 Ind. 401; Cranor *v.* State, 39 Ind. 64; State *v.* Murphy, 21 Ind. 441; Territory *v.* Miera, 1 N. M. 387) or substantially (State *v.* Finch, 2 Ohio Dec. (Reprint) 431), and the omission of this allegation is not cured by the use of the word "feloniously" (Territory *v.* Armijo, 7 N. M. 571, 37 Pac. 1117; Rex *v.* Ryan, 7 C. & P. 854, 2 Moody 15, 32 E. C. L. 907. But *compare* Reg. *v.* Flynn, 18 N. Brunsw. 321).

[I, E, 1, d, (VI).]

is not a felony the word "feloniously" need not be used,[73] and if used may be rejected as surplusage.[74]

(VII) *MEANS EMPLOYED* — (A) *Generally.* It is not necessary to state the means with which the assault was committed[75] or the particular manner in which a weapon was employed,[76] though it is not improper to do so.[77] If, however, the means is alleged it must be proved substantially as alleged.[78]

(B) *Dangerous or Deadly Weapon.* Where an assault is charged to have been committed with a dangerous or deadly weapon the dangerous or deadly character of the weapon must be averred[79] either in the language of the statute,[80]

"Wilfully."— Under some statutes the omission of the word "wilfully" is fatal. State *v.* Robinson, 104 La. 224, 28 So. 1002; State *v.* Langston, 45 La. Ann. 1182, 14 So. 137.

73. Wagner *v.* State, 43 Nebr. 1, 61 N. W. 85; U. S. *v.* Gallagher, 2 Paine (U. S.) 447, 25 Fed. Cas. No. 15,185.

Where the indictment charges that an assault was made, and the striking, cutting, and thrusting were done feloniously, it is sufficient though it do not charge that the wounding was felonious. State *v.* Davis, 29 Mo. 391. So, too, an indictment for assault with a deadly weapon is not rendered invalid by an omission to use "feloniously" in averring the assault itself, where the assault is charged to have been made with intent feloniously to inflict the injury. State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63.

74. State *v.* Beck, 46 La. Ann. 1419, 16 So. 368; State *v.* Mix, 8 Rob. (La.) 549.

75. *California.*— People *v.* Savercool, 81 Cal. 650, 22 Pac. 856.

Indiana.— Ryan *v.* State, 52 Ind. 167.

Nebraska.— Smith *v.* State, 58 Nebr. 531, 78 N. W. 1059; Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491.

New York.— People *v.* Casey, 72 N. Y. 393.

Texas.— Duke *v.* State, 35 Tex. Crim. 283, 33 S. W. 349.

But see Rogers *v.* State, 117 Ala. 192, 23 So. 82 (holding that, unless it affirmatively appears from the indictment that the instrument or means used to effect the offense were unknown, it is necessary to describe the instrument or means used); Reg. *v.* Magee, 8 N. Brunsw. 14 (holding that an indictment, under 12 Vict. c. 29, for causing grievous bodily harm must set out with particularity the means used to manifest the design to commit a felony).

76. State *v.* Ladd, 2 Swan (Tenn.) 225; State *v.* Smith, 2 Humphr. (Tenn.) 457.

77. Webb *v.* State, 36 Tex. Crim. 41, 35 S. W. 380.

Describing weapon in alternative.— The indictment may charge the weapon in the alternative (State *v.* Newsom, 13 W. Va. 859), but each alternative charged must describe the means with the same definiteness as would be required if the charges had been made in separate counts, unless it appears that the means are unknown to the grand jury (Rogers *v.* State, 111 Ala. 192, 23 So. 82).

Where an impossible means is alleged, as where an indictment against several defendants charges that "they, with a knife, which they then and there with their right hand held, made an assault," the indictment is bad. State *v.* Gray, 21 Mo. 492.

Where two weapons were used the indictment may so charge (Johnson *v.* State, 35 Ala. 363), and, where the indictment charges an assault to have been committed with several different weapons, it is not necessary to prove that defendant used all the weapons described; and the indictment will be sustained by proving that one of the instruments was used as alleged (State *v.* McClintock, 1 Greene (Iowa) 392).

78. Walker *v.* State, 73 Ala. 17; Johnson *v.* State, 35 Ala. 363; State *v.* Braxton, 47 La. Ann. 158, 16 So. 745; Lanier *v.* State, 57 Miss. 102; Jones *v.* State, (Tex. Crim. 1901) 62 S. W. 758; Herald *v.* State, 37 Tex. Crim. 409, 35 S. W. 670; Allen *v.* State, 36 Tex. Crim. 436, 37 S. W. 738; Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234, 60 Am. St. Rep. 47; Holliday *v.* State, 35 Tex. Crim. 133, 32 S. W. 538; McGrew *v.* State, 19 Tex. App. 302. *Contra,* holding that the description may be rejected as surplusage. Ryan *v.* State, 52 Ind. 167; People *v.* Casey, 72 N. Y. 393. See also State *v.* Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141.

79. People *v.* Congleton, 44 Cal. 92; People *v.* Jacobs, 29 Cal. 579; People *v.* Vanard, 6 Cal. 562; State *v.* Russell, 91 N. C. 624; Key *v.* State, 12 Tex. App. 506; Wilks *v.* State, 3 Tex. App. 34.

Shooting.— An information under La. Rev. Stat. § 792, for assault by wilfully shooting, need not allege that the shooting was done with a dangerous weapon. State *v.* Cognovitch, 34 La. Ann. 529.

Stabbing.— An indictment for felonious stabbing, under Mo. Rev. Stat. (1879), § 1262, need not charge that the knife with which the crime was alleged to have been committed was a deadly weapon, nor that it was open in the hands of defendant at the time of the stabbing. State *v.* Keele, 105 Mo. 38, 16 S. W. 509.

80. *Arkansas.*— State *v.* Tidwell, 43 Ark. 71.

California.— People *v.* Pape, 66 Cal. 366, 5 Pac. 621; People *v.* Congleton, 44 Cal. 92; People *v.* Jacobs, 29 Cal. 579.

Iowa.— State *v.* Seamons, 1 Greene (Iowa) 418.

Louisiana.— State *v.* Mix, 8 Rob. (La.) 549.

without specifying the weapon,[81] or by a statement of facts from which the court can see that it necessarily was such.[82]

(VIII) *MATTERS OF AGGRAVATION.* An indictment for aggravated assault need not, in so many words, describe the offense as an aggravated assault,[83] but it must charge the matters of aggravation relied on,[84] and must make a case coming within the statute defining the offense.[85] It is also common and proper, in a count charging a simple assault, to insert various matters tending to aggravate the offense,[86] and the insertion of such matters does not affect its legal sufficiency.[87] On the contrary, if proved, it may, in the discretion of the court, justify a heavier punishment;[88] and, when the matters of aggravation are not properly charged in an indictment for aggravated assault, they may be rejected as surplusage and the indictment held sufficient for simple assault.[89]

Minnesota.— State *v.* Henn, 39 Minn. 476, 40 N. W. 572.

See 4 Cent. Dig. tit. "Assault and Battery," § 120.

81. State *v.* Tidwell, 43 Ark. 71; People *v.* Savercool, 81 Cal. 650, 22 Pac. 856.

82. *Arizona.*— West *v.* Territory, (Ariz. 1894) 36 Pac. 207 [*followed* in Evans *v.* Territory, (Ariz. 1894) 36 Pac. 209].

California.— People *v.* Pape, 66 Cal. 366, 5 Pac. 621; People *v.* Jacobs, 29 Cal. 579.

Iowa.— Dollarhide *v.* U. S., Morr. (Iowa) 233, 39 Am. Dec. 460.

Minnesota.— State *v.* Dineen, 10 Minn. 407.

Wisconsin.— See McKinney *v.* State, 25 Wis. 378.

No description of the weapon's size, etc., is necessary where an instrument, *ex vi termini* importing a deadly weapon, is mentioned and described in the language of the statute (Sprague *v.* Com., 22 Ky. L. Rep. 519, 58 S. W. 430; State *v.* Shields, 110 N. C. 497, 14 S. E. 779; State *v.* Phillips, 104 N. C. 786, 10 S. E. 463), but otherwise where the weapon named is not *ex vi termini* deadly (Territory *v.* Armijo, 7 N. M. 571, 37 Pac. 1117; State *v.* Porter, 101 N. C. 713, 7 S. E. 902).

83. Meier *v.* State, 10 Tex. App. 39.

84. State *v.* Beadon, 17 S. C. 55; Coney *v.* State, 43 Tex. 414; Miles *v.* State, 23 Tex. App. 410, 5 S. W. 250; Meier *v.* State, 10 Tex. App. 39; Flynn *v.* State, 8 Tex. App. 368. See also *In re* McKinnon, 2 Can. L. J. N. S. 324.

Where two grounds of aggravation are alleged proof of either is sufficient. Waechter *v.* State, 34 Tex. Crim. 297, 30 S. W. 444, 800; Whitten *v.* State, (Tex. Crim. 1894) 28 S. W. 474.

85. State *v.* Cass, 41 Tex. 552; State *v.* Pierce, 26 Tex. 114; Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622; Marshall *v.* State, 13 Tex. App. 492; Griffin *v.* State, 12 Tex. App. 423; Williamson *v.* State, 5 Tex. App. 485; Browning *v.* State, 2 Tex. App. 47.

By adult male on female.— Where the assault is aggravated because committed by an adult male on a female it should be alleged that defendant was an adult male (Gorman *v.* State, 42 Tex. 221; Blackburn *v.* State, 39 Tex. 153; Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622; Schrader *v.* State, (Tex. App. 1891) 17 S. W. 1101; Lawson *v.* State, 13 Tex. App. 83; Griffin *v.* State, 12 Tex. App. 423) and that the person assaulted was a female (Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622). This need not be done, however, *in ipsissimis verbis* (Veal *v.* State, 8 Tex. App. 474), and where the information refers to defendant by the pronoun "his," and to the person assaulted by the pronoun "her," and mentions the latter's vagina, it is sufficiently clear that defendant was a male, and that he assaulted a female (Slawson *v.* State, 39 Tex. Crim. 176, 45 S. W. 575, 73 Am. St. Rep. 914). So, too, an information which charges the accused with an aggravated assault on one G, and that the accused was "an adult male, and the said E G being then and there a female," is sufficient. Collins *v.* State, 5 Tex. App. 38.

Committed in court of justice.— A charge that the assault was committed in a "court of justice," describing the court, is a sufficient charge of an aggravated assault. State *v.* Hunter, 44 Tex. 94. It has also been held sufficient to charge that the assault was made "in a court of justice, then and there being in session," without specifying what court, or whether lawfully in session. State *v.* Murrah, 25 Tex. 758.

Committed in place of religious worship.— An indictment for aggravated assault is sufficient which charges that it was committed "at Hickory Grove School House," though the evidence shows that it was on a minister in a congregation assembled for religious worship under a brush arbor, a few steps from the school-house. Blackwell *v.* State, 30 Tex. App. 416, 17 S. W. 1061.

Where an assault on an officer is charged it must be alleged that defendant knew the party to be an officer. State *v.* Smith, 11 Oreg. 205, 8 Pac. 343; Johnson *v.* State, 26 Tex. 117.

86. State *v.* Dearborn, 54 Me. 442.

87. *Alabama.*— Murdock *v.* State, 65 Ala. 520.

Iowa.— State *v.* Cokely, 4 Iowa 477.

Massachusetts.— Com. *v.* Clarke, 162 Mass. 495, 39 N. E. 280.

Minnesota.— State *v.* Dineen, 10 Minn. 407.

New York.— People *v.* Cooper, 13 Wend. (N. Y.) 379. See also People *v.* Connor, 53 Hun (N. Y.) 352, 6 N. Y. Suppl. 220, 25 N. Y. St. 138, 7 N. Y. Crim. 468.

Texas.— Tucker *v.* State, 6 Tex. App. 251.

88. Murdock *v.* State, 65 Ala. 520.

89. *California.*— People *v.* Martin, 47 Cal. 112.

(IX) *INTENT.* When the intent is the gravamen of the statutory offense it must be alleged[90] substantially in the words of the statute;[91] but an averment of intent is not necessary when not specifically made an element of the offense or when it may be inferred from the act itself.[92]

(X) *CHARGING BATTERY.* A defendant cannot be convicted of a battery under an indictment which does not charge a battery;[93] but if a count in an indictment for a common assault would be good with the addition of the battery, it is equally good for the assault without the battery.[94]

(XI) *DESCRIPTION OF INJURY.* When the statute prohibits the infliction of a wound less than mayhem, an indictment is fatally defective which does not contain the words "less than mayhem;"[95] but, on an indictment for shooting, it is not necessary to describe the wound inflicted.[96]

Indiana.— Harris *v.* State, 54 Ind. 2; McGuire *v.* State, 50 Ind. 284; Greer *v.* State, 50 Ind. 267, 19 Am. Rep. 709; Sweetser *v.* State, 4 Blackf. (Ind.) 528; Barnett *v.* State, 22 Ind. App. 599, 54 N. E. 414.

Massachusetts.— Com. *v.* Blaney, 133 Mass. 571; Com. *v.* Randall, 4 Gray (Mass.) 36.

Minnesota.— State *v.* Dineen, 10 Minn. 407.

Missouri.— State *v.* Edwards, 19 Mo. 674.

Nebraska.— Kruget *v.* State, 1 Nebr. 365.

Nevada.— State *v.* Lawry, 4 Nev. 161.

North Carolina.— State *v.* Bryson, 127 N. C. 574, 37 S. E. 492; State *v.* Earnest, 98 N. C. 740, 4 S. E. 495; State *v.* Russell, 91 N. C. 624.

South Carolina.— State *v.* Davis, 1 Hill (S. C.) 46.

Texas.— Johnson *v.* State, 26 Tex. 117; Jay *v.* State, (Tex. Crim. 1900) 55 S. W. 335; Schrader *v.* State, (Tex. App. 1891) 17 S. W. 1101; Nelson *v.* State, 2 Tex. App. 227.

Vermont.— State *v.* Burt, 25 Vt. 373.

England.—Atty.-Gen. *v.* Macpherson, L. R. 3 P. C. 268, 11 Cox C. C. 604, 39 L. J. P. C. 59, 23 L. T. Rep. N. S. 101, 18 Wkly. Rep. 1053; Rex *v.* Dawson, 3 Stark. 62, 3 E. C. L. 595.

90. Grayson *v.* State, 37 Tex. 228.

An indictment for an assault without battery must allege an intent to injure. Hill *v.* State, 34 Tex. 623.

Not amounting to intent to murder or maim.— In an indictment for an aggravated assault with a deadly weapon it is not necessary to allege that the assault was made under circumstances not amounting to an intent to murder or maim. State *v.* Franklin, 36 Tex. 155; Hunt *v.* State, 6 Tex. App. 663; Brown *v.* State, 2 Tex. App. 61.

91. State *v.* Elborn, 27 Md. 483.

With intent to commit a felony.— An indictment for assault with intent to commit a felony must state specifically what felony was intended to be committed (Davis *v.* State, 35 Fla. 614, 17 So. 565; State *v.* Hailstock, 2 Blackf. (Ind.) 257; State *v.* Child, 42 Kan. 611, 22 Pac. 721); but it is not necessary to make all the averments required in an indictment for the offense itself (State *v.* Newberry, 26 Iowa 467; State *v.* Montgomery, 7 Baxt. (Tenn.) 160). See, generally, ABORTION; HOMICIDE; LARCENY; MAYHEM; RAPE; ROBBERY.

With intent to inflict great bodily injury. — An indictment for assault "with intent to inflict great bodily injury" is not sufficient where it alleges an "intent to beat, strike, wound, and bruise" (State *v.* Harrison, 82 Iowa 716, 47 N. W. 777), or "to strike and bruise" (State *v.* Clark, 80 Iowa 517, 45 N. W. 910). It is sufficient where it avers an "intent of doing her great bodily injury" (State *v.* Carpenter, 23 Iowa 506), or refers to a "personal" instead of a "bodily" injury (State *v.* Clayborne, 14 Wash. 622, 45 Pac. 303).

92. *California.*— People *v.* Savercool, 81 Cal. 650, 22 Pac. 856; People *v.* Forney, 81 Cal. 118, 22 Pac. 481; *Ex p.* Mitchell, 70 Cal. 1, 11 Pac. 488; People *v.* Turner, 65 Cal. 540, 4 Pac. 553.

Louisiana.— State *v.* Holmes, 40 La. Ann. 170, 3 So. 564; State *v.* Brady, 39 La. Ann. 687, 2 So. 556.

Maine.— State *v.* Goddard, 69 Me. 181.

Missouri.— State *v.* Hays, 67 Mo. 692.

Montana.— State *v.* Broadbent, 19 Mont. 467, 48 Pac. 775.

North Carolina.— State *v.* Stafford, 113 N. C. 635, 18 S. E. 256.

Texas.— State *v.* Hartman, 41 Tex. 562; State *v.* Hays, 41 Tex. 526; McFarlin *v.* State, 41 Tex. 23; State *v.* Allen, 30 Tex. 59; Evans *v.* State, 25 Tex. Suppl. 303; Ferguson *v.* State, 4 Tex. App. 156; Forrest *v.* State, 3 Tex. App. 232; Bronson *v.* State, 2 Tex. App. 46.

93. Bryant *v.* State, 41 Ark. 359; Young *v.* People, 6 Ill. App. 434; Furnish *v.* Com., 14 Bush (Ky.) 180.

Following statutory language is not necessary in charging a battery where words of equivalent import are used. Sloan *v.* State, 42 Ind. 570, holding that the words "heat, strike, and kick" are the equivalent of "touch." See also State *v.* Prather, 54 Ind. 63.

94. State *v.* Burt, 25 Vt. 373.

95. State *v.* Jackson, 43 La. Ann. 183, 8 So. 440.

96. State *v.* Ladd, 2 Swan (Tenn.) 225. See also Jarnagin *v.* State, 10 Yerg. (Tenn.) 528, holding that an indictment charging that defendant did unlawfully, etc., "thrust," "stab," etc., was sufficient, without describing the injury by the term "cut" or "wound."

(XII) *To Damage of Person Assaulted.* The indictment need not allege that the offense was to the damage of the person assaulted.[97]

(XIII) *Negativing Excusatory Clauses.* When these elements enter into the gist of the offense[98] the indictment should aver in substance[99] that the assault was committed without just cause or excuse, or when no considerable provocation appeared, or when the circumstances showed an abandoned and malignant heart.[1]

(XIV) *Present Ability.* It is not necessary that the indictment should aver that defendant had the present ability to carry his attempt to completion.[2]

(XV) *Facts Showing Jurisdiction.* When a superior court has jurisdiction only where the offense was committed under certain circumstances, it has been held that such circumstances need not be averred.[3] On the other hand, where a complaint must first be made to a justice of the peace, it has been held that the indictment must show that proceedings on a complaint and warrant were had before a justice of the peace, and that defendant was bound over to the higher court.[4]

(XVI) *Conclusion*—(A) *Summation.* An indictment for a felonious assault, which sets forth all the facts necessary to constitute the offense, need not allege that defendant is, or is to be deemed and taken to be, a felonious assaulter.[5]

(B) *Contra Formam Statuti.* When the indictment is under a statute it should conclude with the words "against the form of the statute;"[6] but these words may be rejected as surplusage when necessary.[7]

2. For Attempting to Provoke Another to Commit.[8] Under a statute making it an offense to provoke, or attempt to provoke, one having the present ability so to do, to commit an assault and battery, an affidavit charging in a single count that defendant "did provoke, and attempt to provoke," is not bad for duplicity.[9]

F. Defenses — 1. Certificate of Dismissal.[10] Under an English statute, where

97. State *v.* Wimple, 8 Blackf. (Ind.) 214.

98. They do not under the California statute. People *v.* Nugent, 4 Cal. 341.

99. Alleging that the assault was unlawful and with intent to murder excludes "just cause" or "considerable provocation," and it is unnecessary to negative their existence. State *v.* McDonald, 14 Utah 173, 46 Pac. 872.

1. Butler *v.* State, 34 Ark. 480; Baker *v.* People, 49 Ill. 308; Reddan *v.* State, 4 Greene (Iowa) 137; People *v.* Parman, 7 Utah 7, 24 Pac. 539; People *v.* Fairbanks, 7 Utah 3, 24 Pac. 538.

Where two clauses are negatived in conjunction but one assault is charged. State *v.* Townsend, 7 Wash. 462, 35 Pac. 367.

2. *Alabama.*— Shaw *v.* State, 18 Ala. 547.

California.— People *v.* Savercool, 81 Cal. 650, 22 Pac. 856; People *v.* Forney, 81 Cal. 118, 22 Pac. 481.

Illinois.— Allen *v.* People, 82 Ill. 610.

Texas.— Rainholt *v.* State, 34 Tex. 286; Robinson *v.* State, 31 Tex. 170; Forrest *v.* State, 3 Tex. App. 232.

United States.— Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

Contra, Hays *v.* State, 77 Ind. 450; Howard *v.* State, 67 Ind. 401.

3. State *v.* Taylor, 83 N. C. 601.

4. State *v.* Hilton, 32 N. H. 285. *Contra,* State *v.* Thompson, 20 N. H. 250. See also Reg. *v.* Quai, 8 Hawaii 282, holding that the supreme court has concurrent jurisdiction with the police and district courts over an assault with a weapon obviously and imminently dangerous to life, and that, when an indictment charging such an offense is presented, it need not be averred that the accused has been committed for trial, for the reason that the committing magistrate was of opinion that the penalty which he is authorized to impose was inadequate, the fact of such commitment affording a conclusive presumption of law that such was his opinion.

5. Com. *v.* Sanborn, 14 Gray (Mass.) 393.

6. State *v.* McKettrick, 14 S. C. 346. *Compare* Snodgrass *v.* State, 13 Ind. 292.

"Statute" for "statutes."— An indictment will not be quashed because it does not conclude, contrary to the form of the "statutes" instead of "statute." State *v.* Berry, 9 N. J. L. 374.

7. Haslip *v.* State, 4 Hayw. (Tenn.) 272; State *v.* Burt, 25 Vt. 373.

8. For forms of indictment or complaint charging this offense see Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; Stuckmyer *v.* State, 29 Ind. 20; U. S. *v.* Lyles, 4 Cranch C. C. (U. S.) 469, 26 Fed. Cas. No. 15,646.

9. Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141.

10. For form of plea in bar setting up certificate of justices dismissing the complaint see Reg. *v.* Elrington, 1 B. & S. 688, 9 Cox C. C. 86, 8 Jur. N. S. 97, 31 L. J. M. C. 14, 5 L. T. Rep. N. S. 284, 10 Wkly. Rep. 13, 101 E. C. L. 688.

a complaint for assault or battery has been made to justices, who, after a hearing on the merits,[11] dismiss the complaint and give the party a certificate accordingly,[12] the certificate may be pleaded in bar to an indictment, founded on the same facts,[13] charging assault and battery, accompanied by acts of aggravation.[14]

2. COMPROMISE. The offense of assault and battery, except in certain cases, may be compromised either before or after indictment,[15] but not after conviction.[16]

3. CONSENT. Consent of the party assaulted[17] is a defense[18]— so far, at least, as such party can legally assent[19]— provided the party consenting be not of too tender years[20] or the consent be not obtained by fraud;[21] but each of two persons fighting by consent is guilty of an assault, regardless of who struck the first blow.[22]

11. Reg. *v.* Edmondes, 59 J. P. 776.

12. **The granting a certificate of dismissal is a ministerial,** not a judicial, act, and a magistrate is, therefore, bound to grant it. Hancock *v.* Somes, 8 Cox C. C. 172, 1 E. & E. 795, 5 Jur. N. S. 983, 28 L. J. M. C. 196, 7 Wkly. Rep. 422, 102 E. C. L. 795.

13. **Presumption as to identity of offenses.** — When an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day, it is *prima facie* evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day, if he alleges that such is the case. Reg. *v.* Westley, 11 Cox C. C. 139.

14. Reg. *v.* Elrington, 1 B. & S. 688, 9 Cox C. C. 86, 8 Jur. N. S. 97, 31 L. J. M. C. 14, 5 L. T. Rep. N. S. 284, 10 Wkly. Rep. 13, 101 E. C. L. 688.

15. People *v.* Bishop, 5 Wend. (N. Y.) 111. But *compare* Reg. *v.* Wiltshire, 8 L. T. Rep. N. S. 242, 11 Wkly. Rep. 594.

In Massachusetts, under Mass. Gen. Stat. c. 171, § 28, which provides that, on acknowledgment of satisfaction by the party injured by an assault, "the court may, on payment of costs accrued, . . . discharge the defendant from the indictment," the continuance of the prosecution is left to the discretion of the court, and such acknowledgment does not discharge defendant. Dowdican *v.* Com., 115 Mass. 133.

16. People *v.* Bishop, 5 Wend. (N. Y.) 111.

17. **Consent of child's parent may be shown** in mitigation where a patriarch or priest has punished a child capable of appreciating correction. Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368.

18. Reg. *v.* Bealc, L. R. 1 C. C. 10, 10 Cox C. C. 157, 12 Jur. N. S. 12, 35 L. J. M. C. 60, 13 L. T. Rep. N. S. 335, 14 Wkly. Rep. 57; Reg. *v.* Day, 9 C. & P. 722, 38 E. C. L. 419; Reg. *v.* Meredith, 8 C. & P. 589, 34 E. C. L. 907, in which latter case it was said that, to support a charge of assault, such an assault must be shown as could not be justified, if an action was brought for it, and leave and license pleaded.

Mere submission to an indecent act, without any positive exercise of a dissenting will, where, owing to circumstances, the person submitting is in ignorance of the nature of the act, is not such a consent as the law contemplates, so as to prevent the act from being an assault. Reg. *v.* Lock, L. R. 2 C. C. 10, 12 Cox C. C. 244, 42 L. J. M. C. 5, 27 L. T. Rep. N. S. 661, 21 Wkly. Rep. 144.

19. *Indiana.*—Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645, wherein a pupil consented to corporal punishment in lieu of expulsion.

Nevada.— State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754, consent of a woman to sexual intercourse.

New York.— People *v.* Bransby, 32 N. Y. 525, consent of a woman to sexual intercourse.

South Carolina.— State *v.* Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190, consent to whipping to save himself from punishment for felony.

England.— Reg. *v.* Wollaston, 12 Cox C. C. 180, 26 L. T. Rep. N. S. 403, consent of boys to indecent practices.

See 4 Cent. Dig. tit. "Assault and Battery," § 93.

20. State *v.* West, 39 Minn. 321, 40 N. W. 249; Cliver *v.* State, 45 N. J. L. 46; Rogers *v.* State, 40 Tex. Crim. 355, 50 S. W. 338. But see Reg. *v.* Read, 2 C. & K. 957, 3 Cox C. C. 266, 1 Den C. C. 377, 13 Jur. 68, 18 L. J. M. C. 88, 3 N. Sess. Cas. 405, T. & M. 52, 61 E. C. L. 957 (where the assenting party was aged nine); Reg. *v.* Martin, 9 C. & P. 213, 2 Moody 123, 38 E. C. L. 133 (where the assenting party was aged between ten and twelve); Reg. *v.* Johnson, 10 Cox C. C. 114, 11 Jur. N. S. 532, L. & C. 632, 34 L. J. M. C. 192, 12 L. T. Rep. N. S. 503, 13 Wkly. Rep. 815 (in which cases actual consent was held sufficient).

21. Reg. *v.* Bennett, 4 F. & F. 1105, holding that when a man, knowing that he had a foul disease, induced a girl of thirteen, who was ignorant of his condition, to consent to sleep with him, and he infected her, he might be convicted of an indecent assault.

22. *Alabama.*— Harris *v.* State, 123 Ala. 69, 26 So. 515; Engelhardt *v.* State, 88 Ala. 100, 7 So. 154.

Kansas.— State *v.* Newland, 27 Kan. 764.

Massachusetts.— Com. *v.* Collberg, 119 Mass. 350, 20 Am. Rep. 328.

North Carolina.— State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536; State *v.* Bryson, 60 N. C. 476.

England.— Reg. *v.* Lewis, 1 C. & K. 419, 47 E. C. L. 419.

Canada.— Reg. *v.* Buchanan, 12 Manitoba 190.

But see Duncan *v.* Com., 6 Dana (Ky.)

4. Defense — a. Of Property or Possession — (i) *In General.* One may lawfully use that amount of force which is necessary to the protection of his property;[23] but he will be guilty of an assault if he uses excessive force,[24] or any force after the necessity therefor is past.[25] To entitle a person to use force in defending the possession of premises, his possession need not be permanent, if lawful.[26]

(ii) *Against Officer.* A person may likewise use such force as is necessary to prevent the seizure of his property on an execution against a stranger,[27] or where the property is exempt,[28] where the officer has unlawfully broken or opened doors[29] or is otherwise acting in excess of his powers,[30] or where the officer had not been lawfully appointed.[31]

(iii) *Ejecting Trespasser.* One who is lawfully in charge of premises[32]

295; Com. *v.* Miller, 5 Dana (Ky.) 320; Champer *v.* State, 14 Ohio St. 437, in which cases it was held that the indictment on such a state of facts should be for an affray.

See 4 Cent. Dig. tit. "Assault and Battery," § 93.

See, generally, Prize-Fighting.

23. *California.*— People *v.* Teixeira, 123 Cal. 297, 55 Pac. 988.

Colorado.— Goshen *v.* People, 22 Colo. 270, 44 Pac. 503.

Illinois.— Wharton *v.* People, 8 Ill. App. 232.

Massachusetts.— Com. *v.* Beals, 133 Mass. 396.

Michigan.— People *v.* Foss, 80 Mich. 559, 45 N. W. 480, 20 Am. St. Rep. 532, 8 L. R. A. 472; Carter *v.* Sutherland, 52 Mich. 597, 18 N. W. 375.

Missouri.— State *v.* Martin, 52 Mo. App. 609.

Nebraska.— Atkinson *v.* State, 58 Nebr. 356, 78 N. W. 621.

New York.— Corey *v.* People, 45 Barb. (N. Y.) 262; Harrington *v.* People, 6 Barb. (N. Y.) 607.

North Carolina.— State *v.* Austin, 123 N. C. 749, 31 S. E. 731; State *v.* Yancey, 74 N. C. 244.

Texas.— Circle *v.* State, (Tex. Crim. 1893) 22 S. W. 603; Souther *v.* State, 18 Tex. App. 352.

See 4 Cent. Dig. tit. "Assault and Battery," § 99.

Threat not made to protect property.— Where an abutting owner threatens one in the employ of the commissioner of highways engaged in taking up a drain built by defendant across a road, and not for the purpose of preventing the illegal destruction of the drain, he is guilty of assault. People *v.* Sayers, 105 Mich. 708, 63 N. W. 1002.

24. Wharton *v.* People, 8 Ill. App. 232; Carter *v.* Sutherland, 52 Mich. 597, 18 N. W. 375; State *v.* Martin, 52 Mo. App. 609. But see Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143 [*reversing* Sheld. (N. Y.) 504], to the effect that a conviction under a statute imposing increased punishment for assaults with intent to do bodily harm is not proper where the evidence shows that defendant committed the assault in repelling an unlawful attempt to take away property from him, even though the degree of force he used was greater than was justifiable.

25. Hadley *v.* State, 58 Ga. 309; Territory *v.* Drennan, 1 Mont. 41.

26. State *v.* Howell, 21 Mont. 165, 53 Pac. 314; Corey *v.* People, 45 Barb. (N. Y.) 262.

27. Smith *v.* State, 105 Ala. 136, 17 So. 107; Wentworth *v.* People, 5 Ill. 550. *Contra*, where the officer acts in good faith. State *v.* Richardson, 38 N. H. 208, 75 Am. Dec. 173; Faris *v.* State, 3 Ohio St. 159.

28. State *v.* Johnson, 12 Ala. 840, 46 Am. Dec. 283.

29. People *v.* Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; Com. *v.* Moreland, 9 Wkly. Notes Cas. (Pa.) 272; Reg. *v.* Sullivan, C. & M. 209, 41 E. C. L. 118, in which last case, however, defendant was found guilty of an assault, the force having been excessive.

30. Com. *v.* Gillam, 8 Serg. & R. (Pa.) 50.

31. State *v.* Briggs, 25 N. C. 357.

32. Clarke *v.* State, 89 Ga. 768, 15 S. E. 699.

A sexton who has charge of a church building and whose duty it is to conduct funerals therein, may lawfully remove from it an undertaker, who, after being warned to leave, persists in conducting a funeral in violation of the rules prescribed by the authorities of the church, and may also maintain order, and prevent interference with other religious exercises. Com. *v.* Dougherty, 107 Mass. 243.

House-builders who are working on a building have this right. U. S. *v.* Bartle, 1 Cranch C. C. (U. S.) 236, 24 Fed. Cas. No. 14,531.

House owned by wife.— The fact that a dwelling-house occupied by a family is the property of the wife does not affect the right of the husband to eject an unwelcome guest. State *v.* Lockwood, 1 Pennew. (Del.) 76, 39 Atl. 589.

A gambler cannot justify on the ground that the assault was committed in ejecting the person assaulted from a gambling-room, for disorder. Pierce *v.* State, 21 Tex. App. 540, 1 S. W. 463.

A person who has been forcibly ejected from his premises may enter and remove the trespasser therefrom with force. State *v.* Howell, 21 Mont. 165, 53 Pac. 314.

and has requested[33] another to leave, whom he had a right so to request,[34] may lawfully use so much force as is necessary to remove such other,[35] after allowing him a reasonable time to depart;[36] but he will be guilty of an assault if he use more force than is necessary.[37]

b. Of Self — (I) *In General.* One assaulted may repel force with force,[38] and acts done in self-defense cannot be an assault.[39] To support a plea of self-defense, however, there must be some actual attempt or offer to do bodily harm,[40] or

33. A request to depart is necessary before a trespasser who has peaceably entered and is committing no violence may be expelled by force. Rex *v.* Howard, 1 Hawaii 66; State *v.* Woodward, 50 N. H. 527; State *v.* Burke, 82 N. C. 551.

Previous notice not to come on defendant's premises is no defense. People *v.* Van Vechten, 2 N. Y. Crim. 291.

34. One having a right to enter on land and not otherwise interfering therewith cannot be forcibly expelled. McAuley *v.* State, 3 Greene (Iowa) 435; Com. *v.* Rigney, 4 Allen (Mass.) 316.

Public place.— A saloon being a house of public entertainment, the proprietor has no right to forcibly expel one who is engaged in the business ordinarily transacted there, when the latter is guilty of no misconduct justifying forcible expulsion. Connors *v.* State, 117 Ind. 347, 20 N. E. 478. So, too, the president of a public meeting has no right to eject a taxpayer therefrom. O'Hara *v.* State, 21 Ind. App. 320, 52 N. E. 414. But where a board has admitted a newspaper reporter to the floor of the chamber as a privilege, his removal after a revocation of the privilege, using no unnecessary violence, is not an assault and battery. Corre *v.* State, 8 Ohio Dec. (Reprint) 715, 9 Cinc. L. Bul. 242.

Where person ejected has license from owner he should give notice thereof or make a claim of privilege because of the owner's consent. Clark *v.* State, 89 Ga. 768, 15 S. E. 699.

35. *Delaware.*— State *v.* Lockwood, 1 Pennew. (Del.) 76, 39 Atl. 589.

Hawaii.— Rex *v.* Howard, 1 Hawaii 66.

Illinois.— Long *v.* People, 102 Ill. 331.

Iowa.— State *v.* Shea, 104 Iowa 724, 74 N. W. 687.

Massachusetts.— Com. *v.* Clark, 2 Metc. (Mass.) 23.

Montana.— State *v.* Howell, 21 Mont. 165, 53 Pac. 314.

New York.— People *v.* Osborn, 1 Wheel. Crim. (N. Y.) 97.

North Carolina.— State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516; State *v.* Davis, 80 N. C. 259, 30 Am. Rep. 86.

Pennsylvania.— Com. *v.* Eyre, 1 Serg. & R. (Pa.) 347; Com. *v.* Mitchel, 2 Pars. Eq. Cas. (Pa.) 431; *In re* Vandersmith, 10 Pa. L. J. 523.

South Carolina.— State *v.* Lazarus, 1 Mill (S. C.) 33.

United States.— U. S. *v.* Bartle, 1 Cranch C. C. (U. S.) 236, 24 Fed. Cas. No. 14,531.

See 4 Cent. Dig. tit. "Assault and Battery," § 100.

36. Rex *v.* Howard, 1 Hawaii 66; Parrish *v.* State, 32 Tex. Crim. 583, 25 S. W. 420.

Where a trespasser defiantly stands his ground, armed with a deadly weapon, the occupant may at once resort to physical force to remove him, without being guilty of assault. State *v.* Taylor, 82 N. C. 554; State *v.* Davis, 80 N. C. 259, 30 Am. Rep. 86.

37. *Hawaii.*—Rex *v.* Howard, 1 Hawaii 66.

Iowa.— State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

Minnesota.— State *v.* Tripp, 34 Minn. 25, 24 N. W. 290.

Missouri.— State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990; State *v.* Kaiser, 78 Mo. App. 575.

North Carolina.— State *v.* Leggett, 104 N. C. 784, 10 S. E. 464.

South Carolina.— State *v.* Lightsey, 43 S. C. 114, 20 S. E. 975.

Virginia.— Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371.

38. *Indiana.*— Manahan *v.* State, 18 Ind. App. 297, 47 N. E. 1076.

Iowa.— State *v.* Goering, 106 Iowa 636, 77 N. W. 327; State *v.* Shea, 104 Iowa 724, 74 N. W. 687.

Maine.— State *v.* Carver, 89 Me. 74, 35 Atl. 1030.

Minnesota.—Gallagher *v.* State, 3 Minn. 270.

North Carolina.— State *v.* Davis, 52 N. C. 52.

Pennsylvania.— Com. *v.* Bouchet, 5 Pa. Dist. 343.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

South Carolina.— State *v.* Hutchings, 24 S. C. 142.

Texas.— Turner *v.* State, (Tex. Crim. 1900) 55 S. W. 53; Priest *v.* State, (Tex. Crim. 1896) 34 S. W. 611; Leonard *v.* State, 27 Tex. App. 186, 11 S. W. 112.

England.—Anonymous, 2 Lewin 48.

The law of self-defense is not abridged by reason of the fact that the aggressor is a minor (Latham *v.* State, 39 Tex. Crim. 472, 46 S. W. 638), defendant's wife (Leonard *v.* State, 27 Tex. App. 186, 11 S. W. 112), or the minister of a foreign government (U. S. *v.* Ortega, 4 Wash. (U. S.) 531, 27 Fed. Cas. No. 15,971; U. S. *v.* Liddle, 2 Wash. (U. S.) 205, 26 Fed. Cas. No. 15,598).

Self-defense is the only plea admissible, under the Georgia act of 1847, in defense of a prosecution for stabbing. Hodges *v.* State, 15 Ga. 117.

39. People *v.* Lynch, 101 Cal. 229, 35 Pac. 860; State *v.* Jones, 77 N. C. 520.

40. *Illinois.*— Long *v.* People, 102 Ill. 331.

defendant must have had reasonable ground[41] to apprehend a design on the prosecutor's part to commit a felony on him or do some great bodily harm, and that there was imminent danger to him of such design being accomplished.[42] This defense cannot be successfully interposed, moreover, where the force is used after the necessity therefor is past;[43] where defendant provoked the difficulty,[44] unless the prosecutor used more force than was necessary to prevent defendant's aggression,[45] or when the retaliation is excessive or bears no proportion to the necessity or provocation received.[46]

Indiana.— Martin *v.* State, 5 Ind. App. 453, 32 N. E. 594.

Iowa.— McAuley *v.* State, 3 Greene (Iowa) 435.

Ohio.— State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118.

Wisconsin.— State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567.

See also Coleman *v.* State, 28 Ga. 78, holding that it is no palliation of an assault that complainant said that, if he were assaulted, it would be at the assailant's risk.

41. Reasonableness of belief.— It is not a man's belief, simply, that he will be struck, that will justify him in striking first, but his belief, founded on reasonable grounds of apprehension. State *v.* Bryson, 60 N. C. 476; May *v.* State, 6 Tex. App. 191. Thus, the mere fact that a person assailed with threats and offensive language puts his hand in his pocket does not authorize the inference by the assailant that he is about to draw a weapon, so that acts of violence committed against him are justified as in self-defense. Mitchell *v.* State, 41 Ga. 527.

Belief arising from cowardice.—An instruction that if defendant's belief as to the necessity for the use of force arose from want of courage and an unwarrantable cowardice under the circumstances then presented to him, he would not be excused on the ground of self-defense, is erroneous. People *v.* Lennon, 71 Mich. 298, 38 N. W. 871, 15 Am. St. Rep. 259.

"Belief" and "intention" not equivalent. — Testimony of defendant that his intention in shooting was to defend himself is not the full equivalent of a declaration of belief that he was in imminent peril, necessitating instant shooting in self-defense. Duncan *v.* State, 84 Ind. 204.

42. *California.*— People *v.* Guidice, 73 Cal. 226, 15 Pac. 44; People *v.* De los Angeles, 61 Cal. 188.

Massachusetts.— Com. *v.* Mann, 116 Mass. 58.

Mississippi.— Willis *v.* State, (Miss. 1900) 27 So. 524.

Missouri.— State *v.* Dennison, 108 Mo. 541, 18 S. W. 926.

North Carolina.— State *v.* Nash, 88 N. C. 618.

South Carolina.— State *v.* McGraw, 35 S. C. 283, 14 S. E. 630.

Texas.— Burrage *v.* State, (Tex. Crim. 1898) 44 S. W. 169; Harris *v.* State, 37 Tex. Crim. 454, 36 S. W. 263; Warren *v.* State, 22 Tex. App. 383, 3 S. W. 240.

See 4 Cent. Dig. tit. "Assault and Battery," §§ 95, 96.

43. *Alabama.*— Harris *v.* State, 123 Ala. 69, 26 So. 515.

Delaware.— State *v.* Burton, (Del. 1900) 47 Atl. 619.

Georgia.— Hadley *v.* State, 58 Ga. 309.

North Carolina.— State *v.* Gibson, 32 N. C. 214.

Texas.— Marrow *v.* State, 37 Tex. Crim. 330, 39 S. W. 944; Malone *v.* State, (Tex. Crim. 1896) 35 S. W. 991; Yeldell *v.* State, (Tex. Crim. 1894) 25 S. W. 424.

England.— Reg. *v.* Driscoll, C. & M. 214, 41 E. C. L. 120.

But see People *v.* Pearl, 76 Mich. 207, 42 N. W. 1109, 15 Am. St. Rep. 304, 4 L. R. A. 709, holding that one causelessly assaulted by another is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received, and will not thereby be guilty of assault and battery.

See 4 Cent. Dig. tit. "Assault and Battery," §§ 95, 96.

44. *Alabama.*— Smith *v.* State, 105 Ala. 136, 17 So. 107; Henry *v.* State, 79 Ala. 42; Johnson *v.* State, 69 Ala. 253; Page *v.* State, 69 Ala. 229.

California.— People *v.* Douglass, 87 Cal. 281, 25 Pac. 417.

Georgia.— Bailey *v.* State, 89 Ga. 751, 15 S. E. 646; McAfee *v.* State, 31 Ga. 411.

Iowa.— State *v.* Kirkman, 91 Iowa 719, 59 N. W. 24. See also State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

Michigan.— People *v.* Miller, 49 Mich. 23, 12 N. W. 895.

Missouri.— State *v.* Gamble, 119 Mo. 427, 24 S. W. 1030.

North Carolina.— State *v.* Lawhorn, 88 N. C. 634; State *v.* Bryson, 60 N. C. 476.

Rhode Island.— State *v.* White, 18 R. I. 473, 28 Atl. 968.

Texas.— Rhea *v.* State, 37 Tex. Crim. 138, 38 S. W. 1012.

See 4 Cent. Dig. tit. "Assault and Battery," §§ 95, 96.

Merely using abusive words does not constitute one an aggressor within this rule. Howell *v.* State, 79 Ala. 283; Daniel *v.* State, 10 Lea (Tenn.) 261; Smith *v.* State, 8 Lea (Tenn.) 402.

45. Smith *v.* State, 105 Ala. 136, 17 So. 107; People *v.* Gulick, Lalor (N. Y.) 229.

46. *Alabama.*— Mooney *v.* State, 33 Ala. 419.

(II) *In Resisting Arrest.* One who is arrested may, in self-defense, use so much force as is necessary to repel undue violence on the part of the officer[47] or to prevent the arrest if the same is illegal.[48]

e. Of Third Person — (I) *In General.* One may use, in the defense of a third person, so much force as reasonably appears to be necessary, though, in fact, none is necessary, and he is not required to nicely gauge the proper *quantum* of force.[49]

(II) *Child, Parent, or Spouse.* So, too, a parent may defend his child,[50] a child his parent,[51] or a husband or wife his or her spouse,[52] to the same extent that the defended party may defend himself.[53]

5. Enforcement of Regulations — **a. Of Railroad.** A railroad officer may, without becoming liable as for assault and battery, eject a passenger who refuses to submit to a regulation of the company with regard to the payment of fares[54]

Delaware.— State *v.* Burton, (Del. 1900) 47 Atl. 619; State *v.* Hitchens, 2 Harr. (Del.) 527.

Missouri.— State *v.* Brooks, 99 Mo. 137, 12 S. W. 633.

New York.— People *v.* Murray, 54 Hun (N. Y.) 406, 7 N. Y. Suppl. 548, 27 N. Y. St. 84; Morris' Case, 1 City Hall Rec. (N. Y.) 52.

North Carolina.— State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536.

Pennsylvania.— Com. *v.* Cosler, 8 Kulp (Pa.) 97.

South Carolina.— State *v.* Quin, 2 Treadw. (S. C.) 694, 3 Brev. (S. C.) 515; State *v.* Wood, 1 Bay (S. C.) 351.

Texas.— Cotton *v.* State, 4 Tex. 260; Waldon *v.* State, 34 Tex. Crim. 92, 29 S. W. 273.

England.— Reg. *v.* Huntley, 3 C. & K. 142; Reg. *v.* Mabel, 9 C. & P. 474, 38 E. C. L. 280.

See 4 Cent. Dig. tit. "Assault and Battery," §§ 95, 96.

Defendant need not nicely gauge the quantum of force where he has good reason to believe, and does believe, that great bodily harm is about to be inflicted upon him, but may use such force as, under all the circumstances, he had reasonable cause to believe, and did believe, was necessary to protect himself from impending danger. State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; Barr *v.* State, 45 Nebr. 458, 63 N. W. 856; Evers *v.* People, 3 Hun (N. Y.) 716.

The use of deadly weapons to repel a simple assault is not, ordinarily, justified (Floyd *v.* State, 36 Ga. 91, 91 Am. Dec. 760; Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760; Rauck *v.* State, 110 Ind. 384, 11 N. E. 450; Presser *v.* State, 77 Ind. 274; Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392; State *v.* Ferguson, 26 Mo. App. 8; State *v.* Leary, 88 N. C. 615; Stockton *v.* State, 25 Tex. 772; Reg. *v.* Odgers, 2 M. & Rob. 479), but may be where the use of such weapon was necessary to prevent the threatened injury (People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; Baldwin *v.* State, 75 Ga. 482; Floyd *v.* State, 36 Ga. 91, 91 Am. Dec. 760; Hodges *v.* State, 15 Ga. 117; State *v.* Tripp, 34 Minn. 25, 24 N. W. 290; State *v.* Nicolai, 8 Mo. App. 598; Stockton *v.* State, 25 Tex. 772; Pease *v.* State, 13 Tex. App. 18).

No greater force is justified where the defense of property is involved than in cases where only defense of self is involved. State *v.* Blodgett, 50 Vt. 142.

47. State *v.* Dennis, 2 Hard. (Del.) 184.

48. People *v.* Denby, 108 Cal. 54, 40 Pac. 1051; State *v.* Belk, 76 N. C. 10; Com. *v.* Bryant, 9 Phila. (Pa.) 595, 29 Leg. Int. (Pa.) 125; Com. *v.* Cosler, 8 Kulp (Pa.) 97; Stockton *v.* State, 25 Tex. 772; Massie *v.* State, 27 Tex. App. 617, 11 S. W. 638; Franklin *v.* State, 27 Tex. App. 136, 11 S. W. 35; Goodman *v.* State, 4 Tex. App. 349.

Tripping up pursuer.— Without regard to whether defendant would or would not have been justified in resisting an arrest, his tripping up of the person who was pursuing him to arrest him, causing his fall, without first employing other means of resistance, constituted an assault. State *v.* Hedrick, 95 N. C. 624.

49. Spicer *v.* People, 11 Ill. App. 294; State *v.* Totman, 80 Mo. App. 125.

Persons interfering, with intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault. Com. *v.* Cooley, 6 Gray (Mass.) 350. See also Conner *v.* State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217.

50. Com. *v.* Malone, 114 Mass. 295; State *v.* Herdina, 25 Minn. 161; Com. *v.* Brungess, 23 Pa. Co. Ct. 13; Gorman *v.* State, 42 Tex. 221.

A master may do that to protect his apprentice which another person could not do without being an assailant, or giving provocation for an assault. Orton *v.* State, 4 Greene (Iowa) 140.

51. State *v.* Johnson, 75 N. C. 174; Crowder *v.* State, 8 Lea (Tenn.) 669; Waddell *v.* State, 1 Tex. App. 720.

52. State *v.* Bullock, 91 N. C. 614. See also State *v.* Cokely, 4 Iowa 477.

53. State *v.* Herdina, 25 Minn. 161; State *v.* Hays, 67 Mo. 692; State *v.* Bullock, 91 N. C. 614.

Where the defended party was the aggressor a relative has no right to interfere. State *v.* Johnson, 75 N. C. 174; Crowder *v.* State, 8 Lea (Tenn.) 669; Waddell *v.* State, 1 Tex. App. 720.

54. *Iowa.*— State *v.* Chovin, 7 Iowa 204.

Maine.— State *v.* Goold, 53 Me. 279.

or conduct in the stations of the company,[55] but he cannot lawfully use more force than is necessary to accomplish his purpose.[56]

b. Of Voluntary Association. Since the rules of discipline for all voluntary associations must conform to the laws, if a member of such association refuses to submit to the ceremony of expulsion established by the same, which ceremony involved a battery, it cannot be lawfully inflicted.[57]

6. Former Conviction or Acquittal. A trial and conviction for assault and battery, under an information charging that offense, constitutes no bar to a subsequent indictment and prosecution for an assault with intent to commit a great bodily injury, based on the same act;[58] and acquittal of a felony on an indictment under which defendant cannot be convicted of an assault is no bar to a subsequent indictment for the assault.[59]

7. Intoxication. Voluntary intoxication does not justify an assault,[60] and is admissible only to reduce the grade of the crime, where the question of intent, malice, or premeditation is involved.[61]

8. Judgment For Defendant in Civil Suit. A judgment in a civil suit for assault and battery, in favor of respondent in a criminal prosecution, for the same trespass, is not a bar to such prosecution.[62]

9. Making Arrest — a. In General. Either an officer or a private person when he is authorized to make an arrest may lawfully use so much force as may be necessary to effect or maintain the arrest or prevent an escape;[63] but he will be deemed guilty of an assault and battery if, in doing either, he uses more force[64]

Missouri.— State *v.* McDonald, 7 Mo. App. 510.

New Hampshire.— State *v.* Thompson, 20 N. H. 250.

New Jersey.—State *v.* Campbell, 32 N. J. L. 309; State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

New York.— People *v.* Caryl, 3 Park. Crim. (N. Y.) 326; People *v.* Jillson, 3 Park. Crim. (N. Y.) 234, in which latter case it was held that a conductor is not guilty of assault and battery in ejecting a passenger who had refused to pay his fare, though, when the train had nearly stopped, the passenger offered to pay it.

See 4 Cent. Dig. tit. "Assault and Battery," § 90.

55. Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465. See also People *v.* McKay, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169, to the effect that railway passengers are entitled to remain in the waiting-room at a station as long as they have occasion to do so and commit no offense against the good order of the place and reasonable regulations made to govern it; but that they are not bound to leave on being ordered out by the keeper for any such indecorum as spitting on the floor, and the refusal to go on being ordered will not excuse the commission of an assault and battery upon them to compel them to.

56. State *v.* Ross, 26 N. J. L. 224.

Removal while train in motion.— The forcible expulsion from a railway train of a passenger, although wrongfully on the train, before the train is brought substantially to a standstill, is an assault, for which the conductor so ejecting him is criminally liable. State *v.* Kinney, 34 Minn. 311, 25 N. W. 705.

57. State *v.* Williams, 75 N. C. 134.

58. State *v.* Foster, 33 Iowa 525. But see Reg. *v.* Walker, 2 M. & Rob. 446, holding that conviction for an assault is a bar to an indictment for feloniously stabbing in the same transaction.

59. Reg. *v.* Smith, 34 U. C. Q. B. 552.

60. *Alabama.*—Engelhardt *v.* State, 88 Ala. 100, 7 So. 154; Carter *v.* State, 87 Ala. 113, 6 So. 356.

California.— People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503.

Massachusetts.—Com. *v.* Malone, 114 Mass. 295.

Minnesota.— State *v.* Herdina, 25 Minn. 161.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22.

61. Engelhardt *v.* State, 88 Ala. 100, 7 So. 154; State *v.* Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; State *v.* Garvey, 11 Minn. 154; Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22.

62. People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033.

63. See, generally, Arrest.

64. *Delaware.*— State *v.* Lafferty, 5 Harr. (Del.) 491; State *v.* Mahon, 3 Harr. (Del.) 568.

Georgia.— Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613.

Kentucky.—Bowling *v.* Com., 7 Ky. L. Rep. 821.

Mississippi.— Wallace *v.* State, (Miss. 1897) 21 So. 662.

Missouri.— State *v.* Fuller, 96 Mo. 165, 9 S. W. 583.

South Carolina.— Golden *v.* State, 1 S. C. 292.

Texas.— Skidmore *v.* State, 43 Tex. 93; Beaverts *v.* State, 4 Tex. App. 175; Skidmore *v.* State, 2 Tex. App. 20.

Virginia.— Mesmer *v.* Com., 26 Gratt. (Va.) 976.

than the occasion calls for or if he uses force in doing acts which he is not authorized to do.[65]

b. Bystanders. It being the duty of bystanders to assist an officer when called upon so to do,[66] a bystander so assisting an officer is not guilty of assault, even if the officer's acts are without authority.[67]

10. Preservation of Order at Public Meeting. Under a statute permitting the use of violence for the preservation of order at meetings for lawful purposes, the use of means unnecessarily severe is not justified.[68]

11. Previous Punishment For Contempt. One may be convicted of an assault committed in view of the court, though he has previously been fined for the contempt.[69]

12. Provocation — a. In General. Under some statutes sudden and strong provocation is a defense;[70] but this is no defense when the circumstances show a malignant heart,[71] or when the acts charged are not the immediate result of the provocation.[72]

See 4 Cent. Dig. tit. "Assault and Battery," § 91.

The use of handcuffs on a prisoner who has twice escaped is not such an abuse of an officer's power as will subject him to indictment for assault. State *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

Tying a prisoner is not, necessarily, an excessive force, but will render the officer liable to an indictment if he so acts to gratify his malice. State *v.* Stalcup, 24 N. C. 50.

Use of firearms.— Peace-officers are not justified in using deadly weapons, on a mere suspicion that a felony has been committed (Com. *v.* Megary, 8 Phila. (Pa.) 616), or to prevent the escape of one arrested for a misdemeanor (State *v.* Sigman, 106 N. C. 728, 11 S. E. 520).

The officer's intent is immaterial if, in making the arrest, he uses more force than is necessary. Golden *v.* State, 1 S. C. 292.

65. Stone *v.* State, 56 Ark. 345, 19 S. W. 968; Delafoile *v.* State, 54 N. J. L. 381, 24 Atl. 557, 16 L. R. A. 500 (wherein it was held that marshals of an association duly organized to prevent and detect crime and having authority to arrest criminals without a warrant, are not authorized, without a warrant, to forcibly enter the rooms of an inn to verify their suspicions that liquor is being illegally sold, and are guilty of assault and battery in inflicting injury on the keeper's family, who resisted the trespass); State *v.* Shelton, 79 N. C. 605 (holding that persons who, without process legally issued in North Carolina, arrest a person charged with crime in another state, who had fled to North Carolina for refuge, are guilty of an assault and battery); Com. *v.* Stirk, 5 Lanc. L. Rev. 415.

66. See, generally, Arrest.

67. Watson *v.* State, 83 Ala. 60, 3 So. 441; State *v.* James, 80 N. C. 273; State *v.* Stalcup, 24 N. C. 50; Reg. *v.* Chasson, 16 N. Brunsw. 546.

68. Rasberry *v.* State, 1 Tex. App. 664.

69. State *v.* Yancy, 4 N. C. 133, 6 Am. Dec. 553.

70. Prewitt *v.* State, 51 Ala. 33; White *v.* People, 93 Ill. 473. See also People *v.* Ross, 66 Mich. 94, 33 N. W. 30; State *v.* King, 78 Mo. 555.

Mere words, however opprobrious, cannot be said to constitute the "considerable provocation" contemplated by the statute relating to assaults to murder, and to inflict bodily harm. Steffy *v.* People, 130 Ill. 98, 22 N. E. 861. But see Ruble *v.* People, 67 Ill. App. 438, 439, where it is said: "Words do excite the passions and arouse anger and rage, and while they are not sufficient in law to justify an assault or an assault and battery, yet they are proper for consideration in connection with the conduct of the prosecutor when, as here, it is to be determined whether the defendant is guilty under the statute of acting without considerable provocation."

There is not sufficient provocation where complainant had abandoned his home, and left accused in possession, and then returned and set fire to a fence surrounding the premises, and committed a trespass thereon (Scott *v.* State, 118 Ala. 115, 24 So. 414); where prosecutor merely struck the first blow (Riddle *v.* State, 49 Ala. 389); or where a person took hold of another's horse, and turned the horse's head, and, being told by the teamster to let go, did so, and struck the horse on the head with his hand, causing the horse to step back, but not otherwise doing any damage (Com. *v.* Ford, 5 Gray (Mass.) 475).

71. Winfield *v.* State, 3 Greene (Iowa) 339.

72. *Georgia.*— Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630, where a husband had a difficulty with the prosecutor at night, when he discovered the latter attempting to seduce his wife, and shot him the next morning, when he came down and sat near the wife at breakfast.

Michigan.— People *v.* Townsend, 120 Mich. 661, 79 N. W. 901, where defendant learned of the alleged purpose of the prosecutor to betray the former's *fiancée* more than a month before the assault, and since that time had maintained friendly relations with him.

Missouri.— State *v.* Nicolai, 8 Mo. App. 598, where a woman reported to her escort that a man had addressed a rude remark to her, and the escort assaulted the man after he had left the woman's presence.

b. Opprobrious Words or Abusive Language. In the absence of statute, no words, however opprobrious, disgraceful, annoying, or vexatious, will justify an assault or battery,[73] though they may mitigate the punishment.[74] Under some statutes, however, the use of such words may justify a simple assault or battery,[75] but not one of an aggravated nature.[76] This defense is only available between private persons,[77] and is not available where defendant himself first uses opprobrious words.[78] The opprobrious words or abusive language[79] which will justify an assault are such as are used by the person assaulted to the accused at the time of the assault or assault and battery, and not statements published in a paper.[80]

13. Punishment — a. Of Child. A parent may lawfully chastise his child in a reasonable manner,[81] a school-teacher his pupil,[82] and those who stand *in loco*

Nevada.—State *v.* Lawry, 4 Nev. 161, where the provocation occurred two days before.

Virginia.— Rawlings *v.* Com., 1 Leigh (Va.) 581, 19 Am. Dec. 757.

See 4 Cent. Dig. tit. "Assault and Battery," § 94.

73. *Arkansas.*— State *v.* Herrington, 21 Ark. 195.

Delaware.— State *v.* Burton, (Del. 1900) 47 Atl. 619.

Missouri.— State *v.* Gamble, 119 Mo. 427, 24 S. W. 1030; State *v.* Griffin, 87 Mo. 608; State *v.* Kaiser, 78 Mo. App. 575.

New Jersey.— State *v.* Agnew, 10 N. J. L. 165.

New York.— People *v.* Moore, 3 Wheel. Crim. (N. Y.) 82.

Pennsylvania.— Com. *v.* Brungess, 23 Pa. Co. Ct. 13.

South Carolina.— State *v.* Wood, 1 Bay (S. C.) 351.

Texas.— Timon *v.* State, 34 Tex. Crim. 363, 30 S. W. 808; Welburn *v.* State, (Tex. Crim. 1894) 24 S. W. 651; State *v.* Briggs, (Tex. Crim. 1893) 21 S. W. 46; Wood *v.* State, 11 Tex. App. 318.

See 4 Cent. Dig. tit. "Assault and Battery," § 95.

74. State *v.* Herrington, 21 Ark. 195; State *v.* Kaiser, 78 Mo. App. 575; Timon *v.* State, 34 Tex. Crim. 363, 30 S. W. 808.

75. Rogers *v.* State, 117 Ala. 192, 23 So. 82; Spigner *v.* State, 103 Ala. 30, 15 So. 892; Moore *v.* State, 102 Ga. 581, 27 S. E. 675; Murphy *v.* State, 92 Ga. 75, 17 S. E. 845; Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695; Reid *v.* State, 71 Ga. 865; Arnold *v.* State, 46 Ga. 455; Barr *v.* State, (Miss. 1897) 21 So. 131; Wood *v.* State, 64 Miss. 761, 2 So. 247.

76. Taylor *v.* State, 48 Ala. 180; Samuels *v.* State, 103 Ga. 3, 29 S. E. 427; Holland *v.* State, 97 Ga. 345, 23 S. E. 828; Murphy *v.* State, 92 Ga. 75, 17 S. E. 845; Reid *v.* State, 71 Ga. 865; Ward *v.* State, 56 Ga. 408.

77. Burns *v.* State, 80 Ga. 544, 7 S. E. 88, holding that an officer cannot justify an assault and battery on a prisoner on the ground that the beating was provoked by the use of opprobrious words or abusive language.

78. Brown *v.* State, 74 Ala. 42; Reid *v.* State, 71 Ga. 865; Arnold *v.* State, 46 Ga. 455.

79. Grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language" within the meaning of Ga. Pen. Code, § 103. Behling *v.* State, 110 Ga. 754, 36 S. E. 85.

80. Berry *v.* State, 105 Ga. 683, 31 S. E. 592.

81. Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368; Turner *v.* State, 35 Tex. Crim. 369, 33 S. W. 972.

See, generally, Parent and Child.

82. *Alabama.*— Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31.

Arizona.— Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368.

Indiana.—Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Danenhoffer *v.* State, 69 Ind. 295, 35 Am. Rep. 216; Marlsbary *v.* State, 10 Ind. App. 21, 37 N. E. 558.

North Carolina.— State *v.* Stafford, 113 N. C. 635, 18 S. E. 256; State *v.* Pendergrass, 19 N. C. 365, 31 Am. Dec. 416.

Pennsylvania.— Com. *v.* Seed, 5 Pa. L. J. Rep. 78; Com. *v.* Fell, 11 Haz. Reg. (Pa.) 179.

Tennessee.— Anderson *v.* State, 3 Head (Tenn.) 454, 75 Am. Dec. 774.

Texas.— Thomason *v.* State, (Tex. Crim. 1898) 43 S. W. 1013; Whitley *v.* State, 33 Tex. Crim. 172, 25 S. W. 1072; Spear *v.* State, (Tex. Crim. 1894) 25 S. W. 125; Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579; Dowlen *v.* State, 14 Tex. App. 61.

See also 2 Boswell Life of Johnson, 89, 96 [*quoted* in Boyd *v.* State, 88 Ala. 169, 173, 7 So. 268, 16 Am. St. Rep. 31], where Dr. Johnson is quoted as follows: "The government of the schoolmaster is somewhat of the nature of a military government — that is to say, it must be arbitrary; it must be exercised by the will of one man, according to particular circumstances. A schoolmaster has a prescriptive right to beat, and an action of assault and battery cannot be admitted against him, unless there be some great excess, some barbarity. In our schools in England many boys have been maimed, yet I never heard of an action against a schoolmaster on that account. Puffendorf, I think, maintains the right of a schoolmaster to beat his scholars."

See 4 Cent. Dig. tit. "Assault and Battery," § 92.

By voluntarily attending school after majority, a pupil waives any privilege, and sub-

parentis children under their control,[83] having regard to the character of the offense[84] and the sex, age, and physical condition of the offender;[85] but he will be liable *criminaliter* if prompted by malice or other improper motive,[86] if unreasonably severe,[87] if he make use of an improper instrument,[88] or if the punishment result in permanent injury.[89]

b. Of Pauper. The superintendent or keeper of a poorhouse who, without anger and solely for the purpose of preserving discipline, administers moderate physical chastisement to a pauper is not guilty of assault and battery;[90] but he will be guilty if he inflicts such punishment on a female pauper in an indecent manner, even though within the limits of moderation,[91] or if the acts done by him had no connection with the pauper's misconduct.[92]

jects himself to like discipline with those who are within the school age. State *v.* Mizner, 45 Iowa 248, 24 Am. Rep. 769.

83. Dean *v.* State, 89 Ala. 46, 8 So. 38; Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368; State *v.* Alford, 68 N. C. 322. But see Davis *v.* State, 6 Tex. App. 133, to the effect that the provision of the Texas code which recognizes the right of a parent to chastise his child applies only when the real, and not a mere conventional, relation of parent and child exists between the parties.

A brother, who provides a sister fifteen years of age with lodging, clothing, and schooling, may inflict moderate correction. Snowden *v.* State, 12 Tex. App. 105, 41 Am. Rep. 667.

A step-father, who supports his wife's children, is *in loco parentis*, and may reasonably chastise a child to enforce his authority. Gorman *v.* State, 42 Tex. 221.

A patriarch or priest has no right, by virtue of his office, to whip a child capable of appreciating correction, even if done at the parents' request. Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368.

84. Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Com. *v.* Randall, 4 Gray (Mass.) 36.

Misconduct out of school.—Though a schoolmaster has, in general, no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school or subvert the master's authority. Donnelley *v.* Territory, (Ariz. 1898) 52 Pac. 368; Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

Misspelling a word and refusing to try again will not justify a severe punishment by a teacher. Gardner *v.* State, 4 Ind. 632.

Requiring a pupil to work two examples in arithmetic out of school is not unreasonable, and attempted chastisement for the refusal of the pupil to do so does not justify an assault on the teacher with a knife. Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

85. Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Com. *v.* Randall, 4 Gray (Mass.) 36.

86. Dean *v.* State, 89 Ala. 46, 8 So. 38 [*following* Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31]; State *v.* Long, 117 N. C. 791, 23 S. E. 431; State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

87. Gardner *v.* State, 4 Ind. 632; Stanfield *v.* State, 43 Tex. 167; Turner *v.* State, 35 Tex. Crim. 369, 33 S. W. 972; Spear *v.* State, (Tex. Crim. 1894) 25 S. W. 125; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579. But see Dean *v.* State, 89 Ala. 46, 8 So. 38 [*following* Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31], in which case it was held that one standing *in loco parentis* is not criminally liable for punishing a child merely because the punishment be excessive, but that the punishment must also have been inflicted with legal malice, or there must have been some permanent injury; State *v.* Alford, 68 N. C. 322, holding that such a person was not liable unless the punishment inflicted exceeded the bounds of moderation and tended to cause permanent injury.

Chaining to sewing-machine.—Where defendant kept his twelve-year-old daughter chained to a sewing-machine while she was alone in the house with her infant brother, the punishment was unreasonable. Hinkle *v.* State, 127 Ind. 490, 26 N. E. 777.

88. Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Neal *v.* State, 54 Ga. 281, in which latter case it was held not error, on the trial of one for an assault and battery in whipping his own child, a girl ten years old, with a saw twenty-two inches long and three-quarters of an inch wide, to charge the jury that, if there was no good reason for the whipping, one lick with such an instrument was unlawful. But see Stanfield *v.* State, 43 Tex. 167, wherein the jury was instructed that if defendant inflicted a castigation on the person of his ward with an unusual instrument, and one that was calculated to inflict serious injuries to his person, they must find him guilty, and this was held error, because the charge made the instrument and not the extent of punishment the test of unlawful correction.

89. Dean *v.* State, 89 Ala. 46, 8 So. 38 [*following* Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31]; State *v.* Long, 117 N. C. 791, 23 S. E. 431.

90. State *v.* Neff, 58 Ind. 516.

Form of special plea setting up this defense see State *v.* Neff, 58 Ind. 516.

91. Reg. *v.* Miles, 6 Jur. 243.

92. State *v.* Hull, 34 Conn. 132.

e. Of Seaman. The master of a vessel, while at sea, has a right to give a seaman moderate correction.[93]

14. Recaption of Property. A person may lawfully use so much force as is reasonably necessary to retake his property which has wrongfully been taken by another;[94] but if he use more force than is necessary he will be guilty of an assault.[95]

G. Competency of Witnesses. Upon an indictment for assault the accused, under some statutes, is not a competent witness on his own behalf,[96] while, under others, though a competent witness on a trial for common assault,[97] he is not where the assault is one occasioning actual bodily harm.[98]

H. Evidence — 1. Burden of Proof and Presumptions — a. In General. When defendant sets up in defense no distinct and independent fact, but contends that, on the facts proved by the evidence on both sides, he is not guilty, the burden is on the government to satisfy the jury that the assault and battery were unjustifiable;[99] but, when the assault is proved, the burden is on defendant to show the existence of a sufficient justification.[1]

b. Unreasonableness of Chastisement. When the relation of schoolmaster and pupil, or any similar relation, is established in defense of a prosecution for an assault and battery, the legal presumption is that the chastisement was proper, and the burden of proving unreasonableness or excess rests upon the prosecution.[2]

c. Weapon Used. On an indictment for assault with a deadly weapon, where the weapon used is not, necessarily, deadly, the prosecution must establish its deadly character.[3] Where the assault is alleged to have been committed with a firearm the presumption is that the weapon was loaded,[4] and the burden of proving it to be unloaded is on defendant.[5]

2. Admissibility — a. In General — (i) *On Behalf of Prosecution.* On

93. U. S. *v.* Wickham, 1 Wash. (U. S.) 316, 28 Fed. Cas. No. 16,689. See, generally, Seamen.

94. *Alabama.*— Bonner *v.* State, 97 Ala. 47, 12 So. 408.

Massachusetts.— Com. *v.* Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623; Com. *v.* Lynn, 123 Mass. 218.

Missouri.— State *v.* Dooley, 121 Mo. 591, 26 S. W. 558.

New Hampshire.— State *v.* Elliot, 11 N. H. 540.

Tennessee.— Anderson *v.* State, 6 Baxt. (Tenn.) 608.

Texas.— Cox *v.* State, (Tex. Crim. 1896) 34 S. W. 754.

England.— Rex *v.* Mitton, 3 C. & P. 31, 14 E. C. L. 435; 1 Hawkins P. C. c. 64, § 1.

See 4 Cent. Dig. tit. "Assault and Battery," § 99.

Where the right of possession is involved, however, force amounting to a breach of the peace cannot be used. Hendrix *v.* State, 50 Ala. 148; People *v.* Cooper, 13 Wend. (N. Y.) 379; State *v.* Black, 109 N. C. 856, 13 S. E. 877, 14 L. R. A. 205. See also Terrell *v.* State, 37 Tex. 442.

The right of recaption is not restricted to the immediate time and place of taking, and is not lost, though the property is temporarily taken out of sight, when the pursuit is immediate. State *v.* Dooley, 121 Mo. 591, 26 S. W. 558.

95. Bonner *v.* State, 97 Ala. 47, 12 So. 408.

The use of a deadly weapon, or an assault likely to produce death, is not allowed. State *v.* Dooley, 121 Mo. 591, 26 S. W. 558.

96. Reg. *v.* Drain, 8 Manitoba 535.

97. Reg. *v.* Bonter, 30 U. C. C. P. 19.

98. Reg. *v.* Richardson, 46 U. C. Q. B. 375; Reg. *v.* Bonter, 30 U. C. C. P. 19.

99. People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; Com. *v.* McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410; U. S. *v.* Lunt, 1 Sprague (U. S.) 311, 26 Fed. Cas. No. 15,643.

1. Sawyer *v.* People, 91 N. Y. 667, 1 N. Y. Crim. 249; Wright *v.* State, 9 Yerg. (Tenn.) 341; Jarnigan *v.* State, 6 Tex. App. 465. But see State *v.* Shea, 104 Iowa 724, 74 N. W. 687; State *v.* Fowler, 52 Iowa 103, 2 N. W. 983, 2 Ky. L. Rep. 150; People *v.* Shanley, 30 Misc. (N. Y.) 290, 62 N. Y. Suppl. 389, in which cases it was held that the burden is on the state to show that defendant did not act in self-defense.

2. Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Anderson *v.* State, 3 Head (Tenn.) 454, 75 Am. Dec. 774.

3. Branch *v.* State, 35 Tex. Crim. 304, 33 S. W. 356; Jenkins *v.* State, 30 Tex. App. 379, 17 S. W. 938; Melton *v.* State, 30 Tex. App. 273, 17 S. W. 257; Parks *v.* State, (Tex. App. 1890) 15 S. W. 174; Ballard *v.* State, (Tex. App. 1890) 13 S. W. 674; Gladney *v.* State, (Tex. App. 1889) 12 S. W. 868; Hilliard *v.* State, 17 Tex. App. 210.

4. Caldwell *v.* State, 5 Tex. 18; Burton *v.* State, 3 Tex. App. 408, 30 Am. Rep. 146.

5. State *v.* Cherry, 33 N. C. 475; Crow *v.* State, 41 Tex. 468; Caldwell *v.* State, 5 Tex. 18; Burton *v.* State, 3 Tex. App. 408, 30 Am. Rep. 146.

behalf of the prosecution any competent evidence is admissible which tends to prove the commission of the offense by defendant,[6] give character to the assault,[7] or establish a motive therefor.[8]

(II) *On Behalf of Defendant.* The defendant may testify as to the cause and circumstances of the alleged assault,[9] and may show an immediate provocation thereto,[10] provided what took place is not too far removed in time to be part of the *res gestæ*,[11] though he should not be restricted to the exact point of time when the injury was inflicted.[12] Where an intention to wound is not alleged by the prosecution, disproof of it is inadmissible.[13] He may also introduce evidence in mitigation.[14]

b. Acts and Declarations of Parties — (I) *Defendant.* Previous specific

6. Horn *v.* State, 102 Ala. 144, 15 So. 278.

7. *Alabama.*— Smith *v.* State, 123 Ala. 64, 26 So. 641.

Indiana.—Kercheval *v.* State, 46 Ind. 120.

Iowa.— State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

Kentucky.— Hart *v.* Com., 22 Ky. L. Rep. 1183, 60 S. W. 298.

United States.— Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

The friendliness of the parties before and after the difficulty is not admissible as tending to show that the shooting was not unlawful. Hadley *v.* State, 58 Ga. 309.

8. *Alabama.*— Thomas *v.* State, 117 Ala. 178, 23 So. 665.

Indiana.— Kercheval *v.* State, 46 Ind. 120.

Kentucky.— Hart *v.* Com., 22 Ky. L. Rep. 1183, 60 S. W. 298.

Missouri.— State *v.* Sanders, 106 Mo. 188, 17 S. W. 223.

New York.— People *v.* Dailey, 73 Hun (N. Y.) 16, 25 N. Y. Suppl. 1050, 57 N. Y. St. 10 [*affirmed* in 143 N. Y. 638, 37 N. E. 823, 60 N. Y. St. 875].

Texas.—Trimble *v.* State, (Tex. Crim. 1893) 22 S. W. 879.

Evidence of all acts pertaining to the one transaction is admissible as tending to show the animus of defendant (Memmler *v.* State, 75 Ga. 576; State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639; Lanier *v.* State, 57 Miss. 102; Johnston *v.* State, 7 Mo. 183; Nelson *v.* State, (Tex. Crim. 1892) 20 S. W. 766; Richards *v.* State, 3 Tex. App. 423; Hoffmann *v.* State, 65 Wis. 46, 26 N. W. 110); but evidence as to distinct and separate offenses is not (Richardson *v.* State, 63 Ind. 192; State *v.* Kepple, 2 Kan. App. 401, 42 Pac. 745; Latham *v.* State, 39 Tex. Crim. 472, 46 S. W. 638; Bolton *v.* State, (Tex. Crim. 1897) 39 S. W. 672). *Compare* People *v.* Irving, 95 N. Y. 541 [*affirming* 31 Hun (N. Y.) 614]; Rogers *v.* State, 40 Tex. Crim. 355, 50 S. W. 338.

The opinion of the prosecuting witness as to the intent with which defendant committed the act is not admissible, where it does not appear that he had any better means than the jury to judge of such intent. State *v.* Garvey, 11 Minn. 154. But he may be asked what he understood by the assailant's remark, in the course of the assault, that "the easiest way is the best," and may testify that he thought they meant to handle him roughly. People *v.* Moore, 50 Hun (N. Y.) 356, 3 N. Y. Suppl. 159, 18 N. Y. St. 1031.

Evidence in rebuttal.— Accused having testified to the reasons that induced him to commit an assault upon another, the state may prove that no such reasons existed in fact, although accused may have believed that they did. Cornelison *v.* Com., 84 Ky. 583, 8 Ky. L. Rep. 793, 2 S. W. 235.

9. Danenhoffer *v.* State, 79 Ind. 75; Com. *v.* Ribert, 144 Pa. St. 413, 28 Wkly. Notes Cas. (Pa.) 496, 22 Atl. 1031; Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234, 60 Am. St. Rep. 47; Berry *v.* State, 30 Tex. App. 423, 17 S. W. 1080.

10. Robbins *v.* State, 20 Ala. 36.

Where defendant puts in evidence relating to a previous difficulty between the injured man and himself, the prosecution may give other testimony regarding that difficulty to supply the omissions of defendant's evidence. McAfee *v.* State, 31 Ga. 411.

11. Rogers *v.* State, 117 Ala. 192, 23 So. 82 [*affirmed* in 126 Ala. 40, 28 So. 619]; Rosenbaum *v.* State, 33 Ala. 354; Ward *v.* State, 28 Ala. 53; Rives *v.* State, 74 Ga. 375; Whilden *v.* State, 25 Ga. 396, 71 Am. Dec. 181; Gaugler *v.* State, (Tex. Crim. 1893) 22 S. W. 147.

12. Hodges *v.* State, 15 Ga. 117.

13. People *v.* Moore, 50 Hun (N. Y.) 356, 3 N. Y. Suppl. 159, 18 N. Y. St. 1031. So, too, where a railway official assaulted a passenger for not leaving the waiting-room when ordered, the passenger having spit on the floor, a question as to plaintiff's smoking was irrelevant, where his smoking had not been objected to (People *v.* McKay, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169), and evidence that complainant, who was ejected with great force and violence from defendant's hotel, was intoxicated at the time, was inadmissible, that not having been the objection to his entry (People *v.* Van Vechten, 2 N. Y. Crim. 291). But where it appears that a passenger ejected for non-payment of his fare had conducted himself in a disorderly manner, and had disturbed other passengers, defendant may show in justification acts of disturbance committed by such passenger during the whole trip (People *v.* Caryl, 3 Park. Crim. (N. Y.) 326).

14. U. S. *v.* Bartle, 1 Cranch C. C. (U. S.) 236, 24 Fed. Cas. No. 14,531.

threats of defendant to injure prosecutor are admissible,[15] as is evidence of his subsequent conduct tending to explain the transaction.[16] So, too, declarations and remarks of the accused at or near the time of the assault are admissible.[17]

(II) *PARTY ASSAULTED.* Evidence as to the acts and conduct of the party assaulted prior to the commission of the offense is inadmissible[18] though evidence of his subsequent conduct may be.[19] Declarations of the party assaulted, made before or after the assault, are not admissible[20] unless so closely connected therewith in point of time as to be *res gestæ*.[21]

15. Sharp *v.* People, 29 Ill. 464; People *v.* Deitz, 86 Mich. 419, 49 N. W. 296 (holding, however, that it was error to refuse to strike out testimony to the effect that three years before defendant had made threats against the prosecuting witness, when it appeared that the threats were conditional, and there was no intention to inflict injury at the time, and they had since been friends); State *v.* Henn, 39 Minn. 476, 40 N. W. 572. But see State *v.* Moberly, 121 Mo. 604, 26 S. W. 364 (holding that, on a trial for felonious assault on E's guardian, a statement by defendant, several months before the shooting, that E owed him a gambling debt, and that he would have the money or E's blood, was inadmissible); State *v.* Norton, 82 N. C. 628 (holding evidence of declarations of defendant two weeks before the alleged offense, threatening the complaining witness, to be inadmissible).

16. State *v.* Alford, 31 Conn. 40; State *v.* Davidson, 44 Mo. App. 513; Weaver *v.* State, 24 Tex. 387; Reg. *v.* Chute, 46 U. C. Q. B. 555.

Manner of giving up weapon.— On an indictment for assault with a slungshot, evidence that defendant, when called on to give up the slungshot, came forward in a menacing manner, with a knife in his hand, is inadmissible. State *v.* Fowler, 52 Iowa 103, 2 Ky. L. Rep. 150, 2 N. W. 983. See also State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990.

Obtaining warrant against prosecutor.— On trial for an unlawful shooting occurring in a combat between defendant and prosecutor, evidence that, immediately after the combat, defendant obtained a warrant against prosecutor for assault with intent to murder is not admissible. Hadley *v.* State, 58 Ga. 309.

17. *Alabama.*— Riddle *v.* State, 49 Ala. 389. *Compare* Ross *v.* State, 62 Ala. 224.

Indiana.—Allen *v.* State, 74 Ind. 216.

Iowa.— State *v.* Gillett, 56 Iowa 459, 9 N. W. 362.

Kentucky.— Cogswell *v.* Com., 17 Ky. L. Rep. 822, 32 S. W. 935.

Massachusetts.—Com. *v.* Mitchell, 117 Mass. 431.

Texas.—Bolton *v.* State, (Tex. Crim. 1897) 39 S. W. 672; Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140. But *compare* Grammer *v.* State, (Tex. Crim. 1901) 61 S. W. 402; Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234, 60 Am. St. Rep. 47 (holding that, in a prosecution for assault by a teacher on his pupil, statements by the teacher made half an hour after the alleged assault are inadmissible in his favor, as part of the *res gestæ*).

See 4 Cent. Dig. tit. "Assault and Battery," § 129.

18. Henry *v.* State, 79 Ala. 42; Hart *v.* Com., 22 Ky. L. Rep. 1183, 60 S. W. 298; Briggs *v.* State, 6 Tex. App. 144.

Evidence of previous threats of violence against defendant by prosecutor is not admissible (Holly *v.* State, 55 Miss. 424; State *v.* Skidmore, 87 N. C. 509), it not appearing that the force used was in self-defense (State *v.* Dee, 14 Minn. 35; People *v.* Kelly, 94 N. Y. 526).

19. People *v.* Webster, 89 Cal. 572, 26 Pac. 1080 (holding that it is competent, as showing the present relation between the parties, to show by the prosecuting witness that he has, since the assault, instituted proceedings against defendant for a breach of the peace; but that it is error to allow him to testify further that these proceedings were based on an unprovoked attack on him by plaintiff since the original assault); Com. *v.* Jardine, 143 Mass. 567, 10 N. E. 250; Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622 (holding that testimony by the mother of the prosecutrix as to her appearance and condition when she came home soon after the assault was admissible). But see Hadley *v.* State, 58 Ga. 309, holding that, on a trial for felonious shooting, evidence that the prosecutor and the prisoner had become friendly after the difficulty is not admissible.

Conduct toward third persons.— If an officer has a process against B on which the latter is arrested, and there are cross-indictments of assault and battery growing out of the arrest, evidence of B's conduct to other officers, on being arrested, cannot be admitted. People *v.* Odle, 1 Wheel. Crim. (N. Y.) 127.

20. State *v.* Newland, 27 Kan. 764; State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990; Wright *v.* State, 9 Yerg. (Tenn.) 341.

21. Price *v.* State, 35 Tex. Crim. 501, 34 S. W. 622; Waechter *v.* State, 34 Tex. Crim. 297, 30 S. W. 444, 800; Pilcher *v.* State, 32 Tex. Crim. 557, 25 S. W. 24; Pool *v.* State, (Tex. Crim. 1893) 23 S. W. 891; Veal *v.* State, 8 Tex. App. 474; Reg. *v.* Drain, 8 Manitoba 535.

In order to show some motive of resentment on the part of defendant, it was competent for the state to prove that the party assaulted had said, in defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt act," and

(III) *Third Persons.* Acts and declarations of third persons who were present and apparently coöperating with defendant,[22] or which tend to show a conspiracy either with[23] or against[24] defendant, are admissible as *res gestæ*. So, too, the conduct of third persons subsequent to the offense may be shown where it tends to throw light on the offense,[25] but not otherwise.[26]

c. Character of Parties — (I) *Defendant.* It seems that evidence of defendant's good character is admissible, not only in a case where doubt otherwise exists, but also for the purpose of creating a doubt,[27] or to aid the jury in fixing the measure of punishment;[28] although it has been held that, where the offense is proved by direct and positive testimony, evidence as to the good character of defendant is not admissible.[29]

(II) *Party Assaulted* — (A) *In General.* Evidence as to the general reputation for quarrelsomeness of the party assaulted is admissible only when defendant claims to have acted in self-defense,[30] and can never be shown by proof of specific acts.[31] Evidence of his good reputation for peaceableness is admissible where defendant has given evidence that, prior to the difficulty, he had been threatened by prosecutor, and that the latter made a movement as if to draw a pistol before defendant struck him.[32]

(B) *As to Chastity.* Where the indictment charges an assault on a woman by taking indecent liberties with her person, evidence of her general bad reputation for chastity is admissible in behalf of the defense, on the question of consent.[33]

d. Disposition of Defendant in Cause For Which Arrested. In a prosecution against an officer for assault and battery while making an arrest, evidence to show that the person arrested was convicted[34] or acquitted[35] of the offense charged is

to prove, further, that defendant's father had previously been talking about taking the benefit of that act. State *v.* Griffis, 25 N. C. 504.

To rebut defendant's evidence that the assaulted person stated that she did not know who committed the assault, the state, to corroborate her testimony, may prove that she stated soon after the assault that defendant was one of the persons who committed the assault. Duke *v.* State, 35 Tex. Crim. 283, 33 S. W. 349.

22. Ross *v.* State, 62 Ala. 224; Blount *v.* State, 49 Ala. 381.

23. State *v.* Rawles, 65 N. C. 334; Rape *v.* State, 34 Tex. Crim. 615, 31 S. W. 652.

24. Tompkins *v.* State, 17 Ga. 356. See also Reg. *v.* McGavaran, 6 Cox C. C. 64.

25. State *v.* Alford, 31 Conn. 40, holding that evidence that defendant's adult daughters wholly neglected to call on prosecutor to ascertain the extent of her injuries, or to care for her in any way, was admissible as against defendant, since it indicated a feeling on their part which might be presumed to be shared by the mother.

26. McAlister *v.* State, 49 Ga. 306.

27. People *v.* Jassino, 100 Mich. 536, 59 N. W. 230.

Opinions based on personal observation are inadmissible, the rule going no further than allowing testimony as to defendant's general reputation and character. Sawyer *v.* People, 1 N. Y. Crim. 249.

28. Hance *v.* State, 8 Fla. 56.

29. Drake *v.* Com., 10 B. Mon. (Ky.) 225; Matthews *v.* State, 32 Tex. 117. See also Blackwell *v.* State, 30 Tex. App. 416, 17 S. W. 1061.

30. *Alabama.*— Rufus *v.* State, 117 Ala. 131, 23 So. 144; Brown *v.* State, 74 Ala. 42.

Louisiana.— State *v.* Paterno, 43 La. Ann. 514, 9 So. 442.

New York.— People *v.* Frindel, 58 Hun (N. Y.) 482, 12 N. Y. Suppl. 498, 35 N. Y. St. 805.

Tennessee.— Harman *v.* State, 3 Head (Tenn.) 242. See also Wright *v.* State, 9 Yerg. (Tenn.) 341.

Texas.—Lewallen *v.* State, 6 Tex. App. 475; Stevens *v.* State, 1 Tex. App. 591.

Vermont.— State *v.* Lull, 48 Vt. 581.

Where defendant has been examined as to his quarrelsome disposition, the quarrelsome disposition of the complaining witness is equally in issue, and cross-examination relating thereto should be allowed. People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033.

Where the party assaulted was unknown to defendant at the time of the commission of the offense, evidence tending to show that he was a quarrelsome man is inadmissible. Henderson *v.* State, 12 Tex. 525.

31. People *v.* Frindel, 58 Hun (N. Y.) 482, 12 N. Y. Suppl. 498, 35 N. Y. St. 805.

32. Rhea *v.* State, 37 Tex. Crim. 138, 38 S. W. 1012.

33. Com. *v.* Kendall, 113 Mass. 210, 18 Am. Rep. 469.

34. State *v.* Gregory, 30 Mo. App. 582. But see Com. *v.* Cheney, 141 Mass. 102, 6 N. E. 724, 55 Am. Rep. 448, holding that, where an officer is charged with assault and battery in arresting, as intoxicated, a person who was not intoxicated, evidence that such person was convicted of intoxication in the police court the day after the arrest is not admissible as a conclusive adjudication of his intoxication when arrested.

35. Patterson *v.* State, 91 Ala. 58, 8 So. 756.

irrelevant; but where the charge is of assault upon a police officer, committed while defendant was under arrest for drunkenness, the record of a conviction and sentence of defendant for drunkenness at the time of his arrest is conclusive evidence of that fact.[36]

e. Identity and Appearance of Weapon. Evidence to identify the weapon used is admissible,[37] as is evidence of the appearance of the weapon as bearing on the question of reasonable force.[38]

f. Nature and Extent of Injury. Testimony of the party assaulted as to the nature and extent of his injuries is admissible,[39] as is testimony of a physician in corroboration thereof,[40] and the prosecuting witness may[41] and must, when requested by defendant,[42] exhibit the injured part to the jury. So, too, the prosecution may give evidence of the severity and extent of an injury in order to enable the jury to graduate the punishment to be inflicted.[43]

g. Official Character of Party Assaulted.[44] When there is nothing to show that the prosecuting witness was acting as a peace-officer at the time of the assault, it is error to admit evidence that he was then such an officer.[45]

h. Other Prosecution or Action Relating to Same Transaction. It is proper to show in mitigation of the fine that there is a civil action pending for the same assault;[46] but the record of the conviction of prosecutor for assault and battery on the same day on defendant is not admissible for the purpose of showing that prosecutor assaulted defendant first, and that defendant acted in self-defense.[47] So, too, papers and the justice's docket showing the status of an action brought by defendant to oust prosecutor, and pending at the time of the assault, were properly introduced, as tending to explain the situation when the force was used in recovering premises in possession of the prosecutor.[48]

i. Ownership of Premises or Property. Where there is no pretense that a trespass on land was attempted or resisted, it is proper to exclude testimony as to title to the lands of prosecutor and the lands of defendant;[49] but where it is claimed that the force was used in the defense of property, either real[50] or personal,[51] evidence as to ownership is admissible.

j. Physical Condition of Party Assaulted. The prosecuting witness may testify that she was in an advanced state of pregnancy at the time of the assault on her by defendant, though she, herself, was the aggressor.[52]

36. Com. *v.* Feldman, 131 Mass. 588.

37. Com. *v.* Warner, 13 Pa. Super. Ct. 461; Thompson *v.* State, 35 Tex. Crim. 352, 33 S. W. 871.

38. Law *v.* State, 34 Tex. Crim. 79, 29 S. W. 160.

39. People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566; People *v.* Zounek, 20 N. Y. Suppl. 755, 49 N. Y. St. 642.

Prosecutor's wife may, for the purpose of showing the extent of his injuries, testify to exclamations of pain uttered by her husband while confined to his bed by the injuries received in the affray. Com. *v.* Jardine, 143 Mass. 567, 10 N. E. 250.

40. State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536.

41. Parrish *v.* State, 32 Tex. Crim. 583, 25 S. W. 420.

42. King *v.* State, 100 Ala. 85, 14 So. 878.

43. Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234, 60 Am. St. Rep. 47.

Injuries which might have happened.— A physician's testimony as to the result which, according to medical science, might follow blows and violence of a given character, when it is not alleged the result did follow, is not competent as tending to prove an assault with intent to inflict great bodily injury. State *v.* Redfield. 73 Iowa 643, 35 N. W. 673.

44. The record of the appointment of a conservator by the court of probate is admissible to prove his appointment, in a prosecution against the ward for an assault on him while entering the dwelling-house of the ward to discharge the duties of his appointment. State *v.* Hyde, 29 Conn. 564.

45. Angel *v.* Com., 14 Ky. L. Rep. 10, 18 S. W. 849; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565.

46. State *v.* Autery, 1 Stew. (Ala.) 399. See also Buckner *v.* Beck, Dudley (S. C.) 168.

47. Com. *v.* Lincoln, 110 Mass. 410.

48. State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

49. Com. *v.* Warner, 13 Pa. Super. Ct. 461; Holliday *v.* State, 35 Tex. Crim. 133, 32 S. W. 538.

50. State *v.* Weeks, 12 N. C. 135.

51. People *v.* Filkins, 69 N. Y. 101, 25 Am. Rep. 143 [*reversing* Sheld. (N. Y.) 504].

52. Harris *v.* State, 123 Ala. 69, 26 So. 515.

k. Violation of Municipal Ordinance. Where recklessness or gross carelessness was at the foundation of the charge against defendant of an assault with a dangerous weapon, the fact that the act was done in violation of a city ordinance was held to be proper evidence for the jury on the question of negligence.[53]

3. Weight and Sufficiency — a. In General. The offense must be strictly proved as alleged;[54] but defendant cannot be acquitted because the proof shows that he was guilty of a graver offense than was charged;[55] and, where the evidence tends to prove an attempt at actual violence,[56] the use of undue force in an otherwise lawful enterprise,[57] or the existence of any of the elements of aggravation,[58] the question of guilt is properly left to the jury, and its verdict of "Guilty" will not be disturbed on appeal. A conviction may be supported by prosecutor's testimony alone,[59] or by that of an accomplice, if corroborated.[60]

b. Matters of Aggravation — (I) *Character of Weapon.* To warrant a conviction for assault with a deadly or dangerous weapon direct evidence of the character of the weapon is unnecessary, but this may be inferred from other facts and circumstances shown in evidence.[61]

(II) *Defendant an Adult Male.* Evidence that defendant was a man,[62] or that he was constable of his precinct, discharging the duties of his office,[63] is sufficient proof that he is an adult male.

(III) *Intent.* Felonious intent need not be shown by direct and positive evidence,[64] and the act itself may be sufficient to establish the intent.[65]

53. Com. *v.* Hawkins, 157 Mass. 551, 32 N. E. 862.

54. Pinson *v.* State, 23 Tex. 579.

Time.— Where one witness testified that on July 4th he heard screams at defendant's house, and the prosecutrix immediately thereafter came to his house, and complained of the assault; and a witness for defendant testified that on the same day he heard the prosecutrix threaten to knock defendant's head off with an ax, it was sufficiently shown that the offense was committed on July 4th. Waechter *v.* State, (Tex. Crim. 1895) 30 S. W. 800.

55. Calloway *v.* State, 1 Mo. 211; Davis *v.* State, (Tex. Crim. 1897) 42 S. W. 290.

56. *California.*— People *v.* Hawkins, 127 Cal. 372, 59 Pac. 697.

Georgia.— Reilly *v.* State, 82 Ga. 568, 9 S. E. 332; Moore *v.* State, 64 Ga. 449.

Illinois.— Connaghan *v.* People, 88 Ill. 460.

Indiana.— Martin *v.* State, 13 Ind. App. 389, 41 N. E. 831.

Massachusetts.— Com. *v.* White, 110 Mass. 407; Com. *v.* Dougherty, 107 Mass. 243.

New York.— People *v.* Bracco, 69 Hun (N. Y.) 206, 23 N. Y. Suppl. 505, 53 N. Y. St. 227; People *v.* Spriggs, 11 N. Y. Suppl. 433, 33 N. Y. St. 989.

Texas.— Givens *v.* State, 6 Tex. 344; Holloway *v.* State, (Tex. Crim. 1900) 59 S. W. 883; Tracy *v.* State, (Tex. Crim. 1894) 24 S. W. 897; Coker *v.* State, 22 Tex. App. 20, 2 S. W. 615.

57. Com. *v.* Coffey, 121 Mass. 66.

58. State *v.* Brennan, 45 Iowa 697; People *v.* Townsend, 120 Mich. 661, 79 N. W. 901; People *v.* Hannigan, 42 N. Y. App. Div. 617, 58 N. Y. St. 703 [*affirmed* in (N. Y. 1899) 57 N. E. 1120]; People *v.* Hartley, 22 N. Y. Suppl. 295, 51 N. Y. St. 804; Scroggins *v.* State, (Tex. Crim. 1899) 51 S. W. 232; Estes *v.* State, (Tex. Crim. 1898) 44 S. W. 838; Simpson *v.* State, (Tex. Crim. 1896) 33 S. W. 1078; McDade *v.* State, (Tex. Crim. 1895) 33 S. W. 125; Robertson *v.* State, (Tex. Crim. 1895) 29 S. W. 478.

59. Bolton *v.* State, (Tex. Crim. 1897) 39 S. W. 672.

60. State *v.* Adamson, 73 Minn. 282, 76 N. W. 34.

61. Scott *v.* State, (Tex. Crim. 1901) 62 S. W. 419; Briggs *v.* State, 6 Tex. App. 144; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

62. Tucker *v.* State, (Tex. Crim. 1897) 43 S. W. 106; Holliday *v.* State, 35 Tex. Crim. 133, 32 S. W. 538. See also Tracy *v.* State, 44 Tex. 9, holding that, where the defendant appeared at the trial and was designated in the record as a man who wore whiskers, he cannot complain that the court and jury inferred that he was an adult male, not having raised the question on the trial.

63. Pilcher *v.* State, 32 Tex. Crim. 557, 25 S. W. 24.

64. Padgett *v.* State, 103 Ind. 550, 3 N. E. 377.

65. People *v.* Smith, 106 Mich. 431, 64 N. W. 200; People *v.* Miller, 91 Mich. 639, 52 N. W. 65; Reg. *v.* Sullivan, C. & M. 209, 41 E. C. L. 118. See also Richels *v.* State, 1 Sneed (Tenn.) 606, to the effect that pointing a loaded pistol is evidence, but not conclusive, of an intent to do harm.

Intent is not sufficiently shown by evidence that defendant had some words with prosecutor, and pushed him down (Rutherford *v.* State, 13 Tex. App. 92), or when the person injured is the only witness to show the commission of the offense and testifies that defendant did not intend to injure (McConnel *v.* State, 25 Tex. App. 329, 8 S. W. 275).

Intent to do great bodily harm is not shown

(iv) *Official Character of Party Assaulted.* The testimony of the person assaulted that he was a field-driver of the town, and was acting as such at the time of the assault and had so acted for many years, is sufficient to prove that he was a field-driver.[66]

(v) *Party Assaulted a Female.* Proof that the assaulted party was a widow, and that at the time of the assault she had been five months in a pregnant condition, is sufficient to establish the fact that she was a female.[67]

I. Trial — 1. Questions of Law and Fact — a. In General. Whether the acts done constitute an assault;[68] whether there existed the necessary intent[69] and present ability,[70] or the particular intent necessary to constitute an aggravated assault;[71] whether the act was done without considerable provocation;[72] what constitutes great bodily injury,[73] and whether grievous bodily harm might result,[74] are all questions for the jury, under proper instructions. Whether an instrument used in an assault is a deadly weapon is a question of law, where there is no dispute about the facts;[75] but where the character of the weapon — whether dangerous or deadly, or not — is doubtful, or where its character depends on the manner in which it is used, the question whether there was an assault with a dangerous or deadly weapon is to be submitted to the jury.[76]

b. Matters of Justification. It has also been held to be a question of fact for the jury as to whether defendant was justified;[77] whether defendant stood *in loco*

by evidence that defendant had a shotgun with which he jabbed prosecutor, and that he struck the latter several times in the face with his fist (Smith *v.* State, 58 Nebr. 531, 78 N. W. 1059); that defendant struck a person with his fist and broke his jaw (Reg. *v.* Wheeler, 1 Cox C. C. 106), or by the fact that prosecutor, in the act of warding off a blow, pushed his hand against a weapon in defendant's hand, and so received a wound on his finger (Reg. *v.* Day, 1 Cox C. C. 207).

66. Com. *v.* McCue, 16 Gray (Mass.) 226.

67. Pilcher *v.* State, 32 Tex. Crim. 557, 25 S. W. 24. See also Tracy *v.* State, 44 Tex. 9, holding that, where the party assaulted appeared at the trial and was designated in the record by a female name, defendant, not having raised the question on the trial, cannot complain that the court and jury inferred that the assaulted party was a female.

68. People *v.* English, 30 Cal. 214; Myers *v.* State, 121 Ind. 15, 22 N. E. 781; People *v.* Lilley, 43 Mich. 521, 5 N. W. 982; People *v.* Gorman, 83 Hun (N. Y.) 605, 31 N. Y. Suppl. 1064, 65 N. Y. St. 41.

69. Carter *v.* State, 87 Ala. 113, 6 So. 356; Thomas *v.* State, 99 Ga. 38, 26 S. E. 748; State *v.* Edge, 1 Strobh. (S. C.) 91.

70. Thomas *v.* State, 99 Ga. 38, 26 S. E. 748. See also Clark *v.* State, 84 Ga. 577, 10 S. E. 1094, holding that, where defendant shot at another with a pistol loaded with powder only, the question as to what distance a pistol so loaded will carry so as to constitute the statutory offense of shooting at another is for the jury rather than the court.

71. People *v.* Conley, 106 Mich. 424, 64 N. W. 325; People *v.* Jassino, 100 Mich. 536, 59 N. W. 230; Smith *v.* State, 58 Nebr. 531, 78 N. W. 1059.

72. Ruble *v.* People, 67 Ill. App. 438.

73. State *v.* Gillett, 56 Iowa 459, 9 N. W. 362.

74. People *v.* McKenzie, 6 N. Y. App. Div. 199, 39 N. Y. Suppl. 951.

75. Krehnavy *v.* State, 43 Nebr. 337, 61 N. W. 628; State *v.* Rigg, 10 Nev. 284; State *v.* Sinclair, 120 N. C. 603, 27 S. E. 77.

76. *California.*— People *v.* Leyba, 74 Cal. 407, 16 Pac. 200; People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481.

Illinois.—Wharton *v.* People, 8 Ill. App. 232.

Indiana.— Dœring *v.* State, 49 Ind. 56, 19 Am. Rep. 669.

Kentucky.— Smallwood *v.* Com., 17 Ky. L. Rep. 1134, 33 S. W. 822.

Louisiana.— State *v.* Brown, 41 La. Ann. 345, 6 So. 541.

Nevada.— State *v.* Davis, 14 Nev. 407.

New York.— People *v.* Cavanagh, 62 How. Pr. (N. Y.) 187.

Texas.— Skidmore *v.* State, 43 Tex. 93; Shadle *v.* State, 34 Tex. 572; Flournoy *v.* State, 16 Tex. 31; Pierce *v.* State, 21 Tex. App. 540, 1 S. W. 463; Wilson *v.* State, 15 Tex. App. 150; Hunt *v.* State, 6 Tex. App. 663; Sheffield *v.* State, 1 Tex. App. 640.

United States.— U. S. *v.* Small, 2 Curt. (U. S.) 241, 27 Fed. Cas. No. 16,314.

See 4 Cent. Dig. tit. "Assault and Battery," § 141.

77. *Georgia.*— Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630.

Massachusetts.— Com. *v.* Mann, 116 Mass. 58; Com. *v.* Goodwin, 3 Cush. (Mass.) 154.

Minnesota.— Gallagher *v.* State, 3 Minn. 270.

Nebraska.— Atkinson *v.* State, 58 Nebr. 356, 78 N. W. 621.

North Carolina.— State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536.

Texas.—State *v.* Briggs, (Tex. Crim. 1893) 21 S. W. 46.

See 4 Cent. Dig. tit. "Assault and Battery," § 141.

parentis,[78] and whether the punishment was excessive;[79] whether the amount of force used was excessive in making an arrest,[80] or when used in defense of self,[81] a third person,[82] or property,[83] and, in the last case, whether the prosecutor was a trespasser.[84]

2. Pleading to Felony. It has been held that, where a prisoner is indicted for felonious assault, he will not be permitted to plead guilty to a common assault merely, but must plead to the felony; and, if no evidence of the felony is offered, he may be acquitted of the felony and found guilty of the assault on his own confession.[85]

3. Separate Trial. Where the statute provides that any one of several jointly indicted for felony may be tried separately, on application, a defendant may be tried for assault in the absence of his co-defendant;[86] but it has been held that, where several persons are jointly indicted for an assault and battery, and one of them pleads guilty, the others who plead not guilty cannot claim, as a matter of right, to be tried separately from him.[87]

4. Stay Pending Decision in Civil Suit. On an indictment for an assault and battery, the trial will not be stayed because a civil suit is pending to recover damages for the same assault and battery,[88] if the party injured is not to be used as a witness for the government;[89] though, after conviction, the court may, with a view to the measure of punishment, suspend judgment until the decision of the civil action.[90]

5. Election of Offenses. Where one indictment is for two assaults, the state will be compelled to elect;[91] but such election will not be required until after the evidence has been heard,[92] after which further evidence as to the assault selected is admissible on the part of the state.[93]

6. Instructions — a. In General. The court should charge what constitutes the offense as defined by statute,[94] giving the law applicable to the case, and no other;[95] and should also, when the evidence makes such explanation necessary,

Whether abusive language used by the prosecutor is sufficient to justify or extenuate the assault is a question for the jury. Prior *v.* State, 77 Ala. 56; Moore *v.* State, 102 Ga. 581, 27 S. E. 675; Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695; Reid *v.* State, 71 Ga. 865; Marion *v.* State, 68 Ga. 290; Barr *v.* State, (Miss. 1897) 21 So. 131.

78. State *v.* Bost, 125 N. C. 707, 34 S. E. 650.

79. State *v.* Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141; Com. *v.* Randall, 4 Gray (Mass.) 36; Smith *v.* State, (Tex. Crim. 1892) 20 S. W. 360.

80. State *v.* Clark, 51 S. C. 265, 28 S. E. 906; Golden *v.* State, 1 S. C. 292.

81. Com. *v.* Bush, 112 Mass. 280; People *v.* Jennings, 1 Wheel. Crim. (N. Y.) 126; State *v.* Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; Cotton *v.* State, 4 Tex. 260.

82. State *v.* Bullock, 91 N. C. 614.

83. State *v.* Clements, 32 Me. 279; Com. *v.* Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623; Com. *v.* Clark, 2 Metc. (Mass.) 23; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834.

84. Little *v.* State, 89 Ala. 99, 8 So. 82; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834.

85. Reg. *v.* Calverte, 3 C. & K. 201. But see Ferrell *v.* State, 2 Lea (Tenn.) 25, where defendant, being indicted for an assault and battery with intent to commit murder, the felony charged was, by agreement, stricken out, and defendant, having pleaded guilty to an assault and battery, was adjudged to pay a fine of one cent and all the costs of the case, and the judgment was held valid.

86. Malone *v.* State, 77 Miss. 812, 26 So. 968.

87. Thompson *v.* State, 25 Ala. 41.

88. People *v.* Judges, etc., Genesee County Gen. Sessions, 13 Johns. (N. Y.) 85; State *v.* Frost, 1 Brev. (S. C.) 385 [*overruling* State *v.* Blyth, 1 Bay (S. C.) 166].

89. Com. *v.* Elliott, 2 Mass. 372.

90. Cook *v.* Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; People *v.* Judges, etc., Genesee County Gen. Sessions, 13 Johns. (N. Y.) 85; Rex *v.* Mahon, 4 A. & E. 575, 31 E. C. L. 258, the last case holding that the court will not pass sentence on a defendant for an assault where the prosecutor has an action pending for the same assault, even if the prosecutor offers to discontinue the action.

91. State *v.* Hutchings, 24 S. C. 142. But see Memmler *v.* State, 75 Ga. 576, holding that, though the evidence shows several distinct offenses by defendant in beating his wife, the state need not elect on which offense it will rely for a conviction.

92. State *v.* Sims, 3 Strobh. (S. C.) 137.

93. State *v.* Brechbill, (Kan. App. 1900) 62 Pac. 251.

94. Nelson *v.* State, (Tex. Crim. 1900) 57 S. W. 645.

95. People *v.* Ochotski, 115 Mich. 601, 73 N. W. 889; Clubb *v.* State, 14 Tex. App. 192, the latter case holding that the reading of all

explain the meaning of the statutory elements, such as present ability,[96] the use of deadly or dangerous weapons,[97] and the like.[98] The instructions should not assume the commission of the offense,[99] the use of a weapon by defendant,[1] the use[2] or non-use[3] of one by prosecutor, or the infliction of injury on prosecutor.[4]

the articles of the penal code relating to assault and battery, under an agreement that the court might give an oral charge, was error.

Intent.—Where the intent charged in the indictment is not an essential averment (Berry *v.* State, (Tex. Crim. 1897) 40 S. W. 984), or where the state's evidence showed that the injury was slight and temporary, and that defendant accomplished all that he tried to do (People *v.* Ross, 66 Mich. 94, 33 N. W. 30), an instruction on intent is not warranted. But where, on a trial for aggravated assault, the state's evidence was that defendant caught a girl eight years old, and held her between his legs; that she tried to get loose; that he used improper language, and exposed his person, the evidence warranted a charge, in the language of the statute, that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests on the one inflicting the injury to show accident or innocent intention, where the main charge required the jury to find beyond a reasonable doubt that defendant intended to injure the girl. Hill *v.* State, 37 Tex. Crim. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803. See also Young *v.* State, 31 Tex. Crim. 24, 19 S. W. 431.

Serious bodily injury.— Where, on a prosecution for aggravated assault and battery, the aggravation alleged being serious bodily injury, it appears that the injury was nearly fatal, a refusal to define "serious bodily injury" is proper. De los Santos *v.* State, (Tex. Crim. 1895) 31 S. W. 395.

Submitting matters of aggravation not alleged.— It is reversible error to submit to the jury a circumstance of aggravation not alleged in the information. Grayson *v.* State, (Tex. Crim. 1897) 42 S. W. 293; Russell *v.* State, 35 Tex. Crim. 8, 29 S. W. 43; Anderson *v.* State, 16 Tex. App. 132; Reid *v.* State, 9 Tex. App. 472; Hunt *v.* State, 9 Tex. App. 404; Kennedy *v.* State, 9 Tex. App. 399; Williams *v.* State, 8 Tex. App. 367.

96. Boles *v.* State, 18 Tex. App. 422.

97. Gann *v.* State, (Tex. Crim. 1897) 40 S. W. 725; Ellison *v.* State, (Tex. Crim. 1896) 34 S. W. 945.

Where the instrument is not per se a deadly weapon, the jury should be instructed as to the meaning of the phrase "deadly weapon." Lawson *v.* State, (Tex. Crim. 1895) 32 S. W. 895; Howard *v.* State, 18 Tex. App. 348; Kouns *v.* State, 3 Tex. App. 13.

Sufficient charges.—Where defendants were charged with an assault with "a club and knife," an instruction to the jury that the information charged defendants with making an assault with a deadly weapon, and that, if the jury believed from the evidence that defendants, as charged, made the assault with a deadly weapon, they should return a verdict of guilty, is not erroneous, though the evidence tended to show an assault by one defendant alone, and with a club only. McNary *v.* People, 32 Ill. App. 58.

Where the court defined a deadly weapon as one likely to produce death or "great bodily injuries," a further statement that such a weapon is one likely to produce death or "injury," is not reversible error as having misled the jury. State *v.* Rosener, 8 Wash. 42, 35 Pac. 357.

98. Intent.— On a prosecution for assault with intent to wound, it is proper to instruct that the intent with which an act is done is a mental process, and must be inferred from the outward manifestations of the words or acts of the party entertaining them, and the facts attendant on the assault with which it is connected. Clarey *v.* State, (Nebr. 1901) 85 N. W. 897. And, where the evidence shows that the assault was without provocation, that defendant immediately ran after striking the blow, which broke the nose of the person assaulted, and rendered him insensible, an instruction that one is presumed to intend the natural consequences of his act is proper. People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

99. Kennedy *v.* State, 9 Tex. App. 399, holding that a charge: "If the jury believe from the evidence that the defendant committed an assault and battery, . unattended with circumstances of aggravation, they will acquit him of an aggravated assault and battery, and find him guilty of a simple assault," was erroneous, as leaving no option for an acquittal. See also Reid *v.* State, 9 Tex. App. 472.

A charge assuming the assault is not error where it is conceded that defendant committed the same, and the defense is justification (Spigner *v.* State, 103 Ala. 30, 15 So. 892), or where the charge, taken as a whole, was such that defendant could not have been prejudiced (State *v.* Gillett, 56 Iowa 459, 9 N. W. 362).

1. Harris *v.* State, 61 Ga. 359; Regan *v.* State, 46 Wis. 256, 50 N. W. 287.

2. Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760.

3. McFarlin *v.* State, 41 Tex. 23.

4. Floyd *v.* State, 29 Tex. App. 341, 15 S. W. 819.

In a prosecution for an assault on a female child, an instruction that, when an injury is caused by violence to the person, the intent is presumed, and defendant must show the accident, or innocence of the intention, is not erroneous as stating, as a matter of law, that

b. As to Grade of Offense. On an indictment for felonious assault the defendant may be entitled to instructions as to the law relating to the lower grades of assault;[5] but, where the evidence discloses that defendant was either guilty of a more serious offense than simple assault, or was not guilty, the court is justified in failing or refusing to give an instruction as to simple assault;[6] and it has been held that, if such an instruction is given and defendant is convicted of simple assault, the conviction will be reversed.[7] So, too, it is reversible error to submit instructions covering an aggravated assault, where the evidence discloses an assault of a lower grade.[8]

c. As to Matters of Justification. The court may properly refuse to instruct as to matters of justification not raised by the evidence;[9] but, where there is evidence tending to raise the issue, the court should fully and correctly instruct on the right of self-defense,[10] the right to arrest without a warrant,[11] and the effect of accidental striking.[12]

d. As to Punishment. The court should instruct the jury correctly as to the penalty which may be inflicted;[13] but it has been held that the verdict will not

injury had resulted from defendant's acts. Rogers *v.* State, 40 Tex. Crim. 355, 50 S. W. 338.

5. State *v.* Fredericks, 136 Mo. 51, 37 S. W. 832; Blackwell *v.* State, 33 Tex. Crim. 278, 26 S. W. 397, 32 S. W. 128.

Sufficient instruction.— An instruction that the jury might convict of either of two degrees of assault, defining them, sufficiently submits such degrees, no further instruction being requested. State *v.* Broadbent, 19 Mont. 467, 48 Pac. 775.

6. *California.*— People *v.* Davis, (Cal. 1894) 36 Pac. 96; People *v.* McNutt, 93 Cal. 658, 29 Pac. 243; People *v.* Madden, 76 Cal. 521, 18 Pac. 402; People *v.* Guidice, 73 Cal. 226, 15 Pac. 44.

Georgia.—Ward *v.* State, 56 Ga. 408.

Michigan.— People *v.* Sheffield, 105 Mich. 117, 63 N. W. 65.

Missouri.— State *v.* Duncan, 142 Mo. 456, 44 S. W. 263.

New York.— People *v.* Dartmore, 48 Hun (N. Y.) 321, 2 N. Y. Suppl. 310, 15 N. Y. St. 839.

Texas.— Chambers *v.* State, 42 Tex. 254; Zedlitz *v.* State, (Tex. Crim. 1894) 26 S. W. 725.

7. State *v.* Welsh, 73 Iowa 106, 34 N. W. 765; State *v.* Mize, 36 Kan. 187, 13 Pac. 1.

8. Botsch *v.* State, 43 Nebr. 501, 61 N. W. 730. See also Thomas *v.* State, 99 Ga. 38, 26 S. E. 748.

An instruction on felonious assault is warranted where the evidence shows that defendant not only assaulted prosecutor with a pocket-knife, but, at the time he did so, said to him, "I'll cut your damned throat," particularly when an instruction was given also as to simple assault. State *v.* Wiggins, 152 Mo. 170, 53 S. W. 421.

9. Thompson *v.* State, 25 Ala. 41; Angel *v.* Com., 14 Ky. L. Rep. 10, 18 S. W. 849; West *v.* Com., 13 Ky. L. Rep. 856, 18 S. W. 851; People *v.* Williams, 118 Mich. 692, 77 N. W. 248; Mooring *v.* State, 42 Tex. 85; Gruesendorf *v.* State, (Tex. Crim. 1900) 56 S. W. 624; Whitehead *v.* State, (Tex. Crim. 1896) 37 S. W. 422; Myers *v.* State, (Tex. Crim. 1896) 33 S. W. 865; Scott *v.* State, (Tex. Crim. 1895) 29 S. W. 386; Downey *v.* State, 33 Tex. Crim. 380, 26 S. W. 627. See 4 Cent. Dig. tit. "Assault and Battery," § 143.

10. *Alabama.*— Hull *v.* State, 79 Ala. 32.

Missouri.— State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

North Carolina.—State *v.* Harris, 119 N. C. 861, 26 S. E. 37.

South Carolina.— State *v.* Hutchings, 24 S. C. 142.

Texas.— Bell *v.* State, 29 Tex. 492; Ennis *v.* State, (Tex. Crim. 1897) 38 S. W. 998; Masters *v.* State, (Tex. App. 1890) 13 S. W. 999; Pierce *v.* State, 21 Tex. App. 540, 1 S. W. 463.

Washington.— State *v.* Dunn, 22 Wash. 67, 60 Pac. 49.

See 4 Cent. Dig. tit. "Assault and Battery," § 144.

An instruction as to apparent danger may be refused when the danger, if any, was real. Thompson *v.* State, 35 Tex. Crim. 352, 33 S. W. 871; Abney *v.* State, (Tex. Crim. 1895) 29 S. W. 790.

11. State *v.* Surry, (Wash. '900) 63 Pac. 557.

12. Weaver *v.* State, (Tex. Crim. 1894) 24 S. W. 648. But where, in a prosecution for assault with a pistol, there is evidence that the shot was fired over prosecutor's head for the purpose of frightening him, it is not necessary to instruct that, if the jury find that to be the case, they shall acquit, when the jury are instructed to convict if they find that defendant "intentionally and in malice shot at" the assaulted person. State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990.

13. Blackwell *v.* State, 30 Tex. App. 416, 17 S. W. 1061; Graham *v.* State, 29 Tex. App. 31, 13 S. W. 1013; Bostic *v.* State, 22 Tex. App. 136, 2 S. W. 538; Key *v.* State, 12 Tex. App. 506.

Reading the proper section of the code will not cure an error in this respect. Territory *v.* Hancock. (Ariz. 1894) 35 Pac. 1060.

On a trial after the penalty had been

be set aside for an error in this respect when it was without prejudice to defendant,[14] or in the absence of a request for an instruction to supply the omission.[15]

7. VERDICT.[16] The verdict may be simply "Guilty,"[17] or "Guilty as charged in the indictment;"[18] but when the verdict attempts to find the facts, it must, to be sufficient, embrace all the necessary elements of the offense,[19] though these need not be found in the precise words of the statute, words of equivalent import being sufficient,[20] and when defendant is convicted of part of the offense charged, and that part is, of itself, an offense substantially alleged in the indictment, he is liable to be sentenced accordingly.[21]

J. Punishment — 1. AT COMMON LAW. In the absence of any statute upon the subject, the common law must control the punishment,[22] and, at common law,

ameliorated, but for an offense committed before the code took effect, it was error to give, in charge to the jury, the penalty prescribed by the original code, unless the accused elected to receive that penalty. Rich *v.* State, 9 Tex. App. 176; Veal *v.* State, 8 Tex. App. 474; Allen *v.* State, 7 Tex. App. 298.

14. Work *v.* State, 3 Tex. App. 233.

15. Rauck *v.* State, 110 Ind. 384, 11 N. E. 450.

16. For forms of verdicts see *Ex p.* Max, 44 Cal. 579; Rollins *v.* State, 62 Ind. 46.

17. Rollins *v.* State, 62 Ind. 46; State *v.* Douglass, 1 Greene (Iowa) 550; State *v.* Lawry, 4 Nev. 161; Franks *v.* State, 4 Tex. App. 431.

Guilty of assault and battery.— A verdict of "Guilty of aggravated assault and battery" is good, although no battery is charged or proved. The words "and battery" may be rejected as surplusage. Bittick *v.* State, 40 Tex. 117. Such a verdict, rendered under an indictment charging in two counts an assault and battery with a shovel and an assault and battery with a shovel with intent to kill, may be referred to either count. State *v.* Beadon, 17 S. C. 55.

Guilty of indecent assault.— A verdict of "Guilty of an indecent assault" sufficiently describes the offense of taking "any indecent liberties with or on the person of any female," etc., which is made a felony by Minn. Pen. Code, § 245, entitled "Indecent Assault." State *v.* West, 39 Minn. 321, 322, 40 N. W. 249.

Guilty of shooting.— Where the jury returns a verdict of "Guilty of shooting," on an indictment for an assault and battery drawn in the usual form, judgment will be arrested. State *v.* Hudson, 74 N. C. 246.

Grade — How determined.— On a verdict of guilty of assault and battery the punishment assessed will determine whether the jury regarded the offense as an aggravated or common assault and battery, without specification in the verdict. Reynolds *v.* State, 11 Tex. 120. But *compare* Bowen *v.* State, 28 Tex. App. 498, 13 S. W. 787, holding that where, on a charge of aggravated assault, the jury determined on a conviction for simple assault, the verdict should have so specified.

18. Territory *v.* Conrad, 1 Dak. 363, 46 N. W. 605; Harrington *v.* State, 4 Ohio Dec. (Reprint) 402, 2 Clev. L. Rep. 113.

19. *California.*— *Ex p.* Max, 44 Cal. 579; *Ex p.* Ah Cha, 40 Cal. 426.

Dakota.— People *v.* Conrad, 1 Dak. 363, 46 N. W. 605.

Massachusetts.—Com. *v.* Fischblatt, 4 Metc. (Mass.) 354.

Montana.—State *v.* Eschbach, 13 Mont. 399, 34 Pac. 179.

New York.— Hussy *v.* People, 47 Barb. (N. Y.) 503.

Virginia.— Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

Wisconsin.— Vosburgh *v.* State, 82 Wis. 168, 51 N. W. 1092.

See also State *v.* Smalls, 17 S. C. 62; State *v.* Izard, 14 Rich. (S. C.) 209.

See 4 Cent. Dig. tit. "Assault and Battery," § 151.

"Without justifiable excuse or cause."— A verdict finding defendant "Guilty of assault and battery with a sharp and dangerous weapon, with intent to do bodily harm," is sufficient, without adding that it was "without justifiable excuse or cause," although it is harmless error to require the jury to retire and add said words to such verdict. State *v.* Maloney, 7 N. D. 119, 72 N. W. 927.

20. People *v.* Congleton, 44 Cal. 92.

21. *Iowa.*— State *v.* Cody, 94 Iowa 169, 62 N. W. 702.

Massachusetts.— Com. *v.* McGrath, 115 Mass. 150; Com. *v.* Fischblatt, 4 Metc. (Mass.) 354.

Mississippi.— Bedell *v.* State, 50 Miss. 492.

Ohio.— Harrington *v.* State, 2 Ohio Dec. (Reprint) 402, 2 Clev. L. Rep. 113.

Texas.— Singleton *v.* State, 40 Tex. Crim. 455, 50 S. W. 951.

Wisconsin.—Sullivan *v.* State, 44 Wis. 595.

See 4 Cent. Dig. tit. "Assault and Battery," § 151.

Amendment.— Where, upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the jury returned a verdict of "Guilty of the assault and battery as charged, but without the felonious intent," it was held that this verdict might be amended by the court during the same sitting by striking out the words "and battery," and, thus amended, was sufficient. Com. *v.* Lang, 10 Gray (Mass.) 11.

22. Usher *v.* Com., 2 Duv. (Ky.) 394.

The summary mode, by statute, for punishment of assault and battery does not re-

an assault, or an assault and battery, may be punished either by fine or imprisonment or by both.[23]

2. Under Statutes — a. Fining and Imprisonment. The punishment for assault is usually fixed by statute, either by provision in the general statute relating to punishment of criminal offenses,[24] or by provision in the particular statute relating to the offense.[25] Some statutes provide that the punishment must be by fine,[26] others that it may be by fine or imprisonment,[27] and still others that it may be by both.[28]

peal the punishment at common law. Com. *v.* English, 2 Bibb (Ky.) 80.

23. Cornelison *v.* Com., 84 Ky. 583, 8 Ky. L. Rep. 793, 2 S. W. 235.

There is no limitation on the power of the jury in fixing the amount of fine, or the term of imprisonment, except that cruel and excessive punishment, prohibited by the constitution, must not be imposed. Cornelison *v.* Com., 84 Ky. 583, 8 Ky. L. Rep. 793, 2 S. W. 235. See Chandler *v.* Com., 1 Bush (Ky.) 41, holding that a fine of fifteen hundred dollars is not excessive where it appears that defendant knocked down and stamped upon a defenseless woman for the purpose of unlawfully taking away her child.

24. General statutory provisions.— O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183; Matter of Coughlin, 62 How. Pr. (N. Y.) 34; White's Application, 30 Pittsb. Leg. J. (Pa.) 248.

25. Particular statutory provisions.— *Alabama.*— Taylor *v.* State, 114 Ala. 20, 21 So. 947.

California.— *Ex p.* Middleton, (Cal. 1889) 20 Pac. 684; *Ex p.* Arras, 78 Cal. 304, 20 Pac. 683; *Ex p.* Gilmore, 71 Cal. 624, 12 Pac. 800; *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673; *Ex p.* Kelly, 28 Cal. 414.

Idaho.— *Ex p.* Cox, (Ida. 1893) 32 Pac. 197.

Iowa.— State *v.* Lee, 37 Iowa 402.

Massachusetts.— O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183.

New York.— People *v.* Sutton, 6 N. Y. Suppl. 95, 24 N. Y. St. 726.

North Carolina.— State *v.* Watts, 85 N. C. 517.

Oregon.— State *v.* Sheppard, 15 Oreg. 598, 16 Pac. 483.

Texas.— Inglen *v.* State, 36 Tex. Crim. 472, 37 S. W. 861.

Wisconsin.— Vosburgh *v.* State, 82 Wis. 168, 51 N. W. 1092.

England.— Chaddock *v.* Wilbraham, 5 C. B. 645, 12 Jur. 136, 17 L. J. M. C. 79, 3 N. Sess. Cas. 227, 57 E. C. L. 645; Arnold *v.* Dimsdale, 2 E. & B. 580, 17 Jur. 1157, 22 L. J. M. C. 161, 75 E. C. L. 580.

26. Fine.— State *v.* Sheppard, 15 Oreg. 598, 16 Pac. 483 [*overruling* Crowley *v.* State, 11 Oreg. 512, 6 Pac. 70], wherein it is held that Hill's Anno. Laws Oreg. § 2145, prescribing a form for judgment of conviction in the justice's court, in so far as it provides for imprisonment of defendant until the costs adjudged against him are satisfied, does not apply to assault and battery, which is punishable only by fine. To the same effect see Chaddock *v.* Wilbraham, 5 C. B. 645, 12 Jur. 136, 17 L. J. M. C. 79, 3 N. Sess. Cas. 227, 57 E. C. L. 645; Arnold *v.* Dimsdale, 2 E. & B. 580, 17 Jur. 1157, 22 L. J. M. C. 161, 75 E. C. L. 580. *Compare* Taylor *v.* State, 114 Ala. 20, 21 So. 947, wherein it is said that Ala. Crim. Code (1886), § 3747, provides that an assault "must be punished by fine" and that imprisonment "may be added." See also *infra*, note 28, for punishment by both fine and imprisonment.

Imprisonment in case of default in payment of the fine is often included in the sentence (*Ex p.* Kelly, 28 Cal. 414; People *v.* Sutton, 6 N. Y. Suppl. 95, 24 N. Y. St. 726; Matter of Coughlin, 62 How. Pr. (N. Y.) 34; Ovens *v.* Taylor, 19 U. C. C. P. 49); but, in the absence of a statutory authority for such imprisonment, it is unlawful (*Ex p.* Arras, 78 Cal. 304, 20 Pac. 683; Chaddock *v.* Wilbraham, 5 C. B. 645, 12 Jur. 136, 17 L. J. M. C. 79, 3 N. Sess. Cas. 227, 57 E. C. L. 645; Arnold *v.* Dimsdale, 2 E. & B. 580, 17 Jur. 1157, 22 L. J. M. C. 161, 75 E. C. L. 580). The whole term of incarceration, however, must not, when the offense is also punishable by imprisonment, exceed the maximum period allowed by statute as punishment. People *v.* Harrington, 75 Mich. 112, 42 N. W. 680. *Contra*, *Ex p.* Kelly, 28 Cal. 414.

27. Fine or imprisonment.— *California.*— *Ex p.* Gilmore, 71 Cal. 624, 12 Pac. 800 (holding that "fine and imprisonment" is illegal under a statute authorizing only "fine or imprisonment"); *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673 (battery). In case of assault with deadly weapon. *Ex p.* Middleton, (Cal. 1889) 20 Pac. 684; *Ex p.* Arras, 78 Cal. 304, 20 Pac. 683; *Ex p.* Kelly, 28 Cal. 414.

Idaho.— *Ex p.* Cox, (Ida. 1893) 32 Pac. 197, assault with deadly weapon.

Iowa.— State *v.* Lee, 37 Iowa 402, 403, holding that the words "or both such fine and imprisonment, at the discretion of the court," were erroneously retained in the compilation of the Iowa statutes, and were inoperative.

Massachusetts.— O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183, relating to assaults tried in police or district courts.

New York.— People *v.* Sutton, 6 N. Y. Suppl. 95, 24 N. Y. St. 726, assault in third degree.

North Carolina.— State *v.* Watts, 85 N. C. 517; State *v.* McNeill, 75 N. C. 15.

Texas.— Inglen *v.* State, 36 Tex. Crim. 472, 37 S. W. 861, aggravated assault.

Wisconsin.— State *v.* Felner, 19 Wis. 561.

28. Fine and imprisonment.— *Alabama.*— Taylor *v.* State, 114 Ala. 20, 21 So. 947.

b. Form of Sentence.[29] The fine should be so assessed as to indicate for whose use the money is to be paid,[30] and, under a joint indictment for assault, the jury should assess a several fine against each defendant convicted.[31]

c. Payment of Fine or Discharge of Judgment. One who has been convicted of assault, fined, and imprisoned in default of payment of the fine, may at any time recover his liberty by paying the amount of fine unsatisfied,[32] and it has been held that defendant's confession of judgment, with sureties to secure the fine and costs imposed, will discharge the judgment and sentence.[33]

California.— *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673. In case of assault with a deadly weapon. *Ex p.* Middleton, (Cal. 1889) 20 Pac. 684; *Ex p.* Arras, 78 Cal. 304, 20 Pac. 683.

Idaho.— *Ex p.* Cox, (Ida. 1893) 32 Pac. 197.

Michigan.— People *v.* Harrington, 75 Mich. 112, 42 N. W. 680.

New York.— People *v.* Sutton, 6 N. Y. Suppl. 95, 24 N. Y. St. 726 (assault in the third degree); Matter of Coughlin, 62 How. Pr. (N. Y.) 34.

North Carolina.— State *v.* Watts, 85 N. C. 517; State *v.* McNeill, 75 N. C. 15.

Texas.—Inglen *v.* State, 36 Tex. Crim. 472, 37 S. W. 861, aggravated assault.

Hard labor should not be added to the sentence of imprisonment (*Ex p.* Arras, 78 Cal. 304, 20 Pac. 683; *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673), unless specially authorized by statute (Taylor *v.* State, 114 Ala. 20, 21 So. 947; *Ex p.* Middleton, (Cal. 1889) 20 Pac. 684; O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183; Matter of Coughlin, 62 How. Pr. (N. Y.) 34; State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536; White's Application, 30 Pittsb. Leg. J. (Pa.) 248).

The place of imprisonment which is usually designated by the statute is the county jail. People *v.* Aubrey, 53 Cal. 427; *Ex p.* Kelly, 28 Cal. 414; *Ex p.* Cox, (Ida. 1893) 32 Pac. 197; O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183; State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536; State *v.* McNeill, 75 N. C. 15. The convicted defendant cannot be incarcerated in the state penitentiary (People *v.* Wilson, 9 Cal. 259; *Ex p.* Cox, (Ida. 1893) 32 Pac. 197; State *v.* McNeill, 75 N. C. 15), in the absence of statutory provision authorizing such imprisonment (Taylor *v.* State, 114 Ala. 20, 21 So. 947; *Ex p.* Arras, 78 Cal. 304, 20 Pac. 683; *Ex p.* Cox, (Ida. 1893) 32 Pac. 197; O'Neil *v.* Com., 165 Mass. 446, 46 N. E. 183; Matter of Coughlin, 62 How. Pr. (N. Y.) 34).

Sometimes the house of correction (O'Neil *v.* Com., 165 Mass. 446, 43 N. E. 183), and sometimes the workhouse (White's Application, 30 Pittsb. Leg. J. (Pa.) 248), is designated as a proper place of imprisonment.

While the punishment must not exceed the maximum amount of fine or the longest term of imprisonment prescribed by statute (People *v.* Wilson, 9 Cal. 259; *Ex p.* Cox, (Ida. 1893) 32 Pac. 197; People *v.* Harrington, 75 Mich. 112, 42 N. W. 680; State *v.* Eschbach, 13 Mont. 399, 34 Pac. 179; State *v.* Watts, 85 N. C. 517; Vosburgh *v.* State, 82 Wis. 168, 51 N. W. 1092), it seems that any punishment within the prescribed limits should not be considered excessive, it being within the sound discretion of the jury or the court, as the case may be, to assess or fix the punishment (Baker *v.* State, 94 Ga. 700, 19 S. E. 887; State *v.* Akin, 94 Iowa 50, 62 N. W. 667; State *v.* Boynton, 75 Iowa 753, 38 N. W. 505; State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536; State *v.* Roseman, 108 N. C. 765, 12 S. E. 1039; Inglen *v.* State, 36 Tex. Crim. 472, 37 S. W. 861; Young *v.* State, 31 Tex. Crim. 24, 19 S. W. 431; Brown *v.* State, 16 Tex. 122).

On appeal from a justice's court to the circuit court, the latter court is confined to the same measure of punishment for assault to which, by statute, the justice is limited. Matter of Irvin, 29 Mich. 43.

29. A conviction before justices, under 24 & 25 Vict. c. 100, § 43, should show facts to justify the sentence, and show and allege that the offense was of so aggravated a nature that it could not be adequately dealt with under section 42. *In re* Rice, Ir. R. 7 C. L. 74. *Compare In re* Switzer, 9 Can. L. J. 266.

Aggravated assaults upon women and children.— 16 & 17 Vict. c. 30, § 1 [repealed], gave jurisdiction to two justices of the peace, sitting at a place where petty sessions are usually held to convict persons of certain assaults, and a warrant of commitment in the general form provided by 11 & 12 Vict. c. 43, schedule (P), was sufficient, without any allegation that the convicting justices were sitting at a place where petty sessions are usually held. *Ex p.* Allison, 3 C. L. R. 319, 10 Exch. 561, 18 Jur. 1055, 24 L. J. M. C. 73, 3 Wkly. Rep. 57.

30. Warfield *v.* State, 34 Ala. 261, holding that the fine should be assessed in the name of the state, for the use of the county.

31. Jones *v.* Com., 1 Call (Va.) 555 (holding that a joint fine under such circumstances is error for which the judgment may be reversed); Com. *v.* Ray, 1 Va. Cas. 262.

32. *Ex p.* Kelly, 28 Cal. 414, where defendant was convicted under the California statute for assault with a deadly weapon with intent to inflict a bodily injury, and was sentenced to pay a fine of five thousand dollars, and, in default thereof, to be imprisoned in the county jail at the rate of two dollars a day until the same was paid.

33. State *v.* Cooley, 80 N. C. 293, wherein it was held that, after conviction for assault and such a confession of judgment, with execution thereon returned unsatisfied, a motion to order defendant again into custody was properly denied.

d. Vacating Sentence. The court has power, within a reasonable time after the imposition thereof, to vacate its sentence and to resentence a defendant convicted of an assault.[34]

II. CIVIL LIABILITY.

A. Definitions — 1. ASSAULT. An assault is an unlawful offer of corporeal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of immediate peril.[35]

2. BATTERY. A battery, or assault and battery, is the wilful touching of the person of another by the aggressor or by some substance put in motion by him.[36]

B. Elements of Liability — 1. FOR ASSAULT — a. Attempt or Offer. To create a liability for an assault there must be a threat or offer on the part of defendant to do physical injury.[37]

b. Force and Violence. The force or violence offered must be unlawful[38] and physical;[39] but, beyond this, it may be of any kind or degree.[40]

34. *Ex p.* Gilmore, 71 Cal. 624, 12 Pac. 800 (holding that, where defendant was illegally sentenced to "fine and imprisonment" under a statute authorizing only "fine or imprisonment," the court had power to call the prisoner before him at the term at which the sentence was imposed, or within a reasonable time, if the court had no terms, to vacate the sentence, and impose a legal one); Williams *v.* State, (Miss. 1888) 4 So. 550 (holding that where defendant, who was found guilty of assault and had been out on bail until February 10th, when he was fined, was brought into court February 20th and judgment was entered setting aside the first judgment and sentencing him to imprisonment, to which no exception was taken, and it was not shown that the first sentence had been executed, in whole or in part, the second judgment was properly affirmed).

35. Justice *v.* Phillips, 7 Ky. L. Rep. 439. See also Morgan *v.* O'Daniel, 21 Ky. L. Rep. 1044, 53 S. W. 1040, 39 S. W. 410.

Other definitions are: "An attempt or offer with violence to do a corporal hurt to another." Lewis *v.* Hoover, 3 Blackf. (Ind.) 407, 408.

"An attempt or offer, with force and violence, to do a corporal hurt to another." Metcalfe *v.* Conner, Litt. Sel. Cas. (Ky.) 370; Gillespie *v.* Beecher, 85 Mich. 347, 358, 48 N. W. 561; Drew *v.* Comstock, 57 Mich. 176, 181, 23 N. W. 721 [*quoting* Tomlins L. Dict.].

"An unlawful setting upon one's person." Geraty *v.* Stern, 30 Hun (N. Y.) 426, 427.

"An attempt or offer to beat another, without touching him." Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 667, 66 N. Y. Suppl. 454 [*quoting* 3 Bl. Comm. 120].

36. Razor *v.* Kinsey, 55 Ill. App. 605; Westcott *v.* Arbuckle, 12 Ill. App. 577 [*citing* Bacon Abr. tit. Assault and Battery; 3 Bl. Comm. 120; Waterman Trespass, § 146].

Another definition is "The touching . . . the person of another in an angry, violent, or rude manner." McDonald *v.* Franchere, 102 Iowa 496, 499, 71 N. W. 427.

Includes assault.— Every battery includes an assault. Fitzgerald *v.* Fitzgerald, 51 Vt. 420.

37. Woodruff *v.* Woodruff, 22 Ga. 237; Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577. See also Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257, wherein it was held that if a police officer, in preventing a member of a society from entering the society's room, was wholly passive and merely obstructed the entrance as any inanimate object might, he could not be said to have committed an assault.

38. Ganaway *v.* Salt Lake Dramatic Assoc., 17 Utah 37, 53 Pac. 830.

39. **Mere words** do not amount to an assault. Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 66 N. Y. Suppl. 454; Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518; French *v.* Ware, 65 Vt. 388, 26 Atl. 1096; Buller N. P. 15; Candish's Case, Buller N. P. 20, Cro. Jac. 151.

Attempt to induce sexual intercourse.— An attempt, by words of persuasion, to induce a female to have sexual intercourse does not constitute an assault. Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 66 N. Y. Suppl. 454.

40. **Advancing in, or assuming a threatening attitude** (Bishop *v.* Ranney, 59 V 316, 7 Atl. 820; Read *v.* Coker, 13 C. B. 850, 1 C. L. R. 746, 17 Jur. 190, 22 L. J. C. P. 201, 1 Wkly. Rep. 413, 76 E. C. L. 850; Mortin *v.* Shoppe, 3 C. & P. 373, 14 E. C. L. 616), though, when stopped, the assailant was not near enough for his blow to take effect (Stephens *v.* Myers, 4 C. & P. 349, 19 E. C. L. 548).

Intruding on the privacy of a female in her sleeping-room. Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

Menacing violence with a dangerous weapon (Liebstadter *v.* Federgreen, 80 Hun (N. Y.) 245, 29 N. Y. Suppl. 1039, 61 N. Y. St. 621; Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670) or stick (Lewis *v.* Hoover, 3 Blackf. (Ind.) 407).

Pointing a firearm, loaded (Justice *v.* Phillips, 7 Ky. L. Rep. 439; Reese *v.* Barbee, 61 Miss. 181; Osborne *v.* Veitch, 1 F. & F. 317), or unloaded (Beach *v.* Hancock, 27 N. H. 223,

c. **Intent.** The intent to do harm is the essence of an assault,[41] and so, where, from the language, acts, or conduct of the alleged assailant, it is evident that there is no intention to do harm, there is no assault.[42]

d. **Present Ability.** According to some decisions, moreover, defendant must have had the present ability or means of carrying his threat into execution.[43]

e. **Resulting Injury.** To render one liable for an assault it is not essential that any damage result from defendant's acts, or that a blow be actually inflicted.[44]

2. **For Battery — a. Touching.** It is the actual infliction of unlawful[45] violence on the person of another,[46] however slight the injury produced,[47] which constitutes the battery; but this force may be either direct and immediate,[48] or a

59 Am. Dec. 373. But see Blake *v.* Barnard, 9 C. & P. 626, 38 E. C. L. 365, wherein plaintiff was nonsuited for failure to sustain an allegation of the declaration that the pistol pointed at plaintiff was loaded), at a person under such circumstances as to lead him to apprehend personal injury. But see Woodruff *v.* Woodruff, 22 Ga. 237, wherein it was decided that holding a pistol in the hand, pointing in the direction of a man within distance, but not held as if about to fire, and without the immediate intention to fire, was not a presenting, and did not constitute an assault.

Raising the hand or fist in a threatening manner within striking distance.

Maryland.— Handy *v.* Johnson, 5 Md. 450.

Minnesota.— Mailand *v.* Mailand, (Minn. 1901) 86 N. W. 445; Plonty *v.* Murphy, (Minn. 1901) 84 N. W. 1005; Mitchell *v.* Mitchell, 45 Minn. 50, 47 N. W. 308.

Missouri.— Murray *v.* Boyne, 42 Mo. 472.

England.— Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2.

Canada.— Inglefield *v.* Merkel, 3 Nova Scotia Dec. 188.

Removing the windows of a dwelling so as to expose the inmates to the weather. Dubuc *v.* Montreal, 2 Montreal Leg. N. 334. *Contra,* Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442.

Striking a horse which a person is riding or driving is an assault on that person. Marentille *v.* Oliver, 2 N. J. L. 358; Bull *v.* Colton, 22 Barb. (N. Y.) 94; Buller N. P. 16; Dodwell *v.* Burford, 1 Mod. 24. And see Clark *v.* Downing, 55 Vt. 259, 45 Am. Rep. 612.

Striking at another.— Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2.

41. *In re* Murphy, 109 Ill. 31 [*citing* Greenleaf Ev. § 83]; Metcalfe *v.* Conner, Litt. Sel. Cas. (Ky.) 370; Alderson *v.* Waistell, 1 C. & K. 358, 47 E. C. L. 358; Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2; Griffin *v.* Parsons, 1 Sel. N. P. 28 note. But see Morgan *v.* O'Daniel, 21 Ky. L. Rep. 1044, 53 S. W. 1040, holding that it is not necessary that there should be an intention to strike, it being sufficient that gestures are used giving reasonable ground to believe that force will be applied.

42. Blake *v.* Barnard, 9 C. & P. 626, 38 E. C. L. 365; Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2, in which latter case the proof was that defendant put his hand on his sword and said: "If it were not assize-time I would not take such language from you."

43. Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334; Handy *v.* Johnson, 5 Md. 450; Degenhardt *v.* Heller, 93 Wis. 662, 68 N. W. 411, 57 Am. St. Rep. 945; Read *v.* Coker, 13 C. B. 850, 1 C. L. R. 746, 17 Jur. 190, 22 L. J. C. P. 201, 1 Wkly. Rep. 413, 76 E. C. L. 850; Stephens *v.* Myers, 4 C. & P. 349, 19 E. C. L. 548.

44. *Indiana.*— Lewis *v.* Hoover, 3 Blackf. (Ind.) 407.

Maryland.— Handy *v.* Johnson, 5 Md. 450.

Missouri.— Norris *v.* Whyte, 158 Mo. 20, 57 S. W. 1037.

New York.— Prince *v.* Ridge, 32 Misc. (N. Y.) 666, 66 N. Y. Suppl. 454.

England.— Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2.

45. **To touch another in discourse** (Tuberville *v.* Savage, 1 Mod. 3, 1 Ames Cas. Torts 2), or to lay hands on a person merely to attract his attention and not with hostility (Coward *v.* Baddeley, 4 H. & N. 478, 5 Jur. N. S. 414, 28 L. J. Exch. 260, 7 Wkly. Rep. 466) will not constitute an actionable assault and battery.

Service of process.— Under particular circumstances, one person may lay hands on another to serve him with process. Harrison *v.* Hodgson, 10 B. & C. 445, 8 L. J. K. B. O. S. 223, 5 M. & R. 392, 21 E. C. L. 192.

46. Greenman *v.* Smith, 20 Minn. 418; Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Pursell *v.* Horn, 8 A. & E. 602, 35 E. C. L. 751.

47. Cadwell *v.* Farrell, 28 Ill. 438; Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746.

48. Cadwell *v.* Farrell, 28 Ill. 438.

Examples of such force are an attempt by a horseman to ride down a person, which attempt is frustrated by the person seizing the horse by the bridle (Townsdin *v.* Nutt, 19 Kan. 282); awakening, by force, a person in his sleeping-room for the purpose of presenting a bill (Richmond *v.* Fisk, 160 Mass. 34, 35 N. E. 103); compelling a female to submit to a physical examination (Agnew *v.* Jobson, 13 Cox C. C. 625); cutting the hair of a pauper in a poorhouse by force (Forde *v.* Skinner, 4 C. & P. 239, 19 E. C. L. 494, wherein it appeared that the cutting was not done as a sanitary measure, but to degrade the persons assaulted — that is, "to take their pride

force set in motion by defendant, from which the injury was an immediate result.[49]

b. Malice — Intent. Malice is the gist of the action for assault and battery,[50] and the evidence must show that the intention was unlawful[51] or that defendant was in fault.[52]

down"); extorting confession of crime by laying on of hands and production of rope (Stallings *v.* Owens, 51 Ill. 92); forcibly resisting the return of a woman into her residence, which she had momentarily left (Jacobs *v.* Hoover, 9 Minn. 204); injuring another in play by an unlawful and unjustifiable act (Fitzgerald *v.* Cavin, 110 Mass. 153; Markley *v.* Whitman, 95 Mich. 236, 54 N. W. 763, 35 Am. St. Rep. 558, 20 L. R. A. 55, in which latter case it appeared that a number of students, engaged in a game of "rush," injured an unsuspecting fellow-student who was not participating in the game, and it was held to be no defense that defendant was pushed by the others, or that he did not anticipate the consequences, or that the person injured was a fellow-student, and not a stranger); removal from a would-be purchaser of a garment which is being tried on, the act being accompanied with insulting language (Geraty *v.* Stern, 30 Hun (N. Y.) 426); roughly using an initiate into a secret society (Kinver *v.* Phœnix Lodge, I. O. O. F., 7 Ont. 377); "smoking out" a tenant (Wood *v.* Young, 20 Ky. L. Rep. 1931, 50 S. W. 541); snatching a paper from the hands of another (Dyk *v.* Du Young, 35 Ill. App. 138); spitting in the face (Alcorn *v.* Mitchell, 63 Ill. 553; Whitsett *v.* Ransom, 79 Mo. 258; Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Buller N. P. 15); throwing water (Pursell *v.* Horn, 8 A. & E. 602, 7 L. J. Q. B. 228, 3 N. & P. 564, 35 E. C. L. 751; Simpson *v.* Morris, 4 Taunt. 821) or vitriol (Munter *v.* Bande, 1 Mo. App. 484) on a person; unlawful detention (Magnay *v.* Burt, 5 Q. B. 381, Dowl. & M. 652, 7 Jur. 1116, 48 E. C. L. 381); violence to a female to procure sexual intercourse, whether or not such intercourse is ultimately consented to (Dickey *v.* McDonnell, 41 Ill. 62; Desborough *v.* Homes, 1 F. & F. 6. See also Witzka *v.* Moudry, (Minn. 1901) 85 N. W. 911; Dean *v.* Raplee, 75 Hun (N. Y.) 389, 27 N. Y. Suppl. 438, 57 N. Y. St. 690 [*affirmed* in 145 N. Y. 319, 39 N. E. 952, 64 N. Y. St. 677]); or violently jostling one out of the way (Westcott *v.* Arbuckle, 12 Ill. App. 577; Buller N. P. 15).

49. Razor *v.* Kinsey, 55 Ill. App. 605; Horne *v.* Mandelbaum, 13 Ill. App. 607; Westcott *v.* Arbuckle, 12 Ill. App. 577.

Overturning a carriage in which another is sitting amounts to an assault and battery. Hopper *v.* Reeve, 1 Moore 407, 7 Taunt. 698, 2 E. C. L. 554.

50. *In re* Murphy, 109 Ill. 31.

51. Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615 [*citing* 2 Greenleaf Ev. § 85]; Razor *v.* Kinsey, 55 Ill. App. 605; Fitzgerald *v.* Cavin, 110 Mass. 153; Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226; Hoffman *v.* Eppers, 41 Wis. 251. *Contra*, Carlton *v.* Henry, (Ala. 1901) 29 So. 924.

52. Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615 [*citing* 2 Greenleaf Ev. § 85]; Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

Where defendant does an illegal or mischievous act which is likely to prove injurious to another it has been held that he is answerable for the consequences which directly and naturally result from his conduct, though he did not intend to do the particular injury which followed. Horne *v.* Mandelbaum, 13 Ill. App. 607; Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 267; Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Dodwell *v.* Burford, 1 Mod. 24; Hopper *v.* Reeve, 1 Moore C. P. 407, 7 Taunt. 698, 2 E. C. L. 554; Scott *v.* Shepherd, 2 W. Bl. 892, 3 Wils. K. B. 403, Bacon Abr. tit. Assault and Battery (B), 1 Smith Lead. Cas. 738. See also Derry *v.* Lowry, 6 Phila. (Pa.) 30, 22 Leg. Int. (Pa.) 164; Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

Where defendant is guilty of gross or culpable negligence it has been held that this will supply the element of intent, so as to create a liability for an unintentional injury which is the natural proximate consequence of defendant's conduct.

Connecticut.—Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55.

Indiana.— Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221; Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81.

Kansas.— James *v.* Hayes, (Kan. 1901) 65 Pac. 241; Laurent *v.* Bernier, 1 Kan. 428.

Kentucky.—Anderson *v.* Arnold, 79 Ky. 370.

Michigan.— Markley *v.* Whitman, 95 Mich. 236, 54 N. W. 763, 35 Am. St. Rep. 558, 20 L. R. A. 55.

Nebraska.— Carmichael *v.* Dolen, 25 Nebr. 335, 41 N. W. 178.

New Hampshire.— Kendall *v.* Drake, 67 N. H. 592, 30 Atl. 524.

New York.— Bullock *v.* Babcock, 3 Wend. (N. Y.) 391.

Vermont.—Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

United States.— The Lord Derby, 17 Fed. 265.

England.— James *v.* Campbell, 5 C. & P. 372, 24 E. C. L. 611; Weaver *v.* Ward, Hob. 189; Underwood *v.* Hewson, 1 Str. 596. "There is a case put in the Year-book 21 H. 7, 28*a*, that where one shot an arrow at a mark which glanced from it and struck another, it was bolden to be trespass" [Grose,

c. Anger. In the absence of statutory provision, to render one liable the force need not have been used in anger.[53]

C. Persons Liable.[54] Not only the principal actor or actual assailant, but all others who aid, abet, or encourage the wrong-doer, are equally liable with him to the injured party,[55] whether they were present when the wrongful act was done or not;[56] though, in the latter case, the person sought to be charged must have done something which led directly to the assault.[57]

D. Defenses — 1. Accident. It is a general rule of law that an action will not lie when the injury was unavoidable, or was the result of accident, and the party sought to be charged was guilty of no want of care or prudence.[58]

J., in Leame *v.* Bray, 3 East 593, 596]. But see Stanley *v.* Powell, [1891] 1 Q. B. 86, 55 J. P. 327, 60 L. J. Q. B. 52, 63 L. T. Rep. N. S. 809, 39 Wkly. Rep. 76, wherein defendant, one of a shooting party, fired at a pheasant, and a shot, glancing off the bough of a tree, wounded plaintiff, an attendant of the party. It was held that defendant, not being guilty of negligence, was not liable.

Canada.—Anderson *v.* Stiver, 26 U. C. Q. B. 526.

53. Johnson *v.* McConnel, 15 Hun (N. Y.) 293; Bullock *v.* Babcock, 3 Wend. (N. Y.) 391.

54. Liability of infants, lunatics, or married women see Infants; Insane Persons; Husband and Wife.

Liability of master for acts of servant see Master and Servant.

55. *Illinois.*— Stallings *v.* Owens, 51 Ill. 92; Ously *v.* Hardin, 23 Ill. 403.

Indiana.— Little *v.* Tingle, 26 Ind. 168; Baldwin *v.* Biersdorfer, Wils. (Ind.) 1.

Iowa.— Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711; Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748.

Kentucky.— Phillips *v.* Phillips, 7 B. Mon. (Ky.) 268; Sodusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

Minnesota.—Hirschman *v.* Emme, 81 Minn. 99, 83 N. W. 482.

Missouri.— Thomas *v.* Werremeyer, 34 Mo. App. 665.

Nebraska.— Cooney *v.* Burke, 11 Nebr. 258, 9 N. W. 57.

Ohio.— Bell *v.* Miller, 5 Ohio 250.

Pennsylvania.— Frantz *v.* Lenhart, 56 Pa. St. 365.

Virginia.— Daingerfield *v.* Thompson, 33 Gratt. (Va.) 136, 36 Am. Rep. 783.

Wisconsin.— Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401; Hilmes *v.* Stroebel, 59 Wis. 74, 17 N. W. 539.

Canada.— Kinver *v.* Phœnix Lodge, I. O. O. F., 7 Ont. 377.

See 4 Cent. Dig. tit. "Assault and Battery," §§ 17, 18.

The mere presence of parties will not, of itself, render them liable (Lister *v.* McKee, 79 Ill. App. 210; Blue *v.* Christ, 4 Ill. App. 351; Miller *v.* Shaw, 4 Allen (Mass.) 500; Smith *v.* Simon, 69 Mich. 481, 37 N. W. 548; Swinfin *v.* Lowry, 37 Minn. 345, 34 N. W. 22 (holding that the furnishing of liquor to the assailant was not too remote an act to base liability on); Jarvis *v.* Blennerhasset, 18 Wend. (N. Y.) 627), unless, in some way, they commanded, authorized, justified, or approved the assault (Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253; Hayden *v.* Woods, 16 Nebr. 306, 20 N. W. 345; Slater *v.* Wood, 9 Bosw. (N. Y.) 15; Lucas *v.* Mason, L. R. 10 Exch. 251, 44 L. J. Exch. 145, 33 L. T. Rep. N. S. 13, 23 Wkly. Rep. 924). Where, however, persons having the power fail to prevent a merciless battery upon a feeble old man, other slight circumstances may convict them all as principals in the trespass, though they did prevent his being murdered (Gillon *v.* Wilson, 3 T. B. Mon. (Ky.) 216); but a direction, by defendant, to persons to go through a certain roadway, and tear down a fence which plaintiff had erected across it, no matter what it cost, and he would stand by them, warrants no implication of an instruction to them to commit an assault and battery on plaintiff (Wagner *v.* Haak, 170 Pa. St. 495, 32 Atl. 1087).

Where a fight was renewed, but there was no evidence to show a previous agreement to renew the attack, it cannot be said that there was a common purpose. Smith *v.* Simon, 69 Mich. 481, 37 N. W. 548.

56. Levi *v.* Brooks, 121 Mass. 501; Sikes *v.* Johnson, 16 Mass. 389; Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

57. Bird *v.* Lynn, 10 B. Mon. (Ky.) 422.

A magistrate not present when battery was committed, and not having any knowledge of it, is not liable because holding the person assaulted on complaint of the assailant. Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79.

58. *Connecticut.*— Morris *v.* Platt, 32 Conn. 75.

Kansas.— James *v.* Hayes, (Kan. 1901) 65 Pac. 241.

Massachusetts.—Brown *v.* Kendall, 6 Cush. (Mass.) 292.

Michigan.— Shriver *v.* Bean, 112 Mich. 508, 71 N. W. 145.

Nebraska.— Fosbinder *v.* Svitak, 16 Nebr. 499, 20 N. W. 866.

New York.— Harvey *v.* Dunlop, Lalor (N. Y.) 193.

Vermont.—Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

Wisconsin.— Krall *v.* Lull, 49 Wis. 403, 5 N. W. 874.

2. Consent.[59] Under some circumstances, the fact that the party seeking a redress agreed or submitted to the assault may constitute a defense;[60] but the consent of one who, at the time, is mentally incapacitated to give it cannot avail the wrong-doer;[61] nor can consent to mutual combat, such fighting being unlawful,[62] though it seems that such consent may be shown in mitigation of damages.[63]

3. Defense — a. Of Property or Possession — (i) *In General* — (A) *Personalty.* If one attempts to deprive another of his goods, the latter is justified in laying hands on him to prevent him from so doing, and, if he persists with violence, may use sufficient force to cause him to desist.[64]

England.— Stanley *v.* Powell, [1891] 1 Q. B. 86, 55 J. P. 327, 60 L. J. Q. B. 52, 63 L. T. Rep. N. S. 809, 39 Wkly. Rep. 76; Wakeman *v.* Robinson, 1 Bing. 213, 8 E. C. L. 478; Alderson *v.* Waistell, 1 C. & K. 358, 47 E. C. L. 358; Goodman *v.* Taylor, 5 C. & P. 410, 24 E. C. L. 630; Gibbons *v.* Pepper, Buller N. P. 16, 4 Mod. 404.

Contra, Loubz *v.* Hafner, 12 N. C. 185; Underwood *v.* Hewson, 1 Str. 596.

See 4 Cent. Dig. tit. "Assault and Battery," § 16.

Assisting incapacitated person.— If a person intend to do a right act — as to assist a person incapacitated from drink or otherwise — and in so doing unintentionally injure him, he is not liable. Hoffman *v.* Eppers, 41 Wis. 251; Short *v.* Lovejoy, Buller N. P. 16; 2 Greenleaf Ev. § 85.

For injuries received by runaway horses, of which the rider or driver has lost complete control, but is doing his best under the circumstances, there can be no recovery. Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145; Holmes *v.* Mather, L. R. 10 Exch. 261, 44 L. J. Exch. 176, 33 L. T. Rep. N. S. 361, 23 Wkly. Rep. 864; Gibbons *v.* Pepper, Buller N. P. 16, 4 Mod. 404.

59. Condonation.—An action by a man against his former mistress, wherein it appeared that, after the institution of the action, he induced her to assume, on occasions, her former relations with him, assuring her that his suit for damages would be dismissed, the offense was held to have been condoned in so far as concerned the action, which was dismissed. Solanas *v.* Lupin, 104 La. 697, 29 So. 309.

60. Cadwell *v.* Farrell, 28 Ill. 438; O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329 (implied consent to vaccination); Pillow *v.* Bushnell, 5 Barb. (N. Y.) 156; Latter *v.* Braddell, 45 J. P. 520, 50 L. J. Q. B. 448, 44 L. T. Rep. N. S. 369, 29 Wkly. Rep. 366 (submission, though reluctant, to a physical examination). See also Christopherson *v.* Bare, 11 C. B. 473, 477, 63 E. C. L. 473, 477 (where it is said that "an assault must be an act done against the will of the party assaulted; and therefore it cannot be said that a party has been assaulted by his own permission"); Wellock *v.* Constantine, 2 H. & C. 146, 9 Jur. N. S. 232, 32 L. J. Exch. 285, 7 L. T. Rep. N. S. 751 (holding that there can be no action for an assault by consent).

The communication of venereal disease during illicit sexual intercourse is not an actionable wrong, if the act of intercourse was voluntary. That consent to the intercourse was induced through wilful concealment of the disease is immaterial. Hegarty *v.* Shine, 4 L. R. Ir. 288, 14 Cox C. C. 145, 12 Ir. L. T. Rep. 288, 18 Alb. L. J. 202 [*reversing* the decision in the queen's bench division, reported in 14 Cox C. C. 124, and *distinguishing* Reg. *v.* Sinclair, 13 Cox C. C. 28; Reg. *v.* Bennett, 4 F. & F. 1105].

61. McCue *v.* Klein, 60 Tex. 168, 48 Am. Rep. 261, where an intoxicated person was induced to drink an inordinate quantity of liquor on a wager, and died.

62. *Indiana.*—Adams *v.* Waggoner, 33 Ind. 531, 5 Am. Rep. 230.

Maine.— Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413.

Missouri.— Jones *v.* Gale, 22 Mo. App. 637.

North Carolina.— Bell *v.* Hansley, 48 N. C. 131; Stout *v.* Wren, 8 N. C. 420, 9 Am. Dec. 653.

Ohio.— Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Schutter *v.* Williams, 1 Ohio Dec. (Reprint) 47.

Vermont.—Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853.

Wisconsin.— Shay *v.* Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538.

England.— Boulter *v.* Clark, Buller N. P. 16.

See 4 Cent. Dig. tit. "Assault and Battery," § 9.

Where two fight, separate, and again fight, the assailant in the last encounter cannot justify on the ground that the other was the assailant in the first. Chrisman *v.* Hunter, 3 Dana (Ky.) 83. But see Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581, holding that one who voluntarily fights for the sake of fighting, and not in self-defense, cannot recover unless defendant beat him excessively or unreasonably.

63. See *infra,* II, E, 7 b, (VII), (B).

64. *Illinois.*— Devor *v.* Knauer, 84 Ill. App. 184.

Kentucky.— McClelland *v.* Kay, 14 B. Mon. (Ky.) 84.

Louisiana.— Stachlin *v.* Destrehan, 2 La. Ann. 1019.

Michigan.—Ayres *v.* Birtch, 35 Mich. 501.

New York.— Scribner *v.* Beach, 4 Den. (N. Y.) 448, 47 Am. Dec. 265.

Vermont.— Leach *v.* Francis, 41 Vt. 670.

England.— 3 Bl. Comm. 120; Alderson *v.* Waistell, 1 C. & K. 358, 47 E. C. L. 358.

(B) *Realty.* One has no right to use force to acquire possession of realty to which he has a real or fancied right, and of which the person assaulted is in lawful possession,[65] nor, having wrongfully obtained possession, will such mere possession justify him in assaulting the lawful occupant to prevent a reëntry.[66] So, one being on the premises of another, or attempting to enter thereon against the latter's wishes, is liable for any assault or violence which he may commit,[67] and if he commits an assault upon the possessor or his family when the latter attempts to remove him, then, in defending the assault, a wounding is justified.[68]

(II) *EJECTING TRESPASSER* — (A) *In General.* It is the undoubted right of a lawful owner, or one claiming title and rightfully in possession,[69] or of an occupant of premises, to retain possession and to use such force as may be reasonably necessary to remove therefrom trespassers or intruders,[70] or persons, originally on

See 4 Cent. Dig. tit. "Assault and Battery," § 13.

Opposition to enforcement of levy.— A casual visitor may use moderate force to prevent a sheriff, who has broken into a dwelling, from carrying away articles on which he has levied. Curtis *v.* Hubbard, 1 Hill (N. Y.) 336.

65. Sampson *v.* Henry, 11 Pick. (Mass.) 379; O'Donnell *v.* McIntyre, 118 N. Y. 156, 23 N. E. 455, 28 N. Y. St. 619 [*affirming* 37 Hun (N. Y.) 615]; Wood *v.* Phillips, 43 N. Y. 152; Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Hyatt *v.* Wood, 3 Johns. (N. Y.) 239; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633. See also McMillan *v.* Cronin, 75 N. Y. 474.

Expulsion by purchaser.— Although it may be the vendor's duty to deliver immediate possession, and he fails to do so, he may recover damages against the purchaser for expulsion by force and violence. Robichaud *v.* Genest, 16 Quebec Super. Ct. 337.

66. Soule *v.* Hough, 45 Mich. 418, 8 N. W. 50, 159; Liebstadter *v.* Federgreen, 80 Hun (N. Y.) 245, 29 N. Y. Suppl. 1039, 61 N. Y. St. 621; Perkins *v.* West, 55 Vt. 265.

67. *Iowa.*— Thompson *v.* Mumma, 21 Iowa 65.

Massachusetts.— Churchill *v.* Hulbert, 110 Mass. 42, 14 Am. Rep. 578.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

Minnesota.— Rauma *v.* Lamont, (Minn. 1901) 85 N. W. 236.

New York.— O'Connell *v.* Samuel, 81 Hun (N. Y.) 357, 30 N. Y. Suppl. 889, 63 N. Y. St. 143, holding that one assaulting another in his own house is not justified in resisting force to expel him.

Assault by trespasser.— If, while the landlord of a public-house has taken hold of a person and, while putting out the person, the latter lays hands on the landlord, it is an assault. Howell *v.* Jackson, 6 C. & P. 723, 25 E. C. L. 657.

68. Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; McIlvoy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271; Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

69. Mere ownership, without a right of possession, will not justify an assault upon one casually there. Suggs *v.* Anderson, 12 Ga. 461.

A Catholic priest, about to administer an office of his religion to a sick person at the latter's request, has no legal authority, by virtue of his priestly character, to forcibly remove from the room a person lawfully there. Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667.

70. *California.*— Chapell *v.* Schmidt, 104 Cal. 511, 38 Pac. 892; Townsend *v.* Briggs, 99 Cal. 481, 34 Pac. 116; McCarty *v.* Fremont, 23 Cal. 196.

Delaware.—Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587; Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771; McDermott *v.* Kennedy, 1 Harr. (Del.) 143.

Georgia.— Hammond *v.* Hightower, 82 Ga. 290, 9 S. E. 1101; Pierce *v.* Hicks, 34 Ga. 259.

Illinois.—Abt *v.* Burgheim, 80 Ill. 92; Jones *v.* Jones, 71 Ill. 562; Woodman *v.* Howell, 45 Ill. 367, 92 Am. Dec. 221.

Iowa.— See Redfield *v.* Redfield, 75 Iowa 435, 39 N. W. 688, holding that a person has no right to eject an employee boarding with him, who, at the time, was creating no disturbance, without reasonable notice, at an unseasonable hour, or in inclement weather.

Kentucky.— Tribble *v.* Frame, 7 J. J. Marsh. (Ky.) 599, 23 Am. Dec. 439; Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; McIlvoy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271; Howell *v.* Hopkins, 8 Ky. L. Rep. 527.

Maryland.— Manning *v.* Brown, 47 Md. 506.

Massachusetts.— Sampson *v.* Henry, 11 Pick. (Mass.) 379.

Michigan.— Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864; Drew *v.* Comstock, 57 Mich. 176, 23 N. W. 721.

Missouri.— Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508.

Nebraska.— Harshman *v.* Rose, 50 Nebr. 113, 69 N. W. 755; Fosbinder *v.* Svitak, 16 Nebr. 499, 20 N. W. 866.

New Jersey.— Slingerland *v.* Gillespie, (N. J. 1900) 47 Atl. 47.

New York.— O'Donnell *v.* McIntyre, 118 N. Y. 156, 23 N. E. 455, 28 N. Y. St. 619 [*af-*

the premises by license or permission, who subsequently create a disturbance, or conduct themselves in an improper manner, and refuse to desist or leave on request.[71] It has been held that defendant's motive for the expulsion of plaintiff is immaterial if the right to expel existed;[72] but this defense cannot be successfully invoked if the defendant, himself, was in fault,[73] if he unnecessarily beat or wound the wrong-doer, or use a dangerous or deadly weapon.[74] Neither can

firming 37 Hun (N. Y.) 623]; Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Wall *v.* Lee, 34 N. Y. 141; Bliss *v.* Johnson, 73 N. Y. 529; Gyre *v.* Culver, 47 Barb. (N. Y.) 592; Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Newkirk *v.* Sabler, 9 Barb. (N. Y.) 652; Howe *v.* Oldham, 23 N. Y. Suppl. 700, 52 N. Y. St. 734; Comstock *v.* Dodge, 43 How. Pr. (N. Y.) 97.

Ohio.— Pitford *v.* Armstrong, Wright (Ohio) 94.

Rhode Island.— Souter *v.* Codman, 14 R. I. 119, 51 Am. Rep. 364.

Vermont.— Brothers *v.* Morris, 49 Vt. 460; Harrison *v.* Harrison, 43 Vt. 417.

United States.—Walker *v.* Crane, 13 Blatchf. (U. S.) 1, 29 Fed. Cas. No. 17,067.

England.— Polkinhorn *v.* Wright, 8 Q. B. 197, 10 Jur. 11, 15 L. J. Q. B. 70, 55 E. C. L. 197; Buller N. P. 19; Moriarty *v.* Brooks, 6 C. & P. 684, 25 E. C. L. 638; Thomas *v.* Marsh, 5 C. & P. 596, 24 E. C. L. 726; Weaver *v.* Bush, 8 T. R. 78.

Canada.—*Ex p.* Estabrooks, 19 N. Brunsw. 283; McSwain *v.* Chappell, 2 P. E. Island 317; Madden *v.* Farley, 6 U. C. Q. B. 210.

See 4 Cent. Dig. tit. "Assault and Battery," § 15.

One rightfully in the place from whence he is ejected may recover for an assault committed upon him. O'Hara *v.* King, 52 Ill. 303; White *v.* Kellogg, 119 Ind. 320, 21 N. E. 901; Bristor *v.* Burr, 120 N. Y. 427, 24 N. E. 937, 31 N. Y. St. 566, 8 L. R. A. 710; McMillen *v.* Cronin, 57 How. Pr. (N. Y.) 53.

When trespass is a statutory offense.—The fact that intrusion on land, and a refusal to depart on request, is a misdemeanor will not affect the right of the landowner to forcibly resist or expel the wrong-doer. Fosbinder *v.* Svitak, 16 Nebr. 499, 20 N. W. 866.

71. *Illinois.*—Abt *v.* Burgheim, 80 Ill. 92; Brebach *v.* Johnson, 62 Ill. App. 131; Bower *v.* Robinson, 53 Ill. App. 370; Robinson *v.* Clark, 53 Ill. App. 368.

New Hampshire.— Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209.

New York.—Wall *v.* Lee, 34 N. Y. 141.

England.—Webster *v.* Watts, 11 Q. B. 311, 12 Jur. 243, 17 L. J. Q. B. 73, 63 E. C. L. 311; Shaw *v.* Chairitie, 3 C. & K. 21; Howell *v.* Jackson, 6 C. & P. 723, 25 E. C. L. 657; Timothy *v.* Simpson, 6 C. & P. 499, 25 E. C. L. 544; Green *v.* Bartram, 4 C. & P. 308, 19 E. C. L. 528.

Canada.— Reid *v.* Inglis, 12 U. C. C. P. 191.

See 4 Cent. Dig. tit. "Assault and Battery," § 15.

Church authorities may remove a discharged pastor from the pulpit, without liability. Conway *v.* Carpenter, 80 Hun (N. Y.) 428, 30 N. Y. Suppl. 315, 62 N. Y. St. 43.

Protection of ward.— A guardian is justified in removing a person of bad character whom his ward seeks to harbor, and whom he has warned away. Wood *v.* Gale, 10 N. H. 247, 34 Am. Dec. 150.

Trespasser ab initio.— The rule that, if a person enters the house of another without objection from the owner, and there assaults the latter, he is a trespasser *ab initio*, is applicable only to the case when the party enters under authority of law, and not when he enters by license or permission. O'Connell *v.* Samuel, 81 Hun (N. Y.) 357, 30 N. Y. Suppl. 889, 63 N. Y. St. 143.

72. Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Brothers *v.* Morris, 49 Vt. 460; Davis *v.* Lennon, 8 U. C. Q. B. 599; Glass *v.* O'Grady, 17 U. C. C. P. 233.

73. Thus defendant cannot plead justification, on the ground of defense of possession, where he committed an assault in his store after bringing on the affray by the use of irritating and abusive language. Watrous *v.* Steel, 4 Vt. 629, 24 Am. Dec. 648.

74. *California.*—Townsend *v.* Briggs, (Cal. 1893) 32 Pac. 307.

Delaware.— Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771.

Illinois.— Jones *v.* Jones, 71 Ill. 562; Brebach *v.* Johnson, 62 Ill. App. 131.

Kansas.— James *v.* Hayes, (Kan. 1901) 65 Pac. 241.

Michigan.— Talmage *v.* Smith, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414.

Missouri.—Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

Nebraska.— Mengedoht *v.* Van Dorn, 48 Nebr. 880, 67 N. W. 858; Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794.

New York.—Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

South Carolina.— Davis *v.* Whitridge, 2 Strobh. (S. C.) 232.

England.— Oakes *v.* Wood, 6 L. J. Exch. 200, M. & H. 237, 2 M. & W. 791; Collins *v.* Renison, Say. 138; Gregory *v.* Hill, 8 T. R. 299. See also Pollen *v.* Brewer, 7 C. B. N. S. 371, 6 Jur. N. S. 509, 1 L. T. Rep. N. S. 9, 97 E. C. L. 371; Johnson *v.* Northwood, 1 Moore C. P. 420, 7 Taunt. 689, 2 E. C. L. 550.

Canada.— See Kelly *v.* Rhodes, 18 Nova Scotia 524, 6 Can. L. T. 542.

See 4 Cent. Dig. tit. "Assault and Battery," § 15.

Detention of trespasser.— Where one has trespassed merely by coming on land, and is departing, he may not be seized and detained in order to compel him to give his address. Ball *v.* Axten, 4 F. & F. 1019.

it be interposed if, after the ejection, he follow the trespasser up and assault him.[75]

(B) *Notice to Depart.* If a person enter upon premises wrongfully, or with force and violence, it is not necessary, as a prerequisite to the right to eject, to ask him to leave; but, if his entry was rightful, and he is present with license or permission, it is, generally, regarded as necessary to request him to depart, and allow him a reasonable time so to do, before resorting to force.[76]

(C) *Expiration of Tenancy.* For necessary force exerted in resisting his reëntry or in removing him, one, whose tenancy has ended or who has no right of lawful occupancy, cannot recover against the landlord in actual possession, though the force used was cotemporaneous with a forcible entry of the latter upon the premises.[77]

b. Of Self. While it is unquestionably the duty of one who has been assailed to endeavor to avoid the use of force if other means of self-protection are immediately available,[78] yet it has been very generally held that he is justified in repelling the assault by the exercise of such reasonable force as may be, or as appears to him at the time to be, necessary, to protect himself from bodily harm,[79]

One may not throw water on another who is engaged in obstructing an ancient window. Simpson *v.* Morris, 4 Taunt. 821.

Extent of responsibility.—One resisting the violence of a hostile intruder, directed both against his person and his property, is responsible only for the natural and probable consequences of his act. Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508.

75. Brebach *v.* Johnson, 62 Ill. App. 131; Sargent *v.* Carnes, 84 Tex. 156, 19 S. W. 378.

76. *Delaware.*—Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587; McDermott *v.* Kennedy, 1 Harr. (Del.) 143.

Hawaii.— Iauka *v.* Cummings, 9 Hawaii 131.

Illinois.— Woodman *v.* Howell, 45 Ill. 367, 92 Am. Dec. 221.

Iowa.— Redfield *v.* Redfield, 75 Iowa 435, 39 N. W. 688.

Kentucky.— Robinson *v.* Hawkins, 4 T. B. Mon. (Ky.) 134; Cox *v.* Cooke, 1 J. J. Marsh. (Ky.) 360; McIlvoy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271; Howell *v.* Hopkins, 8 Ky. L. Rep. 527.

Michigan.— Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Ayres *v.* Birtch, 35 Mich. 501.

Nebraska.— Harshman *v.* Rose, 50 Nebr. 113, 69 N. W. 755.

New York.— Gyre *v.* Culver, 47 Barb. (N. Y.) 592. See also Hanna *v.* Rust, 21 Wend. (N. Y.) 149.

United States.— Thompson *v.* Berry, 1 Cranch C. C. (U. S.) 45, 23 Fed. Cas. No. 13,943.

England.— Tullay *v.* Reed, 1 C. & P. 6, 12 E. C. L. 16; Ballard *v.* Bond, 1 Jur. 7; Green *v.* Goddard, Salk. 641.

Canada.— Spires *v.* Barrick, 14 U. C. Q. B. 420.

See 4 Cent. Dig. tit. "Assault and Battery," § 15.

77. *Maine.*— Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442.

Massachusetts.— Stone *v.* Lahey, 133 Mass. 426; Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272; Winter *v.* Stevens, 9 Allen (Mass.) 526; Mugford *v.* Richardson, 6 Allen (Mass.) 76, 83 Am. Dec. 617.

Michigan.— Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561; Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

New York.— Sage *v.* Harpending, 49 Barb. (N. Y.) 166, 34 How. Pr. (N. Y.) 1.

Pennsylvania.—Overdeer *v.* Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440.

See 4 Cent. Dig. tit. "Assault and Battery," § 14.

A tenant may not, by force, dislodge his landlord who claims that the tenant's term has expired and who has recently entered during the tenant's temporary absence. Sage *v.* Harpending, 49 Barb. (N. Y.) 166, 34 How. Pr. (N. Y.) 1. *Contra,* Newton *v.* Harland, 1 M. & G. 644, 1 Scott N. R. 474, 39 E. C. L. 952 [*questioned* in Davis *v.* Burrell, 10 C. B. 821, 70 E. C. L. 821; Harvey *v.* Bridges, 14 M. & W. 437; and *overruled* in Blades *v.* Higgs, 10 C. B. N. S. 713, 100 E. C. L. 713].

78. Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518; Howland *v.* Day, 56 Vt. 318.

One need not flee to avoid injury, and may recover if he used ordinary care to prevent harm to himself. Heady *v.* Wood, 6 Ind. 82.

Defendant assailed by several.— There is an essential difference between an assault by one person and an assault by a number of persons acting in concert, in that in the latter case the assaulted party may act with more promptness and resort to more forcible means to protect himself than where the assault is by a single person. Thornton *v.* Taylor, 21 Ky. L. Rep. 1082, 54 S. W. 16; Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

79. *Colorado.*— Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284.

Connecticut.— Morris *v.* Platt, 32 Conn. 75.

though he was not actually in danger.[80] The doctrine of self-defense cannot be successfully invoked, however, where defendant was the aggressor,[81] where he used more force than was reasonably necessary for his protection,[82] or where,

Georgia.— Tucker *v.* Walters, 78 Ga. 232, 2 S. E. 689.

Illinois.— Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615; Patterson *v.* Standley, 91 Ill. App. 671.

Indiana.— Norris *v.* Casel, 90 Ind. 143; Steinmetz *v.* Kelly, 72 Ind. 442, 37 Am. Rep. 170.

Iowa.— Irwin *v.* Yeager, 74 Iowa 174, 37 N. W. 136; Ruter *v.* Foy, 46 Iowa 132.

Kansas.— Taylor *v.* Clendening, 4 Kan. 524.

Kentucky.— Thornton *v.* Taylor, 21 Ky. L. Rep. 1082, 54 S. W. 16; Herron *v.* Dermody, 15 Ky. L. Rep. 703; Chandler *v.* Newton, 13 Ky. L. Rep. 927.

Michigan.—Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663; Kent *v.* Cole, 84 Mich. 579, 48 N. W. 168; Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581; Drew *v.* Comstock, 57 Mich. 176, 23 N. W. 721; Ayres *v.* Birtch, 35 Mich. 501.

Minnesota.— Germolus *v.* Sausser, (Minn. 1901) 85 N. W. 946.

Mississippi.— Jamison *v.* Moseley, 69 Miss. 478, 10 So. 582.

Missouri.— Norris *v.* Whyte, 158 Mo. 20, 57 S. W. 1037; Murray *v.* Boyne, 42 Mo. 472.

Nebraska.— Fosbinder *v.* Svitak, 16 Nebr. 499, 20 N. W. 866.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

Texas.— Harrison *v.* Moseley, 31 Tex. 608.

Vermont.— French *v.* Ware, 65 Vt. 338, 26 Atl. 1096; Paige *v.* Smith, 13 Vt. 251.

Wisconsin.— Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138; Keep *v.* Quallman, 68 Wis. 451, 32 N. W. 233.

England.— Codd *v.* Cabe, 1 Ex. D. 352; Rowe *v.* Hawkins, 1 F. & F. 91.

See 4 Cent. Dig. tit. "Assault and Battery," § 11.

80. Baker *v.* Gausin, 76 Ind. 317.

Belief must be reasonable.— His belief, however, should be such as a reasonable person would entertain under like circumstances.

Colorado.— Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284.

Delaware.—Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587.

Illinois.— Hulse *v.* Tollman, 49 Ill. App. 490; McNay *v.* Stratton, 9 Ill. App. 215.

Minnesota.— Germolus *v.* Sausser, (Minn. 1901) 85 N. W. 946.

Pennsylvania.— Rhodes *v.* Rodgers, 151 Pa. St. 634, 24 Atl. 1044.

Wisconsin.— Morgenstein *v.* Nejedlo, 79 Wis. 388, 48 N. W. 652.

England.— Moriarty *v.* Brooks, 6 C. & P. 684, 25 E. C. L. 638.

See 4 Cent. Dig. tit. "Assault and Battery," § 11.

81. Thomason *v.* Gray, 82 Ala. 291, 3 So. 38. See also Drinkhorn *v.* Bubel, 85 Mich. 532, 48 N. W. 710.

82. *Alabama.*— Thomason *v.* Gray, 82 Ala. 291, 3 So. 38.

Delaware.—Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587; Hazel *v.* Clark, 3 Harr. (Del.) 22.

Illinois.— Trogden *v.* Henn, 85 Ill. 237; Gizler *v.* Witzel, 82 Ill. 322; Ogden *v.* Claycomb, 52 Ill. 365.

Indiana.— Philbrick *v.* Foster, 4 Ind. 442.

Iowa.— Shipley *v.* Edwards, 87 Iowa 310, 54 N. W. 151.

Kentucky.— Thornton *v.* Taylor, 19 Ky. L. Rep. 320, 39 S. W. 830.

Maine.— Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Rogers *v.* Waite, 44 Me. 275.

Massachusetts.— Brown *v.* Gordon, 1 Gray (Mass.) 182.

Michigan.— Drinkhorn *v.* Bubel, 85 Mich. 532, 48 N. W. 710; Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581.

Missouri.— O'Leary *v.* Rowan, 31 Mo. 117; Peyton *v.* Rogers, 4 Mo. 254; Jones *v.* Gale, 22 Mo. App. 637.

New Hampshire.—Dole *v.* Erskine, 35 N. H. 503; Curtis *v.* Carson, 2 N. H. 539.

New York.—Kain *v.* Larkin, 56 Hun (N. Y.) 79, 9 N. Y. Suppl. 89, 29 N. Y. St. 643; Richardson *v.* Van Voorhies, 3 N. Y. Suppl. 599, 20 N. Y. St. 667; Hogan *v.* Ryan, 5 N. Y. St. 110; Scribner *v.* Beach, 4 Den. (N. Y.) 448, 47 Am. Dec. 265; Elliott *v.* Brown, 2 Wend. (N. Y.) 497, 20 Am. Dec. 644.

Ohio.— Close *v.* Cooper, 34 Ohio St. 98; Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209.

Tennessee.— Chambers *v.* Porter, 5 Coldw. (Tenn.) 273.

Vermont.— Harrison *v.* Harrison, 43 Vt. 417.

Virginia.— Fields *v.* Grenils, 89 Va. 606, 16 S. E. 880.

Wisconsin.—Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342.

See 4 Cent. Dig. tit. "Assault and Battery," § 11.

Misconduct of plaintiff not amounting to assault.— Under the general issue, before a defendant can claim exemption from legal responsibility for beating and wounding plaintiff on the mere ground of misconduct of the latter which does not in law amount to an assault, he must show that he, himself, was wholly free from fault. Phillips *v.* Kelly, 29 Ala. 628.

A recovery may be had, in cross-actions for an affray, by the assaulted party for the assault and battery first committed on him, and by the assailant for the excessive force beyond what was necessary for self-defense. Dole *v.* Erskine, 35 N. H. 503.

after the assault had terminated and all danger was past, he struck or beat the aggressor by way of revenge.[83]

c. Of Third Person — (I) *Master or Servant.* A servant may strike another in order to prevent an injury to his master,[84] or a master may come to the defense of his servant.[85]

(II) *Relatives.* A person is justified in using sufficient force to protect his wife, children, or other members of his family, though the danger must be such as to induce one exercising a reasonable and proper judgment to interfere to prevent the consummation of the injury.[86] Under like circumstances, a child may interfere to protect his parent,[87] and it has been held that, to prevent a breach of the peace, one may use gentle and moderate force to prevent an assault on his brother.[88]

4. Ignorance Concerning Health of Party Assaulted. It is no defense that the wrong-doer was not aware of the condition of health of the person assaulted.[89]

5. Intoxication. Intoxication is no defense to an action for assault.[90]

6. Other Proceedings For Same Assault — a. Civil. A former recovery in assault and battery is a good plea, notwithstanding subsequent damages, for the consequence of the battery is not the ground of the action, but the measure of the damages.[91]

b. Criminal — (I) *Former Acquittal or Conviction.* It has been held that, where defendant has been acquitted of felonious assault upon plaintiff, the latter may recover for the civil injury unless he has colluded in procuring the acquittal;[92] but formerly, and in some jurisdictions at the present time, one who, on being convicted in fact,[93] pays the amount adjudged against him or suffers imprisonment is released from liability in a civil proceeding for the same cause.[94]

83. Ogden *v.* Claycomb, 52 Ill. 365; Boren *v.* Bartleson, 39 Ill. 43; St. John *v.* Parr, 7 U. C. C. P. 142.

84. Barfoot *v.* Reynolds, 2 Str. 953, but not by way of revenge.

85. Fortune *v.* Jones, 30 Ill. App. 116 [*reversed*, on other grounds, in 128 Ill. 518, 21 N. E. 523]; Tickell *v.* Read, Lofft 215, but this right will not extend to a case where the servant is the aggressor or to a case of mutual assault.

86. *Connecticut.*— Hanchett *v.* Bassett, 35 Conn. 27.

Illinois.— Smith *v.* Slocum, 62 Ill. 354.

Iowa.— Hill *v.* Rogers, 2 Iowa 67.

Kentucky.— Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232, McIlvoy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271, which cases held that, in defending an assault on his family by an intruder on his premises, he is justified in wounding the latter.

Wisconsin.— Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

United States.— Tompkins *v.* Knut, 94 Fed. 956.

See 4 Cent. Dig. tit. "Assault and Battery," § 12.

87. Flint *v.* Bruce, 68 Me. 183; Drinkhorn *v.* Bubel, 85 Mich. 532, 48 N. W. 710.

Where interference justified.— A son can justify an assault and battery in defense of his father only where the latter was first assailed, and was resisting the attack when the former interfered, and only to the extent of such force as was necessary for the father's defense. Obier *v.* Neal, 1 Houst. (Del.) 449.

88. Mellen *v.* Thompson, 32 Vt. 407.

89. Brownback *v.* Frailey, 78 Ill. App. 262.

90. Reese *v.* Barbee, 61 Miss. 181, but is rather an aggravation.

91. Fetter *v.* Beale, Salk. 11.

If an assault is committed by several, and a recovery is had against one, that recovery may be pleaded in bar to an action for the same battery brought against another. Buller N. P. 20.

92. Crosby *v.* Leng, 12 East 409.

93. Hartley *v.* Hindmarsh, L. R. 1 C. P. 553, 1 H. & R. 607, 12 Jur. N. S. 502, 35 L. J. M. C. 255, 14 Wkly. Rep. 862 (wherein defendant was merely required to enter into a recognizance, and pay the costs); Thompson *v.* Leslie, 9 U. C. Q. B. 360.

94. *North Carolina.*— Johnston *v.* Crawford, 62 N. C. 342; Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

Pennsylvania.— Rhodes *v.* Rodgers, 151 Pa. St. 634, 24 Atl. 1044.

Texas.— Flanagan *v.* Womack, 54 Tex. 45; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

England.— Holden *v.* King, 46 L. J. Exch. 75, 35 L. T. Rep. N. S. 479, 25 Wkly. Rep. 62. *Contra*, Lowe *v.* Howarth, 13 L. T. Rep. N. S. 297.

Canada.— Hardigan *v.* Graham, 12 Quebec Super. Ct. 177.

Change of charge.— Where justices, before whom a charge of "shooting and wounding with intent to do grievous bodily harm" is made, change the charge to one of common assault, the person aggrieved not objecting, their certificate of conviction and payment

(II) *Certificate of Dismissal.* By statute in England[95] and Canada,[96] on a hearing upon the merits[97] of a charge of assault, both parties being in attendance, and after a proper inquiry into the facts of the case, if the charge is dismissed, it is the duty[98] of the magistrate to forthwith[99] grant a certificate of such dismissal, which will be a good defense to a subsequent action for the same assault.

7. Preservation of Order — a. By Peace-Officers. A peace-officer or other person duly empowered is not liable for injuries inflicted by him in the use of reasonably necessary force to preserve the peace and maintain order, or to overcome resistance to his authority;[1] but, if unnecessary violence is used to accomplish the purpose, or he assaults a person without just excuse, he becomes a trespasser and is liable as such.[2]

of th fine is not a bar to an action by the person aggrieved for damages. Miller *v.* Lea, 25 Ont. App. 428, 2 Can. Crim. Cas. 282.

Liability to husband.— One who has been convicted of an assault on a married woman, and has paid the fine imposed, is not liable (because of section 45 of the Offenses Against the Person Act) to the husband for the consequential damages sustained by him. Masper *v.* Brown, 1 C. P. D. 97, 45 L. J. C. P. 203, 34 L. T. Rep. N. S. 254, 24 Wkly. Rep. 369.

95. 24 & 25 Vict. c. 100; 9 Geo. IV, c. 31.

96. Consol. Stat. Can. c. 18.

97. If there has been no hearing on the merits, the magistrate has no jurisdiction to grant the certificate, and, therefore, if it is granted, it is no bar to a subsequent action for the same assault. Reed *v.* Nutt, 24 Q. B. D. 669, 54 J. P. 599, 59 L. J. Q. B. 311, 62 L. T. Rep. N. S. 635, 38 Wkly. Rep. 621, wherein it was held by Lord Esher, M. R. [Lord Coleridge, C. J., doubting], that, upon the trial of the action in the county court, the judge had power to inquire into the validity of the certificate, and to consider whether the magistrate, in granting it, had acted within his jurisdiction.

What constitutes a hearing.— If the accused pleads not guilty and the prosecutor declines to proceed (Tunnicliffe *v.* Tedd, 5 C. B. 553, 17 L. J. M. C. 67, 57 E. C. L. 553), or if the prosecutor withdraws the charge before the day fixed for the hearing, but the accused appears and has the charge dismissed (Vaughton *v.* Bradshaw, 9 C. B. N. S. 103, 7 Jur. N. S. 468, 30 L. J. C. P. 93, 3 L. T. Rep. N. S. 373, 9 Wkly. Rep. 120, 99 E. C. L. 103) there is a hearing which will authorize the granting of a certificate.

98. The granting of such a certificate is a ministerial, not a judicial, act, and a magistrate is, therefore, bound to grant it. Hancock *v.* Somes, 8 Cox C. C. 172, 1 E. & E. 795, 5 Jur. N. S. 983, 28 L. J. M. C. 196, 7 Wkly. Rep. 422, 102 E. C. L. 795.

99. Forthwith.— A certificate applied for five days after a complaint had been dismissed, and granted two days after the application, but dated as of the day upon which the complaint was made, is made out forthwith. Costar *v.* Hetherington, 8 Cox C. C. 175, 1 E. & E. 802, 5 Jur. N. S. 985, 28 L. J. M. C. 198, 7 Wkly. Rep. 413, 102 E. C. L. 802. It need not be drawn up in the presence of the parties, or applied for by the party against whom the complaint was preferred. Hancock *v.* Somes, 8 Cox C. C. 172, 1 E. & E. 795, 5 Jur. N. S. 983, 28 L. J. M. C. 196, 7 Wkly. Rep. 422, 102 E. C. L. 795.

Under the Canadian statute, the certificate must be obtained on the first hearing before the justice — one granted on an acquittal on appeal is not a bar. Westbrook *v.* Calaghan, 12 U. C. C. P. 616.

1. *Colorado.*— Baker *v.* Barton, 1 Colo. App. 183, 28 Pac. 88.

Illinois.— Main *v.* McCarty, 15 Ill. 441.

Indiana.— Kreger *v.* Osborn, 7 Blackf. (Ind.) 74.

Kentucky.— Finnell *v.* Bohannon, 19 Ky. L. Rep. 1587, 44 S. W. 94.

Maine.— Murdock *v.* Ripley, 35 Me. 472.

New York.— Fulton *v.* Staats, 41 N. Y. 498; Henry *v.* Lowell, 16 Barb. (N. Y.) 268; Parke *v.* Gilligan, 14 Misc. (N. Y.) 121, 35 N. Y. Suppl. 477, 70 N. Y. St. 174; Zeiger *v.* Nolan, 1 N. Y. City Ct. Suppl. 54.

Vermont.—See French *v.* Ware, 65 Vt. 338, 26 Atl. 1096.

England.— Buller N. P. 19; Cockcroft *v.* Smith, Salk. 642.

See 4 Cent. Dig. tit. "Assault and Battery," § 7.

2. *Alabama.*— Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

Arkansas.— Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.

Colorado.— Schwenke *v.* Union Depot, etc., Co., 12 Colo. 341, 21 Pac.

Indiana.— Kreger *v.* Osoorn, 7 Blackf. (Ind.) 74.

Kentucky.— Boles *v.* Pinkerton, 7 Dana (Ky.) 453; Finnell *v.* Bohannon, 19 Ky. L. Rep. 1587, 44 S. W. 94.

Maine.— Murdock *v.* Ripley, 35 Me. 472.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

England.— Imason *v.* Cope, 5 C. & P. 193, 24 E. C. L. 521; Stocken *v.* Carter, 4 C. & P. 477, 19 E. C. L. 610; Booth *v.* Hanley, 2 C. & P. 288, 12 E. C. L. 576; Cockcroft *v.* Smith, Salk. 642.

Canada.— Beamer *v.* Darling, 4 U. C. Q. B. 211; Belch *v.* Arnott, 9 U. C. C. P. 68.

See 4 Cent. Dig. tit. "Assault and Battery," § 7.

Person aiding in arrest originally lawful.— Where an officer making a lawful arrest subsequently becomes a trespasser *ab initio*, by

b. In Judicial Assembly. Magistrates, coroners, or like officers may, without liability, remove, or cause to be removed, from their presence persons who disturb or interfere with them in the proper discharge of their duties.[3]

c. In Legislative Assembly. A subordinate officer, acting upon the authority of his superior and using necessary force to eject a member of a legislative body, is not personally liable.[4]

8. Provocation. No provocative acts, conduct, former insults, threats, or words will justify an assault, no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate, nor will they excuse the wrong-doer,[5] though, under some circumstances, they may be considered in mitigation of damages.[6]

failure to return the warrant, a person assisting in making the arrest at the officer's request does not become liable for assault and battery. Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374.

Hindering officer.— If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow. Levy *v.* Edwards, 1 C. & P. 40, 12 E. C. L. 34.

3. Furr *v.* Moss, 52 N. C. 525 (wherein no liability was held to attach to a justice who, in good faith and to preserve order, directed the sheriff to tie a person who was interrupting and insulting him while he was officially engaged); Collier *v.* Hicks, 2 B. & Ad. 663, 22 E. C. L. 278; Garnett *v.* Ferrand, 6 B. & C. 611, 13 E. C. L. 277; Cox *v.* Coleridge, 1 B. & C. 37, 8 E. C. L. 17.

4. Bradlaugh *v.* Erskine, 47 L. T. Rep. N. S. 618, 31 Wkly. Rep. 365.

5. *Alabama.*—Keiser *v.* Smith, 71 Ala. 481, 46 Am. Rep. 342; Terry *v.* Eastland, 1 Stew. (Ala.) 156.

Connecticut.— Matthews *v.* Terry, 10 Conn. 455.

Delaware.— Tatnall *v.* Courtney, 6 Houst. (Del.) 434.

Florida.— Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

Georgia.— Suggs *v.* Anderson, 12 Ga. 461.

Hawaii.— Irwin *v.* Porter, 1 Hawaii 189.

Illinois.— Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558; Gizler *v.* Witzel, 82 Ill. 322; Sorgenfrei *v.* Schroeder, 75 Ill. 397; Ogden *v.* Claycomb, 52 Ill. 365; Donnelly *v.* Harris, 41 Ill. 126; Hulse *v.* Tollman, 49 Ill. App. 490; Scott *v.* Fleming, 16 Ill. App. 539.

Indiana.— Norris *v.* Casel, 90 Ind. 143; Butt *v.* Gould, 34 Ind. 552; Fullerton *v.* Warrick, 3 Blackf. (Ind.) 219, 25 Am. Dec. 99; Nipp *v.* Wiseheart, 7 Ind. App. 642, 34 N. E. 1006.

Iowa.— Irlbeck *v.* Bierl, 101 Iowa 240, 67 N. W. 400, 70 N. W. 206; Ronan *v.* Williams, 41 Iowa 680; Thompson *v.* Mumma, 21 Iowa 65; Thrall *v.* Knapp, 17 Iowa 468; Ireland *v.* Elliott, 5 Iowa 478, 68 Am. Dec. 715.

Kentucky.— Chrisman *v.* Hunter, 3 Dana (Ky.) 83; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557; Dungan *v.* Godsey, 2 A. K. Marsh. (Ky.) 352; Reed *v.* Kelly, 4 Bibb (Ky.) 400; Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Chandler *v.* Newton, 13 Ky. L. Rep. 927.

Louisiana.— Munday *v.* Landry, 51 La. Ann. 303, 25 So. 66; Richardson *v.* Zuntz, 26 La. Ann. 313.

Massachusetts.— Dupee *v.* Lentine, 147 Mass. 580, 18 N. E. 465; Bonino *v.* Caledonio, 144 Mass. 299, 11 N. E. 98; Tyson *v.* Booth, 100 Mass. 258.

Michigan.—Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663; Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705; Heiser *v.* Loomis, 47 Mich. 16, 10 N. W. 60.

Minnesota.— Gorstz *v.* Pinske, (Minn. 1901) 85 N. W. 215; Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

Mississippi.— Martin *v.* Minor, 50 Miss. 42.

Missouri.— Murray *v.* Boyne, 42 Mo. 472; Collins *v.* Todd, 17 Mo. 537; Coxe *v.* Whitney, 9 Mo. 531; Berryman *v.* Cox, 73 Mo. App. 67.

Nebraska.—Haman *v.* Omaha Horse R. Co., 35 Nebr. 74, 52 N. W. 830.

New Hampshire.— Dole *v.* Erskine, 37 N. H. 316.

New Jersey.— See Castner *v.* Sliker, 33 N. J. L. 507.

New York.— Kain *v.* Larkin, 56 Hun (N. Y.) 79, 9 N. Y. Suppl. 89, 29 N. Y. St. 643; Dolan *v.* Fagan, 63 Barb. (N. Y.) 73; Willis *v.* Forrest, 2 Duer (N. Y.) 310; Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518; Ellsworth *v.* Thompson, 13 Wend. (N. Y.) 658; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230.

North Carolina.— Johnston *v.* Crawford, 62 N. C. 342; Barry *v.* Inglis, 1 N. C. 72, 3 N. C. 262.

South Carolina.— Hayes *v.* Sease, 51 S. C. 534, 29 S. E. 259.

Tennessee.— Chambers *v.* Porter, 5 Coldw. (Tenn.) 273; Jacaway *v.* Dula, 7 Yerg. (Tenn.) 81, 27 Am. Dec. 492.

Texas.— Harrison *v.* Moseley, 31 Tex. 608.

Vermont.— Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989; Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

Wisconsin.— Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468.

United States.— Brooks *v.* Carter, 34 Fed. 505; Cushman *v.* Ryan, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3,515.

6. See *infra*, II, E, 7, b, (VII), (D).

9. Punishment of Child — a. By One Authorized by Parent. One authorized by a parent to take charge of or control a minor child is not liable for the use of force necessary to enforce the latter's obedience when such force is not unreasonable or excessive.[7]

b. By Schoolmaster. From the very nature of his employment a schoolmaster has the right to adopt reasonable rules to promote good order and discipline,[8] to inflict reasonable corporal punishment for the infraction of such rules,[9] or to require proper submission or prevent subversion of his authority,[10] and, in inflicting the punishment, he may take into consideration the habitual disobedience of the pupil.[11] He is not liable for an error of judgment as to when and to what extent punishment is necessary;[12] but, if the punishment is cruel or excessive and beyond that required by the circumstances, the master is liable for an assault,[13] from which liability he is not relieved by the fact that he acted in good faith and without malice.[14]

10. Recaption of Property. The owner of personal property may retake it by force from one who has wrongfully deprived him of its possession, if he can do so without wounding the wrong-doer or resorting to the use of a dangerous weapon;[15] but, where the possession was peaceably acquired, the owner may not resort to violence, whether its possession is lawful or not.[16] So, it has been held

7. Vanmeter *v.* True, 16 Ky. L. Rep. 320; Hernandez *v.* Carnobeli, 4 Duer (N. Y.) 642.

8. Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387, 20 Centr. L. J. 418.

9. *Connecticut.*— Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

Indiana.— Cooper *v.* McJunkin, 4 Ind. 290.

Maine.— Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818.

Missouri.— Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387, 20 Centr. L. J. 418.

New Hampshire.— Heritage *v.* Dodge, 64 N. H. 297, 9 Atl. 722.

Vermont.— Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156; Hathaway *v.* Rice, 19 Vt. 102.

But see Newman *v.* Bennett, 2 Chit. 195, 18 E. C. L. 587, holding that a music-teacher of a cathedral is not justified in beating a chorister, even moderately, for singing at an unauthorized place, though such singing might be injurious to such chorister performing in the cathedral.

See 4 Cent. Dig. tit. "Assault and Battery," § 8.

10. Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841; Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

Punishment for refusal to pursue forbidden studies.— A school-teacher is not authorized to punish a scholar to compel him to pursue studies forbidden by his parent. Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471.

11. Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

12. Heritage *v.* Dodge, 64 N. H. 297, 9 Atl. 722.

13. Cooper *v.* McJunkin, 4 Ind. 290; Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156 (holding, also, that, if there is a reasonable doubt of the excessiveness of the punishment, the master should have the benefit of that doubt); Hathaway *v.* Rice, 19 Vt. 102.

The nature of the offense must govern the master as to the mode and severity of the punishment, together with the age, size, and physical condition of the pupil. Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

The use of a rawhide does not necessarily show malice. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

14. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

15. *Connecticut.*—Heminway *v.* Heminway, 58 Conn. 443, 19 Atl. 766; Baldwin *v.* Hayden, 6 Conn. 453.

Illinois.— Winter *v.* Atkinson, 92 Ill. App. 162.

Kentucky.— Bobb *v.* Bosworth, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273.

Michigan.— Hamilton *v.* Arnold, 116 Mich. 684, 75 N. W. 133.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New Hampshire.— Hopkins *v.* Dickson, 59 N. H. 235.

South Carolina.— Davis *v.* Whitridge, 2 Strobh. (S. C.) 232.

Vermont.— Johnson *v.* [illegible]rry, 56 Vt. 703, 48 Am. Rep. 826; Hodgeden *v.* Hubbard, 18 Vt. 504, 46 Am. Dec. 167.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85.

England.— Blades *v.* Higgs, 10 C. B. N. S. 713, 7 Jur. N. S. 1289, 30 L. J. C. P. 347, 4 L. T. Rep. N. S. 551, 100 E. C. L. 713.

See 4 Cent. Dig. tit. "Assault and Battery," § 14.

There should be a request for the property before resorting to force. Dyk *v.* De Young, 35 Ill. App. 138.

16. *Illinois.*— Dyk *v.* De Young, 35 Ill. App. 138 [*affirmed* in 133 Ill. 82, 24 N. E. 520].

Indiana.— Andre *v.* Johnson, 6 Blackf. (Ind.) 375.

Kentucky.—Sims *v.* Reed, 12 B. Mon. (Ky.) 51.

Massachusetts.— Drury *v.* Hervey, 126 Mass. 519.

Minnesota.— Watson *v.* Rheinderknecht,

that one may use force to overcome opposition to his taking possession of personalty to which he is entitled;[17] that one may not assault another who is removing his property from the premises of the former;[18] and, that if, under such circumstances, the former is assaulted, he may use necessary force to repel the attempt to take the property.[19]

11. Service of Process. An officer may use necessary force to overcome resistance to the service of process,[20] or to place a party in possession under a writ;[21] but is liable for unnecessary force,[22] and cannot resort to violence where he has an adequate legal remedy.[23] So, if an officer does not act in pursuance of legal process,[24] or is not justified by the process,[25] neither he nor one acting in his aid can escape liability for personal violence in an attempt to execute it.

E. Actions — 1. Form of Action. At common law, an action of trespass for assault and battery was the proper form of action for direct injuries, negligently and carelessly inflicted, as well as for those that were intentional and malicious.[26]

2. Jurisdiction. An action of assault and battery is transitory, and may be tried in any court having jurisdiction of the person and the subject-matter;[27] but,

(Minn. 1901) 84 N. W. 798; Fredericksen *v.* Singer Mfg. Co., 38 Minn. 356, 37 N. W. 453.

New York.— Richardson *v.* Van Voorhies, 3 N. Y. Suppl. 599, 20 N. Y. St. 667; Gates *v.* Lounsbury, 20 Johns. (N. Y.) 427.

Rhode Island.— Kirby *v.* Foster, 17 R. I. 437, 22 Atl. 111, 14 L. R. A. 317.

South Carolina.— Harris *v.* Marco, 16 S. C. 575.

Vermont.— Bowman *v.* Brown, 55 Vt. 184.

Wisconsin.— Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670.

United States.—Sabre *v.* Mott, 88 Fed. 780.

England.— Chambers *v.* Miller, 3 F. & F. 202.

See 4 Cent. Dig. tit. "Assault and Battery," § 14.

17. Yale *v.* Seely, 15 Vt. 221.

18. Stuyvesant *v.* Wilcox, 92 Mich. 233, 52 N. W. 465, 31 Am. St. Rep. 580.

19. Huppert *v.* Morrison, 27 Wis. 365.

20. Hager *v.* Danforth, 20 Barb. (N. Y.) 16 (a subpœna); Harrison *v.* Hodgson, 10 B. & C. 445, 21 E. C. L. 192.

21. Howe *v.* Butterfield, 4 Cush. (Mass.) 302, 50 Am. Dec. 785.

22. Hull *v.* Bartlett, 49 Conn. 64, where defendant removed a covering from plaintiff's face to identify her, so as to serve a summons.

That the resistance of plaintiff contributed to the injury is no defense where the officer used more violence than was necessary. Murdock *v.* Ripley, 35 Me. 472.

23. Brownell *v.* Durkee, 79 Wis. 658, 48 N. W. 241, 24 Am. St. Rep. 743, 13 L. R. A. 487.

24. Moore *v.* Devoy, 37 How. Pr. (N. Y.) 18. But see Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266, wherein it was held that one who, at the command of an officer, assists him in making an arrest, relying upon his official character and the command, is protected.

Process regular on its face.— One appointed to make a civil arrest may justify an assault and battery in making it under a warrant, regular on its face, though issued on an insufficient affidavit, if he had no knowledge of the insufficiency. Mudrock *v.* Killips, 65 Wis. 622, 28 N. W. 66.

25. Elder *v.* Morrison, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548.

26. Horne *v.* Mandelbaum, 13 Ill. App. 607; Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354 (holding that proof of negligent or careless shooting will sustain an allegation of wilful shooting under the code); Hurst *v.* Carlisle, 3 Penr. & W. (Pa.) 176; Holmes *v.* Mather, L. R. 10 Exch. 261, 44 L. J. Exch. 176, 33 L. T. Rep. N. S. 361, 23 Wkly. Rep. 864. See also Smith *v.* Hancock, 4 Bibb (Ky.) 222.

27. *Connecticut.*— Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850.

Delaware.— Hammer *v.* Pierce, 5 Harr. (Del.) 304.

Illinois.— Hurley *v.* Marsh, 2 Ill. 329.

Kansas.— McAnarney *v.* Caughenaur, 34 Kan. 621, 9 Pac. 476.

Kentucky.— Watts *v.* Thomas, 2 Bibb (Ky.) 458.

Maryland.— Redgrave *v.* Jones, 1 Harr. & M. (Md.) 195.

South Carolina.— Sturgenegger *v.* Taylor, 3 Brev. (S. C.) 7.

Contra, under 2 N. Y. Rev. Stat. p. 409, § 2, which made actions of trespass and trespass on the case for injuries to the person local. Chapman *v.* Wilber, 6 Hill (N. Y.) 475.

See 4 Cent. Dig. tit. "Assault and Battery," § 20.

When joint defendants reside in different counties, the writ may be sent to the different counties of their residence. Ford *v.* Logan, 2 A. K. Marsh. (Ky.) 324.

Assault on vessel within United States.— Jurisdiction generally of an action for assault and battery, or of such an action for an assault and battery committed on board a vessel in the merchant service upon the high seas or without the United States, authorizes the court to entertain a cause for such a wrong committed on a vessel within the United States and not upon the high seas. Farley *v.* De Waters, 2 Daly (N. Y.) 192.

where a justice has no jurisdiction of an action for an assault, he cannot hear an action for injuries incidental thereto.[28]

3. **Conditions Precedent — a. Limitations.** The action must be brought within the time limited by statute.[29]

b. Necessity of Criminal Prosecution. It is the general rule that a criminal prosecution for an assault is not a prerequisite to the right to recover civilly for the injury.[30]

4. **Parties — a. Plaintiff.** Unless authorized by statute, husband and wife cannot sue jointly for the battery of both,[31] nor, in such case, can the husband bring an individual action.[32] Where, by statute, the remedy is by a *qui tam* action, the state must be joined.[33]

b. Defendant. All persons who assault and injure another are jointly or severally liable, and may be sued jointly or separately;[34] but a corporation cannot be joined with private persons as a party defendant.[35]

5. **Process.** It is not important that the initiatory process should state the form of the action, though enough should appear to inform defendant of what he is charged;[36] and where a civil action is commenced by information, the public must be joined and the same notice must be given as in a civil suit.[37] A writ for a joint assault may be sent to the several counties wherein the defendants reside, and no allegation of such residence is necessary.[38]

6. **Pleading — a. Complaint, Declaration, or Petition**[39] — (I) *In General.*

28. Rich *v.* Hogeboom, 4 Den. (N. Y.) 453, an action for tearing plaintiff's clothes during an assault.

29. Laurent *v.* Bernier, 1 Kan. 401; W—— *v.* D——, 14 Wkly. Notes Cas. (Pa.) 239.

In an action for an assault committed during plaintiff's infancy, the delay, though it may be considered, has no tendency to show that no serious injury was done. Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103.

30. Parker *v.* Lanier, 82 Ga. 216, 8 S. E. 57 (since Ga. Code, § 2970); Nowlan *v.* Griffin, 68 Me. 235, 28 Am. Rep. 45; Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123; Harford *v.* Carroll, 21 R. I. 515, 45 Atl. 259.

In New Brunswick, if plaintiff proves that the injury caused grievous bodily harm, and therefore amounted to a felony under 1 Rev. Stat. c. 149, § 15, plaintiff will be nonsuited unless it appears that proceedings have been taken against defendant for the criminal offense. Schohl *v.* Kay, 10 N. Brunsw. 244.

Objection — How taken. The objection be taken by plea. Osborn *v.* Gillett, L. R. be taken by plea. Osborn *v.* Gillett, L. R. 8 Exch. 88, 42 L. J. Exch. 53.

31. Chapman *v.* Hardy, 2 Brev. (S. C.) 170.

32. Belew *v.* Prunty, Litt. Sel. Cas. (Ky.) 241.

33. Houghton *v.* Havens, 6 Conn. 305; Dickinson *v.* Potter, 4 Day (Conn.) 340.

34. *Connecticut.*—Northrop *v.* Brush, Kirby (Conn.) 108.

Maryland.— Mitchell *v.* Smith, 4 Md. 403.

Missouri.— Murphy *v.* Wilson, 44 Mo. 313, 100 Am. Dec. 290; Page *v.* Freeman, 19 Mo. 421; Thomas *v.* Werremeyer, 34 Mo. App. 665.

Montana.— Daily *v.* Redfern, 1 Mont. 467.

North Carolina.— Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

Vermont.— Leach *v.* Francis, 41 Vt. 670.

Canada.— Dunham *v.* Powell, 5 U. C. Q. B. O. S. 675.

See 4 Cent. Dig. tit. "Assault and Battery," § 23.

If one of the participants was actuated by malice, each will be liable for all damages, both actual and exemplary, resulting from the assault. Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588.

Execution.—Where separate actions against several defendants are prosecuted to final judgment, the plaintiff may be compelled to elect against whom he will take his execution. Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711.

Where one defendant, jointly sued, is taken, and the other not, the declaration will not be set aside though, perhaps, the subject of special demurrer (Jarvis *v.* Blennerhasset, 18 Wend. (N. Y.) 627); but, if the one not found in the first instance is brought in on renewal of the writ, the cases may be consolidated or permitted to stand separately on the docket (Mitchell *v.* Smith, 4 Md. 403).

35. Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588.

36. Pryor *v.* Hays, 9 Yerg. (Tenn.) 416.

37. Avery *v.* Bulkly, 1 Root (Conn.) 275; Clark *v.* Turner, 1 Root (Conn.) 200.

38. Ford *v.* Logan, 2 A. K. Marsh. (Ky.) 324.

39. For forms of complaints, declarations, or petitions see the following cases:

Alabama.— Williams *v.* Ivey, 37 Ala. 244.

Indiana.—Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; Johnson *v.* Putnam, 95 Ind. 57; Norris *v.* Casel, 90 Ind. 143.

Kentucky.— Finnell *v.* Bohannon, 19 Ky. L. Rep. 1587, 44 S. W. 94.

Maine.— Flint *v.* Bruce, 68 Me. 183.

Massachusetts.—Blake *v.* Damon, 103 Mass. 199.

The plaintiff must state facts sufficient to constitute a cause of action.[40] He may, with proper allegations, charge in one count[41] several acts of violence, so connected that each of them, to some extent, characterizes the others and all together make a continued series of assaults and batteries,[42] though the instruments used were different.[43]

(II) *Particular Averments*—(A) *Description of Defendant.* The defendant should be clearly identified as the alleged wrong-doer,[44] though, where it is sought to charge a principal for the act of his servant or agent, it is sufficient to allege that the name of the actual assailant is unknown.[45]

(B) *Conspiracy.* Where an assault and battery by more than one is charged, it need not be alleged that there was a conspiracy or collusion between defendants;[46] but, where one of the parties was not present at the time of the alleged assault, sufficient must be alleged to show a conspiracy, or to otherwise connect the absentee with the commission of the offense.[47]

(C) *Place of Assault.* The county in which the assault was committed need not be specified,[48] except where, by statute, the action is made local.[49]

(D) *Characterization of Assault.* It is not necessary that the assault and battery should be characterized as unlawful;[50] that the injuries were wrongfully inflicted or were the result of defendant's wrongful act;[51] or that force was used, where the complaint shows actual violence.[52]

Michigan.— Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561.

Missouri.— McKee *v.* Calvert, 80 Mo. 348.

New York.—Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46.

Ohio.— Parish *v.* Rigdon, 12 Ohio 191.

Pennsylvania.— Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642.

Texas.— Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746.

Virginia.— Daingerfield *v.* Thompson, 33 Gratt. (Va.) 136, 36 Am. Rep. 783.

England.— Noden *v.* Johnson, 16 Q. B. 218, 71 E. C. L. 218, 2 Eng. L. & Eq. 201; Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257.

40. **A mere averment of an unlawful assault** is but the statement of a legal conclusion (Stivers *v.* Baker, 87 Ky. 508, 10 Ky. L. Rep. 523, 9 S. W. 491; Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746); but an allegation charging defendant with the commission of an assault, by the agency of his servants, acting within the scope of his employment, and by certain specified instrumentalities, is an averment of an issuable fact, and not a mere conclusion of law (Foran *v.* Levin, 76 Minn. 178, 78 N. W. 1047).

Aider by verdict.— It has been held that, after a general verdict for plaintiff on the plea of not guilty and *son assault demesne*, the judgment will not be arrested on the ground that no time was stated in the declaration (Digges *v.* Norris, 3 Hen. & M. (Va.) 268); and that, after verdict, a plea of *son assault demesne* sufficiently justifies a battery, charged to have been committed by different instruments (Paige *v.* Smith, 13 Vt. 251; Blunt *v.* Beaumont, 2 C. M. & R. 412, 4 Dowl. P. C. 219, 5 Tyrw. 1100.

41. Earl *v.* Tupper, 45 Vt. 275.

42. Sheldon *v.* Lake, 9 Abb. Pr. N. S. (N. Y.) 306, 40 How. Pr. (N. Y.) 489; Hathaway *v.* Rice, 19 Vt. 102.

43. Benson *v.* Swift, 2 Mass. 50.

44. Ricketts *v.* Sandifer, 69 Ind. 318.

It is a sufficient averment where the complaint describes the injuries inflicted by defendant, and alleges that "thereby said plaintiff was greatly wounded and bruised," etc. Greenman *v.* Smith, 20 Minn. 418. To same effect see Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

Aider by verdict.— Allegations as to defendant's connection with the assault, if obscure, are cured by verdict where such facts appear as will enable the defect to be remedied by reasonable intendments. Puett *v.* Beard, 86 Ind. 104.

45. Southern Express Co. *v.* Platten, 93 Fed. 936, 36 C. C. A. 46; Noden *v.* Johnson, 16 Q. B. 218, 71 E. C. L. 218.

46. Daily *v.* Redfern, 1 Mont. 467.

47. Daily *v.* Redfern, 1 Mont. 467; Andersen *v.* Schlesinger, 16 Misc. (N. Y.) 535, 38 N. Y. Suppl. 296, 73 N. Y. St. 663.

48. Sullivan *v.* Jones, 117 Ind. 327, 20 N. E. 242.

49. Chapman *v.* Wilber, 6 Hill (N. Y.) 475, wherein the venue was laid in the city and county of New York, and it was alleged that the injuries were inflicted "at Batavia, to wit, at the city and county of New York," and in which it was held that the venue was mislaid, because of the presumption that the cause of action arose in Genesee county, wherein Batavia was situated.

50. Schlosser *v.* Griffith, 125 Ind. 431, 25 N. E. 459; Benson *v.* Bacon, 99 Ind. 156; Sheldon *v.* Lake, 9 Abb. Pr. N. S. (N. Y.) 306, 40 How. Pr. (N. Y.) 489.

51. Norris *v.* Casel, 90 Ind. 143. See also McKee *v.* Calvert, 80 Mo. 348, in which case it was held that a failure on the part of plaintiff to allege that the assault was wrongful is cured by verdict.

52. Greenman *v.* Smith, 20 Minn. 418.

(E) *Motive — Malice.* The motive of the assault, or the fact that defendant was actuated by malice, though tending to increase the damages, need not be specially pleaded;[53] but the speaking of slanderous words may be alleged as an incident of the assault to show the malicious intent, and will not be regarded as an attempt to charge more than one cause of action.[54]

(F) *Plaintiff's Freedom From Fault.* It need not be alleged that plaintiff was free from fault,[55] since the doctrine of contributory negligence has no application to an action for assault and battery.[56]

(G) *Institution of Criminal Proceedings.* Notwithstanding a statutory requirement that the institution of criminal proceedings shall be a prerequisite to an action for the same assault, the failure of the declaration to set forth the institution of such proceedings will not vitiate it.[57]

(H) *Matters of Aggravation.* Matters of aggravation, which are not essential to make out a cause of action, and whose effect is merely to enhance the damages, need not be pleaded specially.[58]

(I) *Damages* — (1) IN GENERAL. Where a count for malicious prosecution is improperly joined with a count for assault and battery, and there is a general *ad damnum* clause at the end of the declaration, it will apply to the count for assault and battery;[59] but, where an assault and a false imprisonment at the same time and place were charged separately, a general averment of damages in a specified sum was held to refer to both causes of action,[60] though such damages accrued after the commencement of the action.[61]

(2) NATURAL RESULTS OF INJURY. Elements of damage which are the natural result of the injury need not be specifically set forth to authorize a recovery therefor.[62]

(3) CONSEQUENTIAL OR SPECIAL DAMAGES. Consequential or special damages must be alleged to enable plaintiff to make proof in relation thereto or to recover therefor;[63] but a defect in this respect is cured by verdict.[64]

53. Andrews *v.* Stone, 10 Minn. 72; Lyddon *v.* Dose, 81 Mo. App. 64; Sloan *v.* Speaker, 63 Mo. App. 321; Howard *v.* Lillard, 17 Mo. App. 228; Klein *v.* Thompson, 19 Ohio St. 569; Hilbert *v.* Doebricke, 8 Cinc. L. Bul. 268.

"Maliciously" equivalent of "wantonly and wilfully."— An allegation that an assault and battery was malicious is equivalent to saying that it was committed wantonly and wilfully. White *v.* Spangler, 68 Iowa 222, 26 N. W. 85.

54. Delmage *v.* Crow, 22 Misc. (N. Y.) 511, 49 N. Y. Suppl. 1004; Brewer *v.* Temple, 15 How. Pr. (N. Y.) 286. But see Anderson *v.* Hill, 53 Barb. (N. Y.) 238, wherein it was held that a complaint, stating in one count a cause of action for an assault and battery, and also a cause of action for slander, alleging injury to the person and claiming damages, generally, for a specified sum, is bad on demurrer.

55. Chicago, etc., R. Co. *v.* Doherty, 53 Ill. App. 282; Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

56. Whitehead *v.* Mathaway, 85 Ind. 85; Steinmetz *v.* Kelly, 72 Ind. 442, 37 Am. Rep. 170; Ruter *v.* Foy, 46 Iowa 132; Kain *v.* Larkin, 56 Hun (N. Y.) 79, 9 N. Y. Suppl. 89, 29 N. Y. St. 643.

57. Harford *v.* Carroll, 21 R. I. 515, 45 Atl. 259.

58. *Massachusetts.*— Tyson *v.* Booth, 100 Mass. 258.

Missouri.— Pierce *v.* Carpenter, 65 Mo. App. 191.

New York.— Root *v.* Foster, 9 How. Pr. (N. Y.) 37.

Pennsylvania.— Horton *v.* Monk, 1 Browne (Pa.) 65.

Texas.— McGehee *v.* Shafer, 9 Tex. 20.

59. Sheldon *v.* Sullivan, 45 Mich. 324, 7 N. W. 900.

60. Walsh *v.* Doland, 15 N. Y. Suppl. 96, 39 N. Y. St. 216.

61. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

62. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009 (humiliation, loss of reputation or social position); Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748; Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; O'Leary *v.* Rowan, 31 Mo. 117; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197. But see Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642, in which case it was held to be more regular to set out such elements of damage, but that a defect in this respect is cured by verdict.

63. O'Leary *v.* Rowan, 31 Mo. 117; Uertz *v.* Singer Mfg. Co., 35 Hun (N. Y.) 116.

Failure to specify amount.— Where the plaintiff alleged in his complant that he had been made lame and sick for five weeks, evidence of special damage was held to be admissible, though no specific amount was claimed *eo nomine*. Hutts *v.* Shoaf, 88 Ind. 395.

64. Brzezinski *v.* Tierney, 60 Conn. 55, 22 Atl. 486.

(III) *Amendments.* A complaint charging a battery may be amended by adding an allegation of wounding,[65] of unlawful detention or imprisonment,[66] or, it seems, of permanent injury;[67] but a count in trespass for carrying away goods cannot be added.[68]

(IV) *Joinder of Counts, and Election.* Plaintiff may state his cause of action in separate counts;[69] but, in a proper case, the court may compel plaintiff to elect upon which count he will rely.[70]

b. Answer or Plea[71]—(I) *In Abatement.* To raise the question, before a trial on the merits, that the complaint fails to set forth the institution of criminal proceedings as required by statute, a plea in abatement should be filed setting up the statute relied on, and alleging non-compliance with its provisions.[72]

(II) *In Bar*—(A) *Generally.* Where no special form of general denial is required by statute, any words which fairly import denial of all the averments of the complaint will be sufficient.[73] The answer must, however, be sufficient to present an issue,[74] though circumstances of aggravation need not be traversed;[75] and, where the use of force and arms is charged, it need not be specially denied.[76]

(B) *Accident.* Inevitable accident need not be specially pleaded.[77]

65. Hagins *v.* De Hart, 12 How. Pr. (N. Y.) 322.

66. Cahill *v.* Terrio, 55 N. H. 571.

67. Glass *v.* O'Grady, 17 U. C. C. P. 233.

68. Snyder *v.* Harper, 24 W. Va. 206.

69. Frederick *v.* Gilbert, 8 Pa. St. 454.

Separate causes.—A count charging a malicious trespass to the person may be joined with a charge of an intent to defraud, though the former is in trespass and the latter is in case. Cadwell *v.* Farrell, 28 Ill. 438.

70. Thus, where a declaration charged two with assault and false imprisonment, and plaintiff offered evidence of an illegal arrest by them jointly, but a separate assault by one, it was held proper to compel him to elect on which tort he would rely (Gainey *v.* Parkman, 100 Mass. 316); and, where plaintiff in one count alleged sundry wrongful acts on the part of defendant, on the same day, and after proving an assault by one defendant, attempted to prove a subsequent assault by the other, it was held that she must elect upon which assault she would rely, unless it was shown that the wrongful acts were part of a concerted plan of defendants (Brown *v.* Wheeler, 18 Conn. 199).

71. For forms of answers or pleas see the following cases:

Connecticut.—Hanchett *v.* Bassett, 35 Conn. 27.

Kentucky.— Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232.

Massachusetts.—Blake *v.* Damon, 103 Mass. 199.

New York.— Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46.

Ohio.— Parish *v.* Rigdon, 12 Ohio 191.

Vermont.— Clark *v.* Downing, 55 Vt. 259, 45 Am. Rep. 612; Hathaway *v.* Rice, 19 Vt. 102.

England.— Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257; Mostyn *v.* Fabrigas, Cowp. 161; Lawe *v.* King, 1 Saund. 76.

Effect of failure to plead.—Where defendant makes default, he admits the assault and battery, but not that it was committed on the day laid, nor does he admit circumstances laid by way of aggravation. Bates *v.* Loomis, 5 Wend. (N. Y.) 134.

72. Harford *v.* Carroll, 21 R. I. 515, 45 Atl. 259.

73. Hoffman *v.* Eppers, 41 Wis. 251, in which the answer stated "that defendant is not guilty of the grievances alleged in the complaint, or any or either of them, or any part thereof."

74. Sampson *v.* Henry, 11 Pick. (Mass.) 379.

An answer admitting the assault, but denying that it was of the nature or extent alleged, presents no issue to be tried (Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y.) 37); but, where a malicious assault is charged, an admission that defendant inflicted a blow with a weapon of substantially the same kind as that charged to have been used, while admitting the commission of the assault as alleged, is not an admission of the accompanying malice (Baker *v.* Hope, 49 Cal. 598).

An answer which merely sets up matters in mitigation, but which does not take direct issue upon the fact of the assault and battery, is bad. Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46; Lane *v.* Gilbert, 9 How. Pr. (N. Y.) 150.

Where a battery is not mere matter of aggravation, a sufficient plea must either confess or justify the battery. Seymour *v.* Bailey, 76 Ga. 338; Buller N. P. 19. A plea justifying the assault only is insufficient because only a partial answer. Loder *v.* Phelps, 13 Wend. (N. Y.) 46. But see Bryan *v.* Bates, 15 Ill. 87, holding that a plea professing to answer the assault, etc., and imprisonment, is broad enough to answer the battery complained of.

75. Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46 [*citing* Bates *v.* Loomis, 5 Wend. (N. Y.) 134].

76. Lawe *v.* King, 1 Saund. 76.

77. Wright *v.* Page, 2 Tyler (Vt.) 80.

(c) *Former Recovery or Acquittal.* A former recovery,[78] or dismissal of the criminal prosecution, where that is a defense,[79] must be specially pleaded.

(d) *Justification*—(1) GENERALLY. Matters of justification cannot be given in evidence under the general issue but must be pleaded specially,[80] and so fully as to admit proof which will have the effect of exonerating defendant.[81]

(2) SON ASSAULT DEMESNE. *Son assault demesne* is a good plea of justification, charging plaintiff with having committed the first assault,[82] even, it seems, when extraordinary force is charged.[83] This plea need not set forth minutely or particularly the nature or extent of the force used by plaintiff.[84]

(3) MOLLITER MANUS IMPOSUIT. A plea of *molliter manus imposuit* is also good,[85] except where plaintiff alleges extraordinary or aggravated force or violence.[86]

78. Coles *v.* Carter, 6 Cow. (N. Y.) 691.

79. Harding *v.* King, 6 C. & P. 427, 25 E. C. L. 508.

80. *Alabama.*—Lunsford *v.* Walker, 93 Ala. 36, 8 So. 386.

Georgia.—Kerwich *v.* Steelman, 44 Ga. 197; Brooks *v.* Ashburn, 9 Ga. 297.

Illinois.— Illinois Steel Co. *v.* Novak, 184 Ill. 501, 56 N. E. 966 [*affirming* 84 Ill. App. 641].

Indiana.— Norris *v.* Casel, 90 Ind. 143; Lair *v.* Abrams, 5 Blackf. (Ind.) 191; Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

Kentucky.—Smith *v.* Hancock, 4 Bibb (Ky.) 222; Wilken *v.* Exterkamp, 19 Ky. L. Rep. 1132, 42 S. W. 1140.

Massachusetts.—Hathaway *v.* Hatchard, 160 Mass. 296, 35 N. E. 857; Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667; Levi *v.* Brooks, 121 Mass. 501.

Missouri.— Thomas *v.* Werremeyer, 34 Mo. App. 665.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New Hampshire.—Wheeler *v.* Whitney, 59 N. H. 197; Jewett *v.* Goodall, 19 N. H. 562.

North Carolina.— Meeds *v.* Carver, 29 N. C. 273.

Oregon.— Konigsberger *v.* Harvey, 12 Oreg. 286, 7 Pac. 114.

Vermont.—Wright *v.* Page, 2 Tyler (Vt.) 80.

Wisconsin.— Atkinson *v.* Harran, 68 Wis. 405, 32 N. W. 756.

England.— Fraser *v.* Berkeley, 7 C. & P. 621, 2 M. & Rob. 3, 32 E. C. L. 789. *Contra,* Syers *v.* Chapman, 2 C. B. N. S. 438, 89 E. C. L. 438.

See 4 Cent. Dig. tit. "Assault and Battery," § 28.

If leave is given, under the general issue, defendant may prove anything amounting to a justification. Bobb *v.* Bosworth, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273; Fisher *v.* Johnson, 1 Browne (Pa.) 197.

81. Isley *v.* Huber, 45 Ind. 421; Schroder *v.* Ehlers, 31 N. J. L. 44; Likes *v.* Van Dike, 17 Ohio 454; McGehee *v.* Shafer, 9 Tex. 20.

Defense of master.— A plea by a servant that, plaintiff having assaulted his master in his presence, the servant struck plaintiff in defense of the master, is bad for the reason that, for all that appeared, the assault on the master was over. Barfoot *v.* Reynolds, 2 Str. 953, where it is said that the plea should have been that plaintiff would have beaten the master if the servant had not interfered.

Defense of property.— In justification, on the ground of defense of property, where no force was used by the assailant, defendant should plead that plaintiff refused to leave on demand, or that there was a resistance after a gentle laying on of hands. Robinson *v.* Hawkins, 4 T. B. Mon. (Ky.) 134; McIlvoy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271; Likes *v.* Van Dike, 17 Ohio 454. See also Brubaker *v.* Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111.

Punishment of pupil.—A plea by a schoolmaster which set forth no acts on the part of plaintiff requiring excessive severity, does not disclose a justification of a charge of unreasonable punishment. Hathaway *v.* Rice, 19 Vt. 102.

Where an officer seeks to justify, he must set out enough to show that he acted with authority (Bowman *v.* St. John, 43 Ill. 337. But see Patterson *v.* Kise, 2 Blackf. (Ind.) 127, holding that a plea alleging that defendant was an acting, deputized constable need not set out defendant's appointment), or that the acts of violence charged were rendered necessary by the resistance of plaintiff (Kreger *v.* Osborn, 7 Blackf. (Ind.) 74. And see Beamer *v.* Darling, 4 U. C. Q. B. 211, holding that, where pulling and dragging about are charged, a plea justifying an arrest under legal process is insufficient).

82. Collier *v.* Moulton, 7 Johns. (N. Y.) 109.

83. Mellen *v.* Thompson, 32 Vt. 407.

Son assault demesne is a good plea in mayhem, if the first assault was violent. Cockcroft *v.* Smith, Salk. 642.

84. Mellen *v.* Thompson, 32 Vt. 407.

85. Byran *v.* Bates, 15 Ill. 87; Titley *v.* Foxall, 2 Ld. Ken. 308; McLeod *v.* Bell, 3 U. C. Q. B. 61.

86. *Kentucky.*— Boles *v.* Pinkerton, 7 Dana (Ky.) 453; Brubaker *v.* Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111; Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; Cox *v.* Cooke, 1 J. J. Marsh. (Ky.) 360.

New Hampshire.— French *v.* Marstin, 24 N. H. 440, 57 Am. Dec. 294.

New York.— Gates *v.* Lounsbury, 20 Johns. (N. Y.) 427.

(III) *In Mitigation.* Matters of provocation[87] so recent as to raise a reasonable presumption that such acts prompted the assault,[88] hostile feelings of plaintiff, or the fact of a former assault by him,[89] or the right of possession over which the controversy arose,[90] should be pleaded in mitigation and not as a partial defense, though it has been held that such matters may be shown in evidence even though not alleged in the plea.[91] Defendant may also prove such recent acts of provocation under his denial of malice, without alleging them specifically in his answer.[92]

(IV) *Amendments.* Defendant may amend by striking out a plea of *son assault demesne* and substituting therefor a plea of *molliter manus imposuit;*[93] but, under the general issue, it has been held proper to refuse defendant leave, after all the testimony is in, to file an additional paragraph setting up self-defense, though counsel, in his opening, stated that to be the defense.[94]

(V) *Joinder of Pleas.* A plea in justification may be added to a general denial or a plea of not guilty;[95] and, under the English practice, a plea of a former conviction, for which a certificate was granted as provided by statute, may be joined with a plea of justification.[96]

c. **Counter-Claim.** Where assaults are separate transactions, one cannot be set up as a counter-claim to the other, but redress must be sought in a cross-action.[97]

d. **Replication**[98] — (I) *In General.* To a plea of *son assault demesne* or of defense of possession, the plaintiff may reply *de injuria sua propria*,[99] the effect of which is to confine defendant to proving an excuse for the battery,[1] and, if

Vermont.— Mellen *v.* Thompson, 32 Vt. 407.

England.— Collins *v.* Renison, Say. 138; Gregory *v.* Hill, 8 T. R. 299.

Canada.— Shore *v.* Shore, 2 U. C. Q. B. O. S. 65.

See 4 Cent. Dig. tit. "Assault and Battery," § 27.

87. Ronan *v.* Williams, 41 Iowa 680.

A plea setting up provocation with an intent to induce an assault must allege that plaintiff's conduct was for the purpose of procuring defendant to commit the injury alleged in the declaration. Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853.

Duplicity.— A plea that, at various times and places, plaintiff was guilty of using provocative language and performing insulting actions, with intent to induce an assault, is not duplicitous, though it sets out all of such speeches and actions, however multifarious. Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853.

88. Prindle *v.* Haight, 83 Wis. 50, 52 N. W. 1134.

Allegations of remote provocative acts may be stricken from the answer, and recent acts of provocation, as to which evidence would be admissible, permitted to remain. Prindle *v.* Haight, 83 Wis. 50, 52 N. W. 1134.

89. Dole *v.* Erskine, 37 N. H. 316.

90. Wright *v.* Page, 2 Tyler (Vt.) 80.

91. Rosenthal *v.* Brush, Code Rep. N. S. (N. Y.) 228; Fraser *v.* Berkeley, 7 C. & P. 621, 2 M. & Rob. 3, 32 E. C. L. 789. See also Moore *v.* Adam, 2 Chit. 198, 18 E. C. L. 589, holding that, though defendant has not pleaded a justification, he may extract evidence, in mitigation of damages, in the cross-examination of plaintiff's witnesses.

92. Prindle *v.* Haight, 83 Wis. 50, 52 N. W. 1134.

93. Milburne *v.* Kearnes, 1 Cranch C. C. (U. S.) 77, 17 Fed. Cas. No. 9,543, wherein terms were imposed.

94. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

95. *Connecticut.*— Hanchett *v.* Bassett, 35 Conn. 27.

Illinois.— Bowman *v.* St. John, 43 Ill. 337.

Indiana.—Kreger *v.* Osborn, 7 Blackf. (Ind.) 74.

Missouri.— Rhine *v.* Montgomery, 50 Mo. 566.

New York.— Lansingh *v.* Parker, 9 How. Pr. (N. Y.) 288.

Contra, Moore *v.* Devoy, 37 How. Pr. (N. Y.) 18; Roe *v.* Rogers, 8 How. Pr. (N. Y.) 356.

96. Lawler *v.* Kelly, 15 Ir. C. L. 1.

97. Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y.) 37. But see Slone *v.* Slone, 2 Metc. (Ky.) 339, holding that, if defendant is the party most aggrieved and is actually entitled to relief, he may seek redress against plaintiff by a cross-action in the form of a counter-claim.

98. For form of replication see Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232.

99. **Molliter insultum facere** was not a good reply to a plea of *son assault demesne*, for a beating in defense of possession is not justified. The reply should be *molliter manus imponere, quæ est eadem transgressio.* Jones *v.* Tresilian, 1 Mod. 36.

1. Sampson *v.* Henry, 11 Pick. (Mass.) 379; Brown *v.* Bennett, 5 Cow. (N. Y.) 181; Frederick *v.* Gilbert, 8 Pa. St. 454.

Degree of proof.— Upon issue taken on a plea of *son assault demesne*, it is necessary to prove an assault commensurate with the trespass sought to be justified. Reece *v.* Tay-

plaintiff relies on the fact that he was assaulted, and not for the purpose of expelling him from defendant's premises on his refusal to leave, as pleaded, he may take issue on the plea.[2] The replication must answer the whole plea.[3]

(II) *Necessity of Special Averments* — (A) *In General.* Special facts or circumstances relied on as a justification must be specially pleaded to entitle plaintiff to the benefit thereof.[4] Thus, he must specially justify his own prior assault,[5] and must reply specially where the justification sets up either matter of right, interest, or authority from him.[6]

(B) *Excess of Force.* While there are some cases to the contrary,[7] the more reasonable rule, and the one which seems to have been adopted in this country, is that a general replication of *de injuria* is a traverse of the whole plea of *son assault*, and that, under it, plaintiff may recover for an excess of force without a new assignment or specially pleading such excess.[8]

e. **Rejoinder.**[9] A rejoinder substantially reiterating a replication confessing and avoiding a plea of *son assault* is bad, because not traversing the replication.[10]

7. **Evidence — a. Burden of Proof.** Where the plea is "Not guilty" plaintiff is put to the proof of every material allegation in the declaration,[11] and,

lor, 1 Hurl. & W. 15, 4 L. J. K. B. 74, 4 N. & M. 470.

Election of replication.—Where plaintiff replied *de injuria*, and also exeess, on plaintiff's refusal to select which replication he would rely on, the court granted the motion of defendant to set the second replication aside. Reese *v.* Bolton, 6 Blackf. (Ind.) 185.

2. Glass *v.* O'Grady, 17 U. C. C. P. 233.

3. Hanna *v.* Rust, 21 Wend. (N. Y.) 149 (holding that, where defendant justified on the ground that plaintiff was creating a noise and disturbance in his house, and that he was requested to depart, a replication that plaintiff did not wholly refuse, but remained no longer than was necessary to get his baggage, without excusing the noise, is insufficient); Parlee *v.* Snider, 23 N. Brunsw. 274 (where the replication justified the assault, but not the battery).

Where the declaration averred an assault on plaintiff "while sitting in his gig," and the replication stated that, while defendant was in the gig, plaintiff gently laid hands on him and put him out, and then the assault, there was held to be no departure, since both allegations, though apparently discrepant, might be true, because not necessarily referring to the same exact point of time. Macfarland *v.* Dean, 1 Cheves (S. C.) 64.

4. Brown *v.* Bennett, 5 Cow. (N. Y.) 181; Collier *v.* Moulton, 7 Johns. (N. Y.) 109; King *v.* Phippard, Carth. 280, Comb. 288.

In New Hampshire and Vermont, when *de injuria* is replied to, all the substantial averments of the plea *son assault* are put in issue — as well whether more than necessary force was used in repelling the assault, as who made the first assault. Dole *v.* Erskine, 35 N. H. 503; Harrison *v.* Harrison, 43 Vt. 417; Devine *v.* Rand, 38 Vt. 621; Yale *v.* Seely, 15 Vt. 221; Elliot *v.* Kilburn, 2 Vt. 470.

Where son assault is merely set up by way of notice, under a plea of "Not guilty," so that plaintiff has no opportunity of replying, he will be permitted to give evidence of *molliter manus imposuit.* Collier *v.* Moulton, 7 Johns. (N. Y.) 109.

5. Ayres *v.* Kelley, 11 Ill. 17; Fortune *v.* Jones, 30 Ill. App. 116 [*reversed*, on other grounds, in 128 Ill. 518, 21 N. E. 523]; Elliot *v.* Kilburn, 2 Vt. 470.

6. Parish *v.* Rigdon, 12 Ohio 191.

7. Glass *v.* O'Grady, 17 U. C. C. P. 233; Davis *v.* Lennon, 8 U. C. Q. B. 599; Shore *v.* Shore, 2 U. C. Q. B. O. S. 65.

A replication of excess may be added by way of amendment at the trial, or even after judgment. Glass *v.* O'Grady, 17 U. C. C. P. 233.

8. *Delaware.*— Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771.

Illinois.— Ayres *v.* Kelley, 11 Ill. 17; Fortune *v.* Jones, 30 Ill. App. 116 [*reversed*, on other grounds, in 128 Ill. 518, 21 N. E. 523].

Indiana.— Steinmetz *v.* Kelly, 72 Ind. 442, 37 Am. Rep. 170; Philbrick *v.* Foster, 4 Ind. 442; Fisher *v.* Bridges, 4 Blackf. (Ind.) 518.

Maryland.— Gaither *v.* Blowers, 11 Md. 536.

Massachusetts.— Hannen *v.* Edes, 15 Mass. 347.

New Hampshire.—Dole *v.* Erskine, 35 N. H. 503; Curtis *v.* Carson, 2 N. H. 539.

New York.— Bennett *v.* Appleton, 25 Wend. (N. Y.) 371.

Vermont.— Devine *v.* Rand, 38 Vt. 621 (in which it was held that plaintiff might recover for any excessive force beyond reasonable chastisement of which they should find defendant guilty); Mellen *v.* Thompson, 32 Vt. 407; Bartlett *v.* Churchill, 24 Vt. 218; Elliot *v.* Kilburn, 2 Vt. 470.

See 4 Cent. Dig. tit. "Assault and Battery," § 30.

9. **For form of rejoinder** see Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232.

10. Macfarland *v.* Dean, 1 Cheves (S. C.) 64.

11. Cogdell *v.* Yett, 1 Coldw. (Tenn.) 229. But see Stevens *v.* Lloyd, 1 Cranch C. C. (U. S.) 124, 23 Fed. Cas. No. 13,402.

prima facie, is entitled to a verdict on proof of the assault and battery charged.[12] It is not essential, however, that he should show, in the first instance, by direct evidence, either an intention to commit the injury or that defendant was in fault.[13] On the question of excessive force[14] or abuse of authority,[15] the burden of proof is on plaintiff; and where defendant was engaged in a lawful act when plaintiff was injured, the burden of showing want of due care is also on plaintiff.[16] The assault or battery being proved, it devolves upon defendant to justify or to show facts in mitigation;[17] and where he seeks to justify, the burden rests on him to show the justification.[18] Under the plea of *son assault demesne* in excuse, with the general replication *de injuria*, etc., the burden of proof is also on him to show that plaintiff actually committed the first assault, and, also, that that which was done on his own part was in the necessary defense of his person.[19]

b. Admissibility, Weight, and Sufficiency — (1) *In General.* The assault or battery need not be proved beyond a reasonable doubt,[20] even though an assault with intent to ravish is alleged;[21] nor is more than a preponderance of evidence necessary to warrant exemplary damages.[22] The inducement to the acts, declarations, or conduct of either party leading up to the assault or forming part thereof, or other matters calculated to throw light on the situation, may be introduced in evidence to show the animus of, or the degree of, blame, if any, chargeable to either party, and to aid the jury in arriving at a just measure of damages;[23] but

12. Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Wakefield *v.* Fairman, 41 Vt. 339.

13. Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354.

14. Finnell *v.* Bohannon, 19 Ky. L. Rep. 1587, 44 S. W. 94; Ayres *v.* Birtch, 35 Mich. 501; Henry *v.* Lowell, 16 Barb. (N. Y.) 268.

15. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 12 L. ed. 618.

16. Brown *v.* Kendall, 6 Cush. (Mass.) 292.

17. Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Wakefield *v.* Fairman, 41 Vt. 339.

18. *Alabama.*— Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Illinois.— Gizler *v.* Witzel, 82 Ill. 322.

Indiana.— Schlosser *v.* Fox, 14 Ind. 365.

Kentucky.— Johnson *v.* Strong, 22 Ky. L. Rep. 577, 58 S. W. 430; Phillips *v.* Mann, 19 Ky. L. Rep. 1705, 44 S. W. 379.

Massachusetts.— Hathaway *v.* Hatchard, 160 Mass. 296, 35 N. E. 857; Blake *v.* Damon, 103 Mass. 199.

New York.— Harvey *v.* Dunlop, Lalor (N. Y.) 193.

Wisconsin.— Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401.

United States.— Stevens *v.* Lloyd, 1 Cranch C. C. (U. S.) 124, 23 Fed. Cas. No. 13,402.

See 4 Cent. Dig. tit. "Assault and Battery," § 36.

Opening and closing.— If the justification is appropriately pleaded, defendant is entitled to open and close. Seymour *v.* Bailey, 76 Ga. 338; Johnson *v.* Strong, 22 Ky. L. Rep. 577, 58 S. W. 430; Phillips *v.* Mann, 19 Ky. L. Rep. 1705, 44 S. W. 379. See also Loring *v.* Aborn, 4 Cush. (Mass.) 608, where defendant, a conductor in charge of a railroad train, justified on the ground that plaintiff refused to give up his ticket as required by the rules and regulations of the company. He also filed an admission which, under a rule of the court, entitled him to open and close the case, and it was held that defendant, having obtained the opening and the closing, took upon himself the burden of proof to justify all he did to make a justification throughout.

19. Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587; Sampson *v.* Henry, 11 Pick. (Mass.) 379; Frederick *v.* Gilbert, 8 Pa. St. 454.

Plaintiff may introduce his evidence first; but, if defendant be permitted to first introduce testimony, plaintiff may still prove the assault and battery charged. Young *v.* Highland, 9 Gratt. (Va.) 16.

20. Shaul *v.* Norman, 34 Ohio St. 157.

21. Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668. *Contra*, Crossman *v.* Bradley, 53 Barb. (N. Y.) 125, which holds that the proof in such an action must be of the same nature and degree as on a criminal prosecution for rape.

22. St. Ores *v.* McGlashen, 74 Cal. 148, 15 Pac. 452.

23. *Alabama.*— Logan *v.* Austin, 1 Stew. (Ala.) 476.

California.— Macdougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98.

Georgia.— Hammond *v.* Hightower, 82 Ga. 290, 9 S. E. 1101; Gilliam *v.* Love, 30 Ga. 864.

Illinois.— Ously *v.* Hardin, 23 Ill. 403.

Indiana.— Puett *v.* Beard, 86 Ind. 104; Baker *v.* Gausin, 76 Ind. 317; McMasters *v.* Cohen, 5 Ind. 174; Philbrick *v.* Foster, 4 Ind. 442.

Iowa.— Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625.

Kentucky.— Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267. See also Rochester *v.* Anderson, 1 Bibb (Ky.) 428, holding that defendant may not show the circulation by plaintiff of a slander, for which, prior to the assault, defendant had threatened to beat him.

Maine.— Flint *v.* Bruce, 68 Me. 183.

Maryland.— Handy *v.* Johnson, 5 Md. 450; Shafer *v.* Smith, 7 Harr. & J. (Md.) 67.

evidence as to matters which are so remote as to have no bearing on these questions is inadmissible.[24]

(II) *OF THE ASSAULT OR BATTERY*—(A) *In General.* The assault should be proved substantially as laid,[25] and plaintiff is confined in his proof to the assault

Massachusetts.—Blake *v.* Damon, 103 Mass. 199.

Michigan.— Scheel *v.* Reimer, 98 Mich. 126, 56 N. W. 1108; Pokriefka *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561; Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581; Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

Minnesota.— Schuek *v.* Hagar, 24 Minn. 339.

Mississippi.— Mullins *v.* Cottrell, 41 Miss. 291; Bell *v.* Morrison, 27 Miss. 68.

Missouri.— Collins *v.* Todd, 17 Mo. 537.

New Hampshire.— Green *v.* Bedell, 48 N. H. 546.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 507.

New York.— Hogan *v.* Ryan, 5 N. Y. St. 110; Murphy *v.* Dart, 42 How. Pr. (N. Y.) 31.

South Carolina.—Dean *v.* Horton, 2 McMull. (S. C.) 147.

Texas.— Sargent *v.* Carnes, 84 Tex. 156, 19 S. W. 378.

Vermont.— Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287; Parker *v.* Couture, 63 Vt. 449, 21 Atl. 1102.

Wisconsin.— Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143.

See 4 Cent. Dig. tit. "Assault and Battery," § 37.

Acts of defendant, not committed in plaintiff's presence, and which might be considered by the jury to defendant's prejudice, cannot be shown. Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864.

Declarations of plaintiff, made at a distance of two or three hundred yards from the place of the assault (the interval of time not being fixed), are not admissible as part of the *res gestæ*. Cherry *v.* McCall, 23 Ga. 193.

Evidence that defendant complained of plaintiff for intoxication is immaterial and irrelevant, and consequently inadmissible. Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

Evidence that defendant interviewed plaintiff and paid his physician, having no bearing on the original transaction nor any tendency to disprove malice, is inadmissible. Johnson *v.* McKee, 27 Mich. 471.

Hallucinations.— On a trial for indecent assault on a woman afflicted with a particular disorder, it is proper to show that such persons are subject to hallucinations, and to ask her if she had not made similar charges before. Derwin *v.* Parsons, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262.

In actions for indecent assault the competency of evidence as to complaints made by the female immediately after the assault, or as to her condition and personal appearance, is governed by the same rules as obtain in criminal prosecutions for the same offense. Collins *v.* Wilson, 18 Ky. L. Rep. 1049, 39 S. W. 33; Gardner *v.* Kellogg, 23 Minn. 463. In such an action, the plaintiff need not be corroborated as in a criminal action (Rogers *v.* Winch, 76 Iowa 546, 41 N. W. 214), and, to rebut evidence that defendant was elsewhere at the time, evidence that he pleaded guilty to a similar assault on another at the same time is admissible (Parker *v.* Couture, 63 Vt. 449, 21 Atl. 1102). So, where plaintiff testifies to the commission of the assault in her room, she may show defendant's presence in that room at other times (Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57); and corroborative evidence of defendant's habit of taking women to a particular place for attempted sexual intercourse is also admissible (Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215).

Statements of bystanders.— Evidence is inadmissible to show that, at the time of the assault, bystanders requested the arrest of defendant and threatened him with violence, nor may they testify as to their opinion of the assault, or what they said or did with reference to it. Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. 867.

The weapon used may be introduced in evidence. Von Reeden *v.* Evans, 52 Ill. App. 209. And see Culley *v.* Walkeen, 80 Mich. 443, 45 N. W. 368, wherein the court held it proper to refuse to permit defendant to state the character of a weapon used by plaintiff by a witness who was not present, but to whom defendant showed the weapon and stated it to have been the one so used.

Where a joint action is severed, all the facts occurring at the time of the assault and battery may go to the jury at the trial of either of the actions. Barnes *v.* Gray, 5 Harr. & J. (Md.) 436.

24. *California.*— Badostain *v.* Grazide, 115 Cal. 425, 47 Pac. 118; Chapell *v.* Schmidt, 104 Cal. 511, 38 Pac. 892 (prior commission of trespasses similar to that for which the assault in question was committed).

Iowa.— Irwin *v.* Yeager, 74 Iowa 174, 37 N. W. 136.

Kentucky.— Morgan *v.* O'Daniel, 21 Ky. L. Rep. 1044, 53 S. W. 1040.

Massachusetts.— Miller *v.* Curtis, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469.

Nebraska.— Atkins *v.* Gladwish, 25 Nebr. 390, 41 N. W. 347, statements derogatory to plaintiff's character, made before and after the assault.

It is improper to permit third persons to give in evidence the plaintiff's declarations as to the particular way in which the injury was inflicted. Collins *v.* Waters, 54 Ill. 485.

25. Evidence of an assault only will not support a declaration for an assault and bat-

or assaults charged in his declaration or reply, and cannot introduce evidence of others.[26] So, where two different assaults and batteries are charged, and but one is justified, the effect of the replication *de injuria* is to preclude evidence of an assault and battery other than the one justified.[27] But if, on pleas of "Not guilty" and *son assault* to a declaration in one count, plaintiff newly assigns, on a new plea of "Not guilty," he may prove the trespass so assigned, though it differs from the one originally justified.[28]

(B) *Admissions.* Admissions and confessions of defendant which were directly made, or which may be inferred from his silence when charged with the offense, are admissible against him,[29] and it has been held that evidence as to the disposition made by defendant of his property, after the commission of the acts complained of, may properly be received as tending to show an admission of liability or to explain the character of the acts.[30] Such admissions and declarations are not admissible against a co-defendant,[31] unless when made before the separation of the parties and circumstances of aggravation are shown, in which case the declaration is admissible against all.[32] Declarations by one of the participants in the assault after the termination of the conspiracy are inadmissible against the others,[33] as are the declarations of a person not shown to have been connected with the conspiracy.[34]

(C) *Particular Elements* — (1) DEFENDANT'S PARTICIPATION. Under a count charging an assault, proof that the assault was committed by another acting under defendant's authority is inadmissible;[35] but an averment that an assault was committed by a person named is supported by proof that the person named was present as an aider and abettor.[36] So, evidence of acts of violence or of aid or encouragement, or declarations to one assailant by another person, is admissible in evidence where circumstances exist which tend to show that such other person was coöperating in the assault,[37] though the person alleged to have committed the

tery. Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746.

Means employed.— A charge of an assault by the presentation of a loaded pistol must be sustained by proof that the pistol was loaded (Blake *v.* Barnard, 9 C. & P. 626, 38 E. C. L. 365); but, where an assault with a cane is charged, plaintiff may prove that, during the assault, defendant forced him against an object which injured him (Brzezinski *v.* Tierney, 60 Conn. 55, 22 Atl. 486). The court will take notice that a fence-pole is a "heavy club," the assault being charged to have been committed with the latter, and the proof being that it was committed with a fence-pole. Baker *v.* Hope, 49 Cal. 598.

26. Carpenter *v.* Crane, 5 Blackf. (Ind.) 119; Gillon *v.* Wilson, 3 T. B. Mon. (Ky.) 216; Peyton *v.* Rogers, 4 Mo. 254.

27. Berry *v.* Borden, 7 Blackf. (Ind.) 384.

28. West *v.* Rousseau, 7 Blackf. (Ind.) 450.

29. Puett *v.* Beard, 86 Ind. 104; Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711; Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Jewett *v.* Banning, 23 Barb. (N. Y.) 13 [*affirmed* in 21 N. Y. 27]. See also Cohen *v.* Robert, 2 Strobh. (S. C.) 410, holding that the introduction by plaintiff of an affidavit by defendant admitting the assault rendered admissible defendant's declarations therein of the circumstances which incited him to the violence.

30. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724; Heneky *v.* Smith, 10 Oreg. 349, 45 Am. Rep. 143. *Contra*, Givens *v.* Berkley, 21 Ky. L. Rep. 1653, 56 S. W. 158, holding, further, that it is not competent to show that defendant had caused the indictment of a witness who had testified against him on a criminal prosecution for the assault in question.

31. Elliott *v.* Russell, 92 Ind. 526; Sodusky *v.* McGee, 7 J. J. Marsh. (Ky.) 266.

The declaration or confessions of a defendant not served are inadmissible against his co-defendants. Blackwell *v.* Davis, 2 How. (Miss.) 812.

32. Bell *v.* Morrison, 27 Miss. 68. See also Mawich *v.* Elsey, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

33. Wagner *v.* Haak, 170 Pa. St. 495, 32 Atl. 1087.

34. Hoffman *v.* Eppers, 41 Wis. 251.

35. Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253.

36. Goetz *v.* Ambs, 27 Mo. 28. See also Murphy *v.* Wilson, 44 Mo. 313, 100 Am. Dec. 290, holding that where it is averred that one of defendants committed the assault, but that all of them, together with others, engaged in the commission of the assault, it may be properly shown that plaintiff was injured by one of the participants, though not by one of those named.

37. Williams *v.* Jarrot, 6 Ill. 120; Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711.

Evidence of a previous affray between some of the parties is admissible to show a common purpose to assault. Sodusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621; Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401.

violence is not a party to the action,[38] or where defendants having separate trials were engaged in the common purpose of an illegal act;[39] and where it appears that plaintiff had confederated with others in making the assault, evidence of his participation in previous threats and attacks is admissible.[40] When plaintiff's testimony has a tendency to connect one defendant with an assault committed by the other, it is error to refuse to permit him to explain the apparent incriminating circumstances.[41]

(2) TIME. If the allegation of time is immaterial — as where issue is joined on a plea of not guilty — proof of the assault on any day before the institution of the action is sufficient;[42] but where a plea of *son assault demesne* is interposed, plaintiff must prove that the assault was committed on the day laid, whether defendant supported his plea by evidence or not.[43]

(3) PLACE. Where the place of the battery is alleged, proof that it was committed at the particular place laid is unnecessary. If it is shown that it was committed within the county it is enough.[44]

(4) MOTIVE — MALICE. Where it is material to show the motive of assailant, or the existence of malice or ill-will on his part, in order to enhance the damages or for any other lawful purpose, both his prior and subsequent declarations, acts, and conduct, as well as those which accompany the act, are legitimate evidence for that purpose.[45] Likewise, defendant may testify as to the intent

Express direction to make assault.— It is not incumbent upon plaintiff to show that either of defendants expressly directed the other to make the assault, or that they struck him at the same moment of time, or that one struck him after the other. Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588.

The testimony of other persons injured, tending to show defendant's complicity in the assault on them, is admissible on behalf of plaintiff. Cox *v.* Crumley, 5 Lea (Tenn.) 529.

Evidence of acts tending to show a conspiracy is to be limited in its application to those defendants against whom such acts are proved. Strout *v.* Packard, 76 Me. 148, 49 Am. Rep. 601.

38. Miller *v.* Sweitzer, 22 Mich. 391.

39. Williams *v.* Townsend, 15 Kan. 563.

40. Tyson *v.* Booth, 100 Mass. 258.

41. Prindle *v.* Glover, 4 Conn. 266.

42. Palmer *v.* Skillenger, 5 Harr. (Del.) 234; Sellers *v.* Zimmerman, 18 Md. 255.

43. Gibson *v.* Fleming, 1 Harr. & J. (Md.) 483. And see Buller N. P. 17, where it is said that, where defendant justifies on the ground that plaintiff made the first assault, and issue is joined thereon, defendant may prove an assault on any day before the action joined, and plaintiff cannot give in evidence a battery at another day or at another time in the same day without a novel assignment, which must state the battery to be on the same day mentioned in the declaration, else it will be a departure; though, on said novel assignment, he may give in evidence a battery on any day, the same as he might if defendant had not pleaded "Not guilty" to the declaration.

44. Hammer *v.* Pierce, 5 Harr. (Del.) 304; Hurley *v.* Marsh, 2 Ill. 329; Miller *v.* McKee, 3 Harr. & M. (Md.) 593.

45. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Watkins *v.* Gaston, 17 Ala. 664.

Connecticut.— Bartram *v.* Stone, 31 Conn. 159.

Illinois.— Aulger *v.* Smith, 34 Ill. 534.

Maryland.— Byers *v.* Horner, 47 Md. 23.

Massachusetts.— Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383; Blake *v.* Damon, 103 Mass. 199.

Michigan.—Peterson *v.* Toner, 80 Mich. 380, 45 N. W. 346. See Breitenbach *v.* Trowbridge, 64 Mich. 393, 394, 31 N. W. 402, 8 Am. St. Rep. 829, wherein evidence that defendant, on a criminal prosecution for the same offense, called plaintiff "a d——d police-court shyster," was held admissible as showing the malice of defendant, and, therefore, as bearing upon his credibility as a witness; but that it was incompetent to show malice at the time of the assault.

New York.— Elfers *v.* Woolley, 116 N. Y. 294, 22 N. E. 548, 26 N. Y. St. 678; Jewett *v.* Banning, 21 N. Y. 27 [*affirming* 23 Barb. (N. Y.) 13].

North Carolina.— Mills *v.* Carpenter, 32 N. C. 298.

Oregon.— See Smith *v.* Harris, 7 Oreg. 76.

Wisconsin.— Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060.

Subsequent acts not admissible in chief.— It is held, however, that evidence of defendant's acts and conduct subsequent to the battery is only admissible where defendant attempts to show that he was not actuated by malice or ill-will. Green *v.* Cawthorn, 15 N. C. 409.

Conspiracy to injure plaintiff is evidence as to defendant's motives in an apparent attempt to render him physical aid. Hoffman *v.* Eppers, 41 Wis. 251.

Evidence of malice toward plaintiff's husband is inadmissible to prove malice toward plaintiff. Quigley *v.* Turner, 150 Mass. 108, 22 N. E. 586.

Evidence that a battery was excessive tends

with which he approached plaintiff, and as to his opinion with relation to plaintiff's design.[46]

(5) Excessive Force. Under the plea of *son assault demesne* and reply *de injuria sua propria*, plaintiff may prove that defendant used more force than was necessary, and that an excessive battery was committed,[47] although the replication does not specially allege excess.[48] Upon the question of whether the punishment of a pupil by his master was excessive, evidence may not be given that the ordinary management of the school by defendant was mild and moderate, but defendant may show that, in a former trial, no claim of excessive punishment was made.[49]

(6) Matters of Aggravation. Evidence of acts and circumstances of outrage, or insult accompanying an assault and battery, which wound the feelings and tend to lower the parties in the estimation of society, is admissible in evidence to enhance the damages.[50] Evidence of prior threats[51] or of a criminal intent against plaintiff[52] have also been held admissible.

(7) Resulting Injury — (a) Fact of Injury. Under the plea of *son assault demesne*, defendant may show that a particular injury was sustained otherwise than by his own wrongful act;[53] but such testimony should be limited to a time proximate to the injury;[54] and, where defendant's testimony shows, or tends to show, some other cause, defendant may properly rebut it.[55] Defendant may introduce testimony tending to show that the claim of injury made is a pretense;[56] but, to show that the alleged injury is not as serious as pretended, the evidence must be material on that issue.[57]

to show that the assault was malicious. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

Sufficiency.— Under a complaint charging that an assault was committed wantonly, maliciously, or wilfully, it is only necessary to prove that the assault was intentional. Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588; Cottrell *v.* Piatt, 101 Iowa 231, 70 N. W. 177.

Where compensatory damages only are claimed, evidence of improper motive on the part of defendant as to matters connected with the assault is immaterial, because having no bearing on the amount of recovery. Berryman *v.* Cox, 73 Mo. App. 67.

46. Plank *v.* Grimm, 62 Wis. 251, 22 N. W. 470.

47. Bartlett *v.* Churchill, 24 Vt. 218.

A witness may not testify as to whether or not the force used was excessive, but must state the facts from which the jury may draw their conclusions. Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

48. Dean *v.* Taylor, 11 Exch. 68. *Contra*, Rimmer *v.* Rimmer, 16 L. T. Rep. N. S. 238.

49. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156, wherein it was also held competent to show that the same instrument of punishment was used in other schools in the vicinity.

50. *Connecticut.*— Maisenbacker *v.* Concordia Soc., 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

Iowa.— Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802.

Kentucky.— Worford *v.* Isbel, 1 Bibb (Ky.) 247, 4 Am. Dec. 633. But see Hallowell *v.* Hallowell, 1 T. B. Mon. (Ky.) 130, holding that evidence of words spoken by defendant, either at the time of the assault or at another time and place, is inadmissible in aggravation of damages.

North Carolina.— Pendleton *v.* Davis, 46 N. C. 98.

Wisconsin.— Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670, further holding that, in an action for a battery on the wife, public odium incurred, by exposure, at the trial, of the domestic quarrels of husband and wife, could not be considered.

51. Sledge *v.* Pope, 3 N. C. 607.

52. Pratt *v.* Ayler, 4 Harr. & J. (Md.) 448.

53. Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587.

54. Goracke *v.* Hintz, 13 Nebr. 390, 14 N. W. 379.

55. Pokriefka *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059.

56. Thus, defendant may show that plaintiff advised a witness with whom defendant had had a difficulty to pretend to be injured, and thus extort money from defendant. Wrege *v.* Westcott, 30 N. J. L. 212, also holding that plaintiff might show in rebuttal, to contradict the witness, that the witness was injured in said difficulty, and that he so stated at the time.

57. See Garrett *v.* Thomas, 22 Ky. L. Rep. 490, 57 S. W. 611, wherein plaintiff claimed that his injuries precluded him from manual labor, and it was held error to permit a witness to testify that plaintiff stated "he would be" in business "directly."

Unnecessary bandages.— Evidence is immaterial that plaintiff appeared, on a criminal prosecution against defendant, with a large bandage on his head, with intent to deceive as to the extent of his injuries. Kaline *v.* Stover, 88 Iowa 245, 55 N. W. 346.

(b) NATURE AND EXTENT OF INJURY. Where sickness and injury are alleged,[58] plaintiff may prove, as a consequence of the assault,[59] physical and mental conditions which are not apparent to others,[60] or those the origin or aggravation of which is traceable to the act complained of,[61] and may testify as to his condition prior to and since the assault.[62] Where permanency is pleaded,[63] plaintiff may give evidence as to his condition of health since the assault,[64] or may show the permanence of a bodily infirmity produced or aggravated by the wrongful act.[65] Evidence is also admissible to prove aggravation of a previously impaired physical condition, and the extent thereof,[66] or of an aggravation of the injuries since their infliction, by illness.[67]

(III) *AS TO RIGHT OF POSSESSION.* Where it appears that the assault and battery grew out of a dispute or controversy as to the right to personal or real property, or the use or possession of the latter, or the fact of actual occupancy thereof, and the subject-matter of the controversy is a material element in the

58. **Physical conditions which are not alleged** to have been the result of the injuries cannot be shown (Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. 867); but evidence may be given as to the obviously probable effects of a battery, though not alleged. (Sloan *v.* Edwards, 61 Md. 89; Avery *v.* Ray, 1 Mass. 12).

59. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

60. Johnson *v.* McKee, 27 Mich. 471.

61. Johnson *v.* McKee, 27 Mich. 471.

62. Townsdin *v.* Nutt, 19 Kan. 282.

Other persons than plaintiff, who are competent witnesses because of actual knowledge, may state not only the physical condition of plaintiff before the assault (Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. 866), but also his apparent sufferings and impaired physical or mental condition after the assault (Dimick *v.* Downs, 82 Ill. 570; Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. 866; Hannan *v.* Gross, 5 Wash. 703, 32 Pac. 787) and at the time of the trial (Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76). But, plaintiff having testified to his injuries and sufferings, the testimony of a witness, who had seen him frequently during three or four months after the injury as to "whether at these times he evinced any emotion of pain or otherwise," is inadmissible because tending to elicit a mere opinion. Leonard *v.* Field, 136 Mass. 125.

Professional opinions as to the extent and nature of the injury and its cause, derived from the witness' examination, observation, and statements made by the plaintiff, are competent (Bonino *v.* Caledonio, 144 Mass. 299, 11 N. E. 98; Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215; Fort *v.* Brown, 46 Barb. (N. Y.) 366), and plaintiff's physician may testify that he told plaintiff of his condition, and that it was necessary to amputate his arm, since the mental suffering resulting therefrom was attributable to defendant, if he was the cause of the injury (Townsend *v.* Briggs, (Cal. 1893) 32 Pac. 307).

Complaints and representations indicative of present pain, whether made before or after the suit, and not as a narration of past suffering, but as exhibiting the natural symptoms and effects of the injury, and whether made to a medical expert or other person, are admissible.

Alabama.— Phillips *v.* Kelly, 29 Ala. 628.

Indiana.— Yost *v.* Ditch, 5 Blackf. (Ind.) 184; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92.

New York.— Werely *v.* Persons, 28 N. Y. 344, 84 Am. Dec. 346.

Pennsylvania.— Lichtenwallner *v.* Laubach, 105 Pa. St. 366.

Texas.— Newman *v.* Dodson, 61 Tex. 91; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

See 4 Cent. Dig. tit. "Assault and Battery," § 44.

Exhibiting to the jury mutilations or scars claimed to have resulted from the injury is proper. Townsend *v.* Briggs, (Cal. 1893) 32 Pac. 307; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

A ferrotype, claimed to show the condition of plaintiff's back three days after the beating, may be shown to the jury, where the photographer who took it has testified that it is a true representation. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

63. **Where the petition does not allege such facts,** evidence of permanence is inadmissible (Denton *v.* Ordway, 108 Iowa 487, 79 N. W. 271), unless the permanency is the necessary consequence of the injury (Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481).

64. Hamm *v.* Romine, 98 Ind. 77.

65. Johnson *v.* McKee, 27 Mich. 471.

66. Watson *v.* Rheinderknecht, (Minn. 1901) 84 N. W. 798.

Previous impairment.—Evidence that plaintiff had hemorrhages of the lungs about eighteen months prior to the assault, and that he was weak and feeble at the time it was committed, accompanied by evidence from which it could be inferred that defendant had knowledge of such facts, is admissible. Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

67. The jury being instructed that defendant would be liable only for his own acts. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

case, evidence may be given by either party to prove such right or fact of occupancy;[68] but, if unimportant because not material, or not tending to characterize the transactions, is inadmissible.[69] So, a judgment determining facts tending to show the true boundary line is inadmissible where there is no identity of parties or of subject-matter,[70] or where it is not conclusive as to the rights of the parties.[71] Likewise, under a plea justifying an assault on an alleged trespasser because of a right of possession, that right must be established.[72]

(IV) *JUSTIFICATION.* Where two assaults are charged, and both are admitted by the plea of *son assault*, defendant, to justify, must prove two several assaults.[73] If he seeks to justify as an officer, he must clearly establish his authority.[74] One who attempts to justify on the ground that the assault was committed in endeavoring to remove a trespasser, fails unless he shows that the assault was committed in such an endeavor,[75] or that, as claimed, he mistook the person assaulted for a wrong-doer.[76] Defendant may also give in evidence quarantine regulations to justify his action thereunder.[77]

(V) *CHARACTER AND REPUTATION OF PARTIES*—(A) *In General.* The character and standing of the parties are pertinent in determining the amount of exemplary damages;[78] but are not an element of compensation.[79] Ordinarily, evidence as to the character of defendant, his general reputation, or the like, being

68. *Maryland.*— Du Val *v.* Du Val, 21 Md. 149.

Massachusetts.— Brown *v.* Gordon, 1 Gray (Mass.) 182.

Michigan.— Stuyvesant *v.* Wilcox, 92 Mich. 233, 52 N. W. 465, 31 Am. St. Rep. 580; Franck *v.* Wiegert, 56 Mich. 472, 23 N. W. 172.

New York.— Bliss *v.* Johnson, 73 N. Y. 529; Borst *v.* Zeh, 12 Hun (N. Y.) 315; Hardenburgh *v.* Crary, 50 Barb. (N. Y.) 32.

Pennsylvania.— Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

Texas.— Newman *v.* Dodson, 61 Tex. 91.

See 4 Cent. Dig. tit. "Assault and Battery," § 38.

Evidence of a servant's possession is evidence of possession of the master. Hall *v.* Davis, 2 C. & P. 33, 12 E. C. L. 434.

Unauthorized permission to reënter.— Evidence of license to reënter premises, given by one having no authority to do so, is inadmissible to prove a right to possession. White *v.* Swain, 138 Mass. 325.

69. Brown *v.* Wheeler, 18 Conn. 199; Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864.

70. Phillips *v.* Jamieson, 51 Mich. 153, 16 N. W. 318.

71. Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305.

72. Holmes *v.* Bagge, 1 E. & B. 782, 17 Jur. 1095, 22 L. J. Q. B. 301, 72 E. C. L. 782, holding that joint possession by plaintiff and defendant is established by proof that both were members of a committee which hired the *locus in quo*.

Partial possession.—A plea that defendant was possessed of a dwelling-house, into which plaintiff unlawfully entered, and was making a noise and disturbance therein, is not supported by proof that defendant held two rooms in the house in question, and that plaintiff, who was landlord of the house, and kept the key of the outer door, had unlawfully come into them and made the disturbance complained of. Monks *v.* Dykes, 1 H. & H. 418, 8 L. J. Exch. 73, 4 M. & W. 567.

73. Hardin *v.* Harrison, 2 Bibb (Ky.) 77.

74. Short *v.* Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204, wherein testimony that, when defendant arrested plaintiff, he said to him, "I am a police officer," etc., and the return on the warrant for plaintiff's arrest, which was signed by defendant as a police officer, was held insufficient to show his authority.

The legality of the election of an officer, and his right to the office, may be tested. Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79.

If he relies on the possession of process, proof of that fact must likewise be clear and distinct. Belch *v.* Arnott, 9 U. C. C. P. 68. He may, however, show such possession as a part of the *res gestæ*, hence bearing on the question of damages (Haviland *v.* Chase, 116 Mich. 214, 74 N. W. 477, 72 Am. St. Rep. 519), and it has been held that he may (Cone *v.* Bull, 1 Root (Conn.) 527), and that he may not (Clark *v.* Downing, 55 Vt. 259, 45 Am. Rep. 612), prove such possession, though it is not expressly alleged.

75. Moriarty *v.* Brooks, 6 C. & P. 684, 25 E. C. L. 638.

Proof of striking a cruel blow, not to remove a person from a public-house, but to punish him, does not support a plea of gently laying hands on to remove, etc. Davis *v.* Lennon, 8 U. C. Q. B. 599.

76. Bell *v.* Martin, (Tex. Civ. App. 1893) 28 S. W. 108.

77. O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

78. Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

79. Hare *v.* Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

irresponsive to the issues, is inadmissible in mitigation or augmentation of damages,[80] especially where it is apparent that he was the aggressor;[81] nor may defendant, to reduce or mitigate the damages, attack the character of plaintiff or show his reputation for turbulence or his propensity to commit or provoke a breach of the peace,[82] nor may plaintiff[83] or defendant[84] show that he, himself, is a man of good character or reputation. Where, however, justification by way of self-defense is pleaded, it is competent to show the character of the opposite party to be quarrelsome or otherwise, when such fact has been brought to the knowledge of the other party prior to the assault complained of.[85]

(B) *As to Chastity.* There are decisions to the effect that, in an action for indecent assault, the reputation of the female plaintiff for chastity cannot be called in question,[86] or specific unchaste acts shown in mitigation;[87] but, by the

80. *California.*—Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909; Anthony *v.* Grand, 101 Cal. 235, 35 Pac. 859.

Connecticut.— Thompson *v.* Church, 1 Root (Conn.) 312.

Illinois.—Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558.

Indiana.— Elliott *v.* Russell, 92 Ind. 526; Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

Iowa.— Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

Kentucky.— Reed *v.* Kelly, 4 Bibb (Ky.) 400; Givens *v.* Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646.

Maine.— Soule *v.* Bruce, 67 Me. 584.

Massachusetts.— Day *v.* Ross, 154 Mass. 13, 27 N. E. 676.

Michigan.— Pokriefka *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264; Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305; Derwin *v.* Parsons, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262.

Mississippi.— Sowell *v.* McDonald, 58 Miss. 251.

Missouri.— Lyddon *v.* Dose, 81 Mo. App. 64.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New York.— Pulver *v.* Harris, 61 Barb. (N. Y.) 78.

North Carolina.— Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

Pennsylvania.— Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

United States.— Brown *v.* Evans, 8 Sawy. (U. S.) 488, 17 Fed. 912.

See 4 Cent. Dig. tit. "Assault and Battery," § 42.

81. Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. 866.

82. *Illinois.*— Dimick *v.* Downs, 82 Ill. 570.

Louisiana.— Gardiner *v.* Cross, 6 Rob. (La.) 454.

Massachusetts.— McCarty *v.* Leary, 118 Mass. 509; Hall *v.* Power, 12 Metc. (Mass.) 482, 46 Am. Dec. 698; Ellis *v.* Short, 21 Pick. (Mass.) 142. See also Bruce *v.* Priest, 5 Allen (Mass.) 100.

New York.— Corning *v.* Corning, 6 N. Y. 97 [*affirming* Code Rep. N. S. (N. Y.) 351]; Silliman *v.* Sampson, 59 N. Y. Suppl. 923; Willis *v.* Forrest, 2 Duer (N. Y.) 310.

North Carolina.— Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

South Carolina.— McKenzie *v.* Allen, 3 Strobh. (S. C.) 546.

Texas.— Shook *v.* Peters, 59 Tex. 393.

See 4 Cent. Dig. tit. "Assault and Battery," § 42.

83. Denton *v.* Ordway, 108 Iowa 487, 79 N. W. 271; Givens *v.* Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646.

84. Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453; Sayen *v.* Ryan, 9 Ohio Cir. Ct. 631. *Contra,* Schuek *v.* Hagar, 24 Minn. 339. See also Alford *v.* Vincent, 53 Mich. 555, 19 N. W. 182 (wherein the rejection of an offer made by defendant to prove that he was not a man who would be likely to commit the assault charged was held not to be the subject of complaint, where it appeared that he was permitted to prove that his reputation was that of a peaceable and a law-abiding citizen); Dean *v.* Horton, 2 McMull. (S. C.) 147 (wherein it was held that defendant may give testimony of his own peaceable character when such testimony is calculated to throw light on the nature of the provocation which caused him to commit the battery).

85. *Michigan.*—Culley *v.* Walkeen, 80 Mich. 443, 45 N. W. 368; Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581.

Nebraska.— Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

New Hampshire.— Beckman *v.* Souther, 68 N. H. 381, 36 Atl. 14.

New York.— Silliman *v.* Sampson, 59 N. Y. Suppl. 923.

Vermont.— Knight *v.* Smythe, 57 Vt. 529; Harrison *v.* Harrison, 43 Vt. 417.

Wisconsin.— Keep *v.* Quallman, 68 Wis. 451, 32 N. W. 233.

See 4 Cent. Dig. tit. "Assault and Battery," § 42.

86. Sayen *v.* Ryan, 9 Ohio Cir. Ct. 631.

87. Gore *v.* Curtis, 81 Me. 403, 17 Atl. 314, 10 Am. St. Rep. 265. See also Miller *v.* Curtis, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469 (wherein the court refused to permit defendant to prove specific acts by, and conversations with, plaintiff, a married woman, occurring more than twenty years before, which tended to prove that she had often

weight of authority, if mental and moral outrage is relied on as a substantial ground of recovery, evidence tending to show plaintiff's want of chastity is pertinent to the issue.[88]

(VI) *FINANCIAL CONDITION OF PARTIES.* While evidence of the pecuniary circumstances of defendant is admissible on the question of compensation, evidence of his actual wealth is inadmissible; but, where evidence of such circumstances is admissible to enhance exemplary damages, his actual wealth may be shown, and, in some cases, evidence of defendant's wealth is admissible because bearing on his ability to respond in damages.[89] By parity of reasoning, if it is competent to prove the wealth of defendant for the purpose of augmenting the damages, it is also competent for defendant to show a want of means to diminish them,[90] but this must be shown by way of rebuttal.[91] While it has been held competent for plaintiff to prove his condition in life, in order to show the extent and amount of damages sustained by him, or to augment them,[92] it has also been held that the admission of testimony to show his poverty is erroneous.[93]

(VII) *MITIGATION* — (A) *In General.* To mitigate damages,[94] matters which

made false charges of indecent assault, with intent to extort money from innocent men); Derwin *v.* Parsons, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262 (in which the appellate court severely condemned an attempt to reflect on plaintiff's modesty, because that, by reason of her poverty, she had been compelled to submit to treatment in a medical college in the presence of a class of students).

88. Schuek *v.* Hagar, 24 Minn. 339; Gulerette *v.* McKinley, 27 Hun (N. Y.) 320; Ford *v.* Jones, 62 Barb. (N. Y.) 484; Crossman *v.* Bradley, 53 Barb. (N. Y.) 125; Mitchell *v.* Work, 13 R. I. 645. See also Wood *v.* Gale, 10 N. H. 247, 34 Am. Dec. 150, wherein defendant removed plaintiff from his ward's premises, the assault complained of, and was permitted to show her bad character.

89. *Illinois.*— Cochran *v.* Ammon, 16 Ill. 316; McNamara *v.* King, 7 Ill. 432; Lister *v.* McKee, 79 Ill. App. 210.

Indiana.— See Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96, wherein it is stated that, in estimating the damages, the jury cannot regard the wealth of defendant where that circumstance is wholly unconnected with the offense, and cannot be considered in the way of recompense for the injury.

Kentucky.— Gore *v.* Chadwick, 6 Dana (Ky.) 477.

Maine.—Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688; Johnson *v.* Smith, 64 Me. 553.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Mississippi.— Eltringham *v.* Earhart, 67 Miss. 488, 7 So. 346, 19 Am. St. Rep. 319.

Missouri.— Dailey *v.* Houston, 58 Mo. 361.

North Carolina.— Pendleton *v.* Davis, 46 N. C. 98.

Ohio.— Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209.

Pennsylvania.— Jacoby *v.* Guier, 6 Serg. & R. (Pa.) 399.

South Carolina.— Harris *v.* Marco, 16 S. C. 575; Rowe *v.* Moses, 9 Rich. (S. C.) 423, 67 Am. Dec. 560.

Vermont.— Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

Wisconsin.— Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Hare *v.* Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141; Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670; Birchard *v.* Booth, 4 Wis. 67.

United States.— Brown *v.* Evans, 8 Sawy. (U. S.) 488, 17 Fed. 912.

The pecuniary ability of defendant furnishes no criterion by which to assess damages where no appreciable injury has been shown. Coffin *v.* Spencer, 2 Hawaii 23.

90. Jarvis *v.* Manlove, 5 Harr. (Del.) 452; Johnson *v.* Smith, 64 Me. 553. And see Schmidt *v.* Pfeil, 24 Wis. 452, where an offer of proof as to defendant's means and earnings was held to have been properly rejected.

91. Mullin *v.* Spangenberg, 112 Ill. 140.

92. *Illinois.*— McNamara *v.* King, 7 Ill. 432.

Maryland.— Sloan *v.* Edwards, 61 Md. 89; Gaither *v.* Blowers, 11 Md. 536.

Mississippi.— Eltringham *v.* Earhart, 67 Miss. 488, 7 So. 346, 19 Am. St. Rep. 319.

Missouri.— Dailey *v.* Houston, 58 Mo. 361.

Oregon.— Heneky *v.* Smith, 10 Oreg. 349, 45 Am. Rep. 143.

93. Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645.

94. Byers *v.* Horner, 47 Md. 23; Anonymous, Brayt. (Vt.) 168; Davis *v.* Franke, 33 Gratt. (Va.) 413.

He may show the habitual misconduct of a pupil prior to punishment (Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841), that he believed himself in great danger of bodily harm (Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518; Hogan *v.* Ryan, 5 N. Y. St. 110, 25 N. Y. Wkly. Dig. 349), or that he inflicted the injury unintentionally (James *v.* Campbell, 5 C. & P. 372, 24 E. C. L. 611), and, where defendant relies on his right to remain in a place from which plaintiff attempted to eject him, he may show, in mitigation and to rebut a plea of *molliter manus imposuit*, that plaintiff had no right to remove him (Collier *v.* Moulton, 7 Johns. (N. Y.) 109). So, in an action for indecent assault, specific acts of lewdness with others than plaintiff may be

do not constitute a complete defense may be introduced in evidence, notwithstanding the general rule that whatever is to be shown in justification must be specially pleaded.

(B) *Consent — License.* Any evidence tending to show consent or license on the part of plaintiff is admissible to repel the allegation of force,[95] to mitigate damages,[96] or to reduce punitive damages;[97] and plaintiff may, likewise, repel any implication of license arising from such evidence.[98]

(C) *Official Acts.* An unwarranted assault by peace-officers cannot be palliated by showing facts which might have induced the fear of a general disturbance or riot,[99] nor can an officer who unlawfully breaks into premises[1] to serve process, and therein commits an assault, show his purpose or the fact that he was engaged in the service of process.[2]

(D) *Provocation.* Provocations so recent and immediate as to induce a presumption that the violence done was committed under the immediate and continuing influence of the feelings and passion excited thereby[3] may be shown in mitigation of damages, but never can be considered as a justification or complete defense;[4] though, in some jurisdictions, evidence of cotemporaneous or previous

shown in mitigation. Gulerette *v.* McKinley, 27 Hun (N. Y.) 320.

He may not show that plaintiff's injuries were aggravated because his physical condition was not that of an ordinary person (Littlehale *v.* Dix, 11 Cush. (Mass.) 364); that, long prior to the assault, plaintiff procured his imprisonment in a pending litigation (Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705), or, where the assault was committed on the premises of plaintiff, that he acted under orders from a corporation in whose behalf condemnation proceedings had been instituted and were pending at the time (Colvill *v.* Langdon, 22 Minn. 565).

Effect of default.—The general rule respecting the admissibility of evidence to mitigate the damages is not changed by the fact that defendant has suffered a default; but he may show such extenuating circumstances on the writ of inquiry, or assessment of damages. Hays *v.* Berryman, 6 Bosw. (N. Y.) 679; Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46.

95. Crossman *v.* Bradley, 53 Barb. (N. Y.) 125, an action for an assault with intent to rape, wherein defendant was permitted to show an effort by plaintiff to entrap him and to induce him to have sexual intercourse with her, and in which it was said that evidence of particular acts of immodesty should be limited to those committed with or in defendant's presence.

96. Logan *v.* Austin, 1 Stew. (Ala.) 476; Adams *v.* Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Schutter *v.* Williams, 1 Ohio Dec. (Reprint) 47.

97. Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413.

98. Van Voorhis *v.* Hawes, 12 How. Pr. (N. Y.) 406, wherein defendant sought to defend an attempt to kiss plaintiff by showing that he was acting pursuant to a vote of an excursion party, that he should kiss every lady on the train, and in which plaintiff was permitted to show that she and her friends were not members of the party.

99. Finnell *v.* Bohannon, 19 Ky. L. Rep. 1587, 44 S. W. 94.

1. Where the entry becomes illegal because of the failure to make a proper return of the process, the circumstances of the entry as bearing on the intent to injure plaintiff's feelings is admissible. Paine *v.* Farr, 118 Mass. 74. And, so, it is permissible for an officer to palliate the alleged wrongful act by showing that he acted in obedience to superior authority. Carpenter *v.* Parker, 23 Iowa 450.

2. Sampson *v.* Henry, 11 Pick. (Mass.) 379.

3. Where the assault was committed after a time for reflection and coolness, or in revenge, the rule is otherwise.

Connecticut.— Matthews *v.* Terry, 10 Conn. 455.

Illinois.— Murphy *v.* McGrath, 79 Ill. 594.

Indiana.— Fullerton *v.* Warrick, 3 Blackf. (Ind.) 219, 25 Am. Dec. 99.

Iowa.— Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748; Thrall *v.* Knapp, 17 Iowa 468; Ireland *v.* Elliott, 5 Iowa 478, 68 Am. Dec. 715.

Maine.— Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

Maryland.— Gaither *v.* Blowers, 11 Md. 536; Anderson *v.* Johnson, 3 Harr. & J. (Md.) 162.

Massachusetts.— Bonino *v.* Caledonio, 144 Mass. 299, 11 N. E. 98; Tyson *v.* Booth, 100 Mass. 258; Mowry *v.* Smith, 9 Allen (Mass.) 67; Avery *v.* Ray, 1 Mass. 12. And see Paul *v.* Bissett, 121 Mass. 170.

Minnesota.— Jacobs *v.* Hoover, 9 Minn. 204.

New York.— Ellsworth *v.* Thompson, 13 Wend. (N. Y.) 658; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230.

Vermont.— Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

See 4 Cent. Dig. tit. "Assault and Battery," § 48.

4. *Alabama.*— Lunsford *v.* Walker, 93 Ala. 36, 8 So. 386; Keiser *v.* Smith, 71 Ala. 481,

threats or other matters of provocation is only admissible to defeat or mitigate punitive damages, and cannot be considered in reduction of compensatory damages.[5] The rule which confines defendant to proof of recent provocation

46 Am. Rep. 342; Watkins *v.* Gaston, 17 Ala. 664.

Arkansas.—Ward *v.* Blackwood, 41 Ark. 295, 48 Am. Rep. 41.

Connecticut.— Burke *v.* Melvin, 45 Conn. 243; Richardson *v.* Hine, 42 Conn. 206; Bartram *v.* Stone, 31 Conn. 159; Matthews *v.* Terry, 10 Conn. 455; Guernsey *v.* Morse, 2 Root (Conn.) 252.

Delaware.— Jarvis *v.* Manlove, 5 Harr. (Del.) 452.

Georgia.— Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684; Mitchell *v.* State, 41 Ga. 527.

Hawaii.— Irwin *v.* Porter, 1 Hawaii 159.

Illinois.— Murphy *v.* McGrath, 79 Ill. 594; Ogden *v.* Claycomb, 52 Ill. 365; Donnelly *v.* Harris, 41 Ill. 126.

Indiana.— Schlosser *v.* Fox, 14 Ind. 365; Fullerton *v.* Warrick, 3 Blackf. (Ind.) 219, 25 Am. Dec. 99.

Iowa.— Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748; Thrall *v.* Knapp, 17 Iowa 468; Ireland *v.* Elliott, 5 Iowa 478, 68 Am. Dec. 715.

Kentucky.— Slater *v.* Sherman, 5 Bush (Ky.) 206; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557; Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Chandler *v.* Newton, 13 Ky. L. Rep. 927.

Louisiana.— Caspar *v.* Prosdame, 46 La. Ann. 36, 14 So. 317; Bankston *v.* Folks, 38 La. Ann. 267; Richardson *v.* Zuntz, 26 La. Ann. 313.

Maine.— Currier *v.* Swan, 63 Me. 323.

Maryland.— Byers *v.* Horner, 47 Md. 23; Gaither *v.* Blowers, 11 Md. 536.

Massachusetts.— Bonino *v.* Caledonio, 144 Mass. 299, 11 N. E. 98; Blake *v.* Damon, 103 Mass. 199; Tyson *v.* Booth, 100 Mass. 258; Mowry *v.* Smith, 9 Allen (Mass.) 67; Child *v.* Homer, 13 Pick. (Mass.) 503; Avery *v.* Ray, 1 Mass. 12.

Michigan.— Kent *v.* Cole, 84 Mich. 579, 48 N. W. 168; Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705; Bauman *v.* Bean, 57 Mich. 1, 23 N. W. 451; Dresser *v.* Blair, 28 Mich. 501.

Minnesota.—Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

Mississippi.— Martin *v.* Minor, 50 Miss. 42.

Missouri.— Coxe *v.* Whitney, 9 Mo. 531.

Nebraska.— Haman *v.* Omaha Horse R. Co., 35 Nebr. 74, 52 N. W. 830.

New Hampshire.— Caverno *v.* Jones, 61 N. H. 623.

New York.— Corning *v.* Corning, 6 N. Y. 97; Dolan *v.* Fagan, 63 Barb. (N. Y.) 73; Stetlar *v.* Nellis, 60 Barb. (N. Y.) 524, 42 How. Pr. (N. Y.) 163; Willis *v.* Forrest, 2 Duer (N. Y.) 310; Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518; Ellsworth *v.* Thompson, 13 Wend. (N. Y.) 658; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230.

South Carolina.— McKenzie *v.* Allen, 3 Strobh. (S. C.) 546; Dean *v.* Horton, 2 McMull. (S. C.) 147.

Tennessee.— Jacaway *v.* Dula, 7 Yerg. (Tenn.) 81, 27 Am. Dec. 492.

Texas.— Stude *v.* Saunders, 2 Tex. Unrep. Cas. 122. And see Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746.

Virginia.—Ward *v.* White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883; Davis *v.* Franke, 33 Gratt. (Va.) 413.

Wisconsin.— Morely *v.* Dunbar, 24 Wis. 183; Dixon, C. J., in Wilson *v.* Young, 31 Wis. 574.

United States.— Brooks *v.* Carter, 34 Fed. 505; Schelter *v.* York, Crabbe (U. S.) 449, 21 Fed. Cas. No. 12,446; Cushman *v.* Ryan, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3,515; Cushman *v.* Waddell, Baldw. (U. S.) 57, 6 Fed. Cas. No. 3,516.

England.— Fraser *v.* Berkeley, 7 C. & P. 621, 2 M. & Rob. 3, 32 E. C. L. 789.

Canada.— Short *v.* Lewis, 3 U. C. Q. B. O. S. 385; Percy *v.* Glasco, 22 U. C. C. P. 521.

See 4 Cent. Dig. tit. "Assault and Battery." § 48.

In a joint action against several, it is competent to show a provocation received by one of them. Davis *v.* Franke, 33 Gratt. (Va.) 413.

Where the answer alleges that the assault was wholly provoked at the moment of the attack, evidence of other provocative acts prior to the assault is inadmissible. Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

Threats not known to defendant.—Antecedent threats, not so recent as to constitute a part of the *res gestæ*, and which were unknown to defendant at the time of the commission of the act, cannot be received in evidence as tending to show the formation of a well-grounded belief in the danger of physical injury. Sorgenfrei *v.* Schroeder, 75 Ill. 397; Chambers *v.* Porter, 5 Coldw. (Tenn.) 273.

5. *Connecticut.*— Burke *v.* Melvin, 45 Conn. 243.

Delaware.— Tatnall *v.* Courtney, 6 Houst. (Del.) 434.

Illinois.— Donnelly *v.* Harris, 41 Ill. 126; Scott *v.* Fleming, 16 Ill. App. 539.

Kentucky.—Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

Maine.— Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

Massachusetts.—Blake *v.* Damon, 103 Mass. 199.

Michigan.— See Dresser *v.* Blair, 28 Mich. 501; Johnson *v.* McKee, 27 Mich. 471.

Minnesota.— Jacobs *v.* Hoover, 9 Minn. 204.

Missouri.— Yeager *v.* Berry, 82 Mo. App. 534.

received from plaintiff is subject, however, to modifications which more or less qualify it, according to the particular circumstances of each case.[6] The provocation must, however, be that of plaintiff himself — hence, statements, made by third parties to defendant, of provocative or threatening acts of plaintiff on a former occasion, are inadmissible,[7] and the fact that threats of personal violence were communicated to defendant will not aid him to mitigate the damages unless he shows that the threats were actually made.[8]

(VIII) *OTHER PROCEEDINGS FOR SAME ASSAULT.* By the weight of authority, the fact that defendant was prosecuted criminally, convicted, and imprisoned, or paid a fine imposed, cannot be considered in mitigation of damages nor as a bar to a recovery of exemplary damages;[9] though it has been held that, for the purpose of mitigating vindictive damages, it is competent for defendant to show that he was theretofore convicted and punished for the same offense.[10] A plea of a prior action pending for the same assault is not proven where it appears that the former action was in case.[11] Evidence of a previous conviction or acquittal is not admissible to prove the fact of the assault,[12] nor may defendant

New York.— Keyes *v.* Devlin, 3 E. D. Smith (N. Y.) 518.

Texas.—Shapiro *v.* Michelson, 19 Tex. Civ. App. 615, 47 S. W. 746.

Vermont.— Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

Wisconsin.— Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468; Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582; Wilson *v.* Young, 31 Wis. 574; Morely *v.* Dunbar, 24 Wis. 183; Birchard *v.* Booth, 4 Wis. 67.

See 4 Cent. Dig. tit. "Assault and Battery," § 48.

6. Thus, the lapse of a day or so between the provocation and the assault was held not to preclude defendant from urging the provocation in mitigation (Irwin *v.* Porter, 1 Hawaii 159), and, where a considerable time elapsed between the provocation and the date of the assault, and it was communicated immediately preceding the assault, it was held to be admissible (Gaither *v.* Blowers, 11 Md. 536). So, where the acts done or words spoken some time previous to the assault are a part of a series of provocations repeated and continued up to the time of the assault (Stetlar *v.* Nellis, 60 Barb. (N. Y.) 524, 42 How. Pr. (N. Y.) 163; Fairbanks *v.* Witter, 18 Wis. 287, 86 Am. Dec. 765), or, at the time of the assault, allusion is made to the provocation previously given (Davis *v.* Franke, 33 Gratt. (Va.) 413; Rawlings *v.* Com., 1 Leigh (Va.) 580, 19 Am. Dec. 757), the evidence is admissible as explanatory of the nature of the assault, provided the connection between it and the antecedent provocation plainly appears.

7. Jarvis *v.* Manlove, 5 Harr. (Del.) 452; Everts *v.* Everts, 3 Mich. 580; Corning *v.* Corning, 6 N. Y. 97.

8. Hutts *v.* Shoaf, 88 Ind. 395; Castner *v.* Sliker, 33 N. J. L. 507.

9. *Alabama.*— Phillips *v.* Kelly, 29 Ala. 628.

California.— Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

Delaware.— Keller *v.* Taylor, 2 Houst. (Del.) 20; Jefferson *v.* Adams, 4 Harr. (Del.) 321.

Iowa.— Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Lucas *v.* Flinn, 35 Iowa 9.

Kentucky.— Reed *v.* Kelly, 4 Bibb (Ky.) 400.

Mississippi.—Wheatley *v.* Thorn, 23 Miss. 62.

Missouri.— Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285.

New Hampshire.— Towle *v.* Blake, 48 N. H. 92.

New York.— Cook *v.* Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

Ohio.— Roberts *v.* Mason, 10 Ohio St. 277.

Pennsylvania.— Rhodes *v.* Rodgers, 151 Pa. St. 634, 24 Atl. 1044.

South Carolina.—Wolff *v.* Cohen, 8 Rich. (S. C.) 144.

Texas.— Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

Vermont.— Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197.

Wisconsin.— Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582; Birchard *v.* Booth, 4 Wis. 67.

Contra, Cherry *v.* McCall, 23 Ga. 193; Flanagan *v.* Womack, 54 Tex. 45.

See 4 Cent. Dig. tit. "Assault and Battery," § 49.

10. Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

In an action for assaulting and stabbing, the record of a trial on an indictment charging a stabbing of plaintiff with intent to kill, and containing a count for assault and battery, is admissible to mitigate the damages, defendant having been found not guilty on the counts for murder, and guilty on the count for assault and battery. Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

11. Hunt *v.* McArthur, 25 U. C. Q. B. 90.

12. Caverno *v.* Jones, 61 N. H. 623; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341 (in which latter case it was held, Lewis, J. and Black, C. J. dissenting, that a record, received without objection, is competent evi-

show that he was never arrested or prosecuted,[13] or that the grand jury refused to indict him therefor.[14] Evidence that all the defendants were convicted for the same offense is sufficient to authorize a verdict against them,[15] and where defendant has pleaded guilty to a criminal charge of the same assault or battery, the record of his conviction on that plea may be introduced as an admission on his part.[16]

(IX) *Damages.* Where the extent of pecuniary damages cannot be computed with accuracy, such evidence is admissible as will inform the jury of the approximate loss, though an exact result cannot be reached.[17]

8. Trial — a. Questions of Law and Fact. It is for the court to decide what is an assault in law,[18] but it is for the jury to determine, under proper instructions, the fact of the assault;[19] whether the force used was unnecessary or excessive;[20] whether the injury complained of was the result of defendant's wrongful act;[21] the motives or conduct of the parties;[22] the intention of defendant,[23] and justifi-

dence against defendant, who offered it, to prove his guilt of the crime of which the record shows him to have been convicted); Buller N. P. 16.

13. Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

14. Bonino *v.* Caledonio, 144 Mass. 299, 11 N. E. 98.

15. Wolff *v.* Cohen, 8 Rich. (S. C.) 144, in which case the evidence on behalf of plaintiff failed to implicate one of the defendants, but the proof of the conviction was furnished by the defendants in their cross-examination of a witness.

16. *Connecticut.*— Eno *v.* Brown, 1 Root (Conn.) 528.

Indiana.— Hamm *v.* Romine, 98 Ind. 77; Rudolph *v.* Landwerlen, 92 Ind. 34.

Iowa.— Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802.

Missouri.— Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285.

New Hampshire.— Green *v.* Bedell, 48 N. H. 546.

Virginia.— Honaker *v.* Howe, 19 Gratt. (Va.) 50.

Wisconsin.— Birchard *v.* Booth, 4 Wis. 67.

Contra, Honaker *v.* Howe, 19 Gratt. (Va.) 50 (wherein it was held that the record was inadmissible, the defendant, without pleading, having thrown himself on the mercy of the court and submitted to a fine); Reg. *v.* Fontaine Moreau, 11 Q. B. 1028, 12 Jur. 626, 17 L. J. Q. B. 187, 63 E. C. L. 1028.

It is not conclusive however, but is subject to explanation. Hauser *v.* Griffith, 102 Iowa 215, 71 N. W. 223; Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209. But a statute providing that, when part of a declaration is given in evidence by one party, the other is entitled to show the whole, will not entitle defendant to show explanatory remarks made by him at the time of pleading guilty. Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802.

17. Thus plaintiff's estimate as to the value of the time lost by him because of his injury, together with a statement of fact upon which the estimate is based, is admissible (Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528); but an averment that plaintiff was prevented from attending to, performing, and looking after his necessary affairs and business will not justify evidence of injury thereto because of trouble in procuring assistance therein (Heiler *v.* Loomis, 47 Mich. 16, 10 N. W. 60). See also Welch *v.* Ware, 32 Mich. 77, wherein plaintiff, a theatrical performer, jointly with his wife, was permitted to show actual gains and engagements, and the value of the joint services of himself and wife, the recovery being limited by the court to plaintiff's own share of the joint earnings.

Counsel fee.—In some jurisdictions the jury, in their discretion, may allow plaintiff a counsel fee, but evidence of the value of the counsel's services is inadmissible. Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. St. Rep. 481; Hudson *v.* Voigt, 15 Ohio Cir. Ct. 391.

18. Handy *v.* Johnson, 5 Md. 450.

19. Mailand *v.* Mailand, (Minn. 1901) 86 N. W. 445.

20. *Alabama.*— Thomason *v.* Gray, 82 Ala. 291, 3 So. 38.

Connecticut.— Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841; Baldwin *v.* Hayden, 6 Conn. 453.

Hawaii.— Iauka *v.* Cummings, 9 Hawaii 131.

Maine.— Murdock *v.* Ripley, 35 Me. 472.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

New York.— Howe *v.* Oldham, 23 N. Y. Suppl. 700, 52 N. Y. St. 734.

Vermont.— Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

Canada.— Kelly *v.* Rhodes, 18 Nova Scotia 524, 6 Can. L. T. 542.

See 4 Cent. Dig. tit. "Assault and Battery," § 56.

21. Culley *v.* Walkeen, 80 Mich. 443, 45 N. W. 368, wherein it was a disputed question of fact whether or not an injury complained of was inflicted by defendant or resulted from plaintiff's own actions.

22. Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269; Bond *v.* Warren, 53 N. C. 191.

23. Metcalfe *v.* Conner, Litt. Sel. Cas. (Ky.) 370; Handy *v.* Jackson, 5 Md. 450.

cation of his acts;[24] the reasonableness of a defense[25] or of the belief in the danger of bodily harm;[26] the complicity or participation of the defendants in the assault;[27] the right of possession by one seeking to justify the removal of a trespasser,[28] and the fact of the trespass complained of;[29] the extent of the injury,[30] and the amount or measure of damage.[31]

b. Stay Pending Decision in Criminal Prosecution. The aggrieved person may proceed criminally and civilly,[32] and the proceedings in the civil action will not be stayed to await the event of the criminal prosecution.[33]

c. Instructions — (1) *In General.* It is the duty of the court, in connection with the facts proved upon the trial, to correctly inform the jury as to what does or does not constitute an assault or battery;[34] but it will be sufficient if the defi-

24. *California.*— Dinan *v.* Fitz Gibbon, 63 Cal. 387.

Georgia.— Cross *v.* Carter, 100 Ga. 632, 28 S. E. 390; Tucker *v.* Walters, 78 Ga. 232, 2 S. E. 689.

Hawaii.— Iauka *v.* Cummings, 9 Hawaii 131.

Illinois.— Collins *v.* Walters, 54 Ill. 485.

Maryland.— Barnes *v.* Gray, 5 Harr. & J. (Md.) 436.

New Hampshire.— Hilliard *v.* Goold, 34 N. H. 230, 66 Am. Dec. 765.

Wisconsin.— Higgins *v.* Minaghan, 76 Wis. 298, 45 N. W. 127.

And see Labar *v.* Koplin, 4 N. Y. 547.

See 4 Cent. Dig. tit. "Assault and Battery," § 56.

25. Kent *v.* Cole, 84 Mich. 579, 48 N. W. 168; Edwards *v.* Leavitt, 46 Vt. 126.

26. Morris *v.* Platt, 32 Conn. 75; Hulse *v.* Tollman, 49 Ill. App. 490.

27. *Alabama.*— Carlton *v.* Henry, (Ala. 1901) 29 So. 924.

Indiana.— Baldwin *v.* Biersdorfer, Wils. (Ind.) 1.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264.

Missouri.—Willi *v.* Lucas, 110 Mo. 219, 19 S. W. 726, 33 Am. St. Rep. 436.

Vermont.— Mack *v.* Kelsey, 61 Vt. 399, 17 Atl. 780; Wakefield *v.* Fairman, 41 Vt. 339.

See 4 Cent. Dig. tit. "Assault and Battery," § 56.

28. Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Comstock *v.* Dodge, 43 How. Pr. (N. Y.) 97.

29. Conway *v.* Carpenter, 73 Hun (N. Y.) 540, 26 N. Y. Suppl. 255, 56 N. Y. St. 429, 80 Hun (N. Y.) 428, 30 N. Y. Suppl. 315, 62 N. Y. St. 43.

30. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

31. *California.*— Townsend *v.* Briggs, (Cal. 1893) 32 Pac. 307.

Georgia.— Cross *v.* Carter, 100 Ga. 632, 28 S. E. 390.

Hawaii.— Iauka *v.* Cummings, 9 Hawaii 131.

Illinois.— Donnelly *v.* Harris, 41 Ill. 126.

Iowa.— Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748.

Kansas.— Titus *v.* Corkins, 21 Kan. 722.

Kentucky.— Slone *v.* Slone, 2 Metc. (Ky.) 339.

Maryland.— Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242.

New York.— Millis *v.* Germond, 3 N. Y. App. Div. 383, 38 N. Y. Suppl. 934.

Texas.— Newman *v.* Dodson, 61 Tex. 91.

Virginia.— Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

See 4 Cent. Dig. tit. "Assault and Battery," § 56.

If "Not guilty" is pleaded, the jury may not consider the circumstances of the assault, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded. Watson *v.* Christie, 2 B. & P. 224.

32. Buckner *v.* Beck, Dudley (S. C.) 168. See also State *v.* Blyth, 1 Bay (S. C.) 166 (whereby it appears that, under the earlier practice in South Carolina, though a party might commence a civil action and a prosecution at the same time, yet he could not carry them both on, but would be obliged to elect), and Reed *v.* Kelly, 4 Bibb (Ky.) 400 (wherein this case is stated to be founded upon the peculiar practice in South Carolina rather than upon the English authorities).

33. Nowlan *v.* Griffin, 68 Me. 235, 28 Am. Rep. 45; Towle *v.* Blake, 48 N. H. 92; Cook *v.* Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757. See also Jones *v.* Clay, 1 B. & P. 191; Scott *v.* Seymour, 1 H. & C. 219, 9 Jur. N. S. 522, 32 L. J. Exch. 61, 8 L. T. Rep. N. S. 511, 11 Wkly. Rep. 169.

34. French *v.* Ware, 65 Vt. 338, 26 Atl. 1096. But see Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209, wherein it was held that it is unnecessary to give a technical definition of an assault and battery where the law is otherwise properly charged.

An instruction is erroneous which, attempting to define assault and battery, fails to state what matters are excusable or justifiable (Kaline *v.* Stover, 88 Iowa 245, 55 N. W. 346; Taylor *v.* Clendening, 4 Kan. 524; Drew *v.* Comstock, 57 Mich. 176, 23 N. W. 721), as is an instruction which assumes that an assault was committed in fact where the evidence on that point is conflicting (Orscheln *v.* Scott, 79 Mo. App. 534), for, in such a case, the jury should be cautioned as to the care to be exercised in considering the testimony (Johnson *v.* McKee, 27 Mich. 471); but an instruction declaring the principles applicable to an assault or battery is not erroneous because assuming the commission of the

nition is substantially accurate.[35] If it is an element in the case, the court should instruct the jury as to the difference between an assault by one and by many,[36] and, where the degree of credit to be given to either party, as to the fact of the assault, is material, they may be told that they may find for that party whose testimony they believe.[37] It has also been held that the omission of defendant to deny the fact of the assault, on a repetition of the accusation and after a previous denial, may be properly referred to.[38]

(II) *Burden of Proof.* The use of inapt language, as to the burden of proof, which could not have misled the jury is not prejudicial error,[39] nor is an instruction authorizing the jury to find for defendant if they believe he did not commit the assault, because placing the burden on him, where elsewhere they are informed correctly as to upon whom the burden rests.[40]

(III) *Damages.* The jury should be informed as to the right to damages under the pleadings and proof,[41] the right to give vindictive or exemplary damages,[42] and as to the measure of damages recoverable.[43] Where punitive damages may be awarded, it is of vital importance that the jury should be informed of the effect of their verdict on the question of costs.[44] It is erroneous to advert to matters not in evidence which may have the effect of leading the jury to enhance the damages,[45] or to give undue prominence to matters which might be considered as an aggravation of the assault and tend to the same result;[46] to withdraw from the jury the inquiry as to how much of the damage claimed was attributable to plaintiff's own act;[47] to charge that delay in bringing an action

act (Von Reeden *v.* Evans, 52 Ill. App. 209, wherein the instruction was that one charged with a deadly assault cannot avail himself of the claim of necessary self-defense if the necessity of such defense was brought about by his own deliberate, wrongful act). So, a failure to instruct on the evidence as to which party was the aggressor, and allowing the jury to decide whether, on the facts claimed by one party, there was an assault in fact, is erroneous. French *v.* Ware, 65 Vt. 338, 26 Atl. 1096.

An instruction is not objectionable because leaving to the jury the question of what constitutes an assault, where it charges that, if the jury find for plaintiff, they may award such compensatory damages as were sustained by defendant's unlawful act, and that, if they find that defendant assaulted and struck plaintiff, and was guilty of reckless violence, they may award punitory damages. Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242.

35. Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334.

Where no prejudice results, the judgment will not be disturbed, though an inaccurate definition was given. Ganaway *v.* Salt Lake Dramatic Assoc., 17 Utah 37, 53 Pac. 830.

36. Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

37. Miller *v.* Balthasser, 78 Ill. 302.

38. Jewett *v.* Banning, 21 N. Y. 27 [*affirming* 23 Barb. (N. Y.) 13].

39. Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209.

40. Krause *v.* Spinn, 21 Tex. Civ. App. 510, 52 S. W. 91.

41. Harmless error.—Where defendants who obtained a verdict acted in good faith, and the jury was instructed generally on the questions presented, but not that they must find for plaintiff in some amount, a new trial was refused. Elwell *v.* Bradham, 2 Speers (S. C.) 168. An instruction leaving the question of damages to the discretion of the jury under all the circumstances is not prejudicial where plaintiff is also required to prove his case by a preponderance of the evidence. Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

42. Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

43. It is error to lay down an improper rule as to the right to award punitory damages (Hendrickson *v.* Kingsbury, 21 Iowa 379), or to authorize such damages regardless of whether or not the assault was malicious (Badostain *v.* Grazide, 115 Cal. 425, 47 Pac. 118), or, actual damages alone being claimed, to define an aggravated assault, and thus confuse and mislead the jury and induce them to give more than compensatory damages (Texas Coal, etc., Co. *v.* Arenstein, 22 Tex. Civ. App. 441, 55 S. W. 127).

44. Waffle *v.* Dillenbeck, 39 Barb. (N. Y.) 123 [*affirmed* in 38 N. Y. 53].

45. Crossman *v.* Harrison, 4 Rob. (N. Y.) 38.

There is no impropriety, however, in calling the attention of the jury to the character of plaintiff as bearing on a question of damages, though no evidence was permitted in respect thereto, where counsel for both parties strenuously urged the question of character, as material in determining the amount of damages. McKenzie *v.* Allen, 3 Strobh. (S. C.) 546.

46. Gorstz *v.* Pinske, (Minn. 1901) 85 N. W. 215.

47. Turner *v.* Footman, 71 Me. 218.

tended to prove that no serious injury was done;[48] to make the damages depend to any extent upon the ability of defendant to pay;[49] or, in the absence of proof, to impliedly characterize the assault as unlawful, and permit the jury to allow what they see fit, not exceeding the amount claimed in the declaration, in view of possible latent injuries.[50]

(IV) *Excess of Force.* It is error for the court to refer to an excess of force not proven,[51] or to permit the jury to consider such excess as a factor in arriving at their verdict;[52] but if there is reasonable doubt as to the excess of the force used, defendant should be given the benefit of it.[53]

(V) *Intention — Malice.* It is the duty of the court, especially when so requested, to direct the jury to consider all the circumstances testified to in determining the absence or presence of intention or malice,[54] and also to inform them of the necessity that such elements should exist in order to impose a liability on defendant.[55] The court should not, however, advert to matters not in evidence which may lead the jury to impute improper motives to defendant,[56] or refer to the weight of testimony to prove intention, so as to preclude them from considering all the evidence.[57]

(VI) *Joint Liability.* An instruction as to the right to find against one of two joint defendants, without reference to their joint liability, is erroneous;[58] and an instruction which ignores the proved participation of one defendant in the assault is improper.[59] It has been held, however, that the refusal of defendants sued jointly, when called on by plaintiff, to testify as to who committed the assault, may be commented on by the trial judge.[60]

(VII) *Justification* — (A) *In General.* Where justification is in issue — as self-defense, or the like — the jury must be properly informed as to the legal principles involved, the applicability of the evidence thereto, and the rights of defendant under the circumstances,[61] and also as to their duty in determining whether or

48. Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103, which was an action by an adult for an assault committed upon him during infancy, many years previous.

49. Lister *v.* McKee, 79 Ill. App. 210.

50. Drew *v.* Comstock, 57 Mich. 176, 23 N. W. 721.

51. Vosburg *v.* Putney, 86 Wis. 278, 56 N. W. 480.

52. Smith *v.* Simon, 69 Mich. 481, 37 N. W. 548.

53. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

54. Frost *v.* Pinkerton, 61 N. Y. App. Div. 566, 70 N. Y. Suppl. 892.

55. Where there is a sharp conflict in the testimony, it is error to inform the jury, generally, that they may infer malice if defendant acted with a wanton disregard of plaintiff's rights, without explaining the relative rights of the parties or the duty of defendant, thus permitting them to put their own construction on the acts of defendant and the rights of plaintiff. Brownback *v.* Frailey, 78 Ill. App. 262.

An instruction is not objectionable, though unnecessarily long and somewhat involved, if it intelligently informs the jury that the alleged wrongful act must have been intentional and not accidental (Krall *v.* Lull, 49 Wis. 403, 5 N. W. 874); where it requires the jury to find that the assault was wanton, if there was evidence of malice (Brantz *v.* Marcus, 73 Iowa 64, 35 N. W. 115); or where it authorizes exemplary damages if defendant's acts were done wantonly and without justification, because conveying the idea that "wantonly" and "without justification" are synonymous in law (Shook *v.* Peters, 59 Tex. 393).

56. Crossman *v.* Harrison, 4 Rob. (N. Y.) 38.

57. Shriver *v.* Bean, 112 Mich. 508, 71 N. W. 145.

58. Thomas *v.* Werremeyer, 34 Mo. App. 665.

Failure in one part of the instructions, to discriminate between the liability of defendants, is not erroneous where that liability has been properly stated elsewhere. Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711.

59. Carlton *v.* Henry, (Ala. 1901) 29 So. 924, but an instruction possibly misleading, because failing to explain the effect which the act of one might have in connecting another with the assault and battery, is not reversible error, if its effect might have been prevented by a request that the court inform the jury as to such effect.

60. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

61. *Alabama.*— Carlton *v.* Henry, (Ala. 1901) 29 So. 924.

Illinois.— Collins *v.* Waters, 54 Ill. 485; Patterson *v.* Standley, 91 Ill. App. 671.

Kentucky.— Thornton *v.* Taylor, 21 Ky. L. Rep. 1082, 54 S. W. 16.

Ohio.— Close *v.* Cooper, 34 Ohio St. 98; Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209.

Vermont.— French *v.* Ware, 65 Vt. 338, 26

not the plea is supported.[62] If, however, justification is not in issue, no instruction in respect thereto is necessary, though evidence tending to prove such a defense was admitted without objection;[63] nor, in the absence of such an issue, should the jury be so instructed as to permit them to find for defendant on the ground that he acted in self-defense.[64]

(B) *Defense of Property or Possession.* The jury should be properly instructed as to the right to eject a trespasser,[65] but need not be specifically instructed as to the right to use force, where the law respecting that right has been substantially stated.[66]

(VIII) *Matters of Mitigation.* A party may not be deprived of his right to have the jury properly instructed as to matters of extenuation or mitigation.[67]

(IX) *Nature and Extent of Injury.* Failure of plaintiff to produce important witnesses as to the extent of the injury may be referred to,[68] and a charge calling special attention to the professional evidence bearing on the injury will be deemed harmless where the jury are also instructed to determine the

Atl. 1096, wherein it was held that the erroneous refusal to have all matters bearing on a claim of self-defense properly charged was not cured by an instruction as to the right of a person assaulted to defend himself, though no exception was taken thereto.

Virginia.— Fields *v.* Grenils, 89 Va. 606, 16 S. E. 880.

See 4 Cent. Dig. tit. "Assault and Battery," § 58.

Instructions are erroneous which exclude from the jury a full consideration of the justification claimed (Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284; Collins *v.* Waters, 54 Ill. 485; Bittinger *v.* Druck, 33 Ill. App. 301; Comstock *v.* Dodge, 43 How. Pr. (N. Y.) 97), or which assume that defendant was justified in fact (Roach *v.* Parcell, 61 Iowa 98, 15 N. W. 866).

Ignoring degree of force.— Requested instructions which leave entirely out of consideration the degree of force used by defendant are properly refused. Shay *v.* Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538.

The use of inapt words, as applied to the particular facts, will not, of itself, require reversal. Norris *v.* Whyte, 158 Mo. 20, 57 S. W. 1037. Thus, a charge that "words from one person to another will not justify an assault and battery" is sufficient, without using the word "merely" or the word "only" before the word "from." Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

62. An instruction that the jury must be "satisfied," instead of that they must "find from a preponderance of the evidence" that the plea of self-defense was made out, is erroneous. Brent *v.* Brent, 14 Ill. App. 256, 258.

63. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724. But an instruction as to justification, as to which no evidence was adduced, is not error of which defendant can complain. Johnson *v.* McKee, 27 Mich. 471; White *v.* Barnes, 112 N. C. 323, 16 S. E. 922.

64. Wilken *v.* Exterkamp, 19 Ky. L. Rep. 1132, 42 S. W. 1140.

65. Townsend *v.* Briggs, 99 Cal. 481, 34 Pac. 116.

A lengthy statement as to the right to resist intrusion on one's premises, or as to the right of a trespasser to annoy a householder, is not objectionable because argumentative. Hammond *v.* Hightower, 82 Ga. 290, 9 S. E. 1101.

An instruction that, if the trespasser was of weak mind, he should not be held to the same strictness as one mentally sound, is not erroneous where the jury are also told that he was a trespasser, and that the defendant might have used reasonable necessary force to eject him. Chapell *v.* Schmidt, 104 Cal. 511, 38 Pac. 892.

An instruction is erroneous which authorizes the jury to give plaintiff actual damages for the alleged assault and battery, even though defendant did not exceed his just right in defending the possession of his land. Phillips *v.* Jamieson, 51 Mich. 153, 16 N. W. 318.

66. Jones *v.* Jones, 71 Ill. 562. See also Hamilton *v.* Arnold, 116 Mich. 684, 75 N. W. 133, holding that it is not material that the jury were improperly informed in one part of the instruction as to the right to use force to retake property, where the instruction, as a whole, sufficiently states the law.

67. Hayes *v.* Sease, 51 S. C. 534, 29 S. E. 259, wherein it was held that instructions that, if defendant, having admitted a battery, had not shown a legal justification, plaintiff should have a verdict, and that words spoken ought not to justify an assault, were held not to deprive defendant of his right of mitigation, the court having previously charged that they might consider the extent of mitigation in connection with the facts proven.

An instruction is not erroneous which charges that the jury might consider in mitigation the sincerity of defendant's belief in his right to eject plaintiff, even though he acted unlawfully, when the effect of the finding on the questions of malice and exemplary damages is elsewhere presented. Redfield *v.* Redfield, 75 Iowa 435, 39 N. W. 688.

68. Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176.

question of the injury on all the evidence.[69] If defendant introduces testimony which, if true, disposes of plaintiff's claim as to the nature and extent of the injury, he is entitled to an instruction that, if the jury believe it, plaintiff cannot recover.[70]

(x) *Reference to Immaterial and Extraneous Matters.* Reference to immaterial matters,[71] the incidental characterization of the assault as unlawful,[72] the assumption that defendant was engaged in the commission of an unlawful act at the time of the assault,[73] failure to define an offense which is charged to have been the reason for the assault,[74] or reference to a penal statute respecting the offense,[75] furnish no ground for reversal. It has been held erroneous, however, to instruct as to the law of homicide, because tending to obscure the real issue.[76]

(xi) *Reference to Pleadings.* Instructions that plaintiff is entitled to a verdict if the facts were proved as stated in his pleading[77] are not misleading or objectionable as a summing up of the facts;[78] but, where an assault with different instruments is charged, to inform the jury that the assault must be proved substantially as claimed is error, since proof of an assault by either instrument would be sufficient.[79]

d. Verdict — (i) *In General.* Where the evidence shows that an unjustifiable assault or battery was committed, a verdict in favor of defendant is improper and will be set aside as against the weight of evidence;[80] and, on the same principle, a verdict for plaintiff cannot be upheld where it is apparent that the assault by defendant was justified by the circumstances.[81] If the evidence clearly establishes the commission of an unjustifiable assault, the verdict will not be set aside, if not excessive;[82] and, where plaintiff clearly and conclusively makes out

69. Tordeck *v.* Romadka, 79 Wis. 517, 48 N. W. 592. So, an instruction, as to plaintiff's right to recover for future disability, which is open to criticism because not making that right dependent on whether or not plaintiff's condition was the proximate result of the battery, is harmless where the jury was otherwise properly instructed and the evidence warranted the verdict. Hembes *v.* Fick, 26 Ill. App. 597.

70. Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103.

71. Hayes *v.* Sease, 51 S. C. 534, 29 S. E. 259, wherein the court referred to the right of defendant to bring a civil action, or prosecute criminally for the slanderous provocation, and in which it was claimed that the jury might conclude that defendant had the right to have plaintiff indicted, and, therefore, had no right to a mitigation.

72. Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242, holding that an instruction, authorizing compensation for the unlawful act of defendant, is not objectionable because allowing a consideration of a trespass by defendant on plaintiff's premises at the same time if the jury are also required to find that defendant committed the assault.

73. Mullin *v.* Spangenberg, 112 Ill. 140.

74. Mullin *v.* Spangenberg, 112 Ill. 140, an action against police officers, defended on the ground that plaintiff had interfered with them in the discharge of their duties, and in which the court failed to state what would constitute the offense of resisting an officer.

75. Cross *v.* Carter, 100 Ga. 632, 28 S. E. 390.

76. Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

77. Brown *v.* Wheeler, 18 Conn. 199; Ragsdale *v.* Ezell, 20 Ky. L. Rep. 1567, 49 S. W. 775.

78. Hildreth *v.* Hancock, 156 Ill. 618, 41 N. E. 155 [*affirming* 55 Ill. App. 572].

79. Kaline *v.* Stover, 88 Iowa 245, 55 N. W. 346.

80. *Illinois.*— Boren *v.* Bartleson, 39 Ill. 43; Gillett *v.* Fuller, 2 Ill. App. 144.

Indiana.— Nipp *v.* Wiseheart, 7 Ind. App. 642, 34 N. E. 1006.

Missouri.—Whitsett *v.* Ransom, 79 Mo. 258.

South Carolina.— Dinkins *v.* Debruhl, 2 Nott & M. (S. C.) 85.

Washington.— Hannan *v.* Gross, 5 Wash. 703, 32 Pac. 787.

Wisconsin.— Plank *v.* Grimm, 62 Wis. 251, 22 N. W. 470.

81. Garrett *v.* Thomas, 22 Ky. L. Rep. 490, 57 S. W. 611; Phillips *v.* Mann, 19 Ky. L. Rep. 1705, 44 S. W. 379; Hayden *v.* Woods, 16 Nebr. 306, 20 N. W. 345; Higgins *v.* Quinn, 25 Misc. (N. Y.) 292, 54 N. Y. Suppl. 586; Bisewski *v.* Booth, 100 Wis. 383, 76 N. W. 349.

Where no issue is taken on a good plea of justification, and the court finds the allegations of both complaint and answer true, a judgment for plaintiff is erroneous. Powers *v.* Mulvey, 51 Conn. 432.

82. Smith *v.* Flannery, 69 Hun (N. Y.) 615, 23 N. Y. Suppl. 201, 53 N. Y. St. 159; Krause *v.* Spinn, 21 Tex. Civ. App. 510, 52 S. W. 91. See also Slater *v.* Rink, 18 Ill. 527; Chanellor *v.* Vaughn, 2 Bay (S. C.) 416, the latter case

a case entitling him to substantial damages, a verdict for mere nominal damages will be set aside and a new trial granted.[83] If the evidence is conflicting, but there is sufficient to warrant the jury in finding the commission of an unjustifiable assault, their determination will not be interfered with.[84]

(II) *Form*[85]—(A) *Generally.* At common law, if defendant justified the assault and pleaded not guilty to the battery, and both pleas were found against him,[86] or if, in an action against two, one pleaded not guilty and the other *son assault demesne*,[87] there could be but one damage. Where defendant justifies, a verdict for plaintiff against defendant and assessing the damages is responsive to the issues,[88] and a verdict that defendant is guilty in manner and form as alleged in the declaration necessarily negatives a justification set up by the plea of *son assault demesne*.[89] Unnecessary or immaterial findings,[90] or the failure to find as to immaterial matters,[91] will not vitiate a verdict which is otherwise good. A verdict for a stated amount against some of the defendants, and of "Not guilty" against the others, will support a judgment against the former;[92] and a verdict sufficiently intelligible to enable the entry of judgment against the parties intended cannot be complained of.[93] Where a common intent against several is established, or where defendants aided, abetted, or encouraged the assault, or previously counseled the violence, a joint verdict against all is proper;[94] and, while it has been held that the damages must be assessed against those found guilty as an entirety, and cannot be severed among them according to their different degrees of guilt,[95] it is likewise held that the jury may apportion them,[96] and estimate the damages against all the guilty defendants according to the amount which they think the most culpable should pay.[97]

(B) *Irregularities—How Cured.* Informality in a verdict which is substantially responsive to the issues may be disregarded or cured by amendment,[98] and,

holding that a verdict will not be set aside as excessive if, on the whole, it was warranted by the evidence.

83. Taylor *v.* Howser, 12 Bush (Ky.) 465.

84. *Illinois.*—Dyk *v.* De Young, 35 Ill. App. 138.

Iowa.—Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76.

Minnesota.—Plonty *v.* Murphy, (Minn. 1901) 84 N. W. 1005.

Nebraska.—Wohlenberg *v.* Melchert, 35 Nebr. 803, 53 N. W. 982.

Wisconsin.—Oleson *v.* Flom, 39 Wis. 75.

85. Form of verdict against joint defendants see Fuller *v.* Chamberlain, 11 Metc. (Mass.) 503.

86. Candish's Case, Buller N. P. 20, Cro. Jac. 151.

87. Heydon's Case, Buller N. P. 20, 11 Coke 6.

88. Rector *v.* Shellhorn, 6 Ark. 178; Hamm *v.* Culvey, 84 Ill. 56.

89. Pleasants *v.* Heard, 15 Ark. 403.

90. Purnell *v.* Purnell, 89 N. C. 42, in which case it was held that a finding as to damages was immaterial, on motion for a new trial, where the jury had also found that defendant acted in self-defense. See also Paxton *v.* Boyer, 67 Ill. 132, 16 Am. Rep. 615, wherein the jury found against defendant and fixed plaintiff's damages, and also found that plaintiff committed the assault without malice and under circumstances which would have led a reasonable man to believe that it was necessary to his proper self-defense, and defendant was held entitled to a judgment on the special finding.

91. Johnson *v.* Putnam, 95 Ind. 57, an action for the forcible expulsion of plaintiff from her premises, in which it was complained that the special verdict did not find in reference to what the house was and whether it was under defendant's control.

92. Singleton *v.* Sodusky, 7 J. J. Marsh. (Ky.) 341.

93. A finding in a special verdict that T and B were concerned in the same affray at the same time, and that it was the same affray for which judgment was rendered against B, is a sufficient finding that T and B were jointly guilty of the same assault and battery. Wilkes *v.* Jackson, 2 Hen. & M. (Va.) 355.

94. Little *v.* Tingle, 26 Ind. 168; Cunningham *v.* Dyer, 2 T. B. Mon. (Ky.) 50; Fuller *v.* Chamberlain, 11 Metc. (Mass.) 503 (wherein the jury rendered a verdict for the same amount against three several defendants, and afterward, by direction of the court, rendered a verdict jointly for the aggregate amount, which verdict was held proper); Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

95. Palmer *v.* Crosby, 1 Blackf. (Ind.) 139.

96. Bevin *v.* Linguard, 1 Brev. (S. C.) 503, 2 Am. Dec. 684.

97. Warren *v.* Westrup, 44 Minn. 237, 46 N. W. 347, 20 Am. St. Rep. 578.

98. Hamm *v.* Culvey, 84 Ill. 56; Mitchell *v.* Smith, 4 Md. 403. But see Clark *v.* Weir, 37 Kan. 98, 14 Pac. 533, where, after an instruction that both actual and exemplary damages

where the jury have improperly apportioned and severed the damages between defendants, plaintiff may cure the irregularity by entering a *nolle prosequi* as to all but one, and take judgment against that one alone.[99]

e. Judgment. Where a verdict is joint, the judgment must be joint;[1] but, where the writ is returned as to some of defendants though the declaration is filed against all, judgment may be taken against those served.[2] So, in an action by husband and wife for a battery of both, if the damages are assessed separately, judgment may be given for the wife and the writ abated as to the husband;[3] and, if several damages are assessed on a writ of inquiry, the plaintiff may enter a *nolle prosequi* against one defendant and take judgment against the other.[4] Where the jury has passed on the whole matter in issue, and have assessed damages for an excessive battery not answered by the plea, and judgment *non obstante veredicto* is rendered, a writ of inquiry need not issue, but judgment may be rendered for the damages assessed.[5]

9. Damages — a. In General. Defendant is liable for all the natural and proximate consequences of the assault or battery,[6] whether the consequences might have been foreseen[7] or the injuries are more serious than were intended,[8] and for all damages sustained to the time of trial,[9] as well as those which may be sustained in the future.[10] Where actual damage is sustained plaintiff is entitled to recover as much as, by his proof, he may show he has suffered, and as will compensate him for the injury, irrespective of the motive of the wrong-doer;[11] and, on proof of an unlawful assault or of a battery from which no appreciable injury resulted, is entitled to recover nominal damages at least.[12] Failure

might be awarded, defendant submitted the special interrogatory: "What amount of actual damages did plaintiff sustain, if any?" and the jury returned a general verdict for three hundred dollars, but did not answer the interrogatory, stating that they could not agree. The court, without sending the jury back, directed as an answer: "Jury do not agree," and this was held to be reversible error, the verdict being simply a compromise in the aggregate.

99. Warren *v.* Westrup, 44 Minn. 237, 46 N. W. 347, 20 Am. St. Rep. 578; Ammonett *v.* Harris, 1 Hen. & M. (Va.) 488.

1. Cunningham *v.* Dyer, 2 T. B. Mon. (Ky.) 50.

2. Palmer *v.* Crosby, 1 Blackf. (Ind.) 139.

If one of several defendants is defaulted, and judgment is taken against him, it is proper to take a separate judgment against the other defendants after the verdict. Allen *v.* Wheatley, 3 Blackf. (Ind.) 332.

3. Buller N. P. 20 [*citing* Dickenson *v.* Davis, 1 Str. 480].

4. Conner *v.* Cockerill, 4 Cranch C. C. (U. S.) 3, 6 Fed. Cas. No. 3,112.

5. Likes *v.* Van Dike, 17 Ohio 454.

6. Brownback *v.* Frailey, 78 Ill. App. 262; Hodges *v.* Nance, 1 Swan (Tenn.) 56.

Nerve or courage of assaulted party immaterial.—Where plaintiff's health was injured by the fright and shock to her feelings occasioned by defendant's entry into her sleeping apartment and soliciting her to have sexual intercourse with him, she may recover for such injury, though defendant's acts might not have thus injured a person of ordinary nerve and courage. Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

7. Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

8. Yeager *v.* Berry, 82 Mo. App. 534.

9. Sloan *v.* Edwards, 61 Md. 89; Towle *v.* Blake, 48 N. H. 92.

10. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

11. *Delaware.*— Tatnall *v.* Courtney, 6 Houst. (Del.) 434.

Illinois.— Jones *v.* Jones, 71 Ill. 562.

Iowa.— Lucas *v.* Flinn, 35 Iowa 9.

Minnesota.—Andrews *v.* Stone, 10 Minn. 72.

Missouri.— Goetz *v.* Ambs, 27 Mo. 28.

North Carolina.—Causee *v.* Anders, 20 N. C. 320.

United States.— Boyle *v.* Case, 9 Sawy. (U. S.) 386, 18 Fed. 880.

See 4 Cent. Dig. tit. "Assault and Battery," § 52.

12. *Arkansas.*— Barlow *v.* Lowder, 35 Ark. 492.

Delaware.— Tatnall *v.* Courtney, 6 Houst. (Del.) 434.

Hawaii.— Coffin *v.* Spencer, 2 Hawaii 23.

Indiana.— Lewis *v.* Hoover, 3 Blackf. (Ind.) 407.

Minnesota.— Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

Pennsylvania.— Moses *v.* Bradley, 3 Whart. (Pa.) 272.

Texas.— Flanagan *v.* Womack, 54 Tex. 45; Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

See 4 Cent. Dig. tit. "Assault and Battery," § 52.

On default, on failure of proof of defendant's guilt, nominal damages only are recoverable. Bates *v.* Loomis, 5 Wend. (N. Y.) 134.

Damages need not necessarily be nominal,

to prove matters of aggravation will not preclude a recovery of the damage shown.[13]

b. Compensation. In actions for assault and battery, plaintiff may recover for actual personal or pecuniary injury and loss, the elements of which are the physical injury and consequent pain and suffering, impaired physical or mental powers, mutilation and disfigurement, medical and like expenses,[14] and mental anguish[15] suffered by the person assaulted.

though the trespass was slight (Richmond *v.* Fisk, 160 Mass. 34, 35 N. E. 103), and, in assessing damages, it is competent for the jury to consider the effect which the finding of trivial damages may have to encourage disregard of the laws and disturbance of the peace (Beach *v.* Hancock, 27 N. H. 223, 59 Am. Dec. 373, wherein the assault consisted in the pointing of an unloaded gun).

In England, if the prosecutor, in an action for assault from which he received no personal injury, receives a portion of the fine imposed on defendant, in a subsequent action against the latter he can recover no more than nominal damages. Jacks *v.* Bell, 3 C. & P. 316, 14 E. C. L. 586. See also Roberts *v.* Mason, 10 Ohio St. 277.

13. Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

14. *Alabama.*— Lunsford *v.* Walker, 93 Ala. 36, 8 So. 386.

Arkansas.— Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Barlow *v.* Lowder, 35 Ark. 492.

Hawaii.— Coffin *v.* Spencer, 2 Hawaii 23.

Illinois.— Slater *v.* Rink, 18 Ill. 527; Mueller *v.* Kuhn, 59 Ill. App. 353.

Indiana.— Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110; Little *v.* Tingle, 26 Ind. 168; Cox *v.* Vanderkleed, 21 Ind. 164; Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009.

Iowa.— Martin *v.* Murphy, 85 Iowa 669, 52 N. W. 662; Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802; Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748; Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Lucas *v.* Flinn, 35 Iowa 9.

Kentucky.— Howell *v.* Hopkins, 8 Ky. L. Rep. 527.

Louisiana.— Donnell *v.* Sandford, 11 La. Ann. 645.

Maine.— Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475; Wadsworth *v.* Treat, 43 Me. 163.

Maryland.— Sloan *v.* Edwards, 61 Md. 89.

Massachusetts.—Smith *v.* Holcomb, 99 Mass. 552.

Michigan.— Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215; Welch *v.* Ware, 32 Mich. 77.

Missouri.— West *v.* Forrest, 22 Mo. 344; Stuppy *v.* Hof, 82 Mo. App. 272.

New Hampshire.— Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

New Jersey.— Suffolk *v.* Woodward, 5 N. J. L. 287.

New York.— Ford *v.* Jones, 62 Barb. (N. Y.) 484; Clayton *v.* Keeler, 18 Misc. (N. Y.) 488, 42 N. Y. Suppl. 1051.

Ohio.— Klein *v.* Thompson, 19 Ohio St. 569.

Pennsylvania.— Hawes *v.* O'Reilly, 126 Pa. St. 440, 17 Atl. 642.

Texas.— Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

Vermont.— Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

West Virginia.— Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870. But see Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10, holding that there can be no recovery of damages for injuries which are the indirect consequence of an assault — such as detention from business, expenses of medical attendance, etc.

See 4 Cent. Dig. tit. "Assault and Battery," § 53.

Aggravation of an existing disease or injury is an element. Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Feeling of insecurity.— It has been held that, in estimating damages, the jury may consider any fear or feeling of insecurity which was the result of the assault. Titus *v.* Corkins, 21 Kan. 722.

Loss of a prospective position is not an element of damages. Brown *v.* Cummings, 7 Allen (Mass.) 507.

Loss of honor, good name, and reputation are not elements of damage. Atkins *v.* Gladwish, 25 Nebr. 390, 41 N. W. 347.

Malice may be a factor in estimating compensatory damages. Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688.

Miscarriage.— In an action for an assault on a pregnant woman, an alleged result being a miscarriage, it is not necessary, in order for plaintiff to recover substantial damages for such injury, that she show that she suffered more pain, or increased illness, or greater impairment of health, than she would if the delivery of the child had been at the proper time and in the natural way. Plonty *v.* Murphy, (Minn. 1901) 84 N. W. 1005.

Sexual intercourse consented to.—Where a woman was violently assaulted, but consented to sexual intercourse after all fear of violence was removed, such intercourse should not be taken as the basis of damages in an action for the assault. Dickey *v.* McDonnell, 41 Ill. 62.

15. Mental suffering or injury to the feelings of plaintiff, because of the insult and indignity accompanying the assault, may be considered in aggravation.

Illinois.—Von Rceden *v.* Evans, 52 Ill. App. 209.

Massachusetts.—Smith *v.* Holcomb, 99 Mass. 552.

c. Exemplary Damages — (1) *In General.* Damages in excess of the compensation for the actual injury, or exemplary damages, are recoverable where the wrongful act was done wantonly or maliciously, or was attended with insult, oppression, or other circumstances of aggravation,[16] or where the injury was

Michigan.— Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663.

Missouri.— Stuppy *v.* Hof, 82 Mo. App. 272.

Wisconsin.— Wilson *v.* Young, 31 Wis. 574.

See 4 Cent. Dig. tit. "Assault and Battery," § 53.

16. *Arkansas.*— Barlow *v.* Lowder, 35 Ark. 492.

California.— Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668; St. Ores *v.* McGlashen, 74 Cal. 148, 15 Pac. 452; Wade *v.* Thayer, 40 Cal. 578.

Connecticut.— Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55.

Delaware.— Watson *v.* Hastings, 1 Pennew. (Del.) 47, 39 Atl. 587; Tatnall *v.* Courtney, 6 Houst. (Del.) 434.

Georgia.— Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

Hawaii.— Coffin *v.* Spencer, 2 Hawaii 23.

Illinois.— Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334; Drohn *v.* Brewer, 77 Ill. 280; Jones *v.* Jones, 71 Ill. 562; Scott *v.* Hamilton, 71 Ill. 85; Alcorn *v.* Mitchell, 63 Ill. 553; Reeder *v.* Purdy, 48 Ill. 261; Donnelly *v.* Harris, 41 Ill. 126; Dickey *v.* McDonnell, 41 Ill. 62; Foote *v.* Nichols, 28 Ill. 486; Ously *v.* Hardin, 23 Ill. 403; McNamara *v.* King, 7 Ill. 432.

Indiana.— See Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110, denying the right to exemplary damages in an action for indecent assault.

Iowa.— Martin *v.* Murphy, 85 Iowa 669, 52 N. W. 662; Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802; White *v.* Spangler, 68 Iowa 222, 26 N. W. 85; Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269; Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Ward *v.* Ward, 41 Iowa 686; Guengerich *v.* Smith, 36 Iowa 587; Hendrickson *v.* Kingsbury, 21 Iowa 379.

Kentucky.—Wood *v.* Young, 20 Ky. L. Rep. 1931, 50 S. W. 541; Ragsdale *v.* Ezell, 20 Ky. L. Rep. 1567, 49 S. W. 775; Crosby *v.* Bradley, 11 Ky. L. Rep. 954.

Louisiana.— Webb *v.* Rothschild, 49 La. Ann. 244, 21 So. 258; Scheen *v.* Poland, 34 La. Ann. 1107.

Maine.— Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688; Johnson *v.* Smith, 64 Me. 553; Pike *v.* Dilling, 48 Me. 539.

Maryland.— Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242.

Massachusetts.— Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383.

Minnesota.— Rauma *v.* Lamont, (Minn. 1901) 85 N. W. 236; Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843; Boetcher *v.* Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; Gardner *v.* Kellogg, 23 Minn. 463.

Mississippi.— Lochte *v.* Mitchell, (Miss. 1900) 28 So. 877; Reese *v.* Barbee, 61 Miss. 181; Bell *v.* Morrison, 27 Miss. 68.

Missouri.— Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; Goetz *v.* Ambs, 27 Mo. 28; Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285; Lyddon *v.* Dose, 81 Mo. App. 64; Sloan *v.* Speaker, 63 Mo. App. 321; Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354; Howard *v.* Lillard, 17 Mo. App. 228; Meyer *v.* Pohlman, 12 Mo. App. 567; Munter *v.* Bande, 1 Mo. App. 484.

New Hampshire.— Cooper *v.* Hopkins, (N. H. 1900) 48 Atl. 100; Towle *v.* Blake, 48 N. H. 92. But see, *contra*, Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

New York.— Kiff *v.* Youmans, 20 Hun (N. Y.) 123; Walker *v.* Wilson, 8 Bosw. (N. Y.) 586; Connors *v.* Walsh, 15 N. Y. Suppl. 970, 40 N. Y. St. 984 [*affirmed* in 131 N. Y. 590, 30 N. E. 59, 42 N. Y. St. 868]; Tifft *v.* Culver, 3 Hill (N. Y.) 180.

North Carolina.—White *v.* Barnes, 112 N. C. 323, 16 S. E. 922; Louder *v.* Hinson, 49 N. C. 369; Causee *v.* Anders, 20 N. C. 320.

Ohio.— Roberts *v.* Mason, 10 Ohio St. 277; Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597, 9 Ohio Cir. Dec. 209; Hilbert *v.* Doebricks, 8 Cinc. L. Bul. 268.

Pennsylvania.— Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

South Carolina.— Rowe *v.* Moses, 9 Rich. (S. C.) 423, 67 Am. Dec. 560.

Texas.— Sargent *v.* Carnes, 84 Tex. 156, 19 S. W. 378; Shook *v.* Peters, 59 Tex. 393; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

Vermont.— Edwards *v.* Leavitt, 46 Vt. 126; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197; Earl *v.* Tupper, 45 Vt. 275; Devine *v.* Rand, 38 Vt. 621.

Virginia.— Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin.— Lamb *v.* Stone, 95 Wis. 254, 70 N. W. 72; Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Birchard *v.* Booth, 4 Wis. 67; McWilliams *v.* Bragg, 3 Wis. 424.

United States.— Boyle *v.* Case, 9 Sawy. (U. S.) 386, 18 Fed. 880; Brown *v.* Evans, 8 Sawy. (U. S.) 488, 17 Fed. 912.

England.— Forde *v.* Skinner, 4 C. & P. 239, 19 E. C. L. 494.

See 4 Cent. Dig. tit. "Assault and Battery," § 54.

In Michigan, the court draws a distinction between smart-money and punitive damages, holding that, while acts of indignity to the person or reputation may give an added smart or injury to the feelings if actuated by malice or wilfulness, yet, in the absence of statute, damages by way of punishment may not be awarded. Haviland *v.* Chase, 116 Mich. 214, 74 N. W. 477, 72 Am. St. Rep. 519;

caused by misconduct or culpable negligence.[17] And, by the weight of authority, if a proper case for exemplary damages is made out, the fact that defendant was or may be punished criminally for the same assault will not preclude a recovery of such damages.[18] There can be no recovery of exemplary damages where there was a reasonable excuse for the assault arising from the provocation or fault of plaintiff,[19] or where no proof of actual damages is made.[20]

(II) *Expenses of Litigation.* In some jurisdictions, the expenses of the litigation, or counsel fees, may be taken into consideration by the jury in estimating damages,[21] where exemplary damages are proper[22] or the injury was the result of gross and culpable negligence.[23] In others, the expenses to which plaintiff may be put, and such costs and disbursements as cannot be taxed, are not proper elements of damage.[24]

d. Increasing and Reducing. Formerly, in England, the damages might be increased upon view of the party and examination of surgical experts in open court, and after hearing counsel on a rule to show cause;[25] but an amount of damages equal to the full compensation of plaintiff for the injury sustained by him cannot be increased by the addition of a fine for the punishment of defendant,[26] nor will the court diminish the damages where the circumstances of the assault justify the verdict.[27]

e. Excessive or Insufficient. Courts will not disturb a verdict, in an action for assault and battery, unless it is manifest that the jury was swayed by passion or prejudice, was partial or corrupt, or was misled as to the measure of damages. It is not enough that, in the opinion of the court, the damages are too high, or

Stuyvesant *v.* Wilcox, 92 Mich. 233, 52 N. W. 465, 31 Am. St. Rep. 580 — which also, seemingly, overrule Alford *v.* Vincent, 53 Mich. 555, 19 N. W. 182; Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Not authorized by considerations of public welfare.— The law allows only exemplary damages, either to deter the wrong-doer or as compensation for the wounded feelings of plaintiff; and an instruction to the jury to give exemplary damages if they thought the public good required it, or to deter others, is erroneous. Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

Where plaintiff is the aggressor, he may recover only for such damages as he sustained from the unnecessary excess of force used by the defendant. Turner *v.* Footman, 71 Me. 218.

17. Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55.

18. *California.*—Wilson *v.* Middleton, 2 Cal. 54.

Florida.— Smith *v.* Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

Iowa.—Ward *v.* Ward, 41 Iowa 686.

Minnesota.— Boetcher *v.* Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295.

New York.— Cook *v.* Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

Vermont.— Edwards *v.* Leavitt, 46 Vt. 126.

Wisconsin.— Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582.

United States.— Brown *v.* Evans, 8 Sawy. (U. S.) 488, 17 Fed. 912.

Contra, Huber *v.* Teuber, 3 MacArthur (D. C.) 484, 36 Am. Rep. 110; Nossaman *v.* Rickert, 18 Ind. 350; Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

See 4 Cent. Dig. tit. "Assault and Battery," § 54.

19. Chicago, etc., R. Co. *v.* Randolph, 65 Ill. App. 208; Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 543 [*reversing* 20 Hun (N. Y.) 123]; Robison *v.* Rupert, 23 Pa. St. 523.

20. Flanagan *v.* Womack, 54 Tex. 45.

21. Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Roberts *v.* Mason, 10 Ohio St. 277; Hudson *v.* Voigt, 15 Ohio Cir. Ct. 391.

In Connecticut, if there had been a former trial of the cause, and, by reason of the death of one of the jurors, no verdict was rendered, it was held that the jury might properly take into consideration, in estimating the damages, the expense of such former trial. Noyes *v.* Ward, 19 Conn. 250.

22. Titus *v.* Corkins, 27 Kan. 722.

23. Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55.

24. Howell *v.* Scoggins, 48 Cal. 355; Atkins *v.* Gladwish, 25 Nebr. 390, 41 N. W. 347; Hoadley *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197; Earl *v.* Tupper, 45 Vt. 275.

25. Burton *v.* Baynes, Buller N. P. 21.

26. Boyer *v.* Barr, 8 Nebr. 68, 30 Am. Rep. 814; Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

27. Benson *v.* Frederick, 3 Burr. 1845.

Reduction — When justified.— Where there is a right of action for a trifling assault, no material damage being done, and plaintiff refuses all settlement, and begins and then abandons a prosecution before a magistrate in order to bring an action of damages, the court will reduce damages, which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate. Papineau *v.* Taber, 2 Montreal Q. B. 107.

that a less amount would have satisfied the injury. It must be apparent at first blush that the damages are glaringly excessive.[28] Likewise, if the verdict is manifestly inadequate to compensate plaintiff for the damage sustained, it will be rectified or set aside for insufficiency.[29]

ASSAY. A trial or test of the purity of metals and of coined money.[1]

ASSEMBLY. The act of assembling, or the state of being assembled or gathered together; a company of persons gathered together in the same place.[2] (Assembly: Disturbance of, see DISTURBANCE OF PUBLIC MEETINGS. Legislative, see STATES. Right of, see CONSTITUTIONAL LAW. Unlawful, see UNLAWFUL ASSEMBLY.)

ASSENT. To admit, yield, or concede; to express an agreement of the mind to what is alleged or proposed;[3] the act of the mind in agreeing to or assenting

28. *California.*— Townsend *v.* Briggs, (Cal. 1893) 32 Pac. 307; May *v.* Steele, (Cal. 1885) 9 Pac. 112.

Georgia.— Suggs *v.* Anderson, 12 Ga. 461.

Hawaii.— Marceil *v.* Freitas, 9 Hawaii 396.

Illinois.— Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558; Hennies *v.* Vogel, 87 Ill. 242; Drohn *v.* Brewer, 77 Ill. 280; Mitchell *v.* Robinson, 72 Ill. 382; Scott *v.* Hamilton, 71 Ill. 85; Alcorn *v.* Mitchell, 63 Ill. 553; Kelsey *v.* Henry, 49 Ill. 488; McNamara *v.* King, 7 Ill. 432; Chicago, etc., R. Co. *v.* Swadener, 87 Ill. App. 501; Von Reeden *v.* Evans, 52 Ill. App. 209; Harrison *v.* Ely, 24 Ill. App. 524 [*affirmed* in 120 Ill. 83, 11 N. E. 334].

Indiana.— Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110; Elliott *v.* Russell, 92 Ind. 526; Rudolph *v.* Landwerlen, 92 Ind. 34; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805; Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

Kentucky.— Gore *v.* Chadwick, 6 Dana (Ky.) 477; Wood *v.* Young, 20 Ky. L. Rep. 1931, 50 S. W. 541; Ragsdale *v.* Ezell, 20 Ky. L. Rep. 1567, 49 S. W. 775; Faulkner *v.* Davis, 18 Ky. L. Rep. 1004, 38 S. W. 1049; Crosby *v.* Bradley, 11 Ky. L. Rep. 954; Howell *v.* Hopkins, 8 Ky. L. Rep. 527.

Louisiana.— Munday *v.* Landry, 51 La. Ann. 303, 25 So. 66; Armstrong *v.* Jackson, 37 La. Ann. 219.

Maine.— Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688; Macintosh *v.* Bartlett, 67 Me. 130; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Michigan.— Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346.

Minnesota.— Plonty *v.* Murphy, (Minn. 1901) 84 N. W. 1005.

Mississippi.— Sowell *v.* McDonald, 58 Miss. 251.

Missouri.— Beck *v.* Dowell, 40 Mo. App. 71; Meyer *v.* Pohlman, 12 Mo. App. 567; Munter *v.* Bande, 1 Mo. App. 484.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123; Wohlenberg *v.* Melchert, 35 Nebr. 803, 53 N. W. 982; Winkler *v.* Roeder, 23 Nebr. 706, 37 N. W. 607, 8 Am. St. Rep. 155; Goracke *v.* Hintz, 13 Nebr. 390, 14 N. W. 379.

New York.— Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690, 74 N. Y. St. 119; Walker *v.* Wilson, 8 Bosw. (N. Y.) 586; Caldwell *v.* Central Park, etc., R. Co., 7 Misc. (N. Y.) 67, 27 N. Y. Suppl. 397, 57 N. Y. St. 489; Smith *v.* Flannery, 23 N. Y. Suppl. 201, 53 N. Y. St. 159; Roades *v.* Larson, 21 N. Y. Suppl. 855, 50 N. Y. St. 551; Dunlap *v.* Ross, 18 N. Y. Suppl. 48, 43 N. Y. St. 509.

Tennessee.— Tinkle *v.* Dunivant, 16 Lea (Tenn.) 503.

Texas.— Bell *v.* Martin, (Tex. Civ. App. 1893) 28 S. W. 108.

Virginia.— Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin.— Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Shay *v.* Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; Birchard *v.* Booth, 4 Wis. 67.

United States.— Sabre *v.* Mott, 88 Fed. 780; Brown *v.* Evans, 8 Sawy. (U. S.) 488, 17 Fed. 912.

See 4 Cent. Dig. tit. "Assault and Battery," § 55.

A verdict of one dollar for plaintiff will not be disturbed where the evidence shows that though defendant was not justified in making the assault, yet, that plaintiff was not without fault. Pritchard *v.* Hewitt, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265.

29. Dunbar *v.* Cowger, 68 Ark. 444, 59 S. W. 951; Townsend *v.* Briggs, 88 Cal. 230, 26 Pac. 108; Donnell *v.* Sandford, 11 La. Ann. 645.

Verdict not set aside.— A verdict for one thousand three hundred and seventy-five dollars damages for an assault in which plaintiff was shot, and from which he suffered greatly for several months, but recovered without permanent injury, where neither the actual expense nor loss is shown, except in a general way, and no evidence of defendants' financial condition is given, will not be set aside for insufficiency, especially when plaintiff, being warned of the intended assault, did not exercise any care to avoid it, but relied on his own ability to cope with defendants. Ward *v.* White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883.

1. Burrill L. Dict.

2. Century Dict.

3. Webster Dict. [*quoted* in State *v.* Brassfield, 67 Mo. 331, 339; Norton *v.* Davis, 83 Tex. 32, 36, 18 S. W. 430].

to a thing; consent; agreement.[4] (Assent: Conferring Jurisdiction, see Abatement and Revival; Appeal and Error; Courts. Defense, see Abduction; Abortion; Actions; Assault and Battery; Criminal Law; Rape. In Contracts, see Contracts. To Entry and Occupation of Land, see Adverse Possession. See also Accept; Consent.)

ASSERT. To maintain or defend by words or measures; to vindicate.[5]

ASSESS. To apportion or fix the amount of a tax to be paid or contributed;[6] to adjust or apportion; to fix or settle a sum to be levied or paid;[7] to set, fix, or charge a certain sum in a proportion named;[8] to ascertain, adjust, and settle the respective shares to be contributed by several persons toward an object beneficial to them all, in proportion to the benefit received;[9] to declare payable.[10]

ASSESSMENT. Determining the value of a man's property or occupation for the purpose of levying a tax;[11] determining the share of a tax to be paid by each individual;[12] laying a tax; an official listing of persons and property, with an estimate of the value of the property of each for purposes of taxation;[13] adjusting the shares of a contribution by several toward a common, beneficial object, according to the benefit received.[14] (Assessment: Of Compensation For Property Taken, see Eminent Domain. Of Damages — Generally, see Damages; On Default, see Judgments. Of Expenses of Public Improvements — Generally, see Drains; Levees; Municipal Corporations; Streets and Highways; Death of Party to Proceedings, see Abatement and Revival. Of Taxes, see Taxation. On Corporate Stock, see Corporations.)

ASSESSOR. A person charged by law with the duty of ascertaining and determining the value of property, as a foundation of a public tax;[15] one who makes an assessment or imposes a tax.[16] (See, generally, Taxation.)

ASSETS. The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or trustee is, as such, required to discharge;[17] everything which can be made available for the payment of debts, whether belonging to the estate of a deceased person or not;[18] property.[19] (Assets: Care and Man-

4. Hawkins *v.* Carroll County, 50 Miss. 735, 759; Norton *v.* Davis, 83 Tex. 32, 36, 18 S. W. 430 [*quoting* Webster Dict.].

5. Walker *v.* Hawley, 56 Conn. 559, 567, 16 Atl. 674 [*quoting* Webster Dict.].

6. Harrison, J., in Allen *v.* McKay, 120 Cal. 332, 340, 52 Pac. 828. See also Peay *v.* Little Rock, 32 Ark. 31, 36.

7. Omo *v.* Bernart, 108 Mich. 43, 47, 65 N. W. 622 [*quoting* Burrill L. Dict.].

8. Seymour *v.* Peters, 67 Mich. 415, 418, 35 N. W. 62. See also Webb *v.* Bidwell, 15 Minn. 479 [*citing* Bouvier L. Dict.].

9. Omo *v.* Bernart, 108 Mich. 43, 47, 65 N. W. 622 [*quoting* Black L. Dict.].

10. Vallé *v.* Fargo, 1 Mo. App. 344, 347.

11. State *v.* New York, etc., R. Co., 60 Conn. 326, 335, 22 Atl. 765; District of Columbia *v.* Sisters of Visitation, 15 App. Cas. (D. C.) 300, 306; First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526, 528; Bouvier L. Dict. [*quoted* in Palmer *v.* Stumph, 29 Ind. 329, 332; People *v.* Weaver, 100 U. S. 539, 25 L. ed. 705]. See also opinion of Harrison, J., in Allen *v.* McKay, 120 Cal. 332, 340, 52 Pac. 828.

12. Bouvier L. Dict. [*quoted* in Palmer *v.* Stumph, 29 Ind. 329, 332; People *v.* Weaver, 100 U. S. 539, 25 L. ed. 705].

13. Welty Assess. 3 [*quoted* in Pomeroy Coal Co. *v.* Emlen, 44 Kan. 117, 123, 24 Pac. 340]. See also Chicago *v.* Fishburn, 189 Ill. 367, 375, 59 N. E. 791; People *v.* Weaver, 100 U. S. 539, 25 L. ed. 705.

14. Palmer *v.* Stumph, 29 Ind. 329, 333 [*quoting* Bouvier L. Dict.]. See also Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276, 278; First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526, 528.

15. Wallace, C. J., in S ings, etc., Soc. *v.* Austin, 46 Cal. 416, 509 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Jacob L. Dict.].

16. Jacob L. Dict. [*quoted* in Savings, etc., Soc. *v.* Austin, 46 Cal. 416, 509; Vallé *v.* Fargo, 1 Mo. App. 344, 351].

17. Williams Dist. Tp. *v.* Jackson Dist. Tp., 36 Iowa 216, 219; Favorite *v.* Booher, 17 Ohio St. 548, 557 [*quoting* Bouvier L. Dict.].

It "**does not denote any particular species of property,** but is said to come from the French word *assez*, which means 'sufficient' or 'enough;' that is, enough means in the hands of the heir to pay the debt." Hall *v.* Martin, 46 N. H. 337, 342.

18. Stanton *v.* Lewis, 26 Conn. 444, 449; Williams Dist. Tp. *v.* Jackson Dist. Tp., 36 Iowa 216, 219.

19. Lowber *v.* Le Roy, 2 Sandf. (N. Y.) 202, 217.

agement of by Receiver, see RECEIVERS. Establishment of — By Creditors' Suit, see CREDITORS' SUITS; By Supplementary Proceedings, see SUPPLEMENTARY PROCEEDINGS. Marshaling, see MARSHALING ASSETS AND SECURITIES. Of Bankrupt, see BANKRUPTCY. Of Corporations, see CORPORATIONS. Of Decedents, see EXECUTORS AND ADMINISTRATORS. Of Insolvent, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; INSOLVENCY. Of Partnership, see PARTNERSHIP.)

ASSIGN. To transfer or make over to another;[20] to make over a right to another;[21] to grant;[22] to point out.[23]

ASSIGNATION. In Scotch law, an ASSIGNMENT,[24] *q. v.*

ASSIGNATUS UTITUR JURE AUCTORIS. A maxim meaning "An assignee is clothed with the rights of his principal."[25]

ASSIGNEE. One to whom an assignment has been made;[26] one to whom rights have been transmitted, by particular title, such as sale, gift, legacy, transfer, or cession.[27] (See, also, ASSIGNS.)

20. Haug *v.* Riley, 101 Ga. 372, 379, 29 S. E. 44, 40 L. R. A. 244 [*quoting* Abbott L. Dict.]; Aultman *v.* Sloan, 115 Mich. 151, 153, 73 N. W. 123 [*quoting* Burrill L. Dict.; Webster Dict.]; Mundy *v.* Whittemore, 15 Nebr. 647, 649, 19 N. W. 694; Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386, 391. See also Bump *v.* Van Orsdale, 11 Barb. (N. Y.) 634, 638 [*quoting* Webster Dict.].

21. Hoag *v.* Mendenhall, 19 Minn. 335 [*citing* Bouvier L. Dict.; Worcester Dict.].

22. Hutchins *v.* Carleton, 19 N. H. 487, 515 [*citing* 4 Kent Comm. 491, 492].

23. Bouvier L. Dict.

24. Burrill L. Dict.

25. Broom Leg. Max.

26. Tucker *v.* West, 31 Ark. 643, 646.

The term "is more appropriately used to designate a transaction respecting personal property." Mattoon *v.* Young, 45 N. Y. 696, 700.

"An assignee in fact is one to whom an assignment has been made in fact by the party having the right." Tucker *v.* West, 31 Ark. 643, 646 [*quoting* Bouvier L. Dict.].

"An assignee in law is one in whom the law vests the right, as an executor or administrator." Tucker *v.* West, 31 Ark. 643, 646 [*quoting* Bouvier L. Dict.].

27. Ball *v.* Chadwick, 46 Ill. 28, 31 [*quoting* Bouvier L. Dict.].